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The problem of lost trust deeds

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Discretionary trusts and self-managed super funds are often used as wealth management tools for businesses, families and individuals. But if the deed constituting the terms of that trust is lost, destroyed or misplaced, serious problems may arise.

True, there is no problem for the trust relationship — that stays on foot. But administering the trust relationship can become difficult and uncertain. Problems may become even more fraught should the deed establish a trading trust, whose business is active and long-established.

Drafting a deed afresh is a no-go — this risks creating a new trust, or a resettlement, with potentially significant tax consequences. Further, any amendment,[1] appointment of a replacement trustee,[2] or appointment of a new beneficiary[3] could be declared void ab initio (from the start). Likewise, distributing to a non-beneficiary risks a claim for breach of trust.

Where best to look?

The first step is to undertake searches to try and locate a copy of the original deed, or reliable evidence of its terms. Avenues to pursue include:

- *Trustee*: The trustee bears the primary obligation in relation to the whereabouts of a trust deed, because a trustee has the duty to ascertain the terms of the trust.[4] Have all current and former trustees and directors of corporate trustees been contacted?
- *Settlor*: Has the settlor of the trust (if known) been approached? They may be deceased — what about the executor of their estate who should have control of their personal papers?
- *Trust provider*: More complex deeds may have been drafted by a firm of solicitors or accounting firm. Contact them and any successor partnerships or incorporated legal practices. Sometimes this turns up an unsigned copy of the execution copy of the trust deed prepared by the firm, or they may be able to provide a copy of the trust deed precedent that was current at the date of establishing the trust, and it can be reconstituted from there. The application form, file notes or other contemporaneous documents and even the recollection of relevant persons may also be found which would permit reconstitution of the terms of the precedent trust deed.
- *Relatives*: Inquiries can be made of all adult relatives of the trustee, and those who may have had an association, such as a family business, or lived in the local region.
- *Beneficiaries*: Inquiries should also be formally made of those thought to be beneficiaries of the trust. In turn, their personal accountants and lawyers should also be contacted. If one of the beneficiaries has since died, inquiries should also be made of their legal personal representatives (executor/administrator) and in turn their lawyers. Since the purpose is not only to try to locate the original or copy of the trust, but (should it become necessary) to identify sufficient grounds to enable the trust's terms to be reconstituted by secondary evidence, the past pattern of distributions disclosed in minutes and tax returns should identify some of the beneficiaries within the class of beneficiaries.
- *Financiers*: Finally, try to locate current and former banks, financiers and brokers who may have obtained a copy of the deed as part of any finance application. A property ownership search could demonstrate the identity of all properties acquired by the trust, and in turn identify any mortgage providers and conveyancing solicitors of whom final inquiries can be made.

So something is found — self-help or court?

If an executed and stamped copy of the trust deed is found, all to the good, since that copy (and copies of that copy) should constitute adequate evidence of, and stand as a sufficient substitute for, a lost original trust deed for most purposes (including litigation).[5] A deed of confirmation can be executed referencing the original deed and its terms.

With less certain documentary trails, deciding whether to incur the cost of approaching the court for declaratory assistance could be driven by the size of the trust estate.

Thus, in small estates, or estates with passive investments, court may be avoided if the trustee can accept a degree of restriction and administrative uncertainty, and proceed to administer the trust in accordance with trust law and the relevant Trustee Act.[6]

But if the trust is carrying on a business, even if small, then in most cases such restricted powers will be inadequate (and statutory provisions that provide assistance for the purpose of winding up the business may be unpalatable).

For larger and more complex trusts, even if there is an unsigned execution copy or reconstructed copy of the trust deed, it is usually appropriate to apply for a court order that the unsigned execution copy or reconstructed copy of the trust deed stands in place of the terms of the original trust deed.

The application does not necessarily require a contradictor.[7]

Evidence on the application

The likely success of such an application will be dependent on the evidence that can be adduced as to the terms of the original trust deed (and amendments).

Where an original document constituting a trust has been lost or destroyed, proof of the contents of the document may be given by secondary evidence. However, the court will be looking for "clear and convincing proof not only of the existence, but also of the relevant contents, of the writing".[8] The less evidence of the terms of the trust, the less likely such an application will be successful.

Documentation of all inquiries and responses is essential to establish a proper audit trail, should an application be required to be made to the court to establish that sufficient inquiries and investigations have been made to no avail.[9]

The evidence of the original drafter of the trust deed may be called in aid. In *Sugden v Lord St Leonards*, the court explained in the context of a lost will:

> … if the evidence of the contents of a long and complicated [document] were given by a professional man who had himself drawn the instrument or upon one or repeated occasions had had the opportunity of reading, that would, under ordinary circumstances, be more satisfactory than the evidence of a non-professional person.[10]

Such a person will often be a solicitor, but may also be an accountant (deemed acceptable by Young AJA in *Re Porlock Pty Ltd*[11]).

Alternatively, affidavit material by the settlor (if alive), the trustee or the original and current directors of a corporate trustee, and the principal beneficiaries may be prepared and filed in support of the originating motion.

The evidence should seek to traverse:

- the due and valid establishment of the trust;
- the terms of the trust;
- the continued administration of the trust;
- the assets that constitute the trust fund;
- the purpose of the trust and how the proposed orders will give effect to that purpose;
- the inquiries undertaken to locate the original trust deed; and
- any explanation for the loss or destruction of the original trust deed.

A good illustration of a successful application is the recent decision of the Supreme Court of NSW in *Barp Nominees Pty Ltd*.[12] There, Pembroke J favourably considered an application for judicial advice and directions by a trustee seeking to manage and administer a trust estate in accordance with terms which were substantially the same as the terms of a related trust deed. The actual personal observation and remembrance of the contents of the lost trust deed by a beneficiary of the trust provided sufficient evidence for the application to succeed.

A more detailed but ultimately cogent evidential trail was accepted in *D R McKendry Nominees Pty Ltd*,[13] whereby the evidence of former solicitors, accountants and various beneficiaries were found by Digby J to provide a more than sufficient basis to conclude the terms, existence and due performance and regularity of execution of the missing trust deed.

But … we found nothing!

Sadly, there will be cases where no trace of the original trust or its terms exists or can be found despite all efforts. Alternatively, despite all efforts, there remains an unpalatable degree of uncertainty in ascertaining the terms of the trust.

The difficulty to be confronted then is that if the court has no evidence as to the likely terms of the trust upon which to base its declaration, an application under the relevant Trustee Act could well prove unsuccessful.

Regrettably, the available options could end up very limited: the limited powers under the relevant Trustee Act will only have some use, and it may ultimately be necessary to wind up the trust, vesting the assets and facing up to any adverse consequences.

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Footnotes

1. See for example *Cavill Hotels Pty Ltd as Trustee of Cavill Family Trust v Cavill Hotels Pty Ltd* [1998] 1 Qd R 396; BC9700089.
2. H Ford, W A Lee, M Bryan, J Glover and I Fullerton, Thomson Reuters *The Law of Trusts Ford & Lee* (looseleaf) [9050].
3. See for example *Commissioner of Taxation (Cth) v Ramsden* 2005 ATC 4136; (2005) 58 ATR 485; [2005] FCAFC 39; BC200501419; and *BRK (Bris) Pty Ltd v Commissioner of Taxation* 2001 ATC 4111; (2001) 46 ATR 347; [2001] FCA 164; BC200100627.
4. *Hallows v Lloyd* (1888) 39 Ch D 686.
5. See for example *Evidence Act* 1995 (Cth), ss 47 and 48.
6. See for example Trustee Act 1925 (NSW); Trustee Act 1958 (Vic); and Trusts Act 1973 (Qld).
7. *D R McKendry Nominees Pty Ltd* [2015] VSC 560; BC201509817 at [11].
8. *Maks v Maks* (1986) 6 NSWLR 34 at 36 per McLelland J.
9. *Re Porlock Pty Ltd* [2015] NSWSC 1243; BC201508218 at [6]–[8]; and *Re Thomson* [2015] VSC 370; BC201507162 at [25].
10. *Sugden v Lord St Leonards* (1876) 1 PD 154.
11. *Re Porlock Pty Ltd*, above n 9.
12. *Barp Nominees Pty Ltd* [2016] NSWSC 990; BC201605850.
13. Above n 7.

Ten bullet points when participating in a strata renewal process

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A novel set of provisions — the strata renewal process

From 30 November 2016, Pt 10 of the Strata Schemes Development Act 2015 (NSW) (the Act) commenced and allows for a "collective sale" or "redevelopment" of an entire strata scheme, despite considerable concerns expressed by various representative groups. The provisions aim to wind up and terminate eligible freehold strata schemes where the required level of support is reached (at least 75% of lot owners, not including separately titled utility lots).

For lot owners in dissent of the strata renewal plan, a subsequent order of the Land and Environment Court (LEC) can be made against the wishes of dissenting lot owners to involuntarily alienate their interest in their lot/s and interest in common property. The order can only be made if all lot owners receive minimum compensation and the strata renewal plan (being a plan prepared by the strata renewal committee in accordance with the provisions of the Act and the Strata Schemes Development Regulation 2016 (NSW)) is "just and equitable" in all the circumstances.

The LEC is ultimately responsible for granting the order and must grant an order to give effect to a strata renewal plan where the court is satisfied of all matters contained in s 182(1) of the Act. Once the order is made, the collective sale or redevelopment is binding on the lot owners and their successors in title.[1]

The strata renewal process applies to freehold strata schemes irrespective of use (residential and commercial strata schemes). It does not apply to leasehold strata schemes, strata schemes subject to staged development and a scheme where one or more lots form part of a retirement village. Strata schemes with less than four lots are unable to meet the voting threshold and do not come within the provisions of Pt 10.

Solicitors and other advisors will be expected to advise lot owners on the unique legal issues and risks to their client. This practice note discusses some important considerations for solicitors advising lot owners participating in a strata renewal process.

The 10 bullet points

Part 10 of the Act contains 37 sections and is to be applied in conjunction with other specific clauses in the Regulation. For the LEC to make an order for a collective sale or redevelopment, most of Pt 10 of the Act will be relevant as the procedure is intended to be exhausted before an order can be made by the LEC to give effect to the strata renewal plan and ultimately the winding down of the strata scheme. So, if a client decides to either participate or dissent to a strata renewal plan, the key elements of advising the lot owner would include a detailed advice of the following issues:

1. *Collective sale or redevelopment* — Where a strata renewal proposal is made, the first question is what form the strata renewal is proposed to take, being either a collective sale or a redevelopment. For developers, a "collective sale" translates into another means of site acquisition as it comprises a sale of the whole strata scheme to the developer. A "redevelopment" is broadly defined as a redevelopment of the whole strata scheme in a way that alters the scheme to the extent that its termination and replacement by a further strata scheme is necessary. An example of a redevelopment may comprise a joint venture or other arrangement between the participating lot owners in a strata scheme to knock down and rebuild the strata scheme according to the strata renewal plan. As the former common property and lots will no longer be in physical existence, a new strata plan would be required to be lodged, terminating the former scheme.
2. *Minimum compensation* — For most lot owners, the compensation price will be the most important factor to consider and the developer is required to provide an indicative sale price upfront where a proposal for collective sale is made.[2]
   Under the strata renewal provisions, lot owners are guaranteed minimum "compensation value". Compensation must be no less than the market value plus an additional sum calculated using modified principles from s 55 of the Land Acquisition (Just Terms Compensation) Act 1991 (NSW).

Section 55 lists the relevant matters that are to be considered in determining an amount of compensation, including any special value, disturbance and relocation costs. A valuation from an independent valuer with appropriate experience or expertise is required to form part of the strata renewal plan and a further valuation is required to be attached to the application for the order with the LEC. For a collective sale, the amount paid for the sale of the lots and common property is to be apportioned among the owners of the lots in their respective unit entitlements (s 171(1) of the Act). To assist clients in coming to an early decision to assess whether they are interested in proceeding down the path of strata renewal, lot owners should have a clear idea of the price they are willing to accept, and more importantly the price they will not accept for the collective sale of their lot.

3. *Costs of strata renewal process* — Once the compensation value for each lot is considered, the costs of the strata renewal process should be identified. There is a requirement for the strata renewal proposal to include an estimate of the total costs of obtaining an order from the court to give effect to the strata renewal plan, however other likely costs may include:
   - legal costs prior to commencement of proceedings;
   - costs of an independent valuation;
   - due diligence costs;
   - meeting costs;
   - costs of preparing the strata renewal plan, including the specialists reports;
   - costs of the returning officer; and
   - where an agent is used, potential costs for fees and commission.

The reasonable legal costs of the proceedings of dissenting owners are payable by the owners corporation, who cannot impose a levy to fund these costs (s 188 of the Act).

The next question will be who will pay these costs, and what costs will they pay? There is scope for the developer to contribute to the owners corporation's costs of developing a strata renewal plan, although there is no requirement for the developer to do so.

Both time and money will be wasted by the developer/proponent and strata renewal committee if:

- a strata renewal plan is prepared and then lapses for any reason listed in s 177 of the Act; or
- where the application is made to the court but the LEC refuses to grant the order because the strata renewal plan was not just and equitable in all the circumstances.

Over time, a lack of commitment from lot owners and loss of interest by a developer during the process may also jeopardise the outcome for the parties and potentially result in wasted costs. Lot owners with specific financial concerns would be best advised to seek expert financial advice.

4. *Just and equitable in all the circumstances* — A court order giving effect to the strata renewal plan cannot be made unless the court is satisfied that it would be just and equitable in all the circumstances. This requirement is repeated in cl 36 of the Regulation which states that:

> … a court must be satisfied that the effects of the strata renewal plan are just and equitable in all the circumstances despite any difference between a valuation contained in the plan and any valuation that accompanied the application for an order to give effect to the plan.

Furthermore, the court cannot make an order to give effect to the strata renewal plan where it is not satisfied of the relevant matters listed in s 182 of the Act. Matters that may likely be considered by the court as not being just and equitable may include:

- unreasonable conduct of the developer or proponent;
- a failure or consistent failure to follow the proper procedures, including the issue or form of notices, or a lack of follow-through with the various timescales set in Pt 10 of the Act and the Regulation;
- invalid meetings and/or invalid resolutions;
- a failure to disclose pecuniary interests and/or a questionable relationship between parties preventing the strata renewal plan from being prepared in good faith; and
- an invalid support notice that is not able to be cured or an illegitimately procured support notice.

The strata managing agent will be of vital assistance to the owners corporation and strata renewal committee during the strata renewal process. The court also has the broad power to make a range of ancillary orders pursuant to s 186 of the Act. Such orders may include directions of the matters listed in s 186(2) of the Act.

5. *Buying back into the scheme* — The legislation contemplates that lot owners may potentially buy back into the scheme for a collective sale or redevelopment. This is likely to take the form of an option to purchase and details of such are to be disclosed in the strata renewal proposal submitted by the developer or proponent (s 156(2) of the Act and cl 30(1)(i) of the Regulation).

   It is likely that some elderly residents will face genuine concerns about appropriate alternative accommodation and their ability to afford a repurchase back into the strata scheme. In factoring the affordability, lot owners buying back into the strata scheme will need to be advised of any additional duty, tax or other financial implications associated with the purchase. It is also likely that an option to buy back into the scheme will be subject to any order of court and council approval given at the time the strata renewal plan is being prepared, a site acquisition has yet to occur by the developer.
6. *Tenants* — If an order is made by the court giving effect to the strata renewal plan, leases of lots are terminated on the day stated in the strata renewal plan (s 184(6) or s 185(7) of the Act). The termination of the lease does not affect any other right or remedy under the lease, in other words the clauses of the lease or applicable legislation governing the lease will determine other rights the parties may have.
7. *The better option* — There is a better option. Where unanimous consent of all the lot owners to terminate the strata scheme can be achieved, and where the termination does not appear to have significant competing interests (particularly regarding the division of common property), an application to the Registrar General can be made directly with the NSW Land and Property Information at relatively low costs avoiding the provisions of Pt 10 entirely. The added benefit for terminating a strata scheme unanimously provides potential for meaningful collaboration between lot owners and potentially saved costs for avoiding the strata renewal process. This option should always be put to the owners corporation prior to commencing down the path of the strata renewal process.
8. *Office of the Registrar General (ORG)* — ORG has published a number of useful practical resources through their website including a summary of steps for the strata renewal process and a guide to preparing a strata renewal plan.
9. *Land and Environment Court Practice Note* — The LEC has released a useful practice note for Strata Schemes Development Proceedings that will assist the parties. The practice note is available on the court's website.
10. *Strata Renewal Advice and Advocacy Program* — The NSW Fair Trading has established a hotline dedicated to assist vulnerable lot owners by providing free advice and advocacy services.

Conclusion

At the time of writing there have been no applications made in the LEC to give effect to a strata renewal plan. Practitioners, developers and lot owners wait eagerly for the first application in this court to be made to serve as instructional guidance of the practical operation of the legal complexities consequent on Pt 10 of the Act.

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Kye is also an adjunct lecturer in the Applied Law Program at the College of Law.

Footnotes

1. Pursuant to s 184(2) of the Act.
2. Clause 30(j) of the Regulation.

Dealing with clients with potentially impaired mental capacity

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In *Ryan v Dalton; Estate of Ryan*,[1] Kunc J gave a salutary reminder to the legal profession about the need for continuing legal education on questions of capacity. He provided a detailed checklist described as "at least a starting point for dealing with this increasingly prevalent issue".[2] It is likely his "postscript" may come to be seen as a baseline of a solicitor's standard of reasonable care.

It is important to exclude other conditions that may be masquerading as impaired capacity.

There may be *impaired literacy*. The reason that the client does not understand your document or reply to your email may not be because they lack capacity but because they are functionally illiterate, or are not computer literate, or may speak English as a second language. These issues may be revealed by bad spelling or bad grammar, requests for someone to read the document or email to them, saying it would be easier if someone else completed the form, or saying that they don't have access to a computer or to email.

There may be *impaired hearing*. One of the effects of normal aging is a loss of high frequency hearing (presbycusis). Some consonants, such as T, K and CH are high frequency. The solution is not to talk louder, but to rephrase the question. It may be useful to use hearing loops or personal sound amplifiers.

Or the person may merely have a *difficult personality*. A person may be capricious, irrational, careless, unfair or cruel because that's just the way they are, and not because of any impaired capacity.

It is also important to distinguish between *permanent* capacity issues and *temporary* capacity issues. There may be permanent capacity issues because of a genetic condition, an acquired injury such as car accident, normal cognitive aging, or dementia. However, the capacity issues may be temporary — it may be because the person is under the influence of medication or other drugs such as morphine, oxycontin, endone or other opioids, has an infection such as a urinary tract infection, or suffering from high stress such as separation or divorce, or grief after death of a close companion. The person may ultimately recover their capacity.

There is no single test for capacity under the general law — capacity is decided relative to the specific task — the particular business transacted or the particular legal instrument being executed. In *Guthrie v Spence*,[3] Campbell JA noted the different thresholds of capacity for marriage, for powers of attorney, for commencing litigation and for executing a will. Therefore, a person may not be able to manage their financial affairs and have a financial management order but may still have testamentary capacity.[4]

Capacity is the capacity to understand the nature of the transaction when it is explained.[5] It is not sufficient for the practitioner to explain the transaction, or to demonstrate that the practitioner has read the document aloud. The practitioner needs to be satisfied that the client has capacity to understand and has actually understood the transaction. It may be that the practitioner may only be able to be satisfied *from the client's own responses.*

If the person has impaired capacity, it is necessary to determine the nature of the impaired capacity and map the person's cognitive abilities and limitations of the impaired capacity to the elements of the transaction or the legal criteria.

For example, in relation to powers of attorney, in *Szozda v Szozda*,[6] Barrett J said that the central concept of a power of attorney is a complete and lasting delegation to a particular person, albeit with ability to terminate while the principal has capacity.[7] He considered that the principal needed to be able to understand the following:

- Is it to my benefit and in my interests to *allow another person to have control over the whole of my affairs* so that they can act in those affairs in any way in which I could myself act — but with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do?
- Is it to my benefit and in my interests that all these things can be done by the *particular person* who is to be my attorney?

In relation to testamentary capacity, in *Banks v Goodfellow*, Cockburn CJ said:

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he [is] disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, … that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[8]

More recently, in *King v Hudson*, Ward J analysed the evidence by posing five questions:[9]

> (i) Was the deceased able to understand the nature of the act of executing and publishing a will and the effect of the instrument?
> (ii) Was the deceased able to call to mind the property it was in his power to dispose of in that will?
> (iii) Was the deceased able to call to mind the persons who may have claims upon his testamentary bounty?
> (iv) Was the deceased able to weigh the relative claims of those persons?
> (v) Was the deceased's mind possessed of a delusion that influenced the disposition of his property which, if his mind had been free of that delusion, would not have been made?

A person with impaired capacity may be lucid or may be orientated as to time and space, and may have a reasonable Mini-Mental State Examination. However, this may have nothing to do *with testamentary capacity*. In *Hobhouse v Macarthur-Onslow*,[10] there was medical evidence that Lady Macarthur-Onslow did not know the day and date but did know the month and the year, was oriented with respect of place although she did not realise she was on the seventh floor, and could not perform serial sevens or spell ″world″ backwards or recall three common objects after several minutes. Robb J said that the medical evidence did not explain the significance of these observations *to the testator's actual cognitive ability to dispose of her estate by her will*.[11]

The most relevant issues for testamentary capacity may be frontal lobe functions such as executive function, including abstract reasoning, problem solving and insight, and temporal lobe function such as memory, including holding multiple relevant information in mind, as these impact whether the testator can comprehend, appreciate and weigh competing claims, "to remember reflect and reason",[12] and whether there is any delusion.

These issues may not be revealed by casual conversation, and may only be revealed by testing, such as questions to test memory, questions to test the testator's ability to weigh up claims or clinical testing.

Using these analyses as a template in order to determine whether the client has capacity to understand the particular transaction, it is necessary to frame the transaction:

- First, what are the steps or elements of the transaction?
- Second, what are the issues in each step of the transaction?
- Third, what are the relevant facts for each step of the transaction?
- Fourth, what are the options and choices for each step of the transaction?
- Fifth, what are the consequences for each option or choice for each step of the transaction?

The practitioner should then consider how the client's cognitive abilities and limitations impact on the framework of the transaction. If the practitioner seeks a medical opinion, it should explain the nature of the transaction and ask how the particular client's cognitive abilities and limitations impact on the framework of the transaction.

The practitioner needs to select the appropriate person to give the medical opinion — if the client has a terminal illness, then the appropriate person to give the opinion may be a specialist in the particular illness who is familiar with the effects of the illness on a patient's cognition, rather than a geriatrician or a neuropsychologist.

More generally, when working with older clients, the practitioner should anticipate that the client may have impaired capacity including impaired executive function or at the very least normal cognitive aging, thus:

- The client may need additional time to consider and respond.
- The practitioner should focus on one question at a time.
- The practitioner should avoid leading questions.
- The practitioner should ask the client to repeat their understanding of the question.
- The practitioner should reframe the question if the client doesn't respond to question.
- The practitioner should require the client to answer the question, not the client's carer, spouse or child.
- The practitioner should not expect the client to retain large quantities of information.
- The practitioner should not give the client too many choices.

Appendix 1 — Ryan v Dalton; Estate of Ryan

> [106] Questions of testamentary capacity are necessarily fact sensitive. No rule or procedure will cover every case to avoid the possibility of litigation. Nevertheless, the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is

executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death. Bearing that in mind, and without wishing in any way to derogate from, for example, the desirability of all solicitors being familiar with the guidelines, the recent experience of the Court suggests that proposing some basic rules of thumb (which, as such, are necessarily arbitrary) may be of assistance.

[107] It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

(1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.
(2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.
(3) In all cases instructions should be sought by 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? The questions and answers should be carefully recorded in a file note.
(4) In case of anyone:
    (a) over 70;
    (b) being cared for by someone;
    (c) who resides in a nursing home or similar facility; or
    (d) about whom for any other reason the solicitor might have concern 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. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.
(5) Where there is any doubt about a client's capacity, then the process set out in subparagraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

[108] I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely.

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Footnotes

1. *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007; BC201705735.
2. Above n 1, at [107].
3. *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369; BC200910295.
4. *Perpetual Trustee Co Ltd v Fairlie-Cunninghame; Estate of Samuel Douglas Machattie Service* (1992) 32 NSWLR 377; BC9301766.
5. *Gibbons v Wright* (1954) 91 CLR 423 at 437–38 per Dixon CJ, Kitto and Taylor JJ; above n 3, at [174] per Campbell JA.
6. *Szozda v Szozda* [2010] NSWSC 804; BC201005102.
7. Above n 6, at [34].
8. *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 per Cockburn CJ.
9. *King v Hudson* [2009] NSWSC 1013; BC200909116 at [58]–[59] per Ward J.
10. *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831; BC201611390.
11. Above n 10, at [557].
12. From an article by Myers J writing extra-judicially, (1967) 2 *Australian Bar Gazette* 3.

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