
Capacity Issues In Estate Planning

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What is legal capacity and how do you establish it? It is not always as straight forward as it sounds.

The Supreme Court held in the case of *d'Apice v Gutkovich* that Irene Abrahams (a deceased person) had capacity to make a Will even though six months prior to her making her last Will the Guardianship Tribunal found she was not capable of managing her affairs!

Generally, legal capacity requires a person to:

- understand the facts involved regarding the decision to be made;
- understand what choices are available;
- be able to evaluate the choices and the likely effect of such choices;
- be able to communicate the decision.

Legal capacity requirements vary in different situations.

For Wills, the basic principles were established in 1870 in the case of *Banks v Goodfellow*. The case has withstood the test of time.

Its language is descriptive:

A person making a Will must "...understand the nature of the act and its effects; ... understand the extent of the property of which he is disposing; ... 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 his sense of right or prevent the exercise of his natural facilities..."

This test recognises:

- the need to assess issues of cognitive (medical) ability of the person making the Will; and
- the person making the Will must be able to appreciate the assets he or she owns and potential claim on those assets.

The test is task specific. It depends on the nature and complexity of the Will, the extent and complexity of the Willmaker's assets and the Willmaker's personal circumstances.

"A simple Will can be made by a severely demented person. A complex Will may not be able to be made by a person with the symptoms of mild dementia."

The capacity to make a power of attorney is not exactly the same. A power of attorney usually



allows another to lawfully exercise as attorney legal and financial functions which the donor could do themselves.

Whilst the general tests are still the same, one has to be sure not only that the donor understands that he or she is authorising someone to look after his or her affairs, but also what sort of things an attorney could do without further reference to the donor.

Further, if the power of attorney is to be irrevocable in the case of mental illness, it is important that the person providing the power of attorney clearly understands this.

Issues regarding capacity are becoming more prevalent in these times when people are living longer and medical issues such as dementia are becoming more common.

It is all the more important that where capacity may be an issue, professional advice is sought. If you require assistance, do not hesitate to contact one of our Estate Planning lawyers at Matthews Folbigg.