

Short Minutes Transcript: Testamentary Capacity - Are You Doing Enough?

With an ageing population it is likely that we will see more challenges to wills on the grounds of incapacity. In the 2017 case of *Ryan and Dalton*, the deceased made a new will leaving his estate equally to his de facto partner and three children. In a previous will the deceased had not included his de facto partner, on the grounds that they had a common understanding not to include each other in their wills.

The Court held that the deceased did not have testamentary capacity when making the later will and Justice Kunc took the opportunity in his judgment to provide a basic set of guidelines that he considers every solicitor taking will instructions should use as a starting point:

- Interview the client alone - if an interpreter is required, the interpreter should not be a family member or proposed beneficiary
- Always consider the issue of capacity and the possibility of undue influence, if only to dismiss it in most cases
- Seek instructions using non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way?
- Both questions and answers should be recorded in detailed file notes

Further to this Justice Kunc added, and I quote:

"In case of anyone:

- *Over 70*
- *Being cared for by someone*
- *Who resides in a nursing home or similar facility, or*
- *About whom for any other reason the solicitor might have concerns about capacity*

The solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity, including as a result of any diagnosis, behaviour, medication or the like"

Solicitors should also be aware of the following resources:

- Firstly, the Capacity Toolkit published by the NSW Attorney General's Department; and
- Secondly, The Law Society's Practical Guide for When a Client's Mental Capacity is in Doubt

Links to the case and resources can be found below.

- [Ryan v Dalton; Estate of Ryan \[2017\] NSWSC 1007](#)
- [Capacity Toolkit](#) – The NSW Attorney General's Department
- [When a Client's Mental Capacity is in Doubt](#) – The Law Society of NSW