



Understanding Legal Capacity for Clients with a Diagnosis of Dementia

Presented by Keryn Ruska, Solicitor
and Frances Privitera,
Social Worker

Seniors Legal and Support Service Brisbane

caxton
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Caxton Legal Centre has been delivering specialist legal and support services to older Queenslanders for nearly 20 years.

These services are now delivered statewide via a Queensland Government funded Seniors Legal and Support Service.

The model has always been multidisciplinary with social workers and lawyers working together.

Social workers and lawyers work side by side

psychosocial
assessment

ongoing
social work
support

measure
outcomes



safety first

home visits

capacity
screening

integrated case
planning

legal
casework

What is capacity?

Capacity is determined by cognitive capacity to understand and appreciate the contexts and decisions, not the actual outcomes of the choices made.

What is legal capacity?

Legal capacity is the ability of a person to make decisions for themselves and deal with their legal affairs.

Clients must be able to give lawful, competent and proper instructions.

What is legal capacity?

The requirements of capacity, for a person for a matter, means the person is capable of:

(a) understanding the nature and effect of decisions about the matter; and

(b) freely and voluntarily making decisions about the matter; and

(c) communicating the decisions in some way.

See *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary) and *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary)

What is legal capacity?

- Presumption of capacity
- Freedom to choose is a fundamental human right
- A capacity assessment either affirms this right, or confirms that it is absent

Capacity is:

Domain specific:

- financial and legal
- personal and health care
- lifestyle and accommodation choices

Time specific:

- Capacity can fluctuate over time;
- It can deteriorate or improve depending on the cause, ie acute illness, mental health, strokes

Decision specific:

- Depends on the nature and complexity of the decision in question
- May lack capacity for one sort of decision only, for example a client may be able to decide where they want to live (personal decision), but not be able to decide whether to sell their house (financial decision)

Capacity is:

Capacity to decide must be distinguished from the decision itself:

An adult does not lack the capacity to make a decision merely because they make a decision that others consider to be unwise.

No assumption of incapacity due to appearance, age, behaviour or disability:

An adult's capacity to make a decision should not be assumed or based upon their age, appearance, condition, religion or cultural beliefs, or aspect of their behaviour.

Assessing Capacity

Practical process for assessing client capacity:

- Identify the client.
- Identify the particular decision.
- Consider whether there is any reason to question whether the client has capacity.
- Determine if a substituted decision maker has been formally appointed for the client.
- If 'red flags' are present and there is **no substituted decision maker**, take steps to maximise the client's capacity.

To effectively assess capacity, it is important to recognise that information gathering is an essential part of the process.

Red Flags...

The client is:

- elderly or has a disability or impairment, including a diagnosis of dementia;
- in hospital or a nursing home when instructions are taken;
- having difficulty recalling things, has a bad memory or is forgetful;
- unable to perform simple calculations;
- disoriented, loses things or repeats themselves;
- anxious about decision making or upset by being unable to manage tasks;
- changing lawyers recently or frequently or has radically changed their instructions recently;
- accompanied by a third party who does not give the client an opportunity to speak for themselves
- the person facilitating contact between the client and the lawyer stands to benefit from any decision made by the client;
- presenting differently
- the lawyer is on notice of issues regarding the client's mental health or cognitive function

Questions to pose

- Does the client have a basic understanding of the relevant facts and issues and sufficient knowledge of the world to make decisions such as the one in question?
- Does the client have the cognitive ability to manipulate that information so that they can make an informed decision?
- Is the client aware of their own abilities and limitations, any memory loss and its impacts, and any (possibility of) exploitation?
- Does the client understand the different options available and can they compare the likely consequences of each of those options?
- Does the client understand the likely consequences (for them and for others) of their decisions or failure to make decisions?

Questions to pose

- Does the client have the ability to clearly articulate a reasoning process behind their decisions?
- Are the client's desired outcomes stable or do they vary over time or depending on who is present? Can the client remember prior decisions?
- Are the client's conclusions and decisions consistent with the client's previous decisions, prior behaviour, core beliefs and values and stated or inferred goals?
- Is the decision substantively fair or will it lead to the injury or exploitation of the client or a third party?
- Is the decision irreversible? If so, does the client attach appropriate significance to the decision?.



Psychosocial assessment

An example of our intake and assessment form

Reason for referral	
Background information	
Safety	
Social & family history	Include nature of relationship with family members
Significant others	
Health	Include any formal diagnosis from doctors, medications, cognitive test results
Financial and legal status	Income source, how bills are paid, financial hardship, lawyers involved
EPoA/Will	Beneficiary and executor of will, who is EPoA and what were they appointed to do, commencement of EPoA
Accommodation and housing	Who is on the title of the house, written or verbal agreements, life tenancy, mortgages
Transport	
Strength/interests	
Support networks	
Referrals out	
Summary of issues	
Action plan	



Assessment Form cont.

Capacity concerns

Medical and cognitive conditions (include any formal diagnosis of dementia, neurological, intellectual disability, ABI, acute illness) which may impact on capacity

Client's presentation at the time of assessment (including any observations of confusion, disorientation)

Memory Loss indicating both short -term and long- term memory (eg. forgetful, repetitive, is the client a good historian?)

Any language, hearing impairment or communication issues (receptive and expressive) which may impact on capacity?

Any trauma or emotional/psychological issues (e.g. history of DV, bereavement) which may impact on capacity?

Any mental health issues (including addictions) which may impact on capacity?

Domains:	1. Financial affairs (complex and simple)
	2. Legal (client's understanding of the nature and effect of decisions about the matter, freely and voluntarily making those decisions and communicating the decisions in some way)
	3. Personal health care
	4. Lifestyle and accommodation
	5. Contact

Strategies to maximise capacity

What can affect capacity?

The level of capacity a person has at a particular time can depend on the following factors:

- type of decision
- timing of the decision
- complexity of the decision
- volume of information provided to the person
- person's level of understanding about the information
- communication between the assessor and the person
- physical environment in which the decision is being made
- level of experience of the person
- Health
- personal stress

Capacity may be increased with appropriate support:

1. Identify barriers to capacity and why the client is unable to make their own decisions, such as:

- Cause of cognitive impairment;
- Language;
- Hearing or vision impairments;
- Speech impairments;
- Cultural issues;
- Trauma;
- Bereavement;
- Delirium;
- Mental health condition;
- Limited education, knowledge and skills eg EPOA

2. How do we address these barriers in order to maximise capacity:

- Use interpreters if language is an issue;
- Use sign language translators for hearing impaired;
- Choose appropriate time of day to meet with client eg if a client has dementia, may be better to conduct interview in the morning before fatigue sets in as this may result in diminished capacity;
- Consider conducting multiple short interviews;
- Be prepared to reschedule appointments if the person is unwell or confused;
- Keep interview as simple as possible;
- Understand cultural issues;
- Counselling may be considered to address psychological and social issues;
- With client's consent, work in partnership with community services, organisations and support networks;
- Breakdown legal terminology;
- Keep clarify the client understands;
- Repeat information for clients who have short term memory loss.

3. Identify other strategies to maximise capacity:

- Increase support to assist client to cope with stressful situations;
- Where appropriate and with the client's consent, consult with significant people in the client's life;
- Aim to increase the knowledge and skills of clients to make and communicate their decisions;
- Acknowledge that while clients may not have capacity in some areas, they may have capacity to make decisions in other areas with support;
- Build confidence and encourage independence

Watch out for the pitfalls in supported decision-making

- Be mindful of undue influence and conflict from those close to the client.
- Ability to freely and voluntarily make the decision.

Substituted decision making is a last resort

- Adult must have impaired capacity;
- Even if appointed, the decision maker needs to take into account the wishes of the adult

Our process in the Family and Elder Law Team

1. Referral Received:

Social Worker contacts the client by phone

2. Intake completed:

- Includes social history, health, family & social support, financial & legal status, client's issues & concerns
- Enables the SW to identify capacity red flags including client's ability to give accurate information, details of specific events, any confusion, short term memory loss and insight

3. Intake review:

- Social worker will raise and capacity concerns
- Coordinating solicitor will review the intake and allocate to a Social Worker and solicitor (multi disciplinary approach)

Our process in the Family and Elder Law Team

4. Case work:

- Social Worker and solicitor will review the file and case plan, discussing capacity issues
- Face-to-face appointments are common, including home visits or appointments at other safe venues
- Solicitor will assess legal capacity during appointments
- Capacity is reviewed throughout the time the team is working with the client as capacity often fluctuates