By Darryl Browne

# MENTAL CAPACITY

## The tests and assessment

**A legal practitioner cannot delegate or abrogate the responsibility of assessing a client's mental capacity. This responsibility makes it important to appreciate the different types of capacity relevant to a legal transaction. The aspect that has most disputes, mental capacity, has different tests. It requires a nuanced and fact-sensitive assessment. There is a need for good procedures and great care. This article considers these issues.**

## TYPES OF CAPACITY

It is common to refer to 'capacity' and mean only one of the types of capacity relevant for legal transactions, that being mental capacity. However, there are at least three different types of capacity known to the common law: legal capacity, mental capacity, and physical capacity. This point is emphasised because it is not uncommon, even in important legal publications, for legal capacity and mental capacity to be confused.

The difference between the various types of capacity is best illustrated in the context of making a will. In that context, legal capacity generally means being 18 years or older[1] (although a court may allow a will for a person of a younger age[2] and an exception exists if the minor is about to marry, is married or has been married). Physical capacity requires the testator to sign the will (in the presence of two competent and preferably independent witnesses)[3] although, again, there is an exception. The exception is that someone may sign the will for the testator provided that happens in the presence of and at the direction of the testator.[4] Another instance of physical capacity with will-making is that a witness to the will must be able to see.[5] The mental capacity element required for a will is known as 'testamentary capacity'. It is considered in some detail below.

An example of legal capacity being used in the correct sense of *sui juris,*[6] is s4(1)(a) *Married Persons (Equality of Status) Act* 1996 (NSW). This states that a married person 'has legal capacity for all purposes and in all respects as if that person were unmarried'. A minimum age is often a requirement for legal capacity but that is not always the position. As explained in *Department of Health & Community Services v JWB & SMB (Marion's case)*:[7] 'Pending the attainment of full adulthood, legal capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person[8] … Well before a young person reaches the age of eighteen, she or he possesses legal capacity in a variety of different areas: the capacity to commit (and to be liable to be punished for) crimes requiring criminal intent; within limits, the capacity to make a contract and to be guilty of a tort.'[9]

In some contexts, legal capacity is lost upon bankruptcy[10] or conviction of a serious criminal offence.[11] The kerfuffle around eligibility for election to the Australian Parliament involves a matter of legal capacity. Sometimes, an absence of legal capacity will depend on an absence of physical capacity. *Lyons v Queensland*[12] provides an example. A person who suffered a physical incapacity, loss of hearing, and required the assistance of an interpreter in order to communicate with other jurors, was held to be incapable of serving on a jury.[13] Similarly, a person vacates the office of attorney upon losing physical capacity.[14]

Legislation may define 'legal capacity' more broadly to include presumed mental incapacity. An example is s3(1) of the *Civil Procedure Act* 2005 (NSW) which defines a 'person under legal incapacity' to mean 'any person who is under a legal incapacity in relation to the conduct of legal proceedings' and expands the meaning to include a person under the age of 18 years, a patient within the meaning of the *Mental Health Act* 2007 (NSW), a person under guardianship within the meaning of the *Guardianship Act* 1987 (NSW), a protected person within the meaning of the *NSW Trustee and Guardian Act* 2009 (NSW), and the like. This definition includes persons who lack mental capacity in some respects, although, as will be seen, a conclusion about a loss of mental capacity in other respects is not available at common law.

However, it is important that legal capacity and mental capacity are not conflated or confused. A minor may have testamentary capacity but, unless an exception exists, will always lack legal capacity to make a valid will.

## TESTS FOR MENTAL CAPACITY

### General

In all legal transactions other than with crime and wills, the mental capacity required by the law is relative to the legal transaction which is being investigated. It is the capacity to understand the nature of that transaction when it is explained that is relevant. Ordinarily the nature of the transaction means its broad operation.[15] This is the test that applies to transactions as diverse as contract, a power of attorney and court proceedings.

### Crime

In criminal law, mental capacity is known as *mens rea*. The test for *mens rea*, known as the 'M'Naghten Rule', is expressed


negatively. A person lacks the mental capacity to commit a crime if the person does not know the nature or quality of their allegedly criminal actions or, if that is known, lacks the mental capacity to know that that action is wrong.[16]

### Wills

Because the law relating to wills developed separately from the common law and equity,[17] there are often different legal principles that apply to wills. An example is the test for mental capacity to make a will. It has been the law since at least 1572 that a valid will can be made only by a person of sound mind[18] but, developed separately, the test for mental capacity for a will became more specific than exists with other legal action. In 1870, the test was settled in *Banks v Goodfellow*:[19]

> '[The matters that the court is required to consider when determining whether the deceased had testamentary capacity] have, over the years, been expressed in varying forms and in differing language, but all formulations seem agreed that "testamentary capacity" encompasses the following concepts:
>
> 1. that the testator is aware, and appreciates the significance, of the act in the law which he or she is about to embark upon;
> 2. that the testator is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he or she has a disposing power;
> 3. that the testator is aware of those [who] may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons;
> 4. that the testator has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.'[20]

Given the greater specificity with this test, it is not surprising that much jurisprudence has developed around its four limbs. This is particularly the position with the fourth limb which is commonly phrased as 'The testator must not have suffered from a delusion that influenced the terms of the will at the time it was made.'[21] However, as pointed out in *Easter v Griffith* (*Griffith*),[22] 'Mental infirmity of a kind which denies testamentary capacity does not necessarily involve "insane delusions".'[23]

In response to the complexity around the traditional formulation, another test has been proffered: '[T]he Court needs to be satisfied that the testator had the capacity to remember, to reflect and to reason and, generally, that he did so in a rational way.'[24] If widely adopted, this formulation would bring the test for mental capacity for a will into closer alignment with the general test.

## PRESUMPTION OF MENTAL CAPACITY (SANITY)

There is a rebuttable presumption of mental capacity with all transactions except a will. The origins of the presumption have been attributed to a case in 1792.[25] It is also called 'the presumption of sanity'. In relation to a will, there is no presumption of mental capacity; the onus of proving testamentary capacity always falls on the person propounding the will.[26] However, the onus shifts to a person challenging the will if it was duly executed and rational on its face.[27]

As illuminated by the colourful aphorism, '[p]resumptions ... may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts',[28] a grasp of the relevant facts is crucial to an assessment of mental capacity. This is because there is a move away from the use of presumptions, and a move towards a close examination of the evidence of the case, to determine issues of fact.[29] Accordingly, it is only where a doubt about mental capacity remains after examining all relevant and available information, that the presumption of sanity should be applied.

Generally the burden of proving a fact lies with the person asserting the existence of the fact: 'he who alleges must prove'.[30] However, as a result of the presumption of mental capacity, the onus of establishing mental incapacity lies on the party who seeks to rebut the presumption.[31] A 'determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter'.[32] This suggests that a conclusion about mental incapacity should not be 'produced by inexact proofs, indefinite testimony, or indirect inferences'.[33]

## ISSUE-SPECIFIC ASSESSMENT

A finding of mental incapacity in relation to one type of legal transaction does not mean that mental capacity is lacking in relation to another legal transaction.[34] For example:

- a person who is incapable of managing their financial affairs may still be capable of making a will[35] or making an enduring power of attorney,[36] and may have mental capacity to make a contract or participate in a personal injuries compensation assessment;[37]
- the same mental capacity may not be necessary to revoke a will as to make one[38] and a lesser mental capacity may be sufficient for a codicil compared to a will;[39]
- a person may not have mental capacity to make a contract but have testamentary capacity;[40]
- a litigant may not have mental capacity to act in person but have mental capacity to instruct a solicitor;[41]
- a person may have mental capacity to commence proceedings or act generally, but not the mental capacity to carry on the proceedings;[42]

- greater mental capacity may be needed to make a power of attorney compared to that required for a will;[43]
- a paranoid schizophrenic can have testamentary capacity although his or her estate is managed,[44] not have testamentary capacity even though his or her estate is not managed,[45] or have his or her affairs managed and not have testamentary capacity;[46]
- a person may not have testamentary capacity but have mental capacity to marry.[47]

## TIME-SPECIFIC ASSESSMENT

A finding of mental incapacity at one point of time does not mean that mental capacity will be lacking at another point in time.[48] So an assessment of mental capacity is ideally made contemporaneously with the particular transaction for which mental capacity is being assessed. In *Re Kensall*,[49] the Court remarked:

> 'As in many cases of this kind, [the testator's testamentary] capacity fluctuated over time; there was no day on which he ceased to have capacity forevermore. Indeed, it is likely that the deceased was fully capable of changing his will on a number of days between executing his last will …and his death.'[50]

In *Gray v Taylor; The Estate of the late Stanislaw Zajac*,[51] the Court explained that 'Stress, emotion and other external factors can impact upon a person's level of cognition at a particular time.'[52] Hence the need to concentrate on the particular facts.

## CONTENT-SPECIFIC ASSESSMENT

Lastly, mental capacity may depend on the complexity or officiousness of the legal transaction,[53] and the extent to which it departs from earlier thinking.[54] For instance, if the effect of a transaction is a voluntary disposition 'of the donor's only asset of value, the degree of understanding is as high as that required for a will and the donor must understand the claims of all potential donees and the extent of the property to be disposed of'.[55]

Nevertheless, care needs to be taken with assessing mental capacity on the basis of perceived irrationality (or inofficiousness). As explained in *Schrader v Schrader*:[56] 'Testators do strange things and are entitled to be whimsical, capricious, vindictive, wrong in belief or their acts beyond explanation without that of itself proving lack of capacity'.[57] In *Griffith*, Gleeson CJ pointed out that harsh, unreasonable judgement of character, mere antipathy, albeit unreasonable, is not sufficient to establish a lack of testamentary capacity, while a value judgment so extreme as to defy credulity is.[58]

## CONSIDER THE CIRCUMSTANCES

Because there are different tests for mental capacity, and each assessment is issue, time and content specific, two things follow. First, an assessment can only be made after considering all the relevant circumstances of the particular transaction. In *Scott v Scott*,[59] in the context of the disputed

validity of a power of attorney, the court observed that the circumstances include:

- the identities of the parties to the disputed transaction;
- their relationship;
- the terms of the instrument;
- the nature of the business that might be undertaken pursuant to the transaction;
- the extent to which the parties might be affected in his or her person or property by the transaction;
- the circumstances in which the instrument came to be prepared for execution;
- the particular purpose for which the instrument may ostensibly have been prepared; and
- the circumstances in which it was executed.[60]

The Court added:

> 'A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject's mental capacity in context…It is not, literally, a matter of imposing, or recognising, a different "standard" of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of *"mental capacity" must be assessed relative to the nature, terms, purpose and context of the particular transaction*.'[61] (Emphasis added.)

## ESTOPPEL

The second observation is that a determination of mental capacity, or incapacity, in relation to one transaction at a particular time does not create an issue estoppel in relation to the existence or absence of mental capacity for a different transaction at that time, or for the same transaction at a different time.[62]

There is an unresolved question as to whether a decision about mental capacity (or any other issue) made by a tribunal stops the re-determination of the *same* issue in a court.[63] The current thinking is probably stated in *Steak Plains Olive Farm Pty Ltd v Australian Executor Trustees Limited*: 'The findings of the Tribunal would give rise to issue estoppels in respect of those issues which were essential for the Tribunal's determination.'[64]

## GOOD PROCEDURES FOR ASSESSMENT

It is highly desirable that good practice procedures be adopted in all circumstances for all clients, but that is especially so when it is possible that mental capacity will be challenged. Circumstances which point towards a possibility of challenge include a client's long-standing diagnosis of dementia,[65] current or recent hospitalisation[66] or a significant medical condition.[67] In *Catherine Margaret Thorn, as Executrix of the Estate of the Late Betty McAuley v Ian Geoffrey Boyd*,[68] the Court suggested that circumstances pointing to an issue with mental capacity arise on learning that the client's attorney has exercised authority.[69]

'Differing measures of protection are required according to the physical and mental capacities of individuals at particular times.'[70] However, subject to the exigencies of the particular circumstances, a good practice procedure requires care in arranging a meeting with a client. It means the meeting must be long enough to provide an explanation of the legal transaction and then probe the client's understanding.[71] It will mostly involve an open dialogue and good record-keeping.

If time, circumstance – such as where the solicitor has a doubt about the client's mental capacity or volition – and the client's instructions[72] allow, it may be advisable to obtain a medical opinion concerning the client's mental capacity, capacity to withstand pressure or other appropriate issue. However, it is important to recognise that the 'tests' for mental capacity are legal tests, not medical tests.[73] So, a legal practitioner cannot delegate or abrogate the responsibility of assessing the client's mental capacity.[74] It is this responsibility that makes the forgoing essential. ■

**Notes:** **1** *Succession Act* 2006 (NSW), s5(1); *Wills Act* 1997 (Vic), s5. **2** *Succession Act* 2006 (NSW) ss5(3) and 16; *Wills Act* 1997 (Vic), s20. **3** *Succession Act* 2006 (NSW), s6(1)(a). **4** *Succession Act* 2006 (NSW), s6(1)(a); *Wills Act* 1997 (Vic), s7. A similar alternate signing provision is conferred by *Guardianship Act* 1987 (NSW), s6C(1)(b)(ii), *Powers of Attorney Act* 2014 (Vic) s33(a)(ii) and *Conveyancing Act* 1919 (NSW), s38(1A). **5** *Succession Act* 2006 (NSW), s9; *Wills Act* 1997 (Vic), s10. Another instance is *Powers of Attorney Act* 2003 (NSW), s19(1)(c)(v). **6** *LN v Public Trustee for the ACT* [2014] ACTSC 190, [16]; *Re Tracey* [2016] QCA 194, [10]. **7** [1992] HCA 15; (1992) 175 CLR 218. **8** *Ibid*, [7] (per Deane J). **9** *Ibid*, [3]. **10** *Powers of Attorney Act* 2003 (NSW), s5(d) for an attorney; *Corporations Act* 2001 (Cth), s206B(3) for an officer of a corporation; *Superannuation Industry (Supervision) Act* 1993 (Cth), s120(1)(b) for a trustee of a self-managed superannuation fund. **11** *Corporations Act* 2001 (Cth), s206B(1); *Commonwealth Electoral Act* 1918 (Cth), which imposes a prohibition on voting for person imprisoned for 3 years or more; *Superannuation Industry (Supervision) Act* 1993 (Cth), s120(1)(a). **12** [2016] HCA 38. **13** *Ibid*, [38], [40]. **14** *Powers of Attorney Act* 2003 (NSW), s5. **15** *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423, [7]-[8]. **16** *Queen v M'Naghten* [1843] 8 Eng. Rep. 718. **17** *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786, [102]-[107], [112]. **18** *Marquess of Winchester's Case* [1572] Eng R 280; (1598) 6 Co Rep 23a; 77 ER 287. **19** (1870) LR 5 QB 549. **20** *Read v Carmody* [1998] NSWCA 182, with slight abridgement to delete references to 'testatrix'. **21** *Briton v Kipritidis* [2015] NSWSC 1499. **22** (1995) 217 ALR 284. **23** *Ibid*, 290. **24** *King v Hudson* [2009] NSWSC 1013, [50] - [51]; *Re Matiasz (deceased)* [2017] VSC 677, [27]. **25** *Szozda v Szozda* [2010] NSWSC 804 by reference to *Attorney-General v Parnther* [1792] Eng R 2455; (1792) 3 Bro CC 441; (1792) 29 ER 632. **26** *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558, 570-572; *Worth v Clasohm* [1952] HCA 67; (1952) 86 CLR 439, 453. **27** *Gornall v Masen* (1887) 12 PD 142; *Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757, [44]-[45]. **28** *Mackowik v Kansas City St J & C B R Co* 94 SW 256, 262 (1906); *Neilson v Letch* (No. 2) [2006] NSWCA 254, [25]-[26]. **29** *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95; *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] FCAFC 81; (2012) 289 ALR 237; *Ashton v Pratt* [2015] NSWCA 12; *Veall v Veall* [2015] VSCA 60, fn [71]. **30** *Wallaby Grip Limited v QBE Insurance (Australia) Limited* [2010] HCA 9, [36]; *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125. **31** *Dalle-Molle v Manos* [2004] SASC 102, (2004) SASR 193, [17]; *Lake v Crawford* [2010] NSWSC 232, [13]; *Erdogan v Ekici* [2012] VSC 256, [49]. **32** *Easter v Griffith* (1995) 217 ALR 284, 290. **33** *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; *Evidence Act* 1995 (NSW), s140(2); *Evidence Act* 2008 (Vic), s140. **34** *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423, 437-8; *Secretary, Department of Health and Community Services v JWB (Marion's Case)* [1992] HCA 15; (1992) 175 CLR 218, 237-8. **35** *Re Estate of Margaret Bellew* [1992] NSW Supreme Court, 13 August 1992; *Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377. **36** *Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377. **37** *AEW v BW* [2016] NSWSC

905, [20]. **38** *dÄpice v Gutkovitch; Estate of Abraham (No. 2)* [2010] NSWSC 1333, [96]. **39** *Hay v Simpson* (1890) 11 LR (NSW) Eq 109. **40** *Stevens v Vancleve* (1822) 4 Washington, 267. **41** *Martin v Azzopardi* (1973) 20 FLR 345, 347. **42** *Pistorino v Connell* [2012] VSC 438, [26]; *Daniel Walton v Terence George Hartmann as executor of the Estate of Wanda Resler* [2017] NSWSC 1432, [69], [76]. **43** *Szozda v Szozda* [2010] NSWSC 804. **44** *Briton v Kipriditis* [2015] 1499. **45** *Haim v NSW Trustee & Guardian; Estate of Feurring* [2013] NSWSC 1406. **46** *Re Oliver (dec'd)* [2016] QSC 264. **47** *The estate of Park dec'd; Park v Park* [1954] P 112. **48** *Guthrie v Spence* [2009] NSWCA 369; (2009) 78 NSWLR 225, [174]-[175]. **49** [2016] VSC 724. **50** *Ibid*, [89]. **51** [2017] NSWSC 4. **52** Ibid, [177]. **53** *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558, 571; *Sinnamon v Proe* [1996] QSC 164. However, note that in *Craig-Bridges v NSW Trustee and Guardian* [2017] NSWCA 197 the court observed that the simplicity of the will was 'undoubtedly relevant to a conclusion that the testatrix knew and approved of the will…but does not logically bear upon the issue of whether she had capacity to comprehend or appreciate the claims of her' bounty: [138]. **54** *The Estate of Stanislaw Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934, [372]-[377]; *Roche v Roche* [2017] SASC 8, [31]. **55** *Re Benney* [1978] 2 All ER 595; *Beverley–v Watson* [1994] WASC 511; *Scheps - Cobb; Estate of Dagobert Scheps deceased* [2005] NSWSC 455, [12]. **56** [2013] EWHC 466. **57** *Ibid*, [82]. **58** *Griffith*, above note 22, 289-91. **59** [2012] NSWSC 1541. **60** *Scott v Scott* [2012] NSWSC 1541, [199]. **61** *Ibid.* **62** *Thorn as Executor of the estate of McAuley v Boyd* [2014] NSWSC 1159. **63** *Administration of the Territory of Papua New Guinea v Daera Guba* (1973) 130 CLR 353, 453; *Cachia v Isaacs* (1985) 3 NSWLR 366; *Lambidis v Commissioner of Police* (1995) 37 NSWLR 320, 332- 333; *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501, [56]; *Tiufino v Warland* [2000] NSWCA 110; (2000) 50 NSWLR 104, [34]; *Zavodnyik v Alex Constructions Pty Ltd* [2005] NSWCA 438; (2005) 67 NSWLR 457, [25]; *Morris v Riverwild Management Pty Ltd* [2011] VSCA 283; (2011) 38 VR 103, [84]; *Tiufino v Warland* [2000] NSWCA 110; (2000) 50 NSWLR 104, [34]; *Zavodnyik v Alex Constructions Pty Ltd* [2005] NSWCA 438; (2005) 67 NSWLR 457, [25]; *Thorn as executor of the estate of McAuley v Boyd* [2014] NSWSC 1159, [147]; *Daunt v Daunt* [2015] VSCA 58, [59]. **64** [2015] NSWSC 289, [39]. **65** *dÄpice v Gutkovitch; Estate of Abraham (No. 2)* [2010] NSWSC 1333, [4]; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831. **66** *McNamara v Nagel* [2017] NSWSC 91, [277]. **67** *Ibid.* **68** [2014] NSWSC 1159. **69** *Ibid*, [42]. **70** *Marion's Case* [1992] HCA 15; (1992) 175 CLR 28, [7] (per Brennan J). **71** *Doulaveras v Daher* [2009] NSWCA 58, [65]. **72** There is circularity in obtaining instructions to obtain an opinion on mental capacity which may disclose that the client did not have the mental capacity to give the instructions. However, there is no obvious and easily available approach which avoids this potential circularity. In most circumstances, the solicitor could rely on the presumption of sanity. **73** *Craig-Bridges v NSW Trustee and Guardian* [2017] NSWCA 197, [133]; *Re Matiasz (deceased)* [2017] VSC 677, [29]. **74** *Romascu v Manolache* [2011] NSWSC 1362, [200]; *Daunt v Daunt* [2015] VSCA 58, [59].

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