

## Episode 57

# Beyond Instructions: What to do when client capacity is uncertain

### Intro

This is Risk on Air, by Lawcover. Today's episode - Beyond Instructions: What to do when client capacity is uncertain.

- Julian:** Welcome to Risk on Air. I'm Julian Morrow. And today I'm very pleased to say that we welcome back to Risk on Air, Charu Stevenson, who's a partner at Wotton Kearney.
- Welcome back, Charu.
- Charu:** Thanks Julian.
- Julian:** Now, last time we spoke about family affairs. I got the impression that your practice involves lots of family dramas and human conflict. And I imagine that the same could be said for client capacity issues as well. I suppose the first thing that occurs to us with capacity is things like wills.
- Charu:** Absolutely.
- Julian:** But I imagine it comes in lots of others areas as well. Could you give us a sense of the sort of range of areas in which you've encountered capacity issues arising.
- Charu:** Yeah, and you're quite right - it often comes in that family dynamic. And it does definitely arise in wills because usually it's elderly and that's when you think that they might have capacity issues. And then there's a sense of undue influence by family members taking advantage of someone. But it can arise, I've had matters that arise for people of all sorts of ages and in all sorts of transactions. Really, you're looking at a transaction that can potentially adversely impact a client and whether they understand the impact of that. And so it's arisen in wills for sure, also sale of property transactions, particularly when they're maybe doing it between family members or to benefit a family member. And finally, also commencing proceedings. That's a big step for someone to take and it has some implications in terms of potential adverse costs orders. You've got to make sure that your client knows what they're doing when they're commencing proceedings. And in that context, it's worth remembering Rule 7.14 of the Uniform Civil Procedure Rules in New South Wales, which provides that a person under legal incapacity may not carry on proceedings except by a tutor. And that's something to keep in mind when you're taking instructions to commence proceedings from someone you think might lack capacity.
- Julian:** Of course, given just the demographics of Australia, an aging population, these sorts of capacity issues, although they're not only limited to older people, are going to become more and more prominent. What sort of tools are available for solicitors in terms of getting across these issues and how to handle them?

- Charu:** The best tool I could recommend is the guidance by the Law Society of New South Wales, which is titled *When a Client's Mental Capacity is in Doubt*, available on their website. It's a very practical guide. It starts by saying a finding of incapacity in one area does not automatically mean mental capacity is lacking in other areas and gives different examples where different levels of mental capacity might be required. Different mental capacity is required for writing a will versus revoking a will versus making a power of attorney, which leaves a solicitor wondering what is required. And it helps to distil it to some practical issues, which is - Does the client understand what they're doing? And you've got to ask questions to check that they do understand. And it gives some great guidance on the kind of questions.
- Julian:** Yeah, not just asking questions, but asking them in a particular way.
- Charu:** That's right, in an open-ended way, not like yes or no answers, not in a leading way to put things to them that they can only respond to. And also, where there's concerns about that undue influence, making sure you're asking it of them without the person that might be influencing them in the room. If a client needs a translator, ideally getting someone who's not a family member who has an interest in the transaction to do the translating for them. Which I know can add costs to matters, but in these sorts of situations, it's worth doing. You can explain to the client that you're doing it to make sure that they achieve what they want to achieve and the transaction is not laid according to doubt.
- Julian:** Well, yes, indeed. It might be one of those many examples where in the short term, a cost saves a much greater cost in the longer term. I'm sure that's something that we'll see as we talk about some of the examples where this sort of thing has arisen.
- Charu:** And the other sort of guidance you get is from case law. The judges have been quite keen on legal education in this area. In fact, in *Ryan and Dalton, 2017 decision (Ryan v Dalton; Estate of Ryan [2017] NSWSC 1007)*, the court expressed the importance of continuing legal education in the area of capacity and did refer to this helpful Law Society guidance.
- Julian:** Yep, nice bit of product placement for the Law Society in that judgment.
- Charu:** And then the judge went on to say, the following is at least a starting point for dealing with these increasingly prevalent issues. The client should always be interviewed alone. As I said, if an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary - so, this is straight from the mouths of the court. Solicitors should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases, but you can make a note that you've considered it. That'll help protect you from potential negligence cases later. In all cases, instruction should be sought by non-leading questions. 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 in that testamentary capacity way? Another thing to keep in mind when you're doing a will, ask them, you know, who could have a claim on your assets? Who are your dependents or who could be potential beneficiaries? And then the Judge went on to say in the 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 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. I appreciate this can be a confronting question to ask someone.

But again, the Law Society guidance provides some helpful tips on how to do it in a sensitive way. And the way to do it is to say - *I'm trying to make sure that this transaction cannot be challenged, and you achieve what you want to achieve out of it. And this is the guidance given by the court on what to do to ensure that this is achieved.*

**Julian:** It's interesting that the judge there referred to a carer or a care manager in a home or facility. So that's moving the personnel perhaps beyond the ones that immediately occur to you when you're thinking about these sorts of issues. And the Judge in that case, this is a 2017 case, but the Judge put quite a bit of focus on the role of the solicitor as being important in assessing these issues, referred to the demographic trend that we mentioned before as well, but really stressed how important it is for solicitors to be able to understand these issues.

**Charu:** Absolutely, and in some cases, you know, you feel that you need to refer someone off to get a medical opinion. But the Judges don't just rely on medical opinions, they really heavily rely on the solicitor's notes and impressions of the client. In fact, in *Petrovski and Nasev* which is a 2011 decision (*Petrovski v Nasev; The Estate of Janakievaska* [2011] NSWSC 1275), the Judge said, as I pointed out quite recently in *Kerr and Badran* (*Kerr v Badran* [2004] NSWSC 735), lay evidence of the activities, conversations, family circumstances and relationships with the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, is of far more value than the reports of expert specialist medical practitioners. And including in that evidence, someone who's interacted with the client is the solicitor's evidence. In fact, he goes on to quote another case of the Court of Appeal - *Zorbas v Sidiropoulos* (No 2) [2009] NSWCA 197, and says, indeed, perhaps the most compelling evidence of understanding would be reliable evidence, for example, a tape recording of a detailed conversation with the deceased at the time of the will displaying understanding of the deceased assets, the deceased family, and the effect of the will.

**Julian:** That's interesting because that's 2011, you were saying. Now, technology has come a long way since then and recording interviews and things like that is much easier these days. What approach, well, what's your view on that question of whether you should audio or video record discussions with a client about capacity?

**Charu:** It would be amazing if we could do it all the time, but sometimes people are a bit nervous about it and it can make them a bit uncomfortable if you start doing that, and they may not be that frank with you if you start recording things. So, you've got to be sensitive of that. And also, then you have to save it somewhere and record it in your records. I think file notes is usually what is expected of solicitors. I suppose if you have an inkling that there is going to be a fight. The client has told you there's going to be a challenge to the will, potentially, because they decided to cut someone out or that sort of thing. When you're especially concerned, then you can tell the client this might be a good one to record why you're doing what you're doing.

**Julian:** But I suppose though, pictures can tell 1000 words, but everything is subject to interpretation. So, primary recordings like that can cut in more ways than one.

- Charu:** Yes, absolutely. But in that Petrovski and Nasev case, so what happened was the court set aside a later will from 2004 and upheld the 1999 will. And the 2004 will was set aside based on medical evidence about what capacity the testator would have had in 2004. But the judgment looked very closely then at the notes that the solicitor had taken at the time that they wrote the will. And the Judge went on to say, it is clear also that the file notes lack many of the details one might expect a solicitor of some years experience to include in contemporaneous file notes, especially in circumstances where questions had been raised with her about the state of health of the deceased and whether there was likely to be a dispute about the validity of any will.
- Julian:** So, the bar for file notes might be quite high anyway, but it sounds like incapacity issues is going to be even higher.
- Charu:** Absolutely. And the solicitor gave evidence in the court, and you certainly don't want to be in that situation where the Judge is throwing doubt on your credibility as a witness. But Judges always prefer, in any litigated matter, contemporaneous documents over evidence given in this case 5 1/2 years later. And as I've noted previously, the kind of inquiries you should make of a client, there was no record of that being done. For example, any inquiry as to the value of the estate, nothing about the people who had a claim on the bounty of the estate. Again, evidence that you've asked those open-ended questions and recorded the answers of that. I think what you might want to do, because I know it's easy, you take a lot of shorthand notes and you just note the answers, but you might want to actually note the questions that you're asking. Not just what the answers are to show that your questions were open-ended.
- Julian:** Yes, that makes a lot of sense. And obviously, these things can have really significant implications for solicitors. Let's discuss some of those implications in terms of either costs or even disciplinary proceedings.
- Charu:** Absolutely. Obviously, the first thing that comes to mind is a negligence claim. Someone challenges the documentation and then it gets set aside, even if the argument you would say is, well, if they didn't have capacity, it would never have gone ahead anyway - I haven't caused any loss. Legal costs can be a lot in these sort of hard-fought emotional family disputes, and you could be up for the legal costs at least, if not other costs such as, you know, if there's a loss of opportunity to have had this transaction go through. Secondly, as you've mentioned, costs. Firstly, if someone doesn't have capacity to sign your legal services agreement, then you might not be able to charge them for what you have charged them for because they didn't have the capacity to agree to those fees. But even more concerning is if you commence proceedings without proper authority, then any adverse cost order, personal cost order can be made against you in favour, say, of the opposing side, who say, well, we can't claim the costs against the plaintiff because they didn't have capacity and they didn't actually have the authority to commence these proceedings - we are left out of pocket and we have no one we can claim against. And the courts are open to making personal cost orders against solicitors and there's all this legislation and case law around when that happens. One of the areas where a court will make an order in that regard is where proper authority wasn't obtained to commence proceedings. And then finally, of course, there is the disciplinary aspect - it comes last, but it's obviously the most important because that's a disciplinary finding against solicitors, a very serious thing. And there's certainly a recent finding in...

- Julian:** New South Wales, yes, the case of Weller and New South Wales Legal Services Commissioner, which was a decision back in 2022 (*Weller v NSW Legal Services Commissioner* [2022] NSWCATOD 67). Can you run us through what happened in that one, Charu?
- Charu:** In that one, the solicitor was found to have not taken appropriate steps to ensure that two clients had capacity to provide the instructions they did. In one of them, quite interestingly, it seems that the solicitor issued a writ of habeas corpus to get the client released from an aged care facility.
- Julian:** Right.
- Charu:** And the aged care facility suggested that he might want to apply to the guardianship tribunal.
- Julian:** Don't have to go straight to habeas corpus.
- Charu:** And it's interesting the judgment notes it's not in doubt in the Supreme Court can in appropriate circumstances issue a writ of habeas corpus, but I don't think it's the go-to first.
- Julian:** It does give you a bit of a sense of the colour of the...
- Charu:** Instructions you're being given. And if you are given, not necessarily if you're given strange instructions, it doesn't mean they don't know what they're doing. But that's one of those red flags where if you get odd instructions, you should be thinking about, well, do they have capacity to give these instructions? And ultimately there was a reprimand given, a fine, and a requirement for him to waive his fees in these two matters. So, as I said, also the costs, implications, plus reputational concerns if you've had a finding against you. And I've represented solicitors in these sort of investigations, and it's emotionally draining and takes up a lot of your mind space when you could be spending that on your business. So, certainly something to avoid.
- Julian:** Another recent case is the case of Sowmi and Master Electrical Services. That's Supreme Court of New South Wales 2024 (*Sowmi v Master Electrical Services Pty Ltd* [2024] NSWSC 176). And I think in a way it recaps a number of the points that we've discussed already, but perhaps you can give us some selected highlights from Sowmi.
- Charu:** Yes. In that case, Justice Chen said whether the plaintiff is under a legal incapacity and it was concerning whether they needed a tutor appointed for the purpose of commencing or continuing proceedings, is time and task specific and in relation to the person's capacity to conduct legal proceedings, you consider doing the various things that would need to be done in the course of proceedings in which the party is involved including seeking, comprehending, evaluating the advice and making decisions. And again, Chen J really took into account the views of the solicitor involved. And that's where it comes back - you can't just rely on medical evidence. It's really important for the solicitor to form their own opinion. And Justice Chen said, it's also highly significant that the solicitor for the plaintiff, based on her interactions with the plaintiff, considers him to have relevant legal capacity. In my view, the solicitor is particularly well placed to reliably assess this. I attach considerable weight to this evidence given the degree of her interactions and her undoubted professional and ethical obligations in connection with this issue.

And that shows why, you know, following the Law Society guidance on the things to tick off can be really helpful in these sort of matters. And one of the things that judgment highlights and has become evident in my own practice is that capacity can change over time.

**Julian:** I was going to ask you about that because it seems to me that short phrase that assessing capacity is time and task specific. He's very concise, but there's a lot of complexity packed in those two aspects. Could you just speak a little bit to those two things in your experience?

**Charu:** Yeah, because again, you know, people can have capacity to do certain things, but not other things. And for example, say they might have capacity to commence proceedings, and at that point they had capacity. But then you, know, a year or so down the track, you're having a mediation and you have a settlement conference and someone's going to accept an offer. Do they have capacity to accept that offer? I've had a matter where questions were asked during a mediation by the other side - Are you satisfied that your client has capacity? And the solicitor relied on a medical report that was obtained six months before.

**Julian:** Yeah, so a real risk there of thinking, oh, I've dealt with that issue, put it away, when in fact it's an issue which could re-arise or arise in a different way and you then need to do all the things that you did last time but apply them to the new circumstances.

**Charu:** Yeah, you do have to get updated medical evidence when there's a substantial decision to be made and there are concerns about capacity. And the fact that the opposing side asked that question is one of those flags to consider. And I mean, the solicitor asked the client, do you think you know what you're doing? And he said, yes, obviously, but that might not be enough, especially since the earlier medical report, while it said he had capacity at the time, wasn't conclusive on it - there were some issues raised in that report. Had he capacity to commence proceedings, does he have capacity to accept a settlement amount? And then after he's accepted the settlement amount, does he have capacity to manage it himself? A significant amount of money, does a financial manager need to be appointed to assist him to manage the funds? And what's happened is he's settled, the huge amount of money is passed from the solicitor's trust account to him, and he said, oh, I'll manage it, don't worry, I'm putting it away. And then he's spent it all or lost it. Who knows what's happened to it. It's unclear. And now he's got a tutor appointed who's making claim against solicitors saying he did not have the capacity to manage that money, and you should have had a financial manager appointed.

**Julian:** When we think about practicalities for solicitors, Charu, there was something interesting in what you were talking about just there. We've had, I suppose, primarily in our mind when you are the solicitor whose client's capacity is in question. What about if it's the client on the other side and practical measures to deal with that. What are your thoughts on that issue?

**Charu:** That's an interesting issue and it's certainly arisen in my practice as well. And in many cases, capacity of your client is an issue for the solicitor involved. Similar to, say, conflicts. It's for the solicitor acting for that client to form a view as to whether they have capacity to give instructions - whether there's a conflict. But if you have concerns about it, you've got to also be careful about how you raise it.

- Julian:** Yes, because I can imagine it's not necessarily going to help the tone of an attempt to settle if you're raising these issues, but at the same time, as a precaution, and when you've got a real concern, it might be something that you need to do. What do you do?
- Charu:** Firstly, ask the question, have you considered your client's capacity and are you satisfied as to it? The problem though, of course, is if you do reach a settlement and you get someone to sign on the dotted line, the solicitor didn't have appropriate authority because the client didn't know what they're doing, and they've signed a document that can be set aside because the client didn't have the capacity. So, you want to get the solicitor to of the other side to warrant that, so they can get them to sign to warrant that they've satisfied themselves with their client's capacity. You check with the solicitor - Is there any power of attorney for that client? And should the person holding the power of attorney sign it as well? I've done it in those cases, I've done all, I've got both the client and the person holding the power of attorney and the solicitor all to sign up to say they're understanding what they're doing and they accept the settlement. That's gold-plated, but particularly if you're paying a significant amount of money, you want to protect your own client's interests in making sure that settlement can't be challenged.
- Julian:** And as you say, in a way that might be doing everyone a favour because that's going to impress the importance of the issues on the other side and might help those detailed file notes get made and consideration of the specific time and the specific task that are about to be undertaken.
- I think we've covered the general risks and principles and how to deal with them in practicalities. Is there any particular commentary you'd add, to situations of urgency? Because given the fact that these things are connected to medical situations, I imagine that solicitors could well find themselves having to apply these approaches in suboptimal situations. Does anything change if it's urgent?
- Charu:** It's difficult because you don't have then the luxury of time perhaps to run off and get a medical report done, while at the same time you risk someone dying before they've said, drafted the will that they signed up to the will that they wanted to sign up to - you're really caught in a difficult place there. But in terms of protecting yourself, it's very fact specific - if you really think this person doesn't have capacity, then you shouldn't take those instructions. But if you think that they might have capacity and then you're worried that they might pass away and they will lose that opportunity to do what they want to do and you're not able to get that medical evidence, there are other things you can do. Again, you know, ask those open-ended questions, get their understanding, meet with them without the family members there. Maybe call up people who know them, like their GP with their permission, of course. And you might not need to run off and get that expert medical evidence that's, gold plated, but it might be enough to do that. And certainly, if later on a court decides that someone didn't have capacity because of things you weren't able to do or information you weren't able to get in that short period of time, that doesn't necessarily mean you did the wrong thing - if you did all the things you could and still something goes wrong later on, you'll at least have all this contemporaneous evidence that you've acted in a professionally appropriate manner, as suggested by the Law Society in the capacity guide.

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- Julian:** What a fascinating discussion, Charu. I suspect that there are going to be many, many more issues like this arise. Just finally, I mean, if you've got one message for solicitors diving into the question of capacity - What practical advice would you give them to go away with?
- Charu:** Keep an eye out for the flags. It's not necessarily someone who's old, it might be any client. Keep it under review throughout the matter of the file. Again, it's task specific so, at critical junctures when important things are being done that might adversely affect them, then you have to rethink about it. And then... as potentially with all these podcasts, file notes, file notes, file notes.
- Julian:** Yeah, have a think about whether to record or not, but whatever you do, make those file notes in lots of detail. And keep listening to Risk on Air for more practical advice. Charu Stevenson, thank you so much for joining us.
- Charu:** Thank you.

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### Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date, join us for the next episode on current risks in legal practice.

### Resources:

[Ryan v Dalton; Estate of Ryan \[2017\] NSWSC 1007](#)

[Petrovski v Nasev; The Estate of Janakievaska \[2011\] NSWSC 1275](#)

[Kerr and anor v Badran and anor Estate of Badran \[2004\] NSWSC 735](#)

[Zorbas v Sidiropoulous \(No 2\) \[2009\] NSWCA 197](#)

[Weller v NSW Legal Services Commissioner \[2022\] NSWCATOD 67](#)

[Sowmi v Master Electrical Services Pty Ltd \[2024\] NSWSC 176](#)

[When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors](#)