

Dementia and Estate Planning

By Sarah Walton, Wills and Estate Lawyers, IRDI Legal (June 2016)

It is estimated that there are more than 342,800 Australians living with dementia and that this number is expected to increase to 400,000 in less than ten years¹.

Dementia describes a collection of symptoms that are caused by disorders affecting the brain. It is not one specific disease. Dementia affects thinking, behavior and the ability to perform everyday tasks. Such a disease can impact on a person's estate planning.

Being diagnosed with dementia does not automatically mean that you are unable to make decisions. However, there may be a time when your illness takes away your capacity to make decisions so it is important to consider your estate plan soon after diagnosis. To make a valid Will a person must have testamentary capacity (testamentary capacity describes a person's legal and mental ability to make or alter a valid will).

It is well established in case law that to have sufficient capacity to make a Will, a person must:

- understand the nature of the act and its effects
- be aware of the extent of the property of which they are disposing
- appreciate the claims to which they ought to give effect, that is, they must understand who may have a claim on their estate, and
- not suffer from any delusions of the mind which may 'poison' or affect their affections in disposing of property.

Whether or not a client has testamentary capacity is a legal question. Medical evidence is highly relevant and where a client's testamentary capacity is in question, a lawyer may ask the client to obtain an opinion from a doctor, familiar with the client, as to whether or not the client has testamentary capacity. In this way the client can reduce the chance of family and friends arguing about the validity of their will after they have died.

A positive legal and medical assessment of the client's capacity does not guarantee that the Will will be held to be valid by the Court. However, it is generally preferable for a person's testamentary wishes to be recorded in a Will rather than rely on the provisions of the *Administration Act*. The *Administration Act* sets out how your assets will be distributed if you die without a Will.

A person with dementia should also carefully consider if they may require an **Enduring Power of Attorney** and an **Enduring Power of Guardianship**. These documents continue to operate when a person becomes incapacitated and can no longer make decisions.

An **Enduring Power of Attorney** is a document by which you appoint your nominated Attorney to make decisions on your behalf about your property and financial affairs. An Enduring Power of Attorney differs from an ordinary Power of Attorney in that it continues to operate even if you have lost legal capacity.

¹ Figures according to Alzheimer's Australia as at 23.11.15

An **Enduring Power of Guardianship** is a legal document that allows you to nominate the person who will make personal, lifestyle and health care decisions on your behalf when you have lost the capacity to make such decisions. The Guardian's powers are limited to those specified in the Enduring Power of Guardianship document.

With respect to estate administration, having dementia listed as a contributory cause of death on a death certificate can cause issues because doctors often do not specify a time period that the person had the illness. This may call into question the validity of the Will. However, each matter turns on its facts as the Probate Registry will consider a number of factors, such as when the Will was signed and the terms of the Will. In some cases where dementia is listed as a cause of death, evidence from the deceased's doctor and witnesses to a Will may be required to support an application for a Grant of Probate.

How can I find out more?

At IRDI Legal, our experienced and specialised **Wills and Estates Team** can assist you with all aspects of your personal succession planning and any questions you may have, including preparing and advising on Wills, Enduring Powers of Attorney and other documents. We also have extensive experience in administering deceased estates and provide support and assistance to executors, trustees and beneficiaries in this area.