Making a Will if capacity is in question

It is well known that a Will is a legal document which sets out how a person wants their assets to be distributed once they die.

If you are over the age of 18 you can make a Will - *provided you have capacity*.

In general terms a person will have the necessary capacity if they:

- know what a Will is;
- know of the amount and type of property they are disposing of;
- understand the moral claims to which they should give effect when deciding to whom to leave their property; and
- are not delusional or suffering from a mental illness at the time they sign their will.

Who decides on capacity?

It is not the role of a lawyer to be an expert in assessing the capacity of their client. However, a lawyer can be involved in carrying out a "legal" assessment of the Will maker's capacity.

If there is a question about someone's mental capacity to make a will, then an opinion, preferably in writing, should be obtained from that person's treating doctor. The opinion should state that the Will maker has the required testamentary capacity to make a Will.

When should the Will be signed?

It would be ideal if the doctor could be present when the Will maker signs the will and even better if the doctor is one of the two witnesses to the will. In all likelihood this will not be possible.

Where there is the likelihood of the Will being challenged on the Will maker's death on the basis of a lack of capacity, it is important to obtain contemporaneous medical evidence from the Will maker's treating doctor or in some cases a geriatrician confirming the Will maker has capacity. It is prudent for the doctor to conduct a medical examination to determine this and then provide a written report confirming their opinion.

We feel that the Will maker should *on the same day* provide instructions to the lawyer and sign the Will.

Having a medical report stating that, in the doctor's opinion, the Will maker had capacity and then *on the same day* the person provided instructions and signed their Will, places the Will maker in a strong position so far as capacity is concerned.

Could the Will be challenged?

It is important to address the issue of capacity in some circumstances because a Will can be challenged on the grounds that the Will maker did not have sufficient capacity when signing the Will. This arises most frequently where the Will maker is ill, for example, in hospital on medication or elderly and suffering from dementia.

It is difficult to set aside a Will on grounds that the Will maker lacked testamentary capacity if the Will is prepared by a competent lawyer who took appropriate instructions from the Will maker and was satisfied the Will maker had the requisite testamentary capacity to make a will.

How your lawyer can help

If you are worried because you know someone who wants to make a Will and may not have capacity or may be in the early stages of dementia and you are not sure, then it is prudent to encourage them to consult a lawyer who is experienced in Will making and to do this as soon as possible.

It is also prudent to ensure the lawyer is made aware of this potential difficulty because as we suggest, it may be necessary for the Will maker to first attend their doctors surgery for an appointment with the doctor being able to provide a satisfactory written report so it can be taken to the lawyers office ahead of the Will making appointment but on the same day.

It is then a matter for the lawyer to be in a position to actually prepare the Will on the spot for checking and signing. Then the Will maker will have a Will that is dated the same day as a medical report saying they had capacity to understand the Will they signed.

As you can see there is a degree of planning that is needed, so speak to your lawyer to ensure that all the plans are worked out first.

If this is relevant to you or your family then please call us on 03 9387 2424 or email info@rrrlawyers.com.au.