Seminar on Elder Law: Facing the Challenges of Assisting Older People in NSW

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Synopsis

This seminar will explore meeting the challenges of providing legal assistance for older people across the breadth of NSW.

The challenges of providing a legal service to the older residents of NSW can be examined through the prism of three divisions:

- Firstly the systemic challenges that providing a state wide service encounters.
- Secondly the practical and philosophical challenges that we face in delivering a phone advice service.
- Thirdly there are the personal challenges that our individual clients face within their specific problems coupled with seeking legal assistance remotely.

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How do you deliver a state wide legal advice service to older residents? How do you ensure that the service is a quality service? How do you ensure that the service is accessible? How do you ensure that the service is fiscally responsible? Different models have been developed to achieve this goal. For example there is the social service model. This model involves establishing service delivery centres throughout metropolitan and regional centres throughout the state. These centres would deliver face-to-face service at the centre and through outreach programs. This is the model used in Queensland. Another model involves establishing a phone legal advice service to cover the whole state. This model may be coupled with an extensive community education program to ensure that the service is known throughout the state. The policy decision to provide a specialist legal service in NSW probably had financial considerations as a high priority in determining how the service was to be delivered. The outcome was that TARS, an existing CLC assisting older people, and already providing a massive community education program throughout the state, was chosen to enter into a partnership arrangement with the Older Persons Legal and Education Unit of Legal Aid NSW to provide a state wide phone advice service and referral service known as OPLS.

2

The idea of a phone service providing legal advice to clients that the solicitors may never see is itself quite challenging to a solicitor used to, in private practice, developing a personal relationship with a client. So providing legal advice to a client over the phone does raise some interesting ethical and logistical challenges. While these challenges will never disappear TARS has developed some expertise in meeting those challenges.

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Our very existence is of course to help older people meet specific challenges that they face from time to time. The interesting part of our work comes out of our desire to help our clients. At the personal level, an identical problem creates different challenges for an older person compared to those challenges a younger adult would face. We will look at just a couple of the types of issues that older people seek assistance with and explore some of the challenges that arise in those issues. We will also explore some of the strategies that can be implemented to reduce the risk of harm to older clients by examining planning for later life. We will also provide some pointers for interviewing and providing information to older people.

Background

TARS is the Aged-care Rights Service. We celebrated 25 years of delivering assistance to older people in NSW in 2012. The Older Persons Legal Service was established under the TARS umbrella 6 years ago and is part of the CLSP program funded by Legal Aid NSW and the PPF. TARS has an advocacy service for residents of aged care facilities (nursing homes and hostels) funded by the Commonwealth Department of Health and also has a specialist Retirement Village Legal Advice Service funded by the NSW Office of Fair Trading. All advocates and solicitors undertake community education, last year providing over 700 sessions not counting expos and other promotion activities.

1 The systemic challenge

What we needed to do was design a system that met the challenge of providing a state wide service to older people as effectively, efficiently and economically as possible.

The Solution

It was decided that the service would be delivered by phone advice with a 1800 number for cheaper access to the service. The service covers NSW. Do remote regional and rural residents achieve the same level of service as metropolitan residents? In theory, if we only provided phone advice, they could. Our free service might be the only legal assistance that remote, regional and rural residents can access. However in practice metropolitan residents are able to access more service more easily than their rural cousins. This is simply because Sydney residents are able to attend the office where the issues are complex and face to face interviews are needed to unravel the complexity of the issue. If the assistance being provided is escalated to case level Sydney residents are more readily available to provide statements, affidavits and other evidence. However we do provide the full range of assistance to rural and remote clients as well. We acknowledge that it is not as efficient in terms of turnaround time form instructions to advice, minor assistance or case work, but with use of email and other technology, once we have established a relationship with a client, the time delays are not significant. Where a client lives remotely and does not have such access we must rely on traditional mail so we do make special efforts to write clear letters of advice or seeking further instructions as soon as we identify the need to do so. Most CLCs that conduct face to face advice sessions do not face these challenges.

2 The Challenges in providing a state wide phone advice service

The challenges faced with providing a state wide phone service fall into the categories of ethical challenges and practical challenges.

The Ethical Challenge

Is the person on the other of the phone actually the client?

The first and probably most crucial ethical challenge is determining who the client is. At the foundation of that challenge is the proposition that the person you are talking to may not be who they say they are. There is no easy way around this ethical dilemma when providing phone advice but we all know that we need to test our client instructions through careful questioning. At the end we have to take the client and their instructions at face value.

TARS-OPLS is funded to provide advice and legal assistance to the older person. Naturally we receive many calls from people who are not the older person but who are seeking assistance about or for the older person. We have developed a flow chart – affectionately known as the flow chart from hell- to help us determine whether we can advise the caller. I have annexed that flowchart at the end of this paper. Put simply, unless the caller is the older person or is the validly appointed representative (i.e. their attorney or guardian appointed by an enduring instrument or financial manager or guardian appointed by NCAT) we do not provide advice.[1] The consequences of following the NSW Law Society Guidelines on a phone advice session pose considerable risk to the older person so TARS has taken the policy option of referring such callers to other services or the Tribunal in the first instance.

The Solution

For attorneys and guardians we need to sight the instrument appointing them to confirm their validity. And let me assure you we have seen some pearlers over the years. We refer callers who are not the older person (or their valid representative) to the most appropriate agency to assist them. If the older person has previously given us permission to talk to another person (and we have confirmed that they have not done this under duress- in itself a considerable challenge) then we can take instructions, obtain a better understanding of the problem and provide advice. However it is foremost in our minds that the advice we give to a third party is liable to be mangled when given by the third party to the older person, so we back up such advice with written advice to the older person (provided we have not red flagged communication with the older person as risky).

Of course legal advice given over the phone to a person that we have not developed a face to face client-solicitor relationship with may still have the advice mangled in their own minds, even though we believe that the advice we gave was correct and clear and not ambiguous. It is not sufficient to ask a caller "Have you understood our advice?" – you have to ask the client to repeat to you their understanding of the advice and what they intend to do now that they understand their legal options. I will deal with the question of client capacity in detail below.

The Practical Challenge

The practical challenge in providing a state wide phone service is ensuring that any older person who needs our assistance knows we are available to help them and knows our number. We did an audit of how our callers find out about us and surprisingly very few actually look us up in the white pages phone book. We do receive a flux of calls following community educations sessions. In the past year we conducted over 700 education sessions and of that number 233 were provided in rural remote and regional areas.

[1] The NSW Law Society In its *Protocols and Guidelines* has a section on Client Capacity in Civil and Family Law matters that states, amongst other points:

If the client appears not to have capacity to instruct, a solicitor will require the assistance of a support person, usually a friend, relative or welfare worker, to explain the client's problem and help the client express their wishes. A solicitor then needs to be comfortably satisfied that the support person's interests are not in competition with those of the client. The nature of the matter on which a solicitor is asked to act may be such that the support person's interests are not really involved, or are sufficiently remote as to allay concern.

It is important to give careful consideration to the ramifications of acting without a formal appointment. There is a range of matters where this may be appropriate, generally of a minor and short-term nature, or involving a fairly small claim. While most litigious proceedings require the appointment of a substitute decision-maker, there are a number of legislative schemes that allow claims to be made on behalf of otherwise incapable people where a substitute decision-maker need not be appointed. Examples include the *Anti-Discrimination Act 1977*, the *Victims Support and Rehabilitation Act 1996*, and the *Community Services (Complaints, Review and Monitoring) Act 1993*.

Education sessions are TARS-OPLS main strategy for reaching the country NSW older people and their carers and workers.

When solicitors deliver education sessions they also make themselves available after the sessions to provide face to face advice. We have purchased lap top computers that can connect into the TARS servers remotely to do conflict checks and access resources to provide advice and complete records of that advice.

Following education sessions we observe a spike in the number of callers to our toll free line from country callers. With any strategy like this an older person does not necessarily take notice of our contact details as they do not need our services at the time. Therefore we have to be constantly on the forefoot of keeping our service name recognised in remote rural and regional areas of the state so that when an older person does need our service they recognise who we are. This is a constant requirement and not easy to achieve. The mobility and geographic spread of our potential client base mean we have to keep working to keep our name and service in the public view. We have only undertaken very limited surveys of our name awareness in the community as it is a very expensive process.

Not all of our clients have a home phone and that provides additional practical challenges. We had one client who would call from a public phone at the local railway station. She would talk extremely fast and never allow an interruption. You can imagine the challenges we faced providing assistance in that case. We also have clients who are being isolated by their carers or abusive spouses or abusive adult children and cannot receive phone calls at home. In one of these cases we used the subterfuge of a female friend calling to arrange a morning coffee outing. Sometimes we have to be creative to be able to speak to our clients and to minimise the risk of adverse repercussions for them.

Some of our clients have the opposite problem – an abundance of phones and plans which caused extreme financial hardship.

3 The Personal Challenge

The Challenges

Considerations when taking instructions from elderly clients

Older clients, generally, will need to be treated with more patience than other clients who may understand and clearly distil the legal issues during the interview. This is because the issues that older clients may present with are not always clear cut legal issues. It will require some skill on the part of the solicitor to tease out the legal issues from the other issues when dealing with an elderly client. This is particularly so when the client is complaining, for example, of financial exploitation by a close family member or some other issue that has a large emotional investment from the older person.
Clients with evidence of diminished capacity may still be able to provide instructions to their solicitor. The client with diminished capacity often has the ability to understand, deliberate upon and draw conclusions about matters affecting their own well-being. Lawyer can assist an older client to improve their capacity during instruction taking.

1 gaining client trust and confidence
Solicitors can assist clients during interview to improve their decision-making ability. When first meeting the client break the ice making a few remarks about areas of common interest.
Interview the client alone. This will ensure confidentiality and help to build trust. It is certainly important to interview the client alone in the first place to ensure that the client is not suffering from undue influence my other relatives or friends. However the client may be more relaxed with a family member present so after it solicitor has determined that the client is not being unduly influenced the news providing instructions are freely and voluntarily then a family member who has brought the client in can be asked to come back into the room.

Always encourage client participation in the process of giving instructions. Encourage the client to expand on instructions that they have a giving you if those instructions are couched in minimal terms. Make the client's point of view fear respected and valued by you, the solicitor. Using encouragement and verbal reinforcement often.
Older clients will need more time spent with them. Encourage the client to relax and take their time to tell their story. On the other hand you should be alert to any indicators in their story that there capacity may be diminished. For instance repetition of the same story, veering off into irrelevant side tracks, failure to come back to the task in hand when you nudge them to do so and introduction of inappropriate conversation points are possible indicators that the client's capacity has to be checked very carefully.
It may be necessary to take clients instructions over several visits or sessions rather than one long extended visit. Where appropriate try to make appointments for the elderly client in the morning.

2 Your office environment

Not all older adults will have hearing and vision impairments. Some clients who do have a hearing or vision impairment try to cover this fact so when taking instructions you need to be alert to this possibility and set up your office environment so that distractions are minimised.
When interviewing older clients where there may be differences in memory and problem-solving abilities that give rise to questions of capacity it will assist the client if the solicitor can gain some understanding of the client's decision making processes and take positive steps to help them work through those processes, the client's underlying concerns and their goals and values. The solicitor should try to engage the client in gradual decision-making that includes clarification, reflection, feedback and continuing assessment of the client's ability to understand the issues at stake. Instead a reference to the client's goals and values during the course of the interview will assist the client to focus their decision-making and to make better decisions. It is useful to discuss the advantages and disadvantages of each decision that the client is considering. Appended to these notes is a checklist of points to work through when advising a client in relation to enduring Powers of attorney and enduring guardianship which contain some points of the advantages and disadvantages of decisions being made in relation to those documents.

i Hearing problems

Consider the following factors that may be acting as barriers to your client picking up the discussion that you are having with them.

- Background noise
- looking away from the client when you are speaking with them
- speaking too quickly or not clearly enough
- avoid shouting or over articulating as this may distort your speech and your facial gestures
- try to avoid talking in a high-pitched voice as older people with hearing problems here lower pitched sounds more readily
- set up your office so that you can sit closer to the client and that they are able to your face directly
- provide written summaries and follow-up material there are problems in oral communication

ii Vision problems

- use appropriate lighting
- reduce glare from Windows and light in, older people may be more sensitive to bright lights, do not sit the client facing a bright window
- avoid glossy print material has these also reflect glare and may be difficult to read
- use a larger font and DoubleSpace the lines
- allow clients plenty of time to read the documents as reading speed for holder clients may be slower
- if the client needs to look at a number of different documents or other objects give them plenty of time to readjust focus of their vision
- provide aids for the client such as magnifying glasses or reading glasses obtainable from the chemist
- set your office furniture up so that pathways to the elderly client's seat are clear and not obstructed

iii Cognitive disability

- at the beginning of interview you simple questions that don't require complex answers, use this opportunity to assess your client's capacity in relation to their understanding and their ability to respond to the pace of the questions that you ask
- him with a slower pace to start with and consider picking up the pace of decline appears to be coping with
- pause after a three or four points and briefly summarised them and have the client summarise them back to you as well
- break information into manageable segments
- discuss only one issue at a time as clients of cognitive impairment will have difficulty getting their attention to a number of different topics
- check regularly with the client that they are following what you're talking about making sure that you give them the opportunity to tell you back in their own words what you have just been discussing
- do not accept simple yes or no answers or even yes I understand as the sorts of responses are often learned responses that people with a cognitive impairment rely on to get by. They do not necessarily indicate that the client actually has understood what you have been discussing
- provide information sheets and other summary documents in simple language that the client can take away with them
- try to talk to clients with cognitive impairments at time of day when they are most capable
- be aware of any discomfort that the client might be suffering and suggest drink or water breaks as needed
- consider making appointments at the clients residence where they are most comfortable and knowing about their own surroundings

Barriers to Seeking Assistance

It has been argued that further research is required in order to properly understand the issues surrounding the legal needs of older Australians[2]. Older people may be confronted with numerous barriers that inhibit them from identifying their legal problems and deter them from obtaining legal advice about their rights and options for remedying the situation. Even where there is no adversarial situation and the legal issue is non-contentious it appears older people are reluctant to seek out professional assistance. This fact significantly hinders the collection of data to provide a firm evidence base for developing approaches to assisting older people with their legal needs. Similarly, it has been shown that older people do not usually self identify that they have legal rights or a legal problem, as such. For example when older people do attend legal centres they often present with issues relating to others such as family members rather than seeking assistance for their own problems. It has been found that when issues of abuse or financial exploitation are present, guilt, fear of the loss of informal care arrangements and shame are factors which contribute to the hidden nature of the problem and prevent older people expressing a need for assistance.

It will help solicitors to assist their older clients if the solicitors are aware of the sorts of barriers that confront older people in seeking their assistance. Some of these barriers include:

- diminished awareness capacity (cognitive)
- mental or physical disability
- restricted mobility
- lack of awareness of what constitutes abuse or financial exploitation
- lack of knowledge of their rights or resources available to them
- social isolation or fear of alienation
- need to preserve a relationship

[2] *Inquiry into Older People and the Law* Caxton Legal Centre Inc. Caxton Legal Centre Brisbane 2007

- a dependency on others
- literacy and language barriers
- stigma or shame associated with seeking outside assistance
- religious generational and cultural barriers
- fear of reprisal
- perceived or actual lack of access to services or options available to them.

and

- a lack of community and professional awareness about the problem
- a lack of identification of certain situations as constituting elder abuse, for example, where no physical violence is being experienced
- people may not know who will be able to help them—who do they report it to and what will they do?
- victims of elder abuse tend to be quite isolated, which means that they may not be able to access assistance and that the abuse continues in the absence of the scrutiny of others
- older people and professionals may be afraid that the consequences of reporting the abuse will place the victim in a worse position than they are currently in, such as being institutionalised
- older people may be ashamed that they are being abused by people they should be able to trust, such as close family members, they may not want to jeopardise important relationships with family or friends, or may fear retaliation from their abuser

The Solution

If we think about these barriers and become aware that they exist then we are in a better position to recognise when a client has these barriers in their lives. We can assist them to overcome these barriers by offering them the most appropriate legal assistance or referral to other support services that may be available for them.

Given the dearth of data it is important that solicitors be alert to the possibility that an older client may be subject to pressure, often applied by other family members, to change an existing document, or to create a new one, to advantage the family member. Whether this is the case or not solicitors should meet, as I have mentioned above, with older clients on their own and make suitable enquiries of the older person to ascertain that they are giving instructions of their own volition, freely and with a proper understanding of what they are doing and the implications of their actions. Only then should the solicitor invite other relatives back into the room with the older person.

The last mentioned barrier is the one that poses a particular challenge to organisation like TARS-OPLS. We are tasked with providing legal assistance to disadvantaged people across NSW. We provide a free call phone advice service to meet this challenge. But, do people in remote rural and regional receive the same legal assistance that people in Sydney receive? The answer is “probably not” since residents of Sydney can attend our office if we need to take a statement from them. More Sydney residents have their matters elevated to Legal Minor Assistance or Legal Case than non Sydney residents. Having said that though we have made special efforts to assist remote and regional people when their circumstances are so dire and when no other assistance is available that we do provide extra assistance. For example an elderly lady who believed that she owned the home she was living in, which she thought she had inherited from her late husband, was shocked to discover that her son was the registered title holder. This news emerged when the son and his wife separated and were involved in a property settlement. We managed to obtain a grant of legal aid to instruct Counsel and to fly to the nearest town and attend a Family Court conference with an application to intervene. We were successful; if we had not been our client would have joined the throngs of homeless people in NSW.

The Challenges

Capacity

The challenge of determining capacity is difficult enough but when you have to do it while talking to a client over the phone the challenge becomes intense. In providing phone advice the question of capacity may arise in two ways. Firstly does the caller have capacity to give instructions to you as a solicitor. The second is whether the caller has the capacity to make the decision they are seeking advice about.

Capacity, as you are no doubt all aware, is very much a movable feast. The question of whether a person has capacity or not to make a particular decision is determined specifically at the time and place that the decision is being made and the issue about which the decision arises.

Solicitors routinely make judgements that a person has capacity to give them instructions. Usually the question of capacity is not an issue. But for older people in particular it is crucial that the solicitor has satisfied themselves that the person does have the requisite capacity. If the question of a person's capacity is raised it will ultimately be a Tribunal or Court that determines whether a person has capacity or not for a particular decision. The Court or Tribunal will consider the evidence available and make a decision. That evidence may come from medical practitioners, family members and friends and solicitors. And the older person.

If a Tribunal or Court decides that an older person did not have capacity when they executed a document that a solicitor has witnessed this can have repercussions for the solicitor at a professional level.

The starting point is a presumption of capacity.

The cases[3] have shown us that a solicitor should not rely on that presumption where a question about a client's capacity has been raised. The solicitor must take clear and pre-emptive steps to ensure that, for that particular document or decision, the client has the required capacity. Solicitors should be aware that the level of capacity needed will vary depending on the type and complexity of the decision being taken by the older person.

As Cockburn CJ in Banks -v- Goodfellow LR 5 (1870) QB 549 at 565 stated:

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 property of which is disposing; shall be able to appreciate the claims to which he ought to give effect;

The solution

Capacity is one of those ideas that is impossible to define comprehensively and precisely in a positive way. It is more easily understood as the absence of incapacity. Incapacity can be viewed as having two elements- first the inability to make decisions and secondly the presence of some cognitive impairment.

Without both a person cannot be determined to have incapacity. The first can be recognised by lawyers but the second not so readily. Hence the resort to medical practitioners for medical diagnoses. Keep in mind that capacity is a legal issue and that many doctors have little understanding of the legal conceptualisation of capacity or incapacity.

Therefore if you send a client off to his doctor, or to a specialist, for a capacity check it is crucial to let the doctor know what the legal decision is that the client is making. Generally you need to know whether the

[3] For a full discussion of the question of capacity see *Szozda –v- Szozda* [2010] NSWSC 804, also discussed in more detail below.

client understands the nature and effect of the decision, whether they can freely and voluntarily make that decision and whether they can they communicate that decision, and importantly for the medical practitioner, whether any cognitive impairment will impair any of those capacities. The NSW law Society has a sample letter to the doctor in its Capacity Toolkit.

It might be worthwhile keeping in mind the following checklist of questions to your self as you are assessing your client's capacity for this particular decision:

- Has the person demonstrated the basic understandings that are necessary for making decisions such as the one in question?
- Has there been an erosion of fundamental knowledge such that there is no longer a sufficient knowledge basis for decision making?
- ln a case of memory loss, is the person's "knowledge of the world" now an adequate basis for making decisions of this kind and complexity?
- Is the person aware of the existence or possibility of exploitation for personal gain?
- Is there a working knowledge of issues for which decisions will be needed?
- Is there an awareness of options in regard to decisions, and of personal and legal obligations and restrictions?
- Is there an understanding of the consequences, for both the decision maker and others, which are likely to flow from decisions that are made or from not making a decision at all?
- Is there an ability to compare likely consequences as a result of choosing one option over another?
- Does the person have adequate insight into their own abilities and limitations for informed decision making?
- Is there an awareness of memory loss and its effects on the ability to recall that a decision has been made or action taken?
- Does the person possess power and motivation to initiate action that will put their decision into effect?
- Is appropriate significance assigned to the outcome of decisions made?
- Does the person have the cognitive ability to grasp and manipulate information as is required for informed decision making?
- Is there an impairment that precludes retention of information such as is necessary to reach informed decisions for the matter?
- Are there delusional beliefs that are likely to derail the reasoning process?
- Are conclusions reached by the adult consistent with the information on which the conclusion is based?
- Are decisions made by the adult consistent with stated or inferred goals?
- Is there an ability to remember previous choices and is there consistency of decisions over time?

Even with diligent attention to the question of capacity the challenge still remains for solicitors not just during phone advice sessions but also in face to face interviews. The lessons of *Szozda –v- Szozda* for

solicitors are clear. In this case 2 solicitors, separately, advised Mrs Szozda in relation to the preparation of Enduring Powers of Attorney.

But before we go into the detail of that case let us compare the definition of capacity in two Acts:

The Guardianship Act

(2) In this Act, a reference to a person who has a disability is a reference to a person:

(a) who is intellectually, physically, psychologically or sensorily disabled,

(b) who is of advanced age,

(c) who is a mentally ill person within the meaning of the *Mental Health Act 2007*, or

(d) who is otherwise disabled,

and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.

4 When is a person incommunicate? (cf 1919 No 6, s 163D)

(1) For the purposes of this Act, a person is ***incommunicate*** if:

(a) the person suffers from any physical or mental incapacity (whether of a temporary or permanent nature) that makes the person unable:

(i) to understand communications respecting the person's property or affairs, or

(ii) to express the person's intentions respecting the person's property or affairs, or

(b) the person is unable to receive communications respecting the person's property or affairs because the person cannot be located or contacted.

(2) Without limiting subsection (1) (a), a person may be incommunicate even if the incapacity concerned is induced by any drug or by medical or other treatment

The Powers of Attorney Act

7 Application of general law to powers of attorney

(1) This Act does not affect the operation of any principle or rule of the common law or equity in relation to powers of attorney except to the extent that this Act provides otherwise, whether expressly or by necessary intention.

(2) This Act does not affect the operation of Part 3 of the *Conveyancing Act 1919* except to the extent that this Act provides otherwise, whether expressly or by necessary intention.

Note. Part 3 of the *Conveyancing Act 1919* contains general provisions relating to the execution and effect of deeds.

19 Creation of enduring power of attorney

(cf 1919 No 6, s 163F (2))

(1) An instrument that creates a power of attorney creates an ***enduring power of attorney*** for the purposes of this Act if:

(a) the instrument is expressed to be given with the intention that it will continue to be effective even if the principal lacks capacity through loss of mental capacity after execution of the instrument,

And the case-

Szozda & Ors –v- Szozda & Anor [2010] NSWSC 804

Aniela Szozda (the principal) was a 99 year-old widow. She lived in a nursing home. She had two children—a daughter, Barbara, and a son, Andrew. Andrew died in 2006 and was survived by his wife and three adult children. The three children were Mark, Anna and Gregory.

In 2004, 2 years before Andrew's death, the principal executed a general and enduring power of attorney under the *Powers of Attorney Act 2003* (NSW) (the Act) in which she appointed Andrew and Mark as her attorneys (the 2004 EPoA).

Shortly after Andrew's death in March 2006, the principal executed another enduring power of attorney in which she appointed Mark and Anna as her attorneys (the March 2006 EPoA). Then, in September 2006, the principal executed a further enduring power of attorney in which she appointed Barbara as her attorney (the September 2006 EPoA). Both the March 2006 EPoA and the September 2006 EPoA were in the same general terms as the 2004 EPoA.

The Principal then embarked on a series of revocations of previous EPoAs. In November 2006, she executed an instrument revoking the March 2006 EPoA. Then, in September 2007, the principal executed an instrument revoking the 2004 EPoA. Then, in December 2007, the principal executed an instrument revoking the September 2006 EPoA. She was a serial revoker.

In 2008 Barbara, the Principal's daughter, purported to use the September EPoA to appoint a proxy for the Principal to vote at a general meeting of a family company. This resulted in a change of the company's board. This in turn led Mark, Anna and Gregory to commence proceedings seeking declarations that both the September EPoA and the family company resolutions at the general meeting were invalid.

A cross claim was made by the defendants seeking a declaration that the September EPoA and the board resolutions were valid and further that the 2004 EPoA and the March 2006 EPoA were validly revoked and thus of no effect.

The issue turned on the question of whether the Principal had the requisite capacity in September 2006 when she executed the EPoA.

His Honour, Barrett J. found that

"different considerations attend a decision to grant a general power of attorney without reference to any foreshadowed transaction and as a means of catering for the possibility that the donor might be unavailable or unable to act at some undefined future time when action is needed."

It is the nature of that act (by which I mean to include its ramifications and consequences) that the donor must sufficiently understand. That, as I apprehend matters, is what is required by what was said by Dixon CJ, Kitto J and Taylor J in *Gibbons v Wright* (above) at 437-438:

"[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained."

His Honour examined the evidence of the conduct of the process of taking instructions and executing the instrument by the two solicitors involved and described it thus:

Mr Marsh prepared wills and powers of attorney in final draft for both Mrs Szozda and Barbara and sent them to Barbara by post. Both women then attended at Mr Marsh's office at Strathfield by appointment on 28 September 2006. This was the first time that Mrs Szozda had been in contact with Mr Marsh about the relevant matters. She had not, in any first hand way, been in touch with Mr Marsh during the process that caused him to draft the documents in the form presented for signing on 28 September 2006; and it is likely

that what was conveyed to him by Barbara as the wish of Mrs Szozda corresponded with the wish of Barbara. (at para 76)

78 Mr Marsh then dealt with the power of attorney. He read aloud to Mrs Szozda the five operative clauses. He did not read the notes and certificates. He deposes to the following conversation:

"PM: This is a general power. Barbara can take any action you could do as a matter of law.

AS: Yes, I want Barbara to look after my affairs.

PM: This will continue to operate even if you lose capacity to understand it.

AS: Yes Mr Marsh. I am not getting any younger."

79 Mr Marsh, according to his affidavit, then said to Mrs Szozda:

"The power of attorney allows Barbara or, if she was unable, Mark and me to act as your Attorney in the event that you are unable to manage your own affairs. Mrs Szozda, because you want me to be one of your attorney in the event that Barbara is not able to act as your attorney, I will need to have my colleague Mr Erickson, explain the document to you."

80 Mr Marsh accepted in cross-examination that there may well have been further conversation that he does not recall. In fact, Mr Marsh accepted that he had no real recollection of the meeting except as gathered later from his file notes (which are quite detailed) and that his account of what was said and done was based very largely on his general practice in such matters.

Q. And that didn't involve elaborating on the sorts of acts a power of attorney could do, did it?

A. Did I take Mrs Szozda senior to the manner in which or the occasion on which Barbara might exercise her appointment in relation to Szozda Holdings Pty Ltd, I did not, no.

Q. The same with Trishwa? A. Same with Trishwa, yes.

Q. Would you agree with me that without taking Mrs Szozda to those matters you couldn't be sure she understood that Barbara could do all those things?

A. I don't agree with you, no, I made it perfectly clear to Mrs Szozda that the appointment of Barbara and the gift of her estate to Barbara effectively meant that she was resting control of the trustees or leaving control of the trustees in Barbara's hands.

Q. You say that on the basis of following your usual practice? A. No I say that on the basis of that is what occurred on the day, and Mrs Szozda told me quite definitely that is what she wanted.

Q. Would you agree with me that without testing Aniela's, that is Mrs Szozda's short-term memory, you couldn't be sure she remembered your explanation when she signed the power of attorney?

A. Well I didn't test her short-term memory so I had no basis on which I could be sure or otherwise but again, nothing occurred in the conference to indicate to me that she would lose her recollection within the space of 15 or 20 minutes."

81 After Mr Marsh had spoken alone with Mrs Szozda, he arranged for her to see Mr Eriksen whose office is in the same building (according to Mr Eriksen, both Mrs Szozda and Barbara were present with him). Arrangements had been made in advance for Mr Eriksen to be on hand to explain the power of attorney to Mrs Szozda with a view to his giving the statutory certificate of explanation required by the *Powers ofAttorney Act* for an enduring power of attorney. Mr Eriksen set out in a witness statement his usual practice in such matters:

"5. I have a usual practice in relation to an attendance on a person for the purpose of explaining to them the effect of grating a power of attorney. My usual practice is to use the information sheet attached to the general

form of power of attorney as a check-list. I explain each of the matters listed in the information sheet. I also explain that where the power of attorney is without restriction, the attorney will effectively have power to do anything in respect of a donor's affairs.

6. I also ask the person that I am attending on general questions in relation to their life circumstances so as to form a view as to whether they are in full possession of their faculties. Such questions relate to a person's date of birth, how old they are, how long they have lived at their present residence, where they lived previously, how many children they have and the like. These questions are also designed to test a person's memory."

82 Mr Eriksen has no reason to think that he departed from this practice in the case of Mrs Szozda. His witness statement records one thing said by him to her about the effect of the power of attorney:

"It is important that you understand that this is an enduring power of attorney. That means that if you become unable to look after your affairs, the power of attorney will still be effective and your attorney will be able to control your affairs."

83 Mrs Szozda's response was:

"I understand that."

84 Mr Eriksen accepted in cross-examination that he did not do anything to test Mrs Szozda's understanding of the explanation he had given her and that he took at face value her statement that she understood what he had said. Nor did he expand his explanation to make it clear that the power extended to matters such as the appointment of an alternate director or the exercise of a power of appointment. He took the view that he did not need to "particularise each and every thing that Mrs Szozda could do". Also, Mr Eriksen was not worried by the presence of Barbara (the principal donee of the power) during his meeting with Mrs Szozda as he did not think that Barbara was exercising any influence.

85 Both Mr Marsh and Mr Eriksen gave evidence of having been satisfied after speaking with Mrs Szozda on 28 September 2006 that she understood the import of the power of attorney she was about to sign.

119 Having surveyed the evidence relevant to the question of Mrs Szozda's capacity at 28 September 2006, I proceed to state findings:

1. Each of Mr Marsh and Mr Eriksen explained to Mrs Szozda in broad terms the general nature of the general and enduring power of attorney – in essence, that Barbara (or, in default, Mr Marsh and Mark together) would have authority to do anything and everything that Mrs Szozda herself could do. Each received from Mrs Szozda a generalised statement of acceptance or understanding of what was said to her. Neither, however, referred to any particular things that the attorney could do or to particular aspects of the family companies and family trusts in relation to which the attorney could act; nor did either probe Mrs Szozda by, for example, asking her to repeat what had been said to her or putting questions about aspects of her property and affairs answers to which might have formed a basis for specific questions or comments designed to ensure that an informed understanding had been received and was held.

2. Each of Mr Marsh and Mr Eriksen noted Mrs Szozda's good grooming and presentation and her polite manner and drew from this an inference of attentiveness to surroundings.

3. The evidence of the solicitors was conscientiously and thoughtfully given but does not dispel the possibility that, on 28 September 2006, Mrs Szozda did not understand the nature and import of a general and enduring power of attorney or the meaning and implications of the power of attorney document that she signed on that day.

120 The overall conclusion is therefore fourfold: first, that nothing in the evidence shows that Mrs Szozda was informed, on 28 September 2006, of the full meaning and significance of the power of attorney she was about to sign (see item 1 at paragraph [119] above); second, that Mrs Szozda's statements and conduct in the presence of the solicitors on that day suggesting comprehension and acceptance do not establish understanding by her of the nature, implications and far-reaching ramifications of the power of attorney

document she was signing and the several acts the attorneys were authorised to do; third, that Mrs Szozda's cognitive incapacity on 28 September 2006 was such that she could not have understood the nature, implications and far-reaching ramifications of the appointment under the general and enduring power of attorney document she signed or the range of circumstances, affecting herself and her property, in which the attorney would be empowered to act; and, fourth, that, according to the applicable general law principles, Mrs Szozda did not possess, on 28 September 2006, the capacity necessary to enable her to grant a general power of attorney in the form of the document she signed on that day.

The lesson for solicitors from this case is quite clear. Where elderly clients are concerned and where there arises a question of capacity a thorough explanation of the instrument and what it entails is required. A learned response ("Yes that is what I want") from a client may give the impression of capacity so it is essential that the client retells the information provided in their own words.

The challenge of Elder Abuse and Financial Exploitation for our older clients

Part of the TARS strategy in facing these challenges includes assisting older people to reduce risks of elder abuse and financial exploitation through planning for later life. We will cover strategies that elderly clients can adopt to reduce the risk of financial exploitation and elder abuse.

The Solutions

These strategies include considering Enduring Powers of Attorney and Enduring Guardianship appointments. We will cover advice on how to choose a substitute decision maker and the range of options for providing more directions for the attorney in the document. It will cover the advantages and disadvantages of different options. We will also cover the duties and responsibilities of attorneys. We will also demonstrate how being appointed may change the relationship of a child with their parent.

We will also cover the basics of creating Family Agreements and provide some cautions for solicitors in doing so. Clients should be aware that making a family agreement involves creating a legal relationship with their children, so that in the rare cases where the situation turns sour the parent does have a suite of options to recover their situation that would not be available if the arrangement was purely within the family and there was no intention to create a legal relationship.

We will cover the requirements for capacity. We will look at recent case law in relation to the typical parent-adult child arrangement for the care of the parent in later life which has run into crisis.

Strategies to reduce the risks of exploitation: alternative decision makers

Enduring Power of Attorney (EPoA)

Advice to Clients

Solicitors should provide comprehensive advice to their elderly clients when they are considering drafting an Enduring Power of Attorney. The discrepancy between how much a solicitor can charge their client for drafting an enduring power of attorney or an enduring guardianship and the time spent in advising the client is an issue. However given that no one will get rich drafting Enduring Powers of Attorney or Enduring Guardianships the solicitor needs to consider the quality of the service that is being provided, which includes the relief that the client will experience in knowing that they are planning well for their later life. The following considerations are couched in a discussion format with the client.

Advantages and Disadvantages

With your older client you should cover the advantages and disadvantages of making an enduring power of attorney including the following points:

If you become of unsound mind and have not made an enduring power of attorney then you lose the ability to appoint someone to manage your property and finances. Someone will need to apply to the NCAT (Guardian Division) or the Supreme Court to have a financial manager appointed. This means a government official (located in Sydney) could be making decisions on your behalf. Regular fees are charged for this service.
It is a safe way of preparing for the future. It is an easy alternative to other forms of financial management such as the NSW Trustee or a private trustee company.

A caring friend and/or relative holding your power of attorney is usually a much cheaper and better alternative.

Make an enduring power of attorney while you are in good health. Do not leave it until it's too late.
It allows you to choose who you want to manage your affairs.

The important disadvantage is that if choose your attorney unwisely you may be financially exploited.

As the advisor you should also cover the advantages and disadvantages of the various elements within the document, including the commencement clause as well as the extra conditions that might be included – I will cover these shortly.

What to consider in choosing your attorney

- ♣ Does the person have to ability to manage your financial affairs?
- ♣ Is the person honest?
- ♣ Do they understand what is required of them?

You need to choose a person who is trustworthy and responsible enough to manage your property and finances.

The principal should choose an attorney who is absolutely trustworthy given the broad powers conferred on the attorney and that the attorney is subject to little supervision. (*Refer Review by Guardianship Division of NCAT of Enduring Power of Attorney Appointment).*

The principal has several choices including appointment of a family member or friend, appointment of NSW Trustee or a professional trustee company, or the appointment of a solicitor as an attorney.

Where the NSW Trustee or professional trustee company is appointed fees will apply to the administration of the estate.

Before you appoint someone you should be sure the he or she will in fact do all the things that you want. Your attorney is legally bound to carry out the written instructions in the appointing document.

If your attorney acts dishonestly or improperly, it may be possible to have the court intervene to protect your interests. Dishonesty or impropriety can be hard to prove so be careful about choosing your attorney. Also, if the attorney has acted dishonestly and spent your money you may not be able to recover it even with a court Order.

How many attorneys should your client appoint? Sometimes it is best to appoint more than one attorney. Choose people who are able to coordinate well with each other.

The client should consider whether they want the attorneys to act jointly (together) or severally (individually). Where it is appropriate the principal could appoint attorneys to act severally for the daily decisions such as paying the electricity bill or the grocery bill but where the decision is substantial such as selling the house the attorneys may be required to act jointly.

Conditions of Appointment

Some Parts in the form allow the donor to put specific conditions on the operation of the EPoA:

Part 2 is easy to use because it involves ticking (or not ticking) a series of boxes that provide specific directions and powers to the attorney. WARNING: Always treat tick the box options with extreme caution and be careful to advise the principal on what these mean and the ramifications if adopted.

Part 2 allows the attorney to give *reasonable* gifts. It is possible that the principal would like to give the sorts of gifts that may have habitually been given in the past such as birthday and Christmas presents. On the other hand they may want to avoid giving away their house or their portfolio of shares. These sorts of conditions could be included in Part 2. The space allowed on the form is brief so an additional page may need to be added.

Part 2 also allows the attorney to make decisions about the principal's assets that provide benefits to the attorney for living and medical expenses (in other words it allows conflicts of interest). Where the principal is considering allowing the attorney to make decisions that involve an inherent conflict of interest the principle needs to think carefully about the extent of this power and how it might be curtailed. The solicitor needs to advise the principal on the pitfalls of allowing the attorney to make decisions that involve a conflict of interest. On the other hand there may be advantages in allowing decisions for specific purposes where the donor has indicated support for the decision – for example the donor may want to keep the house in the family, so for example the attorney could sell the house to his daughter (assuming independent valuations and so forth). If the donor has thought about this then it could be included in the appointment document.

Part 2 allows the attorney to confer benefits on nominated third parties, to meet reasonable living and medical expenses.

Solicitors should advise their clients on the advantages and disadvantages of including or excluding any of these conditions.

Part 3 of the form allows further conditions, not specified in the form to be included in the Power of Attorney appointment. What conditions should the solicitor advise the client to consider?

Here is where you can control or restrain the power you give to the attorney by describing limits or conditions in the enduring power of attorney instrument. For example, you can give the attorney limited authority to do specific tasks, such as paying regular bills but not selling property. You might like to identify the order in which assets are sold if you need to raise funds for example for the bond for a place in an aged care facility.

This is where the solicitor's knowledge and understanding of the client's circumstances will assist the solicitor to provide the best possible legal advice. The solicitor should advise the client on the type and scope of directions that the principal can give to the attorney in writing in the instrument. The solicitor should cover the advantages and disadvantages of each and allow the donor to decide what if any conditions are to be included.

One advantage that should be covered is that it provides the attorney with a better understanding of what sorts of decisions the donor would have made except for the loss of capacity. We cannot assume that the donor and the attorney have discussed, in any detail, the approach that the donor would like the attorney to take on any particular decision. It would probably be unusual for any such discussion to have taken place – but this is where the advising solicitor raises the "what if" scenarios. Obviously not every particular possible incident will be covered but this is where the drafting skills of the solicitor come to the fore – conditions are sufficiently broad to cover the general type of decision to be made in relation to the particular question but not so broad as to be meaningless or superfluous.

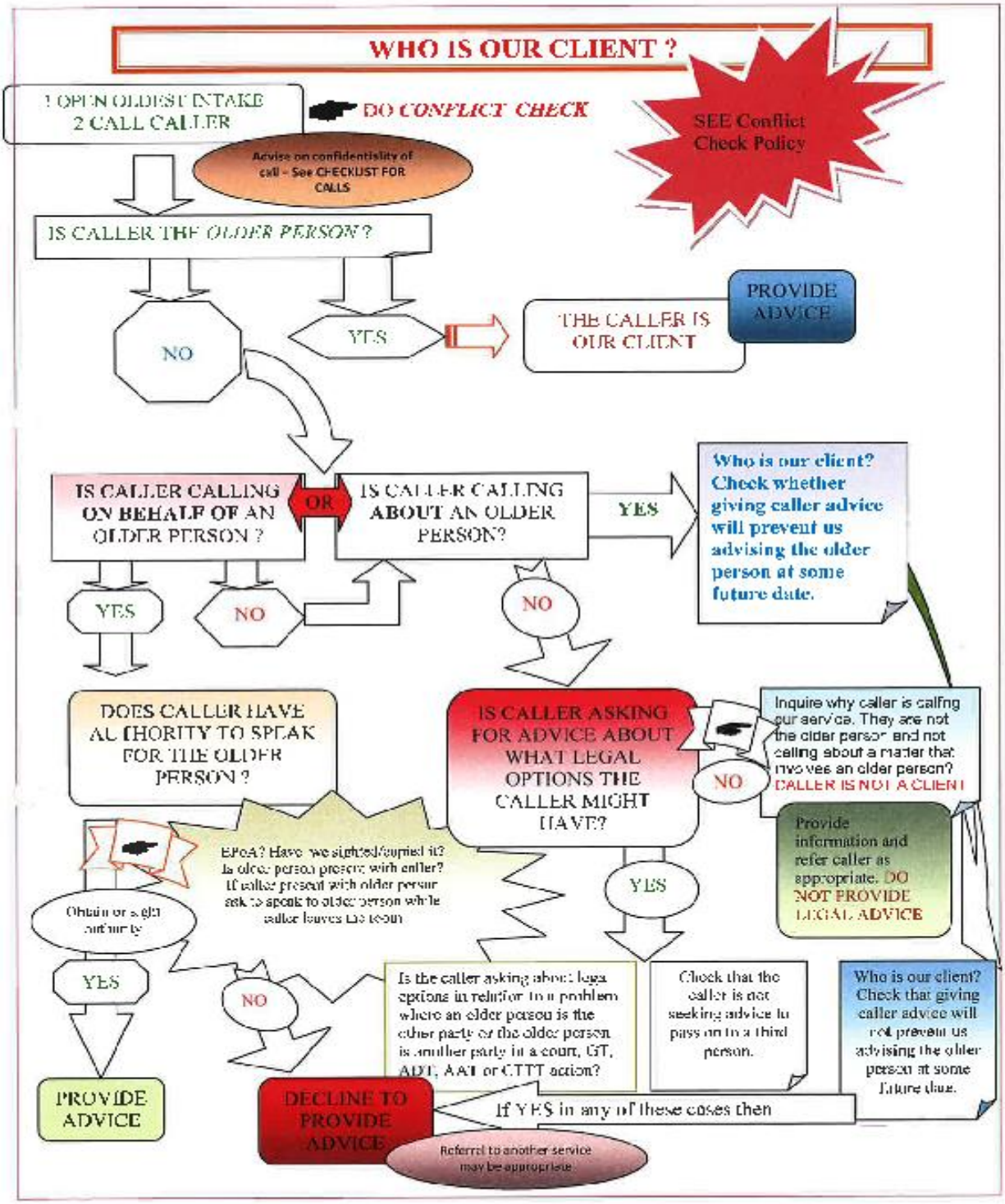
Part 4 Commencement allows the principal to decide when the power should commence. Of the tick the box options being offered only (a) or (b) should be considered. (a) provides for immediate commencement – that is while the principal still has capacity. The advantage of this is that the principal can decide if the attorney is up to the job and if found wanting the principal can revoke the appointment. If the principal chooses to delay commencement of the power until they have lost capacity then the question of when this situation crystalizes should be left in the hands of professional medical practitioners. My preferred option is to require the decision be made by the GP in consultation with another medical specialist such as a geriatrician.

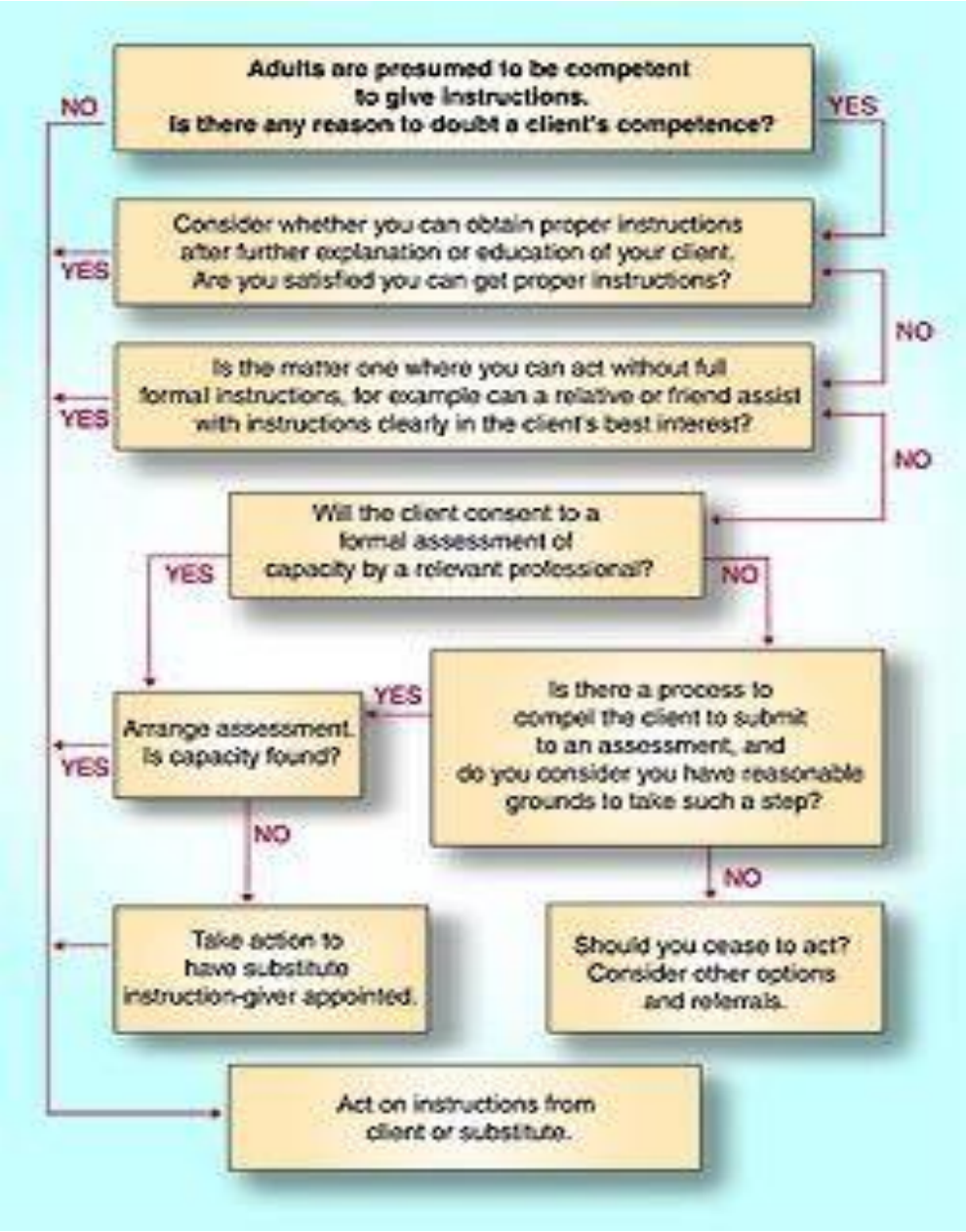
We advise on Powers of Attorney but we do not execute or witness Powers of Attorney. The challenge is to determine whether the advice we have provided is sufficient to satisfy legal requirements and to satisfy the client's needs. We have developed checklists to ensure that all the terrain of the legal requirements are covered. Since we do not witness or execute the instruments the greater burden of verifying capacity is placed on the solicitor who is to do that work.

References

Unconscionable Dealing:	Blomley v Ryan (1956)99 CLR 362
	CBA v Amadio (1983) 151 CLR 447
	Garcia v National Australia Bank (1998) 194 CLR 395
	Brown v NSW Trustee & Ano [2011] NSWSC 1203
Undue Influence:	Bank of NSW v Rogers (1941) 65 CLR 42
	Brown v NSW Trustee & Ano [2011] NSWSC 1203
	Hamilton v Carter [2011] NSWSC 394 at para108
Capacity	Szozda & Ors –v- Szozda & Anor [2010] NSWSC 804

Elder Law second edition 2012 by Rodney Lewis.
Family provision cases under chapter 3 of the Succession Act by Richard Neill Delivered as part of a UNSW Seminar: *Inheritance Disputes and Family Provision Claims* on 28 March 2012. This paper gives an excellent rundown of the cases and how each of the criteria contained in the Succession Act for determining whether a family provision claim has legs or not is considered.
Developments in New South Wales Succession Law by Ian Davidson SC a CPDS seminar given on 16 March 2011


WHO IS OUR CLIENT ?
1 OPEN OLDEST INTAKE
2 CALL CALLER
DO CONFLICT CHECK
SEE Conflict Check Policy
Advise on confidentiality of call – See CHECKLIST FOR CALLS
IS CALLER THE OLDER PERSON ?
NO
YES
THE CALLER IS OUR CLIENT
PROVIDE ADVICE
IS CALLER CALLING ON BEHALF OF AN OLDER PERSON ?
OR
IS CALLER CALLING ABOUT AN OLDER PERSON?
YES
Who is our client? Check whether giving caller advice will prevent us advising the older person at some future date.
YES
NO
NO
DOES CALLER HAVE AUTHORITY TO SPEAK FOR THE OLDER PERSON ?
IS CALLER ASKING FOR ADVICE ABOUT WHAT LEGAL OPTIONS THE CALLER MIGHT HAVE?
Inquire why caller is calling our service. They are not the older person and not calling about a matter that involves an older person? CALLER IS NOT A CLIENT
NO
Provide information and refer caller as appropriate. DO NOT PROVIDE LEGAL ADVICE
EPoA? Have we sighted/copied it? Is older person present with caller? If caller present with older person ask to speak to older person while caller leaves the room
Obtain or sight authority
YES
NO
YES
Is the caller asking about legal options in relation to a problem where an older person is the other party or the older person is another party in a court, GT, ADT, AAT or CTTT action?
Check that the caller is not seeking advice to pass on to a third person.
Who is our client? Check that giving caller advice will not prevent us advising the older person at some future date.
PROVIDE ADVICE
DECLINE TO PROVIDE ADVICE
If YES in any of these cases then
Referral to another service may be appropriate


Adults are presumed to be competent to give instructions. Is there any reason to doubt a client's competence?
NO
YES
Consider whether you can obtain proper instructions after further explanation or education of your client. Are you satisfied you can get proper instructions?
YES
NO
Is the matter one where you can act without full formal instructions, for example can a relative or friend assist with instructions clearly in the client's best interest?
YES
NO
Will the client consent to a formal assessment of capacity by a relevant professional?
YES
NO
Is there a process to compel the client to submit to an assessment, and do you consider you have reasonable grounds to take such a step?
YES
Arrange assessment. Is capacity found?
YES
NO
NO
Take action to have substitute instruction-giver appointed.
Should you cease to act? Consider other options and referrals.
Act on instructions from client or substitute.