



Assessing legal capacity in estate planning matters

Author: [Bridget Schultz](#)

Email: bridget@ealawyers.com.au

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There are a number of documents you can choose to prepare as part of your estate planning; [your Will](#), a [Power of Attorney](#) and an [Enduring Power of Guardianship](#) are some of the primary ones. In each case, the person writing the document (for example, the Will-maker or the principal in the case of a Power of Attorney) will need to have legal capacity to ensure the documents are valid. In this blog, we look at what this means and how legal capacity is assessed.

What is capacity?

There are three different types of capacity:

1. Mental capacity;
2. Legal capacity; and
3. Physical capacity.

There are circumstances where an estate planning lawyer will need to assess their client's capacity before proceeding with the execution of estate planning documents. To do this, the lawyer will make an assessment as to whether their client has the required legal level of mental capacity to enter into the document.

If the client has, for example, an age-related cognitive disability, an intellectual disability, or an acquired brain injury, then the lawyer will need to assess the client's capacity to ascertain whether this disability will affect the client's ability to understand the legal consequences of their decisions.

Why does capacity need to be assessed when executing legal documents?

It is vital that the client is aware of the legal implications of the documents that they are entering into. The need for capacity to be assessed varies from document to document.

For documents such as a Power of Attorney or Appointment of Enduring Guardian, these documents give powers to the appointed person/s to make important decisions regarding the client's finances and health. It is essential that the client is aware of the effect of these documents and that they trust the person/s being appointed to act in their best interests.

The client needs to be aware that such documents provide access to personal financial and health records. The client's bank accounts, share portfolios etc, can be accessed by their Attorney in the case of a Power of Attorney. Significant decisions can be made in relation to medical treatment, lifestyle and health decisions in the case of an Enduring Power of Guardianship.

There are scenarios where capacity will be assessed as an insurance for a potential [future claim against an estate](#). An assessment will protect from a potential future claim made by a beneficiary or a person who believes they are entitled to be a beneficiary but have been left out of the Will. They may challenge the Will in the Supreme Court alleging that the deceased did not have capacity at the time of the making of their Will and, accordingly, [Probate should not be granted](#).

If, for example, a client wishes to make a new Will but their capacity has been assessed by their lawyer and a medical report obtained stating that the client has capacity at the time of making the Will, then this can be relied upon should any legal proceedings arise in the future regarding the validity of the Will.

How is capacity assessed in estate planning matters?

The lawyer will take a detailed file note of the instructions provided by their client which will assist them to assess the client's capacity.

If after this assessment, the lawyer is not satisfied that their client has capacity then the client will be asked to attend a professional assessment. The lawyer will consider the client's particular circumstances before making a referral to the appropriate person. The professional may be a geriatrician, a neuropsychologist, a psychiatrist or a neurologist.

If a lawyer raises the need to assess capacity before proceeding with the execution or drafting of your estate planning documents, this is being done to protect the client's present and future interests.

Get help from a Wills and Estates lawyer

If you'd like guidance and assistance with estate planning needs, including consideration of capacity prior to executing any documents, our lawyers have significant experience in this area of practice.

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

info@ealawyers.com.au

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