



THE UNIVERSITY
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South Australian Law Reform Institute

Powers of Attorney

Fact Sheet 3 – The Principal's Legal Capacity

Legal Capacity

With respect to Powers of Attorney (POA), legal capacity means the individual is capable of making financial decisions – such as the sale of property, management of share portfolios and day-to-day transactions. The way in which capacity is determined within a medical or clinical setting may take a different form from this legal position.

An individual must have legal capacity to create a POA. This creates legal and practical issues when determining whether an individual has the capacity to create a POA.

An Enduring Power of Attorney will be activated once the principal has become legally incapacitated. This creates legal and practical issues when determining at which point the principal loses capacity, thereby activating the POA. Once activated, the attorney has the power to make financial decisions on the principal's behalf. These issues become more complex when the person has fluctuating capacity.

Making decisions about a person's capacity could have significant human rights implications if a person's freedom is wrongly deprived. The law must ensure that a principal's rights are the primary consideration when capacity is assessed.

Assessment of Capacity

The current medical and legal approach to assessment is that all individuals are presumed to have capacity. This is a necessary starting point, which acknowledges the importance of individual autonomy in decision-making. Capacity and autonomy are intricately linked, whereby a determination of incapacity restricts individual freedom and autonomy. Currently, there is a lack of understanding and education surrounding the presumption of capacity and the need to begin an assessment from the viewpoint that an individual has capacity.

In some cases, such as an accident or a suddenly occurring medical condition, incapacity is easy to establish. However, when a principal has a particular condition such as dementia, where capacity 'comes and goes', it is often a delicate process determining incapacity. In addition to this, onset is often gradual, and the principal may have difficulty accepting their incapacity.

Diagnosis of a mental illness, cognitive impairment or a neurodegenerative disorder does not necessarily render an individual legally incapacitated. It must be respected that capacity in such situations cannot be assessed as 'all or nothing' and the level of capacity required may vary depending on the type of decision to be made. Given the changing social factors of an ageing population, promoting autonomy when assessing whether or not a person has the capacity for a particular decision, or when to substitute the decision of the attorney in lieu of a direct decision by a principal whose capacity fluctuates, is a complex task.

Interestingly, when creating POAs, it is often the solicitor who is responsible for determining the capacity of the principal creating the document, however when activating these documents, it is often the attorney or health professional that will make an assessment of the principal's capacity. In South

Australia, it is not expressly required that a mental capacity assessment be completed by a health professional. For the most part, this may be sufficient, however, a solicitor or attorney have not been trained in this area and, when dealing with the more complex situations described above, it is questionable whether either has the ability to make this assessment.

It has been recommended that capacity assessments should be undertaken by professionals, such as psychologists or neuropsychologists. The use of health practitioners in the process of capacity assessment enables better identification of these cases and allows for a clinical assessment of capacity at the time of the decision. It may, however, create additional complexity as many of these financial decisions are made outside of the clinical environment and/or relationship.

Discussion Questions

1. How should capacity be defined?
2. Should the test in the 1870 case of *Banks v Goodfellow* continue to be the relevant test for assessing capacity?
3. Who should be making the capacity assessment for the creation and activation of a POA?
4. How can the principal's rights be protected when assessing capacity?
5. Should there be principles to guide capacity assessment?
6. What evidence should be required to create or activate an enduring power of attorney?
7. Is there sufficient guidance and support for those making the assessment?

<p>Please note: SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice we encourage you to speak to a lawyer and/or contact a community legal service.</p>
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