

# The Tax Summit

## Session 4.1: Capacity – A practical guide

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Susan Fielding

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# Contents

<b>1. Introduction .....</b>	<b>5</b>
<b>2. Ethical Responsibilities .....</b>	<b>6</b>
<b>3. Capacity .....</b>	<b>7</b>
3.1 Legal Capacity .....	7
3.2 Advisers are Not Doctors.....	7
3.3 Testamentary Capacity .....	8
<b>4. Clients Whose Capacity May be in Doubt.....</b>	<b>10</b>
4.1 Possible Undue Influence .....	10
4.2 Appointments .....	10
4.3 Medical Reports .....	10
4.4 Taking Instructions.....	12
4.5 Influence of Third Parties – Who is Your Client? .....	13
4.6 Taking Time .....	13
4.7 Whose Notes? .....	14
4.8 Keep It Simple .....	15
4.9 Witnessing A Will .....	15
4.10 Taking Notes.....	16
4.11 Closing and Retaining Files .....	16
<b>5. Capacity and Enduring Documents.....</b>	<b>17</b>
5.1 Eight Separate Jurisdictions .....	17
5.2 Enduring Powers of Attorney Western Australia, South Australia, New South Wales, Northern Territory.....	17
5.3 Queensland, Australian Capital Territory, Tasmania and Victoria.....	19
5.3.1 Queensland – Powers of Attorney Act 1998.....	19
5.3.2 Australian Capital Territory - Powers of Attorney Act 2006 .....	20
5.3.3 Tasmania - Powers of Attorney Act 2000 .....	20
5.3.4 Victoria – Powers of Attorney Act 2014 .....	20
<b>6. Enduring Powers of Guardianship .....</b>	<b>22</b>
6.1 Different Legislation in States and Territories.....	22

6.2	Queensland - Powers of Attorney Act 1998 .....	22
6.3	Australian Capital Territory – Powers of Attorney Act 2006 .....	22
6.4	Victoria – Powers of Attorney Act 2014 .....	23
6.5	Western Australia – Guardianship and Administration Act 1990.....	23
6.6	South Australia – Advance Care Directives Act 2013 .....	23
6.7	New South Wales – Guardianship Act 1987 .....	24
6.8	Tasmania – Guardianship and Administration Act 1995 .....	24
6.9	Northern Territory -Advance Personal Planning Act 2013 .....	25
<b>7.</b>	<b>Certificates By Witnesses and the Responsibilities Placed on Them .....</b>	<b>27</b>
<b>8.</b>	<b>Is Seventy the New Fifty? .....</b>	<b>29</b>
<b>9.</b>	<b>What Can an Enduring Attorney or Enduring Guardian Do? .....</b>	<b>31</b>
9.1	Western Australia – Enduring Attorney .....	31
9.2	Western Australia – Enduring Guardian .....	32
9.3	Queensland – Enduring Attorney (Both Financial and Personal).....	33
9.4	Australian Capital Territory - Enduring Attorney (Both Financial and Personal) .....	34
9.5	Victoria - Enduring Attorney (Both Personal and Financial) .....	34
9.6	New South Wales - Enduring Attorney .....	36
9.7	New South Wales – Enduring Guardian.....	36
9.8	South Australia - Enduring Attorney .....	36
9.9	South Australia – Substitute Decision Maker .....	36
9.10	Tasmania – Enduring Attorney .....	37
9.11	Tasmania – Enduring Guardian.....	39
9.12	Northern Territory – Decision Maker .....	39
<b>10.</b>	<b>When the Client had Lost Capacity .....</b>	<b>40</b>
10.1	Statutory Wills.....	40
10.2	Appointment of Guardian and Administrator .....	40
10.3	Trustees.....	40
10.4	Inherent Jurisdiction.....	41
10.5	Medical Decisions.....	42

10.6	Enduring Powers of Attorney and Section 17A Superannuation Industry (Supervision) Act 1993 (Cth) .....	42
10.7	Binding Death Benefit Nominations .....	43
10.8	Corporations and Directors .....	44
<b>11.</b>	<b>What Can We Learn From this Paper? .....</b>	<b>46</b>

# 1. Introduction

This paper is intended primarily to assist professional persons, rather than just lawyers, when faced with making decisions regarding the legal capacity of their clients. This may be when they are taking instructions from their client or when they are witnessing documents which may have been prepared by them or prepared by the client's lawyers. In doing so, this paper intends to provide some practical help especially in circumstances where the capacity of the client might be doubtful or fluctuating. As these professional persons may be accountants, financial advisers or indeed tax lawyers who do not practise in the area of succession planning, the term 'adviser' has been used to cover these different professionals.

## 2. Ethical Responsibilities

This is not a paper about ethics. However, it is not possible in a paper dealing with mental capacity not to mention the ethical considerations which may occur when acting for a client whose capacity may be in doubt. Lawyers as officers of the court have an obligation to act in the interests of their client. Acting in the interests of their client does not mean that they can permit their client to execute documents which the client does not have the capacity make. Many advisers have clients whom they have advised for a very long time. It must sometimes be tempting for those advisers, when they know what the client should be doing even though the client does not have the capacity to do it. However, acting with integrity means that the adviser cannot encourage a client to do acts or sign documents when the client does not have the requisite capacity.

## 3. Capacity

### 3.1 Legal Capacity

Although this paper is intended to provide practical assistance it is essential that advisers are aware of the legal rules relating to legal capacity. The starting point is that at common law every person is presumed to have capacity. This presumption has been restated in the legislation in all the states and territories relating to guardianship and administration. Whether a person has capacity to do something varies with the decision to be made. The High Court when considering whether a person had the capacity to enter a contract explained it this way:

*The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires in relation to each particular matter or piece of business transacted that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.*<sup>1</sup>

It is for this reason, that as well as providing the practical assistance to deal with the question as to whether a client has capacity to give instructions or sign a particular document, it is necessary to examine what the law says about the level of capacity required. In doing so, this paper will be limited to looking at wills and enduring documents (that is enduring powers of attorney and enduring powers of guardianship). It will then look at the powers which can be exercised by an enduring attorney and an enduring guardian. Finally, it will discuss other options if the enduring attorney or enduring guardian cannot act or a person has not executed these documents and no longer has the capacity to do so.

### 3.2 Advisers are Not Doctors

Although advisers, including lawyers, must be satisfied that a client has the capacity to carry out a particular transaction it is not their role to make a final determination as to whether the client in fact had the capacity to do so. It is for the court to make this decision. The court or tribunal will make this decision if the capacity of the client is disputed and ends up in a court action. The court will rely on a variety of witnesses: family members, friends, medical practitioners, psychologists or other health professionals or the client's lawyer or adviser. However, where an adviser is involved, the adviser will usually be the professional person who has seen the client most regularly, possibly over a period of many years, who was present when the client initially discussed the particular transaction and who also may have been present when any documents relating to it were signed. The 'family' lawyer, being a lawyer who sees a client on a regular basis (as opposed to a divorce lawyer) is becoming a rare commodity. However, there are many advisers, particularly tax accountants who have become the general practitioners of their clients' financial affairs, who see their clients on a regular basis and will be called upon to witness documents including documents prepared by the client's lawyer or superannuation adviser. It is the facts which lead the adviser to make the decision that the client had the capacity to carry out a particular transaction which are important. As many years may elapse before the transaction is disputed on the grounds of incapacity it is essential that the adviser's records show why the adviser considered that the client had the capacity to carry out the transaction. It is not sufficient for the adviser simply to record that the client had the requisite capacity. The adviser must record in the notes the facts that led the adviser to make this decision. In doing so the adviser must address the particular legal test for the particular transaction, if there is one, or if there is not, record the facts which led the adviser to consider that the client understood what the client was doing. The adviser in making the notes is not expected to use medical terms or

<sup>1</sup> *Gibbons v Wright* (1954) 91 CLR 423 at 427

make a medical assessment of the client's capacity. However, medical reports or assessments which may have been made available to the adviser should be kept with the notes.

### 3.3 Testamentary Capacity

The bad old days when advisers would run up a will using a client's previous will as the precedent would appear to be over. It is also not such a common practice for advisers to send instructions to a lawyer to prepare a will for a client which the lawyer would prepare without seeing the client. The will would then be sent back to the adviser to arrange for execution by the client. Advisers are and should be involved in their client's succession planning. Often it is the adviser who has suggested to the client that the client should make a will or update an existing will. In many cases the adviser will assist with providing detailed information about the client's assets and the structures in which they are held. Often the adviser will be called upon to witness the will and other documents related to the client's succession planning.

The test as to whether a client has the capacity to make a will is that stated by Cockburn CJ in *Banks v Goodfellow*.<sup>2</sup>

*It is essential...that a testator shall understand the nature of the act, and its effects, shall understand the extent of the property of which he disposes; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert this sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of the property and bring about a disposal of which, if the mind had been sound, would not have been made.*

This test has been accepted as the test for testamentary capacity in all the Australian states and territories even if individual judges may endeavour to add their own gloss to it. It can be broken down into three parts namely:

1. The testator must understand that the testator is making a will and the effect of making a will.
2. The testator must understand the extent of the property that is being disposed of by the will. It should be noted however, that Powell JA in *Read v Carmody*<sup>3</sup> said that although a testator must be able to evaluate and discriminate between the strength of the claims on his or her bounty it was not necessary to know precisely the value of individual assets or even classes of assets, especially in the case of a large and complex estate.
3. The testator must comprehend and appreciate the claims to the estate which should be carried out by the testator. In giving effect to these claims the testator should not be prevented by any insane delusion or disorder of the mind which prevents the testator from disposing of his or her property in such a way that if the testator's mind had been sound, he would not have done.

Many discussions of the *Banks v Goodfellow* test overlook the second part of point three and only look to the first part of it. The family provision legislation, which is different in all the states and territories<sup>4</sup> sets out who can make a claim on the testator's estate. However, to have testamentary capacity in dealing with those claims the testator must not be delusional.

#### Case Study 1

<sup>2</sup> (1870) LR 5QB 549 at 565

<sup>3</sup> [1998] NSWCA 182

<sup>4</sup>Section 6 *Family Provision Act* 1972 (WA); section 7 *Family Provision Act* 1969 (ACT); section 57 *Succession Act* 2006 (NSW); section 41 *Succession Act* 1981 (Qld); section 6 *Inheritance (Family Provision) Act* 1972 (SA); section 7 *Family Provision Act* 1970 (NT); section 91 *Administration and Probate Act* 1958 (Vic); section 3A *Testator's Family Maintenance Act* 1912 (Tas).

*Mrs C was a very independent widow with an adult son and daughter. She had been a client of the firm for many years. When her husband died, she made a new will appointing her son executor and after giving her jewellery to her daughter left the rest of her estate equally to her two children. Some years later, she made another will and said that as her daughter was not very nice to her, she wanted the estate left equally to the two children with no mention of the jewellery. A year or two later, Mrs C came to see her lawyer and explained how dreadful her daughter was to her and that she did not see her. Despite being advised that her daughter might bring a family provision claim, she made a new will leaving her entire estate to her son. She also insisted on some words in the will explaining this. A year or so later, Mrs C died and her daughter made an appointment to see Mrs C's lawyer with her brother to have the will read and collect it. Mrs C's lawyer felt very upset as the daughter sounded so nice on the telephone, but steeled herself for the interview. The son and daughter were ushered into the meeting room and before anyone could even sit down the son said to the lawyer whatever was in the will, he did not want it read out as he would be sharing the estate equally with his sister. He briefly explained that his mother, for no apparent reason for several years prior to her death would have nothing to do with his sister. He then collected the will and they left. This case had a happy ending. There was nothing in Mrs C's manner or appearance or the answers she gave to the lawyer at the interviews regarding her will to suggest to the lawyer that Mrs C was delusional and was inventing the problem with her daughter.*

This case shows that there may be occasions where it is very difficult to ascertain whether a client is suffering from the delusions such as Mrs C was suffering which meant that she did not make provision for her daughter.

## 4. Clients Whose Capacity May be in Doubt

### 4.1 Possible Undue Influence

As the purpose of this paper is to provide practical assistance to advisers when faced with a client whose capacity may be in doubt it will now deal with some practical points with dealing with such clients. As mentioned earlier in the paper there is a common law presumption that a person has capacity. However, there are certain situations where the adviser should be alert as to whether their client has the ability to do what the client is planning to do, whether this is giving instructions or signing documents. For example, if the client is advanced in age or is very ill or in hospital, these alone may not be sufficient to raise concern but if in addition, the client suddenly wants to make changes to their planning which is out of character or wishes to benefit, without there be a rational reason, one member of the family over another or seems to be influenced by one member of the family at the expense of the rest of the family then the adviser needs to make sure that:

1. The instructions being given are really the client's instructions; and
2. The client has the capacity to give those instructions.

### 4.2 Appointments

On the very few occasions when I have felt unable to make a will for a client due to the inability of the client to give me instructions the appointment was made by someone other than the client. While it is not unusual for another person to make an appointment for a client who is elderly or sick it is often a red flag for the adviser that care needs to be taken to ensure that it is the client who is making the decision. This is particularly relevant if the client usually makes the appointments. When seeing a client who is ill or elderly and frail there are some practical things that the adviser can do to ensure that the client is in the best possible state to give instructions or sign documents: these include ascertaining the best time of the day for the appointment so that the client is not seen too early in the day or in the afternoon when the client usually has a rest. If a client is in an aged care facility or in hospital it is important that the appointment does not clash with mealtimes or treatment. This may lead to a discussion about the drugs the client is taking and may lead to the adviser deciding that the client's medical practitioner and succession lawyer be involved.

### 4.3 Medical Reports

In Case Study 1 perhaps the lawyer should have suggested to Mrs C that as she was omitting her daughter from the will, the will might be challenged and therefore it would be a good idea to obtain a medical report as to her testamentary capacity to make a will. However, if Mrs C had refused to give permission a medical report could not be obtained as medical reports can only be obtained with the client's permission. However, if permission is granted, the adviser might at this stage wish to involve the client's lawyer as a medical report that simply states that a person has capacity without addressing what the person has the capacity to do is useless. The medical report needs to address the legal requirements for what the client is going to do. Later in the paper the different capacity tests for making enduring documents will be discussed. The test for testamentary capacity as set out in *Banks v Goodfellow*<sup>5</sup> has already been discussed. In order to ensure that the medical report addresses the relevant points then the letter requesting the report should ask the medical practitioner to address these issues. If the client's lawyer does not practise in the area of succession law it may be necessary to obtain the assistance of a lawyer who does practise in this area.

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<sup>5</sup> (1870) LB 5QB 549 at 565

The three main problems with obtaining medical reports are:

1. who should provide the report;
2. delay in obtaining the report;
3. the need for the client's cooperation.

It used to be suggested that the reports of this nature should only be made by a specialist, a geriatrician for the older testator or perhaps a psychiatrist, psychologist or neurologist for other clients whose capacity may be in doubt. *'The crucial question in making a referral is how much experience does the medical profession have in the area of capacity of older people/people with a possible mental illness/intellectual disability/acquired brain injury?'*<sup>6</sup> In many cases the medical practitioner who is most likely to have an ongoing relationship with an elderly client is their general practitioner and where there is such a relationship this may be the best professional to ask to make the report.

Often when a client is elderly or where a client is ill the need to give instructions and sign documents may be urgent. Unless the client is already a patient of a specialist there may be a considerable delay before the report is received. In the Western Australian case of *Smart v Power*<sup>7</sup> where the testator was totally blind, and had a significant hearing and cognitive impediment the lawyer sought a report from the client's doctor immediately after he saw her on 11 July 2011. The doctor did not see the client until 6 September and by the time the doctor prepared and sent his report it was 22 September before the lawyer was able to see the client again.

Care should always be taken when obtaining a medical report. The medical report may not necessarily support the adviser's or lawyer's assessment of the client's legal capacity. Even if the client agrees to a medical report being obtained if the client is not co-operative the medical report may not support the adviser's or lawyer's view.

## Case Study 2

*This case shows the risks inherent in referring a person to a specialist for a capacity report. Mrs D was a widow with a son and a daughter. She owned a share in a pastoral station which in her will made many years ago was left to her son. She owned a property in Perth which she had left to her daughter. Both the son and daughter had a share in the pastoral lease and the fourth share was owned by other relatives.*

*The son had lived on the station all his life and took over the running of the station when his father died and his mother moved to Perth. The new bank manager wanted better security for the son's substantial overdraft and so Mrs D signed a transfer of her interest in the pastoral lease to her son. This transfer was prepared and witnessed by her lawyer who had acted for her for many years. The lawyer visited her at home and spent a considerable amount of time with her. The daughter at the urging of her husband, lodged a caveat against the transaction on the grounds of lack of capacity of Mrs D to sign the transfer and the dealing was stopped at Landgate and placed in the Commissioner's Packet. The lawyer made a statutory declaration regarding what had occurred and the Commissioner of Titles requested that a medical report be obtained. The family made an appointment for Mrs D to see a geriatrician who reported that when asked about her assets Mrs D replied that she had 'enough' and was not forthcoming about either her assets or the transaction. It transpired that Mrs D, a woman brought up in the old school way of not talking to strangers, or indeed almost anyone except the bank manager, accountant or lawyer, about money and assets, simply would not provide the geriatrician who was unknown to her, with any information. The transfer did not go ahead. The bank manager was somehow placated. Eventually Mrs D died, the son received her interest in the pastoral lease pursuant to her will and the daughter's husband having died, the son and daughter were back on speaking terms.*

If the client does not agree to obtaining a medical report or if there is a need to take instructions or sign documents as a matter of urgency then as mentioned earlier in the paper the adviser may need to arrange for a

<sup>6</sup> *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors'* Law Society of Western Australia 2019 at 10

<sup>7</sup> [2019] WASCA 106 The WA Supreme Court on Appeal upheld the decision of Derrick J in *Power v Smart* [2018] WASCA 168.

lawyer experienced in the area to assist. Often a client will agree to the obtaining of a medical report if the adviser explains to the client that due to the client's age or ill health if family members do not agree with a particular action being taken or the documents executed then they may later claim that the client did not have the capacity to do so. The medical report may deter them from making such a claim.

## 4.4 Taking Instructions

Whilst tax accountants probably have more contact with their clients than lawyers or other advisers, what used to be a personal relationship where the client called to see the tax accountant to seek advice on a regular basis, this is now not so likely to happen. Many tax returns are completed and lodged and advice given without the client seeing the tax accountant or even speaking to the tax accountant. This tax accountant may be the person who also liaises with the superannuation advisers and sends documents to the client to sign. In the past, sometimes the tax accountant would instruct a lawyer to prepare documents for the client such as wills and enduring documents which would be sent to the client via the tax accountant for execution without either seeing the client in person. Fortunately, this practice is no longer common.

There is no doubt that taking instructions from a client whose capacity may be in doubt it is essential that the client is seen in person. An interesting example of a will made without seeing the client is that of *In the Estate of Tucker Deceased*<sup>8</sup>. Mr Tucker lived in the country. He gave his instructions to his trustee company for his will in the way he always gave them which was by letter. It must be remembered that this was at a time when many country people conducted their business affairs by letter as trips to the city were made infrequently. Mr Tucker had made wills in this manner in 1947, 1952, 1953, and one in 1955 which was not executed. In 1956 he wrote to say that he was getting married to the local doctor. The trust officer prepared two wills, one to sign before the marriage and one to sign after the marriage. The latter was executed and sent back to the trustee company. Mr Tucker died in 1960 unmarried. There was nothing in the correspondence with the trustee company to alert the trustee company to the fact that Mr Tucker had not married or that anything was amiss. However, enquiries made after his death ascertained that Mr Tucker had delusions that his medical practitioner was going to marry him and that when he signed the will she had done so. In his judgment, Mayo J pointed out that:

*'Assumptions and inferences should not be relied on...(instructions) should be taken from the person himself, not from third persons, nor by written communications unless handed over in person. Instructions for the 1956 document here were by letter...The person who prepared the 1956 document relied on the presumption that there had been no change in the mental condition of the person involved. He acted in good faith, but there is a risk if instructions for wills are accepted by correspondence...No indication, at least no certain indication, of mental capacity or delusions had become manifestly noticeable in the instructions, but it would seem that to any person who saw and observed the man, face to face in his surroundings, the situation would have appeared different.'*<sup>9</sup>

It transpired that Mr Tucker was a recluse and so if the trust officer who made the will had seen Mr Tucker in his own surroundings it is possible that the trust officer may have ascertained that Mr Tucker was delusional in saying that he was going to marry his medical practitioner. Whilst it is uncommon for instructions to be given by letter nowadays, the case is relevant as emails and text messages have replaced letter writing. More so than ever, instructions are being given to advisers without the adviser speaking to the client either by telephone or in person.

<sup>8</sup> [1962] SASR 99

<sup>9</sup> [1962] SASR 99 at 101 and 102

## 4.5 Influence of Third Parties – Who is Your Client?

It is not uncommon for advisers to act for more than one member of a family. There is nothing wrong with this provided that the members of the family are aware that the adviser is acting for all parties and that the interests of those members of the family coincide. Often one or two members of the family will own more assets than the other members of the family. Sometimes as the asset owning members of the family age, they will wish to make decisions which benefit themselves or some, but not all the other members of the family. Again, this in itself is not necessarily a problem but it is very important for the adviser to ascertain who is the adviser's client. In addition, it is important to ascertain whether the instructions being given are really the instructions of that client and not that of a third party, usually but not always a family member. Sometimes the third party will not be a member of the family but will be a person involved in the business carried on by the client or a trusted employee of the client. If the client is elderly and sick and frail the client may well be a person whose capacity is in doubt. Sometimes, the client will be apparently healthy but starts to make decisions which seem out of character which may lead the adviser to consider that the apparently healthy client is a person whose capacity is in doubt.

The first decision to be made is who is the client of the adviser? Sometimes this will be an easy decision. Sometimes, the adviser will have a conflict of interest in acting for any member of the family due to having information about the assets and family dynamics of the members which would affect the advice if given to one member of the family. In this case the adviser, should cease to act for any member of the family unless in acting for one member of the family the other members of the family are totally in agreement that this should happen.

### Case Study 3

*Mr and Mrs C were a wealthy couple with an adult son and daughter. Their considerable assets were held in various ways including two trusts which they controlled which benefited their son and daughter and their grandchildren. Their adviser had from time to time acted for their son by preparing simple documents for him. The son's marriage was not a happy one. The son requested the adviser to prepare some documents for him. It was agreed that the adviser would no longer act for the son. In this case due to the complicated affairs, both personal and business, of Mr and Mrs C everyone agreed that it was in the interests of all that the adviser should continue to act for Mr and Mrs C.*

Often an elderly or sick client will be accompanied by a close friend or family member. This is to be expected. The client should always be given the opportunity to see the adviser alone. If it is the wish for the client for the third party to be present it is not for the adviser to prevent it. However, if the third party starts to give the instructions or answer questions addressed to the client the adviser should firmly but politely point out that the adviser needs to receive these instructions from the client. If it appears that the third party is unduly influencing the client or the instructions are for an action which is for the benefit of the third party the adviser should explain that in these circumstances the adviser should see the client alone. There are many cases where a testator has been held to either being unduly influenced by a third party who was present at the time the will was made or a claim has been made that the client did not have the capacity to make the will.<sup>10</sup>

## 4.6 Taking Time

One of the disadvantages for advisers in large firms is that the charging regime for larger firms does not permit them to spend the time with a client which is needed to decide whether a client has the capacity to give instructions or sign documents. It is only by spending time with a client that an adviser can make this

<sup>10</sup> An interesting case is *Smart v Power* [2019] WASCA 106 where an appeal against the decision of Derrick J in *Power v Smart* [2018] WASC 168 was dismissed. The lawyer's notes showed that the granddaughter who arranged the appointment and was present when the lawyer arrived had left the room when the testator gave her instructions for her will to the lawyer.

assessment. Sometimes, the time spent chatting about the weather or the family may be sufficient to put an anxious client at ease and enable the client to discuss the difficult matter which the client has really come to discuss. On other occasions this may show that the client is unable to provide details of family members or assets. Sometimes the time spent may show that a client who initially appeared to be giving appropriate answers to questions, after a period of time it becomes apparent that the client has no memory of what has been discussed earlier in the meeting.

Where the client is a long- standing client, changes in the client's capacity may often be more apparent if there is change in the client's physical appearance. This is not so easy to recognise with a client who is new to the adviser. It is important when dealing with elderly clients that the adviser ensures that the client is given the best opportunity to give their instructions or understand the advice being given by the adviser.

A noisy café is not the place to interview an elderly or sick client. Similarly, if the client is in hospital or in an aged care facility it is important that the client is seen in a private area where the meeting will be free from interruptions. Many elderly clients do have trouble hearing or seeing although with the marvellous advances in medical science it is not possible to put an age on this. Many clients will not admit initially to being hard of hearing or difficulty in seeing. It is always a good idea for the adviser to look at the client when speaking rather than looking down or looking at the computer to make notes. This may be helpful as many people who have hearing problems lip read to some degree. If a client seems to be having trouble reading a document or a client who usually wears glasses arrives without them it is worth asking if the glasses have been left at home. Usually, the answer is yes although in some cases nowadays an elderly person who used to wear glasses may no longer need them. Where the client for whatever reason cannot see to read documents because the print is too small, they can easily be provided in a larger font.

#### **Case Study 4**

*This was a case where Mrs Y's deafness led to an administration order being made at the instigation of the medical practitioner at the aged care facility she had moved to. Her son who lived overseas had not been contacted and due to family and work commitments he had not been able to visit his mother when she first moved in to the facility. It transpired that Mrs Y being a proud woman had not told anyone that she could not hear. As a result, when questioned the replies she gave made no sense. Her son when he was given notice of the administration order came to Perth as soon as he could but in the meantime, he instructed a lawyer to visit his mother. Using cards with handwritten questions Mrs Y was able to tell the lawyer about her family and her assets and in fact had the capacity to make a will. The son arranged for his mother to see a specialist who found that Mrs C was profoundly deaf. Later the son was able to have the administration order revoked.*

## **4.7 Whose Notes?**

Often a client whose capacity is in doubt may come to see their adviser armed with some notes. This in itself is not necessarily a bad thing. If the notes have been made by the client, they may simply be a list of things that the client wishes to discuss with the adviser or details of the client's assets or family which the client has prepared to assist with the discussions with the adviser. Often when a client sees their lawyer, the client may have obtained a diagram setting out how assets are owned prepared by the client's accountant to assist the lawyer in preparing a succession plan for the client. However, sometimes where the notes have been made by a third party, the notes will be aimed at getting the client to instruct the lawyer in a way which will benefit that third party.

#### **Case Study 5**

*On the few occasions where I felt unable to make wills for clients these clients came to see me with notes made by a third party which set out the changes to be made to benefit those third parties. In one case there were also written instructions to revoke the client's enduring power of attorney and to prepare a new enduring*

*power of attorney in favour of the third party. In each case I asked the clients to hand the notes to me. One of the client's had already made provision in her life time for the third party by providing her with an interest free loan to buy a house. The notes contained a request that her will be amended to contain a provision to forgive the loan. The client had no idea why I had come to see her and as I knew that the client before she lost capacity was adamant that the loan should be repaid and not be a gift it was quite clear that these notes had not been made at her request.*

## 4.8 Keep It Simple

It can be seen from the examples already discussed in this paper that where a client is frail due to illness or advanced age or their capacity is in doubt changes to succession plans both business and personal and the signing of documents should be done at such a time and in such a way that the client is at their best when this is done. However, it would seem obvious that in these cases the client should not be asked to sign lengthy and overly complicated documents unless this is absolutely necessary. It should be borne in mind that a client in these circumstances may have the capacity to sign a simple will or straight forward binding death nomination or appointment for an alternate director but would not have the capacity to sign a superannuation deed of forty pages or the complex provisions of a will containing a so called multi-generational discretionary trust. The meaningless wills produced as a result of testators being told that they must have such a will was discussed at a seminar in 2021 by C & S Boyle (then) Registrars of the Supreme Court of Western Australia.<sup>11</sup>

Where a testator whose capacity may be challenged wishes to make a small change to their will it is usually better to make a codicil rather than revoke the existing will and make a new will.<sup>12</sup>

## 4.9 Witnessing A Will

Many advisers are called upon to witness wills made by their clients. Where there is any likelihood that the will may be challenged either because the client's capacity may be in doubt or where the client is making a will which may be challenged as persons who expect to benefit have not benefited or have not benefited to the extent that they hoped it is a good idea if both the lawyer and the adviser act as witnesses. Alternatively, if the client has a general practitioner who is prepared to act as a witness and who knows the client well, the general practitioner might agree to be a witness. If the will or other documents are being signed in a hospital or aged care facility arrangements should be made in advance to make sure there are two witnesses available as employees in these institutions are often not willing or permitted to witness documents. As it is difficult to take detailed notes while speaking to a client one of the witnesses can make the notes while the other speaks to the client.

Where the capacity of a testator is in doubt and there is an application to the court for proof in solemn form, knowledge and approval of the will by the testator when the testator signs the will must be proved.<sup>13</sup> It is essential that there is a *'proper and sufficient reading over of the will.'*<sup>14</sup> It follows that where a person is not well or their capacity may be in doubt it will help if the will is not too long or complicated. A useful case on this topic is the judgment of E M Heenan J in *Scarpuzza v Scarpuzza*.<sup>15</sup> In this case the latest will made by the testator was sent to the testator so that the family could arrange for it to be executed by him. The evidence from the witnesses was that the testator simply signed it and it was not read over to him in English or translated to him in Italian. An earlier will was admitted to probate in solemn form as one of the witnesses swore an affidavit stating how he had read the will to the testator in English, explained each paragraph in Italian, and how the testator

<sup>11</sup> *'Is Succession Law Succeeding? A Long View'* Registrars C & S Boyle 2021

<sup>12</sup> Hutley's Australian Will Precedents (9<sup>th</sup> Edition) p 10

<sup>13</sup> *Barry v Butlin* (1838) 2 Moo PC 480

<sup>14</sup> Williams Mortimer & Sunnucks, *Executors, Administrators and Probate* (2008) [13-23]

<sup>15</sup> [2011] WASC 65

although not a young man appeared to know what was going on and said that he was happy with it. It follows from this that where a will is complicated it will not be sufficient for the witness to read the will. It will be necessary for the witness to show that any complicated parts of the will have been explained to the testator and that the testator appeared to understand the effect of the will. Where a testator's capacity is in doubt and the will is complicated, or where the testator is making a will which may be challenged, even if the will has been sent to the client or the adviser to arrange for the client to sign the will, the adviser may decide that it is better for the will to be signed with the lawyer present.

## 4.10 Taking Notes

It can be seen from the above that the witnessing of documents, particularly where a client's capacity may be questioned is one that should be attended to with care. These circumstances may arise because the client is sick, aged or mentally or physically frail, or where the client is doing something which may not be liked by family members who expect to benefit either from the actions of the client when the client is alive or from the estate on the client's death. It goes without saying that the adviser should see the client in person. In these matters the adviser should take comprehensive notes of the discussions that have been held with client. These discussions should address the matters which the client must at law understand before signing the relevant document.

## 4.11 Closing and Retaining Files

Many files now are kept only in digital form. However, in addition to the digital file there may be handwritten notes. There is no point in keeping notes, particularly those relevant to a client's capacity to sign certain documents or make certain decisions unless these files are retained. When decisions regarding superannuation binding death benefits or dispositions by will of assets are discussed and made, these decisions may not be queried until after the client has died. If the file is to be retained in digital form which is now the most usual way of keeping records care should be taken that any handwritten notes or other relevant records on paper should be carefully scanned before they are destroyed. Whilst most taxation records need only be kept for five years any records relating to testamentary matters should be retained at least up until probate has been granted of the client's will. Records relating to a trust may need to be kept until the trust vests or the limitation periods for bringing an action against the trustees have expired. These records are important as they may also protect the adviser if allegations are made that the client did not have the capacity to sign documents which the adviser witnessed or prepared. In the *Szozda*<sup>16</sup> case which is discussed later in the paper, the judge did not agree with the assessment of the two solicitors that their client had the capacity to sign an enduring power of attorney. However, he did not criticise them and in fact complimented them on the evidence they gave. In order to give such detailed evidence both solicitors must have relied on the contemporaneous notes which they had made at the time the enduring power of attorney was signed.

The question still remains that if all these important notes are maintained only in digital form will it be possible in ten, twenty or thirty years to access the digital form? Even if access is possible, will it all just be too expensive?

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<sup>16</sup> [2010] NSWSC 804

## 5. Capacity and Enduring Documents

### 5.1 Eight Separate Jurisdictions

Unlike testamentary capacity, where the test in *Banks v Goodfellow*<sup>17</sup> is accepted in all the states and territories of Australia there is no one standard test for the capacity to execute enduring documents. As these are documents that the adviser may be often asked to assist a client in filling out the appropriate form, which are readily available on the internet, or to witness a form which has been prepared by the client or the client's lawyer it is important that the adviser has a basic understanding of the effect of these documents and the obligations placed upon witnesses which also differ between the various state and territories.

Enduring powers of attorney relate to financial matters and enduring powers of guardianship relate to so called 'personal' matters. Unfortunately, there is an overlapping between these areas in some instances. For example, the decision as to which aged care facility should be chosen for the elderly person who has lost capacity is a personal matter whereas organising the funds to enable this to happen is a financial matter. This may cause problems where the enduring attorney has different views on the amount of money to be used for this purpose than the enduring guardian. In some of the Australian jurisdictions there is provision for a hybrid document which combines the two types of powers in one instrument.

Unfortunately, there is no uniformity in the legislative provisions for these documents amongst the states and territories. Apart from the differences in the tests for capacity to make these documents the legislative provisions relating to the forms to be signed and the witnessing requirement although similar, differ in the various states and territories. The terms used are also different as will be explained in the following sections of this paper. Firstly, the paper will deal with enduring powers of attorney and then with enduring powers of guardianship. Except with dealing with the legislation in the Northern Territory and South Australia, it is not proposed to deal with advance health directives or advance care directives. These documents are often made without seeking any professional advice. In addition, where these are made with professional advice they should ideally be made with consultation with the client's medical practitioner and specialists as well as the client's lawyer.

### 5.2 Enduring Powers of Attorney Western Australia, South Australia, New South Wales, Northern Territory

As from 17 March 2014 when the *Advance Personal Planning Act* 2013 (NT) came into operation in the Northern Territory it is no longer possible to make an enduring power of attorney in that jurisdiction.<sup>18</sup> However, enduring powers of attorney made before that date are still valid as are interstate enduring powers of attorney recognised under section 6A (4) regardless of when they were created.<sup>19</sup> Unlike the previous legislation for making an enduring power of attorney the *Advance Personal Planning Act* contains tests for capacity which will be discussed later in the paper as this legislation differs radically from the legislation in other Australian jurisdictions.

In Western Australia, South Australia, New South Wales and the Northern Territory (under the previous legislation) there is no legislative test for capacity to make an enduring power of attorney.

As a result, the common law applies. As a starting point, the way the High Court explained it bears repeating:

<sup>17</sup> Cockburn CJ 1870 LR 5QB 549 at 565

<sup>18</sup> Section 13 (aa) *Powers of Attorney Act* 1980 (NT)

<sup>19</sup> See note to Part III *Powers of Attorney Act* 1980 (NT)

*The law does not provide any fixed standard of sanity as requisite for the validity of transactions. It requires, in relation to each particular matter or piece of business transacted, that such party shall have such soundness of mind as to be capable of understanding the general nature of what he (or she) is doing by his (or her) participation.*<sup>20</sup>

A series of cases have elaborated what this means. With respect to making enduring powers of attorney reference is usually made to the decision in New South Wales of Young J in *Ranclaud v Cabbar*<sup>21</sup> in which he referred to the type of power where a person was authorised to do whatever an attorney could lawfully do. In this case he said ‘one would have to be sure not only that she understands that she was authorising someone to look after her affairs but also what sort of things the attorney could do without reference to her.’

From this it follows that it is important that not only must the adviser know what the attorney can do but also what the attorney cannot do. The most alarming misunderstanding that I have come across in practice is that due to the name ‘enduring power of attorney’ there is a wrongful belief that the enduring power attorney ‘endures’ beyond the death of the principal.<sup>22</sup> Acting upon this misapprehension some attorneys have dealt with the assets of the principal after the principal’s death. An enduring power of attorney ceases on the death of the principal. Unlike a common law power of attorney, it does not cease on the incapacity of the principal. It endures beyond loss of capacity unlike a common law power of attorney which ceases on loss of capacity as well as on death. As an enduring power of attorney is created by statute the form used to make it must be in, or substantially similar to the statutory form provided in the legislation which as has already been mentioned, is different in all the states and territories.

The English case of *re K*<sup>23</sup> listed four points which a person should understand before making an enduring power of attorney. These points provided the basis for some of the certificates which witnesses must sign in some of the Australian jurisdictions.

1. That the attorney will be able to assume complete authority over the donor’s affairs.
2. That (where in fact this is the case) the attorney will in general be able to do anything with the donor’s property which the donor would be able to do.
3. The authority will continue if the donor becomes mentally incapable.
4. That if the donor becomes mentally incapable the power will become irrevocable without confirmation by the court.

In the Western Australian case of *Legal Profession Complaints Committee v Wells*<sup>24</sup> President Curthoys J expressed more onerous obligations when he set out what he considered to be the very least obligations which a lawyer has when taking instructions for and supervising the execution of an enduring power of attorney:

- *Determine if the donor has capacity; and*
- *if capacity is in doubt, to ask non-leading questions designed to properly probe that capacity;*
- *if capacity is in doubt, to seek medical advice.*

<sup>20</sup> *Gibbons v Wright* (1954) 91 CLR 423 at 437

<sup>21</sup> (1988) NSW Conv R 55-385 at 57,548

<sup>22</sup> A not well-known legislative exception to this rule, is contained in section 86 *Property Law Act 1969* (WA.) This section provides that where a power of attorney given for valuable consideration is stated to be irrevocable, then, in favour of the purchaser the power cannot be revoked by the donor of the power except with the concurrence of the donee. It is not revoked by the death, mental incapacity or bankruptcy of the donor. There is similar legislation in some of the other states.

<sup>23</sup> (1988) 1 Ch 310 at 316

<sup>24</sup> [2014] WASAT 112 at 17

- *To be alert to possible conflicts of interest where the person instigating the EPA (sic) is a donee or associated with the donee; and*
- *to take proper notes.*

How far the judge thought that these obligations should extend to advisers other than solicitors is not indicated in the judgment. There is no doubt that advisers should always be alert to possible conflicts of interest. The difficulties of obtaining medical advice have been discussed earlier in the paper. The learned judge makes no reference to the need to have the client's consent before obtaining such advice. There can be no doubt that where an adviser acts as a witness to an enduring power of attorney where the client's capacity is in doubt, or may be disputed at a later date due to the age or illness of the client proper notes should be made.

It is possible that the obligations enumerated above were more a statement of what the solicitor should have done in a case where the client was in hospital and was being attended by his doctor who proffered her advice to the solicitor that she did not consider that his client had capacity he being barely conscious. Notwithstanding this the solicitor proceeded to get his client to sign the enduring power of attorney after asking a series of questions which were mainly predicated on the assumption that what the solicitor had been told by the friend of the client, who was appointed the sole attorney, and his mother were correct.

## 5.3 Queensland, Australian Capital Territory, Tasmania and Victoria

In Queensland, the Australian Capital Territory, Tasmania and Victoria the test for capacity is to be found in the legislation.

### 5.3.1 Queensland – Powers of Attorney Act 1998

Queensland<sup>25</sup> retains the presumption of capacity but provides that a person can only make an enduring power of attorney (which includes personal and health matters as well as financial matters other than special health and personal matters which are specifically excluded), if the person is capable of making the enduring power of attorney freely and voluntarily and understands the nature and effect of the enduring power of attorney. The section then provides that understanding the nature and effect includes:

1. *That the principal may, specify or limit the power to be given to the attorney and instruct the attorney as to the exercise of the power.*
2. *When the power begins.*
3. *Once the power for a matter begins, the attorney has the power to make and full control over the subject matter subject to the terms or the information about exercising the power included in the power of attorney.*
4. *The principal may revoke the enduring power of attorney at any time while the principal has capacity.*
5. *The power continues even if the principal has impaired capacity.*
6. *At any time the principal has impaired capacity the principal is unable to oversee the use of the power.*

<sup>25</sup> Section 41 *Powers of Attorney Act 1998* (Qld) Under the 'general principles' an adult is presumed to have capacity. Section 6C general principle 1

### 5.3.2 Australian Capital Territory - Powers of Attorney Act 2006

The ACT legislation<sup>26</sup> states that a person has '*impaired decision-making capacity*' if that person does not understand the nature and effect of the decision the person makes in relation to the person's affairs. There are also criteria<sup>27</sup> to work out if a person understands the nature and effect of making the enduring power of attorney. These criteria are similar to the criteria in the Queensland legislation.

### 5.3.3 Tasmania - Powers of Attorney Act 2000

In Tasmania an enduring power of attorney can be made by deed or by the forms provided in the schedule to the *Powers of Attorney Act*.<sup>28</sup> The legislation further provides that a deed or instrument is not effective to create an enduring power of attorney unless the '*donor understands the nature and effect of the deed or instrument*' and there is an acceptance by the attorney endorsed on it.<sup>29</sup> The donor is taken to understand the nature and effect if the donor understands six criteria which are almost identical to those contained in the Queensland legislation although instead of '*impaired capacity*' the Tasmania legislation refers to '*loss of mental capacity*'. It should be noted that any power of attorney for use in Tasmania must be registered before it can be used.<sup>30</sup> Section 42 provides that an instrument creating a power of attorney which is registered in another state or territory under a law that corresponds to the Tasmanian legislation is taken to be registered in Tasmania. Provision for filing and noting of instruments pursuant to the Western Australian *Transfer of Land Act* 1893 is taken to be corresponding law.<sup>31</sup>

### 5.3.4 Victoria – Powers of Attorney Act 2014

Victoria has the most comprehensive legislation relating to powers of attorney. The *Powers of Attorney Act*<sup>32</sup> is a mammoth piece of legislation and it is beyond the scope of this paper to discuss the provisions relating to enduring documents in detail. Suffice to say that the legislation has a lot to say about 'capacity'. It provides<sup>33</sup> that '*decision making capacity*' is if a person can:

- a) *understand the information relevant to the decision and the effect of the decision;*
- b) *retain that information to the extent necessary to make the decision; and*
- c) *use or weigh that information as part of the process of making the decision; and*
- d) *communicate the decision and the person's views and needs as to the decision in some way including gestures and other means.*

Notwithstanding this lengthy list there is more. The common law presumption of capacity unless there is evidence to the contrary is enshrined in the legislation.<sup>34</sup> Understanding information is taken to have occurred if a person understands an explanation of the information given to a person in a way that is appropriate to the

<sup>26</sup> Section 9(2) *Powers of Attorney Act* 2006 (ACT)

<sup>27</sup> Section 17 *Powers of Attorney Act* 2006 (ACT)

<sup>28</sup> Section 30 (1) *Powers of Attorney Act* 2000 (Tas)

<sup>29</sup> Section 30 (2) *Powers of Attorney Act* 2000 (Tas)

<sup>30</sup> Section 16 *Powers of Attorney Act* 2000 (Tas)

<sup>31</sup> Section 42 (2) *Powers of Attorney Act* 2000 (Tas)

<sup>32</sup> *Powers of Attorney Act* 2014 (Vic)

<sup>33</sup> Section 4 *Powers of Attorney Act* 2014 (Vic)

<sup>34</sup> Section 4 (2) *Powers of Attorney Act* 2014 (Vic)

person's circumstances, whether by using modified language, visual aids or any other means.<sup>35</sup> There is also list of matters which should be taken into account when determining whether a person has capacity namely:<sup>36</sup>

- a) *a person may have decision making capacity for some matters and not for others;*
- b) *if a person does not have decision making capacity for a matter, it may be temporary and not permanent;*
- c) *it should not be assumed that a person does not have decision making capacity on the basis of appearance;*
- d) *it should not be assumed that a person does not have decision making capacity for a matter merely because the person makes a decision that is, in the opinion of others, not wise; this subsection is qualified<sup>37</sup> so that if a proposed decision is 'high risk of being seriously injurious to the person's health or wellbeing' then taken in conjunction with other factors it may be evidence that the person cannot understand the decision or its effect.<sup>38</sup>*
- e) *a person has decision making capacity if it is possible for the person to make a decision in the matter with practicable and appropriate support.*

Finally, it is mandatory for the person who is assessing capacity to take reasonable steps to conduct the assessment at a time and in an environment in which the person's decision- making capacity can be assessed accurately.<sup>39</sup>

<sup>35</sup> Section 4 (3) *Powers of Attorney Act 2014* (Vic)

<sup>36</sup> Section 4 (4) *Powers of Attorney Act 2014* (Vic)

<sup>37</sup> Section 4 (5) *Powers of Attorney Act 2014* (Vic)

<sup>38</sup> The length of Section 4 and the qualifications which are included show the difficulty of providing a satisfactory legislative definition for capacity.

<sup>39</sup> Section 5 *Powers of Attorney Act 2014* (Vic)

## 6. Enduring Powers of Guardianship

### 6.1 Different Legislation in States and Territories

All states and territories used to have legislation to enable a person to appoint an enduring guardian for so called personal or life style matters. It is now no longer possible to appoint an enduring guardian in the Northern Territory and South Australia. In the jurisdictions where an enduring guardian can be appointed, there is no uniformity as to how this should be done or the terms used to describe the documents or the parties involved. It is beyond the scope of this paper to describe in detail the regimes in each state and territory. The following is a brief outline of how an enduring guardian (or the equivalent), is appointed and the names given to the parties in each jurisdiction. The capacity required by the principal to make this appointment and when the power becomes operative will also be discussed.

In Queensland, Australian Capital Territory and Victoria the document is called an enduring power of attorney and it is possible to execute one document which combines the functions of an enduring power of attorney and an enduring power of guardianship. In all other jurisdictions other than the Northern Territory, which will be dealt with separately, it is necessary for two separate documents to be executed.

### 6.2 Queensland - Powers of Attorney Act 1998

In Queensland the document is called an enduring power of attorney<sup>40</sup> and the capacity required by the principal to make this combined document has already been discussed earlier in this paper. Section 33 (2) makes it quite clear that if no time is specified in the enduring power of attorney for the time on which a financial matter becomes exercisable, it becomes exercisable once the enduring power of attorney is made. Power for a personal matter, on the other hand is exercisable by the attorney only during every period where the principal has impaired capacity for the matter.<sup>41</sup>

### 6.3 Australian Capital Territory – Powers of Attorney Act 2006

Section 13 (2) of the Australian Capital Territory legislation<sup>42</sup> provides that by an enduring power of attorney an adult (called the principal)<sup>43</sup> may appoint one or more persons (the attorney) to act in relation to property matters, personal care matters, health care matters or medical research matters for the principal *‘that the principal could lawfully do by an attorney if the principal had decision-making capacity for the matter when the power to do the thing is exercised.’* The capacity for the principal to make this combined document has already been discussed. It is important to note that Section 31 provides that if the principal has capacity, the enduring power of attorney operates as a general power of attorney. If the principal has impaired decision-making capacity section 32 provides that the enduring power of attorney is not revoked and it can be exercised while the principal has impaired decision-making capacity and more importantly, it can operate whether or not a

<sup>40</sup> Chapter 3 Enduring documents *Powers of Attorney Act 1998* (Qld)

<sup>41</sup> Section 33 (4) *Powers of Attorney Act 1998* (Qld)

<sup>42</sup> *Powers of Attorney Act 2006* (ACT)

<sup>43</sup> The legislation in the various states and territories is not consistent for the names of the persons making the enduring document. They may be called ‘donor’ ‘appointor’ or ‘principal’. The persons appointed may be called ‘donee’, ‘attorney’ or ‘guardian’. When referring to particular legislation I have used the terms in that legislation. When referring in general terms, I prefer to use ‘principal’ for the person making the appointment and ‘attorney’ or ‘enduring attorney’ for financial matters and ‘enduring guardian’ for lifestyle matters.

condition about when the power is to start is satisfied.<sup>44</sup> The meaning of the terms '*property matter*', '*personal care matter*', '*health care matter*' and '*medical research matter*' are contained in Chapter 2.<sup>45</sup>

## 6.4 Victoria – Powers of Attorney Act 2014

Section 22 provides that a person may make an enduring power of attorney where a person (called 'the principal') may appoint an attorney who may be authorised to act as to:

- a) *personal matters only; or*
- b) *financial matters only; or*
- c) *to matters specified in the instrument of appointment.*

The capacity to make an enduring power of attorney has already been discussed. It is apparent from the legislation that although one document may be made to cover both personal and financial matters that there was an awareness that it might be better to have separate documents in certain circumstances. A person who had the financial acumen to look after the principal's financial matters may not be the best person to look after the principal's personal matters.

## 6.5 Western Australia – Guardianship and Administration Act 1990

Western Australian legislation to create an enduring power of guardianship is contained in the *Guardianship and Administration Act 1990* (WA). Section 110B provides that '*A person who has reached 18 years of age and has full legal capacity*' may make an enduring power of guardianship. There is no attempt in the legislation to define '*legal capacity*.' Every person is presumed to be capable of looking after his own health and safety and making reasonable judgments in respect of matters relating to his person until the contrary is proved to the satisfaction of the State Administrative Tribunal.<sup>46</sup>

The terms used are '*appointor*' and '*enduring guardian/appointee*.' The appointment may be of one or more persons but in the case of more than one person the appointment is joint.<sup>47</sup> The appointment of an enduring guardian is not valid unless it is in the form or substantially in the form prescribed in the regulations and is signed by the appointor and is witnessed by two persons (one of whom must be authorised by law to take declarations) who must sign in the presence of the appointor and each other. Each appointee must also accept the appointment and the acceptance must be witnessed in a similar fashion.<sup>48</sup> Subject to its terms, an enduring power of guardianship has effect '*any time the appointor is unable to make reasonable judgments in respect of matters relating to his or her person*.'<sup>49</sup>

## 6.6 South Australia – Advance Care Directives Act 2013

As from 1 March 2024 it is no longer possible in South Australia to appoint an enduring guardian pursuant to Section 25 *Guardianship and Administration Act 1993* (SA). The *Advance Care Directives Act 2013* (SA) was also amended. Section 11 provides that a competent adult may give an advance care directive if that person:

<sup>44</sup> Section 32 (2) *Powers of Attorney Act 2006* (ACT)

<sup>45</sup> Sections 10, 11, 12 and 12A *Powers of Attorney Act 2006* (ACT)

<sup>46</sup> Section 4 (3) *Guardianship and Administration Act 1990* (WA)

<sup>47</sup> Section 110B (b) *Guardianship and Administration Act 1990* (WA)

<sup>48</sup> Sections 110B, 110E *Guardianship and Administration Act 1990* (WA)

<sup>49</sup> Section 110F *Guardianship and Administration Act 1990* (WA)

- a) *understands what an advance care directive is; and*
- b) *understands the consequences of giving an advance care directive.*

The advance care directive can make such provision relating to future health care, residential and accommodation matters and personal affairs as the person making the directive thinks fit.<sup>50</sup> Section 21 provides that a person giving the advance care directive may appoint one or more persons to be a '*substitute decision maker*' as the person thinks fit. Conditions may be imposed on the powers of the substitute decision maker and they may act separately or together.<sup>51</sup> The advance care directive is operative from the time it is witnessed as provided in the legislation.<sup>52</sup>

Section 35 of Schedule 1 containing the transitional provisions provide that an instrument appointing an enduring guardian under section 25 *Guardianship and Administration Act 1993* that is in force immediately prior to 1 March 2024 will be taken to be an advance care directive.<sup>53</sup>

## 6.7 New South Wales – Guardianship Act 1987

In New South Wales the legislation to create an enduring power of guardianship is contained in the *Guardianship Act 1987* (NSW) and uses the terms '*appointor*' and '*appointee*'.<sup>54</sup> Section 6C provides that a person of 18 years or over may by using the form in the regulations or a form to that effect appoint one or more persons as an enduring guardian which appointment only has effect during such period of time as the appointor is in need of a guardian. The appointee must accept the appointment. The execution of the instrument by the appointor and the appointee must be witnessed by an eligible witness. The witness must certify that the appointor and appointee executed the instrument voluntarily in the presence of the witness and appeared to understand the effect of the instrument. The enduring power of guardianship is operative, subject to its terms, anytime the appointor is unable to make '*reasonable judgments in respect of matters relating to his or her person*'.<sup>55</sup>

## 6.8 Tasmania – Guardianship and Administration Act 1995

In Tasmania the appointment of an enduring guardian is contained in Part 5 of the *Guardianship and Administration Act 1995* (Tas). Section 32 provides that a person over the age of 18 years (called 'the appointor') may by instrument in writing appoint one person, or two or more persons jointly (called 'the enduring guardian') to act as enduring guardians. Other than being over 18 years, there is no reference in the legislation to the capacity of a person to appoint an enduring guardian. The instrument must be in the form contained in the schedule to the act or in a form to similar effect and the appointment must be accepted by the enduring guardian and be registered in the Tribunal.<sup>56</sup> It must also contain a declaration in the form provided, or to that effect, that each enduring guardian has obtained and understood any advance care directive given by the appointor.<sup>57</sup> Unlike an enduring power of attorney an enduring power of guardianship does not become operative until the appointor, by reason of disability, becomes unable to make reasonable judgments in relation to his or her personal circumstances.<sup>58</sup>

<sup>50</sup> Section 11 (3) *Advance Care Directives Act 2013* (SA)

<sup>51</sup> Section 22 *Advance Care Directives Act 2013* (SA)

<sup>52</sup> Section 16 *Advance Care Directives Act 2013* (SA)

<sup>53</sup> Schedule 1 Part 8 Transitional provisions *Advance Care Directives Act 2013* (SA)

<sup>54</sup> Section 5 *Guardianship Act 1987* (NSW)

<sup>55</sup> Section 6C *Guardianship Act 1987* (NSW)

<sup>56</sup> Section 32 *Guardianship and Administration Act 1995* (Tas)

<sup>57</sup> Section 32 (2) (b) (ii) *Guardianship and Administration Act 1995* (Tas)

<sup>58</sup> Section 3 *Guardianship and Administration Act 1995* (Tas)

## 6.9 Northern Territory -Advance Personal Planning Act 2013

As mentioned above, the legislation in the Northern Territory is completely different from the legislation in other Australian jurisdictions. The *Advance Personal Planning Act 2013* (NT) makes provision for the creation of a document called an 'advance personal plan'.<sup>59</sup> This document should not be confused with advance health directives or advance care directives which may be made in other states, (other than South Australia) either at common law or using a statutory form. These documents are an expression of either directives or wishes from the person making the document and do not appoint a third person to make decisions and are limited to personal and health matters.

An adult who has '*planning capacity*' can by making an advance personal plan do one or more of the following:

1. make decisions about future health care action, similar to an advance health directive;
2. set out views and beliefs which form the basis of how he or she wants someone to act but which are not binding;
3. appoint one or more persons who are called the '*decision maker*' to make decisions if he or she loses decision making capacity.<sup>60</sup>

The decision mentioned in item 3 can be about all or any of the adult's care and welfare (including health care) and property and financial affairs. The advance personal plan must be made on the approved form<sup>61</sup> and signed in the presence of an authorised witness.<sup>62</sup> The '*decision maker*' has authority to do anything which the adult (called the '*represented adult*') could do if he or she had full legal capacity, but only when the represented adult has impaired decision-making capacity for the matter.<sup>63</sup> Rather unhelpfully, '*impaired decision making capacity for a matter*' is defined as being when an adult's '*decision-making capacity for the matter is impaired*.'<sup>64</sup> An adult has '*decision making capacity*' if he or she understand and retain information about a matter, and can weigh the information in order to make a decision about the matter and can communicate the decision in some way.<sup>65</sup> There is also a detailed list of matters which even if the adult may have any or some of them does not mean that the adult's decision making is impaired.<sup>66</sup>

The authorised witness must certify that:

- the witness reasonably believes that the adult making the plan is who he or she purports to be and is at least 18 years of age;
- it appears to the witness that the adult understands the nature and effect of the advance personal plan and is making it voluntarily and without coercion; and
- it was signed by the adult or a representative acting on the direction of an adult who is unable to sign in the presence of the witness.<sup>67</sup>

### Case Study 7

*Mr X was a wealthy widower with two daughters whom he had appointed as his enduring guardians. Mr X formed a relationship with a younger single woman who lived in the same apartment block. For several years*

<sup>59</sup> Section 8 *Advance Personal Planning Act 2013* (NT)

<sup>60</sup> Section 8 (1) *Advance Personal Planning Act 2013* (NT)

<sup>61</sup> Section 9 (1) *Advance Personal Planning Act 2013* (NT)

<sup>62</sup> Section 10 *Advance Personal Planning Act 2013*(NT)

<sup>63</sup> Section 20 *Advance Personal Planning Act 2013* (NT)

<sup>64</sup> Section 6 (3) *Advance Personal Planning Act 2013* (NT)

<sup>65</sup> Section 6 (1) *Advance Personal Planning Act 2013* (NT)

<sup>66</sup> Section 6 (5) *Advance Person Planning Act 2013* (NT)

<sup>67</sup> Section 10 (3) *Advance Personal Planning Act 2013* (NT)

*although living in separate apartments they enjoyed shared holidays and socially appeared as a couple. Their finances were kept separate although Mr X assisted Ms Y greatly by advising her on her investments and also leaving a legacy to her in his will. A few years later Mr X's health declined and although he continued to live in his apartment Ms Y broke off the relationship. Mr X asked his solicitor to visit him at home and made a new will in which he did not include a legacy for Ms Y. He also explained to his solicitor his reasons for not making the legacy and his solicitor made notes detailing the breakdown of the relationship. About two years later Mr X had a stroke which affected him both mentally and physically. His daughters arranged for him to enter an aged care facility. Ms Y started visiting him explaining to the staff she was Mr X's de facto partner. Mr X was greatly distressed by these visits although his health had declined to the degree that he could not explain his distress to the staff at the facility. The daughters sought advice from Mr X's solicitor who advised them that from her notes she was able to tell them when the relationship had ceased. She was also able to advise them that as enduring guardians they could prevent Ms Y from visiting their father.*

## 7. Certificates By Witnesses and the Responsibilities Placed on Them

All the respective legislation for the states and territories has specific provisions for the witnessing of enduring powers of attorney. South Australia and Western Australia all have requirements for witnesses, which are different but the witnesses do not have to sign a certificate. The Northern Territory requirements have already been discussed separately.

Tasmania provides for a certificate if the forms provided in the schedule to the legislation are used to create an enduring power of attorney. This certificate is simply that the witnesses have witnessed the instrument and that they are not relatives or close relatives to the parties. For an enduring power of guardianship, the certificate must state that they witnessed the instrument in the presence of the appointor and each other and are not a relative of a party to it.

The certificates in the Australian Capital Territory, New South Wales, Queensland and Victoria are far more wide reaching. In the Australian Capital Territory for instance, the witnesses must certify that the donor signed voluntarily and that the donor appeared to understand the nature and effect of making the enduring power of attorney. In Victoria the certificate is similar although the wording is that the donor appeared to have '*decision making capacity in relation to the making of the appointment*'.<sup>68</sup> The witness must also state that the witness is not an attorney under the power of attorney or a relative of the principal or the attorney or a care worker or accommodation provider for the principal.<sup>69</sup>

In Queensland<sup>70</sup> an enduring document must contain a certificate signed by the witness that the principal:

1. signed the enduring document in the witnesses' presence; and
2. at the time appeared to the witness to have the capacity to make the enduring document.

As well as providing for a certificate '*it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that their principal understood the 'necessary matters*'.<sup>71</sup> The '*necessary matters*' are those requirements for understanding the nature and effect of the enduring power of attorney which are listed at paragraph 5.3.1.<sup>72</sup>

In New South Wales<sup>73</sup> the person who witnesses the enduring power of attorney must sign a certificate that:

1. the person explained the effect of the instrument to the principal before it was signed;
2. the principal appeared to understand the effect of the power of attorney;
3. the person is a prescribed witness;
4. the person is not the attorney named in the power; the person witnessed the signature of the principal.

Any comfort that a witness may take from the qualifying words '*the principal appeared to understand*' would be misplaced. The case of *Szozda v Szozda*<sup>74</sup> indicates the responsibility placed on the lawyers who signed the certificate. There is no reason to think that a similar responsibility would not be placed on other advisers, as most of them would have a clear understanding of their clients' financial affairs and would be able to provide

<sup>68</sup> Section 36 (1) (a) (ii) *Powers of Attorney Act* (2014) Vic

<sup>69</sup> Section 36 (1) (b) *Powers of Attorney Act* 2014 (Vic)

<sup>70</sup> Section 44 *Powers of Attorney Act* 1998 (Qld)

<sup>71</sup> Note to section 44 *Powers of Attorney Act* 1998 (Qld)

<sup>72</sup> Section 41 *Powers of Attorney Act* 1998 (Qld)

<sup>73</sup> Section 19 *Powers of Attorney Act* 2003 (NSW)

<sup>74</sup> [2010] NSWSC 804 Barrett J

examples of what could be done by the attorney with respect to the principal's financial affairs. The judge after examining the question of capacity and approving the principles laid down in *re K*<sup>75</sup> examined in detail the evidence of the two solicitors who saw Mrs Szozda when she made her will and enduring power of attorney by which she appointed her daughter to act as her attorney. If her daughter could not act, she appointed the first solicitor and her grandson as attorney. Both solicitors spent considerable time with Mrs Szozda and appeared to have no concern as to her ability to sign the enduring power of attorney. They both separately explained that as there were no restrictions on the enduring power of attorney her daughter would have the power to do anything in respect of her affairs. Mrs Szozda answered that she understood this and she wanted her daughter to look after her affairs. Medical evidence was given that led the judge to the conclusion that Mrs Szozda did not have capacity when the enduring power of attorney was signed. Moreover, the judge considered that although both solicitors explained that her daughter could act and do anything with respect to Mrs Szozda's affairs this explanation did not amount to informing her *'of the full meaning and significance of the power of attorney she was about to sign...and that she could not have understood the nature, implications and far reaching ramifications of the appointment.'*<sup>76</sup> In particular, the judge indicated that the solicitors should have explained in detail the type of things which could have been done. *'Neither...referred to any particular things that the attorney could do or particular aspects of the family companies or trusts in relation to which the attorney could act; nor did either probe Mrs Szozda by, example, asking her to repeat what had been said to her or putting questions about aspects of her property and affairs answers to which might have formed a basis for specific questions or comments designed to ensure an informed understanding had been received and was held.'*<sup>77</sup> The judge<sup>78</sup> however, did finally conclude that *'The evidence of the solicitors was conscientiously and thoughtfully given.'*

<sup>75</sup> (1988) 1 Ch 310 at 316 and set out at par 5.2 of this paper

<sup>76</sup> At par 120

<sup>77</sup> At par 119 -1

<sup>78</sup> At par 119-3

## 8. Is Seventy the New Fifty?

The 'Golden Rule', which has never been adopted in Australia and in later years has been criticised in England, was enunciated by Lord Templeman in the cases of *Kenward v Adams*<sup>79</sup> and *re Simpson*.<sup>80</sup> Lord Templeman stated that when dealing with a testator whose capacity might be in doubt, such as an aged testator or a testator who has suffered a serious illness, the making of the will must be witnessed by a medical practitioner. In an article on 'the 'Golden Rule'<sup>81</sup> it was suggested that one of the questions which should be asked to see if the 'Golden Rule' should apply is '*Is the testator over 50?*' The cases referred to above relating to enduring powers of attorney do raise the question as to whether the standard of capacity for signing enduring documents and in particular enduring powers of attorney is higher than that required for testamentary capacity. As already mentioned in *Legal Profession Complaints Committee v Wells*<sup>82</sup> President Curthoys J set out what he considered to be '*A solicitor's obligations when taking instructions for and supervising the execution of an EPA.*' He then not only cited with approval Barrett J in *Szozda*:

*'The decision to create a general and enduring power of attorney differs from that involved in the making of a will but must be regarded as of a similar degree of complexity or even greater complexity.'*<sup>83</sup>

but said that this applied equally to the making of enduring powers of attorney in Western Australia<sup>84</sup> despite the difference in the legislation between the two states. In Western Australia, as in some other states, there are no legislative requirements for a certificate to be signed by the witnesses to an enduring power of attorney.

In *Szozda*<sup>85</sup> the judge made it quite clear that in this case it was not sufficient for the solicitors to explain to Mrs Szozda that the attorney could do anything that could be done by an attorney. This is the usual explanation given to clients who sign enduring powers of attorney. It may be coupled with examples of things that the attorney cannot do and perhaps a few examples of things that the attorney can do such as selling land and operating bank accounts. Mrs Szozda was an elderly woman and the judge relying on medical evidence decided that she did not have capacity. However, many enduring powers of attorney are made by young people as part of their succession planning. How much time should an adviser spend explaining the nature and effect of an enduring power of attorney to such a client bearing in mind firstly, that there is a presumption that the client has the capacity to sign the enduring power of attorney and secondly, that if the enduring power of attorney is not activated by loss of capacity for twenty or thirty years would any detailed explanation given to the client at the time of the making of the enduring power of attorney be still relevant at the time of the loss of capacity? Finally, many enduring powers of attorney are not signed before lawyers but before other qualified witnesses. How much detailed explanation should be given by an adviser (who is a qualified witness) or the local pharmacist<sup>86</sup> when witnessing an enduring power of attorney?

With regard to enduring powers of attorney, there is no doubt that in some cases attorneys have abused the trust which has been placed in them. Unfortunately, it is these cases of abuse which reach the courts and receive publicity. As a result, there have been many suggestions for 'strengthening' the witnessing requirements for these documents and more stringent supervision of attorneys where the donor has lost capacity. It seems appropriate to consider these words on behalf of the Western Australian Public Trustee.<sup>87</sup>

<sup>79</sup> (1975) The Times 29 November

<sup>80</sup> (1977) 121 SJ 224

<sup>81</sup> '*The Golden Rule*' Magdalen Chambers Charles Cooper 21 June 2013

<sup>82</sup> [2014] WASAT 112

<sup>83</sup> [2010] NSWSC 804 at par 35

<sup>84</sup> [2014] WASAT at par 18 and 19

<sup>85</sup> [2010] NSWSC 804 Barrett J at par 120

<sup>86</sup> A pharmacist is qualified to take a statutory declaration in Western Australia and therefore can witness an enduring power of attorney, the second witness requiring no other qualification other than being 18 years or over.

<sup>87</sup> Michael Bowyer, Principal Legal Officer, Public Trustee WA Transcript of Evidence: *Elder Abuse - A National Legal Response* 'Australian Law Reform Commission Report 131

*'If we make these things too restrictive with an enduring power of attorney, or we make the punishments too great with an enduring power of attorney, people will not want to do them. There are a lot of enduring powers of attorney that are working perfectly well, but also they may turn (instead) to other methods of abuse.'*

## 9. What Can an Enduring Attorney or Enduring Guardian Do?

At common law an attorney could do what was legal for the principal to do. Generally speaking, an attorney cannot do any acts which the principal must attend to personally. Accordingly, an attorney cannot make a will.

<sup>88</sup> The swearing of an affidavit or the making of a statutory declaration cannot be delegated.<sup>89</sup> An attorney cannot marry as proxy for their principal.<sup>90</sup> A company director cannot appoint an attorney to act as director. There is often confusion over this and so it is dealt with later in the paper at paragraph 10.8. In addition, an attorney cannot sign for the principal if a statute requires that the principal sign personally. A person cannot delegate an action which *'the competency to do...arises by virtue of some duty of a personal nature requiring skill or discretion for its exercise.'*<sup>91</sup>

Enduring powers of attorney and enduring powers of guardianship being creations of statute the powers that can be exercised as an enduring attorney or guardian are those conferred by the statute creating the power as limited by the instrument of appointment. In some of the legislation there is a list of what can and cannot be done but there is no uniformity in the legislation. A detailed examination of the law in each state and territory is beyond the scope of this paper. However, a few of the more unusual aspects of the legislation in each jurisdiction is set out below. This is not intended as advice on a particular set of circumstances but more as an indication of how much the legislation varies so that the adviser is aware of the necessity to obtain advice from a lawyer in the relevant jurisdiction.

### 9.1 Western Australia – Enduring Attorney

The legislation in Western Australia does not say what an enduring attorney can or cannot do. The obligations of the attorney are:

1. to exercise the powers as attorney to protect the interests of the donor;
2. keep and preserve accurate records and accounts;
3. not to renounce the power during any period of incapacity of the donor without the approval of the tribunal; and
4. if the attorney becomes bankrupt to notify the tribunal.<sup>92</sup>

At common law an attorney has a duty to avoid a conflict between the duty to the principal (donor) and his or her own interest. As a result, attorneys usually cannot make gifts to themselves but may be able to make them to other people.<sup>93</sup> In making any gifts the amount of the gifts and whether the donor usually made such gifts, as well as whether it is the interests of the donor that the attorney make the gifts must be considered. Where there is any doubt about the making of the gift an application should be made to the State Administrative Tribunal for approval for the attorney to make the gift.

Section 104 provides that an enduring power of attorney may be created by an instrument in the form, or substantially in the form contained in Schedule 3 of the Act. This form authorises the attorney to do on behalf of the donor *'anything that I can lawfully do by and attorney.'* It is important in Western Australia that the statutory

<sup>88</sup> Hardingham, Meave and Ford, *Wills and Intestacy in Australia and New Zealand* 2nd edition 1989 page 110

<sup>89</sup> *Claus v Pir* [1987] 2 All ER 752

<sup>90</sup> Friedman *The Law of Agency* 6<sup>th</sup> edition 1990 p56

<sup>91</sup> *Claus v Pir* [1987] 2 All ER 752 at 755

<sup>92</sup> *Guardianship and Administration Act* 1990 (WA) s 107

<sup>93</sup> *Freedom vs Protection* 8.2 Michael Bowyer Legal Officer Public Trustee WA [www.wa.gov.au](http://www.wa.gov.au);

form is strictly adhered to. If this is not done and the attorney needs to have the enduring power of attorney noted by the Registrar of Titles so it can be used for a land transaction the Registrar may refuse to accept it. There is provision in the form to subject the authority of the attorney to conditions and restrictions. However, the view of the Registrar is that in accepting enduring powers of attorney for noting it is not the role of the Department of Land Administration (Landgate) to check an enduring power of attorney which has detailed conditions and restrictions to ensure that the attorney has authority to carry out land transactions. These views are supported by the legislation<sup>94</sup> and the case law of *Clazy v Registrar of Titles*.<sup>95</sup>

*'I think it would be very dangerous for the Titles Office to accept such strange, or at all events, such unusual powers of attorney as that in question...It was never intended that the duties should be put upon the Registrar or the Commissioner of forming an opinion in which they may be mistaken, or upon which others may take a different view, as to the meaning of strange and eccentric powers of attorney. I think the Act imposes upon them a duty to see that the powers of attorney which are filed in the Office are in substance similar to those which are set forth in the Act.'*

The reference to 'the Act' is to the *Transfer of Land Act 1893* (WA) which in section 143 requires the Registrar of Titles to maintain a '*...book noting every power of attorney that is lodged*'. Lodging an enduring power of attorney for noting is not registering an enduring power of attorney. It simply enables the attorney to deal with the donor's land in accordance with the powers of attorney which has been recorded in the book kept by the Registrar of Titles. If land dealings are to be lodged for registration relying on the powers contained in an enduring power of attorney it is wise to check that the enduring power of attorney does not list any restrictions or conditions. It is also sensible to lodge the power of attorney for noting prior to registering the transfer or instrument. The reason for this is if the Registrar of Titles will not accept the enduring power of attorney for noting the land dealing will not be registered.

## Case Study 8

*Mrs D was a very wealthy widow. As her income was far in excess of her needs, from time to time she made large gifts of cash to her son and daughter. These gifts were not in the nature of maintenance but enabled the daughter to enjoy a more comfortable life style. Her daughter, a divorced woman suffered from ill health and no longer worked. She had been married for nearly twenty years and had raised a stepson during the course of her marriage. When the stepson became an adult and left home her husband had divorced her. The daughter had received a very small divorce settlement as the court had taken into account that she would eventually inherit a half share in her mother's estate and would receive a significant income stream from this inheritance. Some years later, Mrs D suffered from dementia. Her son and a trusted family adviser managed Mrs D's financial affairs pursuant to her enduring power of attorney. The attorneys decided that despite the fact that there were sufficient funds to do so, they could not continue to give Mrs D's money away especially as she always gave money to both her son and her daughter and her son was attorney. They also knew that Mrs D would not have liked them to apply to the tribunal for permission to make the gifts (which may not have been granted) as she was a very private person.*

## 9.2 Western Australia – Enduring Guardian

The provisions relating to an enduring power of guardianship are completely different. The functions of an enduring guardian are the same as those given to a parent under a Family Court parenting order although the enduring guardian does not have the right to punish or chastise the appointor. The enduring guardian may do any of the following:

- a) decide where the person is to live, whether permanently or temporarily;

<sup>94</sup> Nineteenth Schedule -Power of Attorney s143 (1) *Transfer of Land Act 1893* (WA)

<sup>95</sup> (1902) 4 WALR 113

- b) decide with whom the person is to live;
- c) decide whether the person should work and if so, the nature or type of work, for whom he is to work and matters related thereto;
- d) make treatment decisions, except for sterilisation which can only be performed in accordance with the legislation;
- e) decide what education and training the person is to receive;
- f) decide with whom the person is to associate;
- g) conduct legal proceedings and defend or settle legal proceeding brought against the person except those relating to the estate of the person;

It also specifically states that the enduring guardian cannot vote in an election, consent to an adoption of a child or the person, or agree to a surrogacy parental order or consent to a marriage. In addition, the appointor may include provisions in the enduring power of guardianship which limit the functions of the enduring guardian or the circumstances in which the enduring guardian may exercise the power to act or give directions as to how the functions may be exercised.<sup>96</sup>

### 9.3 Queensland – Enduring Attorney (Both Financial and Personal)

As mentioned previously, in Queensland the functions of an enduring attorney and enduring guardian can be combined in one document. Unless the enduring document says otherwise, an attorney is taken to have the maximum power that could be given to an attorney by an enduring document. Thus, if the enduring power of attorney says '*I appoint (full name) as my attorney,*' then the attorney is taken to have power for all financial matters and all personal matters for an adult.<sup>97</sup>

There has been much discussion by lawyers as to whether an enduring attorney has the right to access a copy of the principal's will. It is usually agreed that at common law a copy of the will should not be provided to an attorney without the order of the court or tribunal. This sometimes causes problems for enduring attorneys who are trying to decide whether it is in the interests of the attorney for certain assets (usually the family home) to be sold. Without this information the attorney does not know whether provisions of the principal's will be adversely affected so that a specific gift to a beneficiary will no longer be in existence on the death of the principal. Section 81<sup>98</sup> provides that the attorney is entitled to all the information that the principal is entitled to if the principal had capacity and, '*it is necessary to make ...informed decisions about anything the attorney is authorised to do.*' These words suggest that the attorney should not be requesting the information for their own purposes.

An attorney must also avoid conflict situations unless authorised by the court or the principal.<sup>99</sup>

The legislation divides the 'Types of Matters' which an attorney can do into three categories, namely 'Financial matter', 'Personal matter' and 'Health matter'. What can be done by the enduring attorney under each heading is listed in Schedule 2. Matters which the enduring attorney cannot do are called 'Special personal matter' and are also listed in Schedule 2.<sup>100</sup>

A financial attorney must also:

<sup>96</sup> Section 110G *Guardianship and Administration Act 1990* (WA)

<sup>97</sup> Section 77 *Powers of Attorney Act 1998* (Qld)

<sup>98</sup> Section 81 *Powers of Attorney Act 1998* (Qld)

<sup>99</sup> Section 73 *Powers of Attorney Act 1998* (Qld)

<sup>100</sup> Schedule 2 Parts 1 and 2 *Powers of Attorney Act 1998* (Qld)

- keep accurate records and accounts;<sup>101</sup>
- keep property separate;<sup>102</sup>
- only make gifts or donations of a nature the principal made when the principal had capacity or are of a nature the principal might reasonably be expected to make or the value is reasonable given the circumstances of the principal's financial circumstances;<sup>103</sup>
- maintain the principal's dependants, but unless there is a contrary intention in the enduring power of attorney it must be reasonable and in particular with regard to the principal's financial circumstances.<sup>104</sup>

## 9.4 Australian Capital Territory - Enduring Attorney (Both Financial and Personal)

The legislation in the Australian Capital Territory also has detailed provisions as to what an attorney can and cannot do which are helpfully listed together in Part 4.3 of the Act.<sup>105</sup> Firstly, there is a list which applies to all powers of attorney of 'special personal matters' which are similar to those matters in other jurisdictions which cannot be done by an attorney<sup>106</sup> and a list of 'special health care matters' which also cannot be done by an attorney and which include a number of matters which are not specifically mentioned in some of the other legislation such as termination of pregnancy, electroconvulsive therapy or psychiatric surgery.<sup>107</sup> Secondly, there is a list of things which can and cannot be done by an enduring attorney.<sup>108</sup> This covers gifts and in what circumstances they may be made, the payments of reasonable living expenses and maintenance of dependants.<sup>109</sup> These sections indicate the importance of careful drafting of the enduring power of attorney as different powers will apply whether or not there is an authorisation contained in the document creating the power.

The obligations and principles of an enduring attorney in the Australian Capital Territory are set out in Part 4.4<sup>110</sup>. They include an obligation to keep interested people informed, a right to information, special provisions relating to medical treatment, mental health treatment and health care, keeping records and keeping the attorney's own property separate from the principal's property.

## 9.5 Victoria - Enduring Attorney (Both Personal and Financial)

As mentioned previously, the Victorian legislation<sup>111</sup> is extremely detailed and answers many of the questions which are asked about the operation of enduring powers of attorney. In particular, the Victorian legislation confirms the common law rule that an enduring power of attorney does not have the effect of empowering the attorney to delegate a power under the enduring power of attorney.<sup>112</sup> Section 22 enables an enduring power of attorney to be made whereby the person may authorise the attorney to act as:

<sup>101</sup> Section 85 *Powers of Attorney Act 1998* (Qld)

<sup>102</sup> Section 86 *Powers of Attorney Act 1998* (Qld)

<sup>103</sup> Section 88 *Powers of Attorney Act 1998* (Qld)

<sup>104</sup> Section 89 *Powers of Attorney Act 1998* (Qld)

<sup>105</sup> Sections 33-41 *Powers of Attorney Act 2006* (ACT)

<sup>106</sup> Section 36 *Powers of Attorney Act 2006* (ACT)

<sup>107</sup> Section 37 *Powers of Attorney Act 2006* (ACT)

<sup>108</sup> Part 4.3.2. *Powers of Attorney Act 2006* (ACT)

<sup>109</sup> Sections 39, 40 and 41 *Powers of Attorney Act 2006* (ACT)

<sup>110</sup> Sections 42-48 *Powers of Attorney Act 2006* (ACT)

<sup>111</sup> *Powers of Attorney Act 2014* (Vic) Part 3

<sup>112</sup> Section 25 *Powers of Attorney Act 2014* (Vic)

- a) *to personal matters only; or*
- b) *to financial matters only; or*
- c) *to matters specified in the instrument.*

It is apparent from this section that in drafting the legislation there was an awareness that although it might in some cases be useful to combine both personal and financial matters into one document there would be many people who would want to appoint different attorneys to act for them in respect of personal matters and financial matters. As a practical consideration, where the principal owns substantial investments, the person appointed will need to have experience in dealing with such investments, such as the ability to seek and understand financial or property advice. Whereas a person appointed as an enduring guardian would need to be a person who has the time and ability to ensure that the principal is receiving proper care.

As already mentioned, in Victoria an enduring attorney can have power over financial, personal and other matters which are included in the enduring power of attorney. A 'financial matter' is defined in section 3(1)<sup>113</sup> as '*a matter relating to the principal's financial or property affairs, and including any legal matter that relates to the financial or property affairs of the principal*'. This is followed by a list of examples which is not intended to be an exhaustive list. Similarly, '*personal matter*' is defined as '*any matter relating to the principal's personal or lifestyle affairs*.' It also includes any legal matter relating to those affairs but does not include medical treatment or medical research matters.

The principles and scope of an enduring power of attorney are contained in Part 3. Section 21 states that where a person is acting for a principal who does not have capacity, they must act in the least restrictive way of the principal's ability to decide and act, as is possible in the circumstances. They must also ensure that in doing so the principal is given practicable and appropriate support to participate in decisions affecting the principal as is possible in the circumstances. In addition, they must '*take any steps that are reasonably available to encourage the principal to participate in decision making, even though the principal does not have decision making capacity; and*

*(c) act in a way that promotes the personal and social wellbeing of the principal including by-*

- (i) recognising the inherent dignity of the principal; and*
- (ii) having regard to the principal's existing supportive relationships, religion, values and cultural and linguistic environment; and*
- (iii) respecting confidential information relating to the principal.*<sup>114</sup>

For an adviser acting as an enduring attorney with respect to financial matters for a client who does not have capacity to actually attend to these matters but has some degree of understanding about them this creates a very high level of need to spend time discussing and explaining decisions made with respect to financial matters with the client.

Section 24 enables the principal to include conditions on the exercise of the power. Section 26 sets out the matters which the attorney cannot do which are similar to those in the Western Australian legislation set out above.

The duties of an attorney<sup>115</sup> are set out in some detail and include provisions relating to acting honestly, exercising reasonable skill and care, not using the position for profit unless authorised by section 70, conflicts of interest, not disclosing confidential information unless authorised by the power, keeping records, gifts, maintenance of the principal's dependants and separation of the attorney's and principal's property. Unusually,

<sup>113</sup> Powers of Attorney Act 2014 (Vic)

<sup>114</sup> Section 21(2) Powers of Attorney Act 2014 (Vic)

<sup>115</sup> Sections 63-69 Powers of Attorney Act 2014 (Vic)

there is also a specific section covering remuneration of the attorney. Section 70 states that the attorney is not entitled to be remunerated unless it is specifically authorised by the enduring power of attorney or by law. This may provide a problem for some advisers and where there is no such provision in the enduring power of attorney then an application should be made to VCAT for permission to be remunerated.

## 9.6 New South Wales - Enduring Attorney

There are no detailed provisions in the New South Wales legislation as to what can and cannot be done by an attorney. Section 20<sup>116</sup> provides that the enduring power of attorney does not confer any authority on the attorney until the attorney has accepted the appointment by signing the instrument creating the power. The attorney cannot appoint a substitute attorney or delegate the power conferred on the attorney unless authorised by the instrument creating the power.<sup>117</sup>

## 9.7 New South Wales – Enduring Guardian

As previously mentioned, an enduring guardian in New South Wales is made by a separate document. An enduring guardian (called in the legislation ‘the appointee’) can exercise the following functions namely deciding where the appointor is to live (such as a specific nursing home or in their own home), what health care and other kinds of personal services the appointor is to receive, giving consent to the carrying out of medical or dental treatment for the appointor and any other function relating to the appointor’s person that is specified in the instrument creating the power.<sup>118</sup>

The functions given to the appointee can be limited or excluded in the instrument creating the power.<sup>119</sup> For the purpose of exercising the function the appointee has the same right of access to information as the appointor and may sign and do all such things as are necessary to give effect to any function of the enduring guardian.<sup>120</sup>

## 9.8 South Australia - Enduring Attorney

Section 6 *Powers of Attorney and Agency Act* 1984 (SA) provides that an enduring power of attorney may be created by deed made pursuant to this section or by a deed which states that the authority is conferred notwithstanding (or alternatively) in the event of the donor’s legal incapacity. The general duty of the attorney (called ‘the donee’), during any period of legal incapacity of the donor, is to exercise his power as attorney with reasonable diligence to protect the interests of the donor.<sup>121</sup> The donor must keep and preserve proper accounts<sup>122</sup> and not renounce his power during any period of incapacity of the donor except with permission of the Supreme Court.<sup>123</sup>

## 9.9 South Australia – Substitute Decision Maker

Section 23 *Advance Care Directives Act* 2013 (SA) provides that such a directive cannot give a power of attorney. Section 23 provides that the decisions that a substitute decision maker may make are:

<sup>116</sup> *Powers of Attorney Act* 2003 (NSW)

<sup>117</sup> Section 45 *Powers of Attorney Act* 2003 (NSW)

<sup>118</sup> Section 6E (1) *Guardianship Act* 1987 (NSW)

<sup>119</sup> Section 6E (2) *Guardianship Act* 1987 (NSW)

<sup>120</sup> Sections 6E (2A) and 6F *Guardianship Act* 1987 (NSW)

<sup>121</sup> Section 7 *Powers of Attorney and Agency Act* 1984 (SA)

<sup>122</sup> Section 8 *Powers of Attorney and Agency Act* 1984 (SA)

<sup>123</sup> Section 9 *Powers of Attorney and Agency Act* 1984 (SA)

- a) *health care*; (other than health care excluded in the regulations)
- b) *residential and accommodation arrangements*;
- c) *personal affairs*.

However, section 23 does not authorise the decision maker to act as a trustee or personal representative in place of the person who made the directive.

The substitute decision maker can only act if the person giving the directive has '*impaired decision-making capacity in respect of the decision*' *'at the relevant time.'*<sup>124</sup> As far as is practicable the substitute decision maker must:

- (a) *give effect to any instructions or directions expressed in the advance care directive; and*
- (b) *seek to avoid any outcome or intervention that the person who gave the advance care directive would wish to be avoided (whether such wish is expressed or implied); and*
- (c) *obtain and have regard to, the wishes of the person who gave the advance care directive (whether such wishes are expressed or implied); and*
- (d) *endeavour to make the decision in accordance with the principles set out in section 10.*

In addition, the substitute decision maker must make the decision that the substitute decision maker reasonably believes the person making the directive would have made and act in good faith and with due diligence.<sup>125</sup> Section 10 set out at length the principles to be observed in connection with the operation of the Act including the presumption that a person is competent to make their own decisions. Section 9 also sets out at length the objects of the legislation.

'*Impaired-decision making capacity in respect of a particular decision*' is defined in section 7. It is quite clear that a person may have capacity to make some decisions and not others.

## 9.10 Tasmania – Enduring Attorney

Section 31 *Powers of Attorney Act 2000* (Tas) sets out the scope of the authority of an enduring attorney. Where an instrument is expressed to confer '*general authority*' on the attorney it operates to confer, subject to any conditions or restrictions specified in the instrument, authority to do on behalf of the donor any act which can lawfully be done by an attorney. These acts include but are not limited to:

- (a) *collect, receive and recover any income or property to which the donor is entitled; and*
- (b) *invest money in any manner in which a trustee may by law invest; and*
- (c) *take a lease of real estate at the rent, and on the conditions, that the attorney thinks fit; and*
- (d) *exercise any power of leasing vested in the donor; and*
- (e) *surrender any lease, accept any lease, accept the surrender of any lease or renew any lease; and*
- (f) *sell, exchange, partition or convert into money any interest in any property other than real estate; and*
- (g) *sell, exchange, partition or convert into money any interest in any real estate; and*

<sup>124</sup> Section 34 (1) *Advance Care Directives Act 2013* (SA)

<sup>125</sup> Section 35 *Advance Care Directives Act 2013* (SA)

- (h) mortgage, purchase, acquire, lease or charge any property or sever any joint tenancy; and*
- (i) exercise any power of the donor in respect of any superannuation of the donor; and*
- (j) pay any debts and settle, adjust or compromise any demand made by or against the estate of the donor, discharge any encumbrance on the estate and reimburse (whether legally obliged to make such reimbursement or not) any person who has expended money for the benefit of the donor; and*
- (k) renounce, on behalf of the donor, the donor's right to apply for a grant of probate in respect of an estate in respect of which the donor has been appointed as an executor; and*
- (l) renounce on behalf of the donor, the donor's right to a grant of letters of administration; and*
- (m) carry on, so far as appears desirable, any trade, profession or business which the donor carried on; and*
- (n) agree to any alteration of the conditions of any partnership into which any donor has entered or to a dissolution and distribution of the assets of the partnership; and*
- (o) bring and defend actions and other legal proceedings in the name of the donor; and*
- (p) execute and sign deeds, instruments and other documents; and*
- (q) complete any contract for the performance of which the donor was liable or enter into any agreement terminating liability; and*
- (r) pay sums, or use the donor's property, for the maintenance and education of the donor's spouse or any child, parent or other person dependent on the donor; and*
- (s) expend money in the insurance, repair, maintenance, renovation, reconstruction or preservation of any property; and*
- (t) to do all matters necessary or incidental to the performance of any of the matters specified in this subsection and apply any money, or any property, which is necessary to apply for the purpose of this Act; and*
- (u) exercise any power, including a power to consent, vested in the donor, whether beneficially or otherwise.<sup>126</sup>*

The most interesting power listed is the one relating to superannuation which does not appear in the legislation of any of the other states and territories. Superannuation will be discussed later in the paper.

Section 31(2B) then provides that an enduring attorney does not have the power to make any decisions in relation to a 'personal matter' on behalf of the donor. A 'personal matter' is defined as a decision in relation to a matter that relates to the private life, lifestyle or health of the donor and then provides a list of matters which are excluded.<sup>127</sup>

The legislation also contains provisions about acting in the best interests of the donor, conflicts of interest, gifts, right to information and keeping of records. It also provides that during any period of mental incapacity of the donor the attorney is taken to be a trustee of the property and affairs of the donor.<sup>128</sup> This means that there is no doubt that the enduring attorney must comply with the duties and obligations which are placed on a trustee except where the *Powers of Attorney Act* otherwise provides. These obligations include the inability to delegate the power to act and the duties of trustees relating to investments.

<sup>126</sup> Section 31 (2A) *Powers of Attorney Act* 2000 (Tas)

<sup>127</sup> Section 31 (2B) and (2C) *Powers of Attorney Act* 2000 (Tas)

<sup>128</sup> Section 32 (1) *Powers of Attorney Act* 2000 (Tas)

## 9.11 Tasmania – Enduring Guardian

As previously mentioned, the legislation relation to enduring powers of guardianship in Tasmania is contained in Part 5 *Guardianship and Administration Act 1995* (Tas). This legislation contains similar provisions to those in respect of an enduring attorney relating to conflict of interest, right to information and keeping records. Section 32 (5) provides that subject to any conditions specified in the instrument creating the enduring power of guardianship, the powers which can be exercised by the guardian are those contained in section 25<sup>129</sup> which a full guardian would have in Tasmania if he or she were parent of a child. These are:

- to decide where the appointor will live;
- to decide with whom the appointor is to live;
- to decide whether the appointor is to work, and if so the nature and type of work and for whom the appointor will work and related matters;
- to restrict visits as may be necessary or to prohibit visits which are having an adverse effect on the appointor;
- to consent to health care except relating to certain matters and to refuse or withdraw consent to treatment.

## 9.12 Northern Territory – Decision Maker

In the Northern Territory section 16<sup>130</sup> provides that a decision maker can be appointed for one or more matters for an adult relating to care or welfare (including health care) or property and financial affairs. If the adult does not identify the matters for which the decision maker is appointed then the decision maker is appointed for all matters. Examples of these matters are listed in section 16 (2) and they include both personal and health care matters and financial matters. The adult may indicate when the decision maker is to act. It may be at all times or only in stated circumstances or at all times except in stated circumstances. However, the decision maker can only act when the adult has impaired decision- making capacity for the matter. The adult can also impose restrictions and limitations on the actions by the decision maker.

When acting, the decision maker has authority to do anything in relation to a matter that the adult could lawfully do if he or she had full legal capacity.<sup>131</sup> The decision maker must also give effect to any current advance care statement made by the adult about the matter and where possible, take into account the current and previous views the adult has expressed concerning the matter. There is also a list of considerations included in the legislation which the decision maker must weigh up when making a decision.<sup>132</sup> Detailed provisions relating to gifts, keeping records, managing property as trust property and obtaining information are similar to those contained in the legislation in the other states and territory with regard to enduring documents.<sup>133</sup> The authority of the decision maker to make certain health decisions is also restricted.<sup>134</sup>

<sup>129</sup> *Guardianship and Administration Act 1995* (Tas)

<sup>130</sup> *Advance Personal Planning Act 2013* (NT)

<sup>131</sup> Section 20 *Advance Personal Planning Act 2013* (NT)

<sup>132</sup> Section 22 (7) *Advance Personal Planning Act 2013* (NT)

<sup>133</sup> Sections 28-33 *Advance Personal Planning Act 2013* (NT)

<sup>134</sup> Section 25 *Advance Personal Planning Act 2013* (NT)

## 10. When the Client had Lost Capacity

When an adviser, usually in conjunction with the client's lawyer and most likely with some medical evidence, comes to the decision that a client does not have the requisite capacity to take certain actions or sign certain documents there will often be a legal solution to the problem. We have already discussed what actions can be taken by an enduring attorney, enduring guardian or substitute decision maker. Unfortunately, not every client who loses capacity will have appointed someone to act on their behalf. Sometimes the person appointed will have died or is unable, for whatever reason, to exercise the power. The paper will now look at some of the legislative provisions which may be used in appropriate circumstances to overcome this problem.

### 10.1 Statutory Wills

Earlier in the paper it has already been mentioned that where a client does not have the capacity to make a long and complicated will the client may have the capacity to make some simple and necessary changes to his or her will. As previously mentioned, if this is the case it is usually better to do this by way of a codicil as a new will would normally revoke all previous wills. If this is not possible all states and territories provide for the making, altering or revocation of a statutory will by the court. As such an application in most jurisdictions involves an application to the Supreme Court with the associated costs of a solicitor and also briefing counsel it should not be undertaken lightly. However, it can be worthwhile in the right circumstances.<sup>135</sup>In Tasmania the Civil and Administrative Tribunal also has limited jurisdiction to make a will for an adult who has lost capacity without ever making a will.<sup>136</sup>The Tribunal can also alter or revoke a statutory will made by the Tribunal.

### 10.2 Appointment of Guardian and Administrator

Where an adviser is faced with a client who no longer has the capacity to make an enduring power of attorney or enduring power of guardianship an application may be made to the appropriate state administrative tribunal for the appointment of a guardian and administrator. It is usually not necessary to engage a lawyer for such an application although if the client's affairs are complicated or there is disunity amongst the client's family as to whom should be appointed it may be worthwhile obtaining advice from a lawyer who is experienced in these matters even if the lawyer does not appear when the application is made. It should be borne in mind also that it should not be taken for granted that an orders for costs will be made from the estate of the proposed represented person. Costs orders are made in some circumstances. When making such an application if the family cannot reach agreement as to whom should be appointed there is always a possibility that the Public Advocate may be appointed as guardian and the Public Trustee appointed as administrator. The tribunal will always make the decision which it considers to be in the best interests of the proposed represented person. Guardianship and administration orders are not made if the needs of the person in respect of whom orders are sought can be met by means less restrictive of the person's needs.

### 10.3 Trustees

At common law a trustee could not delegate the powers and authorities conferred on the trustee by the trust instrument. The exception at common law was the appointment of an attorney if the trustee was leaving the jurisdiction.<sup>137</sup>Where the client who is a trustee loses capacity, the common law rule is that the client's enduring attorney cannot act in the client's place as a trustee. The inability of a trustee to appoint an attorney arose out

<sup>135</sup> *Wills Act 1968 (ACT)* ss16A-16I, *Succession Act 2006 (NSW)* ss18-26, *Wills Act 2000 (NT)* ss19-26, *Succession Act 1981 (Qld)* ss21-28, *Wills Act 1936 (SA)* s7, *Wills Act 2008 (Tas)* ss21-28, *Wills Act 1997 (Vic)* ss21-30, *Wills Act 1970 (WA)* ss39-48

<sup>136</sup> *Wills Act 2008 (Tas)* s29-38

<sup>137</sup> *In re Dunlop; McClintock v Perpetual Trustee Co (Ltd)* (1925) 26 SR (NSW)

of the obligation of the trustee to act personally. There are exceptions to this rule some of which will be discussed later in the paper. The deed creating the trust may provide for the appointment of a new trustee where a trustee is incapable of acting as a trustee. If there is no such provision in the trust deed then legislation<sup>138</sup> provides that where a trustee whether original or substituted, and whether appointed by the Court or not, is incapable of acting as a trustee then the person nominated for the purpose of appointing new trustees (usually called the appointor) in the trust deed may by writing appoint a replacement trustee. If an appointor is not named in the trust deed, then the surviving or continuing trustee or trustees or the personal representatives of the last surviving trustee may exercise the power of appointment. As the exercise of the power of appointment must be in writing a lawyer will need to be engaged to prepare a deed of appointment of new trustee.

In Western Australia, section 7 of the *Trustees Act* does not include a personal representative. There is no provision in the *Administration Act* 1903 (WA) for a grant to be made to an attorney where the sole executor has lost capacity and the applicant is the attorney of the executor pursuant to an enduring power of attorney. However, it is the practice of the court to allow such grants. The court will also make grants to an administrator appointed under the *Guardianship and Administration Act* 1990 (WA) of a sole executor. The basis of the grants is that at common law a grant would have been made to the committee of a lunatic who was the sole executor. The grant to the committee was limited until the lunatic recovered and obtained probate.<sup>139</sup>

## 10.4 Inherent Jurisdiction

Since the 1970's many discretionary trusts have been established whereby control of the trustee and the terms of the trust is maintained by the person setting up the trust (not the settlor) by appointing an appointor who has the power to appoint a new trustee. In addition, a guardian whose consent must be obtained before certain powers are exercised by the trustee may also be appointed. Many such trust deeds do not make provision for a substitute appointor and guardian in circumstances where the appointor and guardian, due to lack of capacity, are unable to act. This was the position of the discretionary trust, the subject of the recent Western Australian case of *Dryandra Investments Pty Ltd as trustee of the Dryandra Trust v Hardie*<sup>140</sup>.

Mrs Hardie became appointor and guardian of the Dryandra Trust (established in 2018) in 2022 upon the death of her husband who was the original appointor and guardian. Mrs Hardie, who was born in 1942, did not at any time have capacity to act as appointor and guardian due to dementia. This meant, that amongst other things, Dryandra Investments Pty Ltd as trustee could not exercise its discretion in distributing the income of the Dryandra Trust. Moreover, Mrs Hardie did not have capacity to appoint a replacement appointor and guardian. Mrs Hardie, by her litigation guardian and with the consent of her three children who with their children were discretionary beneficiaries of the Dryandra Trust, sought relief under section 90 *Trustees Act*<sup>141</sup> to amend the trust deed or alternatively for the court in its inherent jurisdiction to appoint Mrs Hardie's accountant, who was her enduring attorney and also the executor of her will, as appointor and guardian of the Dryandra Trust. Master Russell was not satisfied that the court had power under section 90 to approve the variations to the trust deed. However, after referring to the observations of the Court of Appeal in *Blenkinsop*<sup>142</sup> and in particular:

<sup>138</sup> *Trustee Act* 1925 (ACT) s6 (2)(e), *Trustee Act* 1925 (NSW) s6 (2)(e), *Trustee Act* 1893(NT) s11, *Trusts Act* 1973 (Qld) s12 (1) (f) but see Clause 20 *Trusts Bill* 2024, *Trustee Act* 1936 (SA)s14 (1), *Trustee Act* 1898 (Tas) s13 (1), *Trustees Act* 1958 (Vic) s48 (1), *Trustees Act* 1962 (WA) s7 (1) (f)

<sup>139</sup> *Tristram and Coote's Probate Practice* 18<sup>th</sup> edition pp 208 and 209

<sup>140</sup> [2024] WASC 248

<sup>141</sup> Section 90 *Trustees Act* 1962 (WA) empowers the court to approve arrangements to a trust on behalf of a beneficiary of a trust who is incapable of assenting to those arrangements. Mrs Hardie was a beneficiary of the trust but she was not seeking the amendments to the trust deed in her capacity as a beneficiary.

<sup>142</sup> *Blenkinsop v Herbert* [2017] WASCA 87

*‘There seems to us to be much to be said for the proposition that the court has power to remove a guardian if that is necessary to secure, but not alter, the due execution of the trusts, and that other considerations go to discretion rather than jurisdiction.’<sup>143</sup>*

Master Russell was of the view that the court has power under its inherent supervisory jurisdiction to remove and replace a guardian and appointor of a trust and that in this case it was necessary to do so to secure the proper administration and due execution of the Dryandra Trust. She did however point out that this was not a fixed rule and that each case must be considered on its own facts and circumstances, including the terms of the trust deed.<sup>144</sup>

## 10.5 Medical Decisions

In all Australian jurisdictions where a person has lost capacity and has not appointed someone to make medical decisions on their behalf and where there is no Advance Health Directive (or similar statutory document) made by the person requiring treatment there is a hierarchy of persons who are authorised to make those decisions. It is beyond the scope of this paper to examine this area in detail.

## 10.6 Enduring Powers of Attorney and Section 17A Superannuation Industry (Supervision) Act 1993 (Cth)

An interesting modification to the law relating to powers of attorney is contained in the superannuation legislation. Section 10 of the *Superannuation Industry (Supervision) Act 1993* (Cth) defines a ‘*legal personal representative*’ as not only the executor or administrator of a deceased person, but extends it for the purpose of the SIS Act to include ‘*the trustee of the estate of a person under legal disability or a person who holds an enduring power of attorney granted by a person.*’ Section 17A sets out the requirements for a self-managed superannuation fund. Funds which have more than one member must have fewer than five members. If the trustees of the fund are individuals, each individual trustee must be a member of the fund and if the trustee of the fund is a body corporate each director of the body corporate must be a member of the fund. No member of the fund can be an employee of another member of the fund unless the members concerned are relatives. With respect to a single member fund, there are similar rules although if a body corporate requires two directors the member must be one director and the other director a relative of the member.<sup>145</sup> Subsection (3) of Section 17A then provides that a superannuation fund does not fail to comply with the conditions set out in subsections (1) and (2) if the legal personal representative of the fund is a trustee of the fund or a director of the body corporate. Where a member of the fund is under a legal disability the ‘*legal personal representative*’ is the person who has an enduring power of attorney for that member.

It can be seen from this convoluted legislation that it is extremely important that every member of a self-managed superannuation fund should, whilst having the capacity to do so, appoint an attorney pursuant to the enduring power of attorney legislation in their particular jurisdiction. If this is not done it may be necessary to apply to the relevant state tribunal to have an administrator appointed who can act as a trustee. As there is a period of six months before the fund becomes non-compliant<sup>146</sup> it is necessary that this application should be made as quickly as possible. The time that it takes to make such an application and have the matter heard varies in the different jurisdictions.<sup>147</sup> It goes without saying that the person appointed as attorney should be a trust worthy person. When using an enduring power of attorney for this purpose it would also be prudent to check that the enduring power of attorney has been correctly executed and has been made according to the

<sup>143</sup> *Blenkinsop v Herbert* [2017] WASCA 87 at par 75

<sup>144</sup> *Dryandra Investments Pty Ltd as trustee of the Dryandra Trust v Hardie* [2024] WASC 248 at par 101-104

<sup>145</sup> Section 17A (2) *Superannuation Industry (Supervision) Act 1993* (Cth)

<sup>146</sup> Section 17A (4) (b) *Superannuation Industry (Supervision) Act 1993* (Cth)

<sup>147</sup> See DBA Lawyers SMSF Online Updates 23 February 2023 William Fettes on applications for an administrator in New South Wales

laws in the correct jurisdiction. The SIS Act provides that if a self-managed superannuation fund does not comply with the SIS Act, then it may be penalised and the tax advantages which the members have benefited from may be lost and penalty tax incurred.

In SMSFR 2010/2 the Australian Taxation Office sets out the scope and operation of Section 17A (3) (b) (ii). One of the unusual aspects of this ruling is that where one person is the enduring attorney for two separate family members (for example, a son or daughter who is enduring attorney for each parent who both no longer have capacity to act as trustee of their two member fund) that one person can act as in effect act as a sole trustee. Similarly, where a husband and wife have a two member fund and the husband loses capacity the wife as his legal personal representative by virtue of being his enduring attorney may be the only trustee of the fund.

## 10.7 Binding Death Benefit Nominations

As mentioned earlier in the paper, at common law there are certain actions which cannot be done by an attorney. These are matters which are considered to be actions which cannot be delegated but must be performed by the principal personally. The making of a will is such an action.<sup>148</sup> The law relating to binding death benefit nominations has not been entirely straight forward. Many lawyers, considered that a binding death benefit nomination was an act of a testamentary nature as the nomination was a direction by the superannuation fund member as to what is to happen on the death of the member and thought that such a nomination should be executed in the same manner as a will. The situation was complicated by confusion as to whether regulation 6.17A *Superannuation Industry (Supervision) Regulations* 1994 (Cth) which provides that a binding death nomination expires after three years applied to self-managed superannuation funds. As a result, many binding death benefit nominations only lasted for three years. This was the case in the Queensland case of *Re Narumon*.<sup>149</sup> Mr Giles who had lost capacity had appointed his son as his enduring attorney. Prior to losing capacity he had made a binding death benefit nomination whereby he divided his superannuation as to 47.5% to his wife, 47.5% to his son and 5% to his sister on his death. The gift to his sister was not a valid one. His son in his role as his father's attorney signed an extension of the existing binding death benefit nomination and also a new binding death benefit nomination where the sister's share was added to the share of his mother and himself. The court held that the extension of the binding death benefit nomination by the attorney was an extension of Mr Giles's succession planning and that as it was in accordance with the superannuation trust deed and in accordance with the law it was validly exercised. However, the new nomination was not upheld by the court for in it the attorney conferred an additional benefit on himself

Since the decision of the High Court in *Hill v Zuda as trustee for The Holly Superannuation Fund*,<sup>150</sup> which confirmed the decision of the Supreme Court of Western Australia that Regulation 6.17A<sup>151</sup> does not apply to self-managed funds and that a binding death benefit nomination does not lapse after three years, a binding death benefit nomination for a self-managed superannuation fund may, if the trust deed permits, provide that the payment can be made on the death of the member. If the trust deed does not permit the execution of a non-lapsing binding death benefit nomination, then where possible, the superannuation trust deed should be amended to permit this. It should be noted that for the actual nomination to be valid it must be in the form prescribed in the superannuation trust deed.

<sup>148</sup> Where a testator is physically unable to sign a will, it may be 'signed by some other person in the testator's presence and by the testator's direction...' Section 8 (b) *Wills Act* 1970 (WA), Section 7(1)(a) *Wills Act* 1997 (Vic), Section 6(1)(a) *Succession Act* 2006 (NSW), Section 10 (2)(b)(ii) *Succession Act* 1981 (Qld), Section 8 (a) *Wills Act* 1936 (SA), Section 8(1) *Wills Act* 2008 (Tas), Section 8(a) *Wills Act* 2000 (NT), Section 9(1)(b) *Wills Act* 1968 (ACT)

<sup>149</sup> [2018] QSC 185

<sup>150</sup> [2022] HCA 2

<sup>151</sup> *Superannuation Industry (Supervision) Regulations* 1994-Regulation 6.17A *Payment of benefit on or after death of member* (Act, s59 (1A))

## 10.8 Corporations and Directors

There is often confusion surrounding the use of powers of attorneys by corporations and directors. This arises out of a confusion as to whether it is the corporation or the director which must appoint someone as an agent to carry out the act.

Section 126 of the *Corporations Act* 2001 provides that a company's power to make, vary, ratify or discharge a contract or execute a document (including a deed) may be exercised by an individual acting with the company's express or implied authority. This may be without the use of a common seal and since 2022<sup>152</sup> may be in physical or electronic form. Section 126 should be contrasted with execution pursuant to section 127 which sets out how the company itself can execute documents.

It is quite clear from section 126 that the powers which can be delegated by a company are those which the company exercises. The directors on the other hand, are not empowered to delegate their powers except as authorised by section 201K which is as follows:

*Alternate Directors (Replaceable Rule-see section 135)*

- 1) *With the other directors' approval, a director may appoint an alternate to exercise some or all of the director's powers for a specified period.*
- 2) *If the appointing director requests the company to give the alternate notice of directors' meetings the company must do so.*
- 3) *When an alternate exercises the director's powers, the exercise of the powers is just as effective as if the powers were exercised by the director.*
- 4) *The appointing director may terminate the alternate's appointment at any time.*
- 5) *An appointment or its termination must be in writing. A copy must be given to the company.'*

ASIC must be given notice of the appointment and termination (see subsections 205B (2) (5) and (6)) which are as follows:

*'(2) A company must lodge with ASIC a notice of:*

- (a) the personal details of a person who is appointed as an alternate director; and*
- (b) the terms of their appointment (including terms about when the alternate director is to act as director) within 28 days after their appointment as an alternate director. The notice must be in the prescribed form.*

*(5) If a person stops being a director, alternate director or secretary of the company, the company must lodge with ASIC notice of the fact within 28 days. The notice must be in the prescribed form.*

*(6) Subsection (5) does not apply if:*

*(a) the person was an alternate director who stopped being a director in accordance with the terms of their appointment as an alternate director.'*

It can be seen from the legislation that this may not always provide the answer if a director has already lost capacity as the appointment must be by the director appointing the substitute who must have the capacity to make the appointment. Part of the succession plan for a company should include considering whether there is

<sup>152</sup> Section 126 was amended by the *Corporations Amendment (Meetings and Documents) Act* 2021 (Cth)

a need for the appointment of a successor director. Any appointments, whether as substitute or successor director, must be in accordance with the constitution of the company.

## 11. What Can We Learn From this Paper?

It can be seen from this paper that over the last forty years or so that there have been many changes to the law in an endeavour to address the problems faced not just by a population who are living longer but generally speaking, a population who are living longer and who are comparatively comfortably off compared with earlier generations. Some of the legislative changes have been more successful than others. Whilst there are many advantages to Australia being a federation, in the area of succession law and capacity this has meant that the six states and two territories all have different laws in these areas. As a result of the recommendations in the Australian Law Reform Commission's 2017 report, '*Elder Abuse: A National Legal Response*' the Attorneys General from the states and territories agreed to consult on a proposal for a mandatory national register of enduring powers of attorney in order to reduce the financial abuse of older Australians. The submissions received were published on 21 June 2021 but due to the different laws in the Australian jurisdictions, lack of agreement on the content of a national enduring power of attorney and the requirements for registration, the national register has not eventuated. The website of the Department of the Attorney General simply states that while a national registration scheme is still under consideration it has not yet been established.

Despite all the differences there are certain practical matters which are common to all states and territories. A list of the more important issues which have been discussed is probably the most helpful way to end this paper.

- Remember that the states and territories are separate jurisdictions for wills and enduring powers of attorney and therefore for issues relating to capacity. Advice should be obtained from a lawyer in the relevant jurisdiction experienced in this area of law.
- An adviser cannot encourage a client to do acts or sign documents which a client does not have the capacity to do even when the adviser knows that these actions are in the client's best interests.
- At common law everyone is presumed to have capacity.
- There is no one fixed standard of capacity to validate all transactions. The client must at the time of the transaction or particular matter have an understanding of what the client is doing.
- Where a client's capacity is in doubt it is the facts which lead an adviser to decide whether the client did or did not have capacity which are important.
- Remember the *Banks v Goodfellow* test and if asked to witness a will where a client's capacity may be in doubt the points which must be addressed.
- Ensure that it is the client who is giving instructions.
- Instructions should be taken directly from the client or confirmed by the client.
- Capacity may fluctuate. Where a client's capacity is in doubt take time and keep it simple.
- Remember that medical reports can only be obtained with the consent of the client.
- Keep proper notes and retain those notes.
- Loss of capacity can happen to anyone so that enduring documents should be part of any succession plan.
- The forms for enduring documents are different in all the states and territories. Make sure the correct forms are used and that they are correctly executed and witnessed. When in doubt get advice.

- When witnessing enduring documents be aware of the responsibilities placed on witnesses and the importance of any certificate which must be completed.
- Companies can appoint an attorney but directors cannot.
- The SIS Act enables an enduring attorney to act as legal personal representative for a trustee of a self-managed superannuation fund who has lost capacity and therefore act as trustee in place of that incapacitated trustee.
- Trustees cannot delegate their trust so an attorney cannot, except in certain circumstances, act on behalf of a trustee.
- Where a client has lost capacity, advice should be sought as in some circumstances all is not lost.

Susan Fielding TEP Retired

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