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Basic “rules of thumb” when assessing mental capacity

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When solicitors are approached by people wishing to make a new will or amend an existing will, one of the principal considerations is whether or not a person actually has the legal and mental capacity to fully understand their intentions and actions. In this article we consider the basic “rules of thumb” when assessing mental capacity.

In the recent case of Ryan v Dalton [2017] NSWSC 1007, an elderly man made a new Will leaving his estate equally to his de facto partner and three children. Previously he had not included his de facto on the grounds that they had a common understanding that they would not include each other in their wills.

The Court held that he did not have the necessary mental capacity to make the Will, even though instructions had been taken by a solicitor. The Judge considered that whilst the solicitor taking the instructions did her best in taking notes, she should in the circumstances have checked the testator’s medical records and obtained a letter of capacity from a general practitioner.

The Judge used the case as an opportunity to provide a warning that there must be careful investigation of a testator’s mental capacity, particularly in the case of elderly will makers. The judge provided some best practice guidelines to be undertaken in the case of a will maker who is:

1. over 70;
2. being cared for by someone;
3. who resides in a nursing home or similar facility; or
4. about whom for any other reason the solicitor might have concern about capacity.

Justice Kunc highlighted that any doubt surrounding a testator’s capacity should be clarified by asking the client, their carer or a care manager in the home or facility whether there has been any diagnosis, behaviour, medication or the like which would affect capacity. There must then be a decision as to whether an independent assessment is required to properly determine a testator’s legal decision making capacity.

The requirement for an interview with the testator without other people being present, using open rather than leading questioning and taking comprehensive file notes also provides clear guidance for experts in the assessment process.

It may indeed become a best practice baseline that independent assessments by a qualified treating doctor are routinely requested to confirm testamentary capacity.

Although this may be seen as somewhat arduous, the effort involved in assessing capacity when taking instructions and when the will is executed, including the obtaining of an independent report Justice Kunc observed that it “pales into insignificance with the expense, delay and anxiety caused by litigation after the testator’s death”.

These “rules of thumb” may be “offered only as suggested basic precautions” but will no doubt become a clear baseline for assessing whether experts met their standard of reasonable care in the execution of a will or other similar transaction.