



EVERSOL'S weekly law

Contributed by John Boag

Who makes the decisions?

As we grow older, the decisions we need to make do not necessarily get less but our ability to make those decisions may diminish and occasionally even disappear.

So when does our ability to make our own decisions cease, and is there a transition period when decision making can be shared or assisted?

In this column, over some period of time, I would like to explore these questions and provide an opportunity for members of the community to gain more information about loss of capacity and substitute decision making.

Firstly, what is "capacity" in a legal sense? You have capacity if you have the ability to make your own decisions. The law recognizes that, in virtually all cases, if you have capacity, it is only you who can make a decision for you. Sure, all manner of people will want to influence the decisions that you make. We are subjected daily to advertisements; friends and family are always willing to offer advice; and not infrequently we will ask another's opinion as to what course of action we should take. But, ultimately, the decision you make is yours alone.

While you have capacity, the law allows you to appoint someone or others to make decisions for you. You might appoint an agent to do something for you, you might appoint an attorney to perform certain functions for you and, of course, you can appoint an executor to make decisions for you after your death.

Now, the law recognizes different levels of capacity when it comes to making decisions. It isn't written in a statute, but the courts have determined that someone may have capacity to make a Will but may have lost capacity to appoint an attorney. Interestingly, the courts have frequently relied on local evidence, rather than on clinical tests and assessments, to determine whether or not someone had capacity at the relevant time.

Recently, a Supreme Court judge commented that "the contemporaneous notes of (the deceased's) accountant and solicitor more accurately demonstrated her capacity than any estimate of her cognitive functioning (by an expert medical practitioner)".

I will explore the acceptable levels of capacity for different decision making events in another column.

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