

Talking Law Article – June 2009 Legal Capacity in Making Wills

My parent suffers from dementia\has suffered a stroke.

Can he/she still make a valid will?

Depending on the degree of dementia or effect of the stroke, the answer could be “yes”!

The test for testamentary capacity (for Wills) is long-standing and it can be summarised as follows:

- Does the person know the document is a will?
- Does the person know his/her assets?
- Does the person know who the important people in his /her life are?
- Is the person able to weigh up the claims those people may have on him/her?
- Is the person free from other delusions or mental defect?

If these questions can be answered in the affirmative, then the person will probably be able to make a will.

The level of capacity required is not the same in all cases and the level of capacity for certain decisions may be much lower than the level of capacity required to execute a complex legal document.

Mere idiosyncrasy or eccentricity is not a good reason to declare a person incapable - many bizarre and irrational decisions are actually made by “competent” people – especially if they are in love!

Capacity can also vary on a day to day basis – because of medicine, transient infections and the like.

The important step, from a legal point of view, is that a solicitor taking instructions must carefully question the client to ascertain his/her capacity. Care at this stage will assist in fending of claims after the death of the will maker **or** prevent a power of attorney subsequently being declared invalid and perhaps voiding decisions made by the attorney.

This article is for general information and is not to be taken as specific legal advice. If you require advice on any matters relating to Wills or any other legal matters please contact Racheal Despotellis at Kyabram (5851 0200), Lesley Hart at Shepparton (5831 2377), Terry McKiterick at Echuca (5482 2555) or Geoff Lipshut at Tatura (5824 0300).

Dawes & Vary Pty Ltd – Offices at:

147 Fenaughty Street
(PO Box 300)
Kyabram 3620
Tel: 03 5851 0200

145 Hogan Street
(PO Box 212)
Tatura 3616
Tel: 03 5824 0300

26 Gillies Street
(PO Box 207)
Rochester 3561
Tel: 03 5484 1800

159 Welsford Street
(PO Box 2272)
Shepparton 3630
Tel: 03 5820 0200

51-55 Heygarth Street
(PO Box 378)
Echuca 3564
Tel: 03 5482 2555

Email: service@dawes-vary.com.au