



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Presentation – The Mind Gap *Mind the gap when navigating diminished capacity*

Ann Janssen – Lawyer & Accredited Specialist

Sam Janssen – Lawyer & Associate



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Disclaimer

All publications and materials are prepared for training, educational and general information purposes only. It should not be relied on as (or in substitution for) legal, accounting, financial or other professional advice.

The presenter is a solicitor of Estate First Lawyers. Estate First is a division of Corporate First Pty Ltd ABN 61 613 157 074.

Liability limited by a scheme approved under professional standards legislation.



Diminishing Capacity - Overview

- About Us
- Case Study 1 – Roy and Patricia
 - Capacity fundamentals
 - Red flags for advisors & what to do
 - Estate planning
- Case Study 2 - Roy
 - Adult children stepping in – what to do
 - Estate planning
- How we work, feedback and pricing



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

WHO WE ARE



Ann Janssen
FOUNDER
& DIVISIONAL HEAD



Kylie Costigan
SPECIAL COUNSEL



Josh Philo
SENIOR ASSOCIATE



Betty Leung
SENIOR ASSOCIATE



Sam Janssen
LAWYER, ASSOCIATE
& GENERAL MANAGER



Melissa Foote
LAWYER & ASSOCIATE



Rosie Everaarts
(nee Walters)
LAWYER



Chloe Borger
LAWYER



Ella Evans
LAWYER & ASSOCIATE

- Estate planning law – it's our focus and our specialty
- One of the largest & experienced estate planning legal teams in Australia
- We deliver comprehensive advice – from straightforward to complex
- Timely and efficient fixed fee service
- We work closely and collaboratively with advisors



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

CASE STUDY 1

Roy & Patricia





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Case Study 1 – Roy & Patricia

About Roy and Patricia

- Roy and Patricia first came to see you in their early 50s for retirement advice
- With your help, they were able to retire in their early 60s and live comfortably off their superannuation
- They have been loyal clients now for 30 years





Case Study 1 – Roy & Patricia

About Roy and Patricia

- Roy and Patricia are now in their early '80s
- Healthy & intelligent
- They still live at home with regular visits from their two daughters
- You meet with them 6 monthly when they visit your office
- They have an ongoing advice relationship with you and pay your advice fees annually





Case Study 1 – Roy & Patricia

About Roy and Patricia

- In a stable marriage and good relationship with both daughters and their grandchildren
- You are noticing changes in Roy's behaviour:
 - More quiet, Patricia does all the talking
 - Roy has had some car scrapes and a 'near miss'





Case Study 1 – Roy & Patricia

Roy and Patricia's Assets

Asset	Roy	Patricia	Joint
Home (PPR)			\$3M
Superannuation in SMSF (<i>shares + cash</i>)	\$1M (<i>pension</i>)	\$1M (<i>pension</i>)	
Cash at Bank			\$100K

- Total Assets - **\$5.1M**
- Roy and Patricia are the individual Trustees and Members of the SMSF



Case Study 1 – Roy & Patricia

Financial Strategy for Roy and Patricia

- You want to switch some of the investments to maximise income
- Patricia asks some questions and agrees. Roy nods
- Clients have very old and basic Wills and no EPoAs – you are urging a review/update





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Capacity - Fundamentals

What is Capacity and why is it Important?

For an agreement to be legally binding, the parties must have decision making capacity.

To demonstrate **decision-making capacity** for a particular decision, a person must:

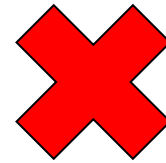
- 1) Understand the main facts and choices involved
- 2) Weigh up the consequences (pros & cons)
- 3) Be able to communicate the decision





Capacity - Fundamentals

- The law presumes that adults have capacity, but this can be rebutted
- Capacity is not binary, it is **decision-specific**
- The degree of capacity you need is dependent on how complex or weighty the decision is
- Persons suffering with dementia or other cognitive impairment may still be able to make some decisions
- Capacity can fluctuate
- Capacity can be enhanced by supported decision making



ALL or NOTHING



Do you have any concerns about Roy's capacity to make the investment decisions or to update his estate planning?

How many capacity concerns have you spotted so far?

- 1) 1 - 3
- 2) 4 - 5
- 3) 6+



Does Roy have capacity to agree to the switches and to update his estate planning?

How many capacity triggers did you spot in Case Study 1?

1) 1 - 3

2) 4 - 5

3) 6+



Triggers for assessing capacity

Capacity Triggers for assessing Roy's capacity:

1. Roy's age

- Cognitive impairment is closely linked to age:
 - Under 65 – less than 0.1%
 - 65 – 74 yrs – 3.2%
 - 75 – 84 yrs – 9.7%
 - over 85 yrs – 29.5%

*(Economic Cost of Dementia in Australia 2016-2056
– National Centre for Social and Economic Modelling,
Univ of Canberra 2017)*

- Up to 50% of family members may not recognise that their relative has a cognitive impairment – “he’s just getting old”





Capacity - Fundamentals

Capacity Triggers for assessing Roy's capacity:

2. Roy's change of behaviour
3. Roy not participating in your meetings
4. Roy's near miss car accident and scrapes





Triggers for assessing capacity:

- Your client's age
- Confused about matters previously easily understood
- Noticeable memory problems
- Loss of [language, social, reading, writing] skills
- Disorientation to time, place or person
- Change in mental state, personality or expressing inappropriate emotions
- Making decisions very different from usual
- Making decisions that put self or others at risk of harm



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

What should advisors do?

What to do as an advisor in this situation:

- Make sure you are getting instructions from Roy as well as Patricia
- Spend some time with Roy to gauge his understanding of what you are recommending
- Ask open ended questions to determine his level of understanding





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

What should advisors do?

What to do as an advisor in this situation:

- Not necessary that the client understands all of the technical detail – a general understanding is sufficient
- Take a thorough file note (Standard 8 – complete and accurate records)
- Better to see clients with diminishing capacity in person, and if necessary, alone





- As advisors you do have legal obligations including those under the Code of Ethics (set by FASEA):
- Standard 4:
*“You may act for a client only with the client’s free, prior and **informed** consent”*
- Standard 5:
*“... You must be satisfied that **the client understands your advice**, and the benefit, costs and risks of the financial products that you have recommended, and **you must have reasonable grounds to be satisfied**”*



- If you feel comfortable with Roy's capacity to make the decision about the investment switch, you can proceed, but take a detailed file note of the meeting.
- Consider having an honest discussion with Patricia about Roy's possible condition
- You may want additional evidence, such as a medical opinion or from a lawyer. Ultimately capacity is a legal question.
- Standard 6:
*"You must take into account the broad effects arising from the client acting on your advice and **actively consider the client's broader, long-term interests and likely circumstances.**"*



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Estate Planning considerations for Roy & Patricia





What does 'good' look like?

- Wills – include testamentary discretionary trusts (TDTs) for each daughter
- SMSF – testamentary gift:
 - Reversionary pension?
 - BDBN?
- SMSF – restructure:
 - Trust deed need upgrade?
 - Change to corporate trustee
 - Rollover to Industry/retail fund?
- EPoA: attorneys, Special conditions



What is possible now?

- Roy is restricted in his estate planning by his impaired capacity:
 - Testing the degree of impairment
 - Capacity to make a Will
 - Capacity to make an EPoA for Roy
 - Can Roy remain as Director of the SMSF?





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Estate Planning considerations

What is possible now?

- Patricia's estate planning:
 - She needs to review her current Will:
 - Protective trust for Roy?
 - Remove Roy from executor role
 - TDTs for daughters
 - Create an EPoA
 - SMSF is problematic





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

CASE STUDY 2

Roy and daughter 'Karen'



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Case Study 2 – Roy and Karen

- Fast track 6 months later
- Patricia died of a heart attack shortly after your last meeting
- Roy has been struggling
- You phone to make your 6 monthly review meeting
- Roy's daughter 'Karen' answers and is reluctant to talk with you or to put Roy on





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Case Study 2 – Roy and Karen

Your meeting with Roy and Karen

- You agree on a meeting at your office in 2 weeks' time
- Roy attends with Karen
- Roy now has a wheelie walker and looks frail
- He smiles at you but doesn't greet you in the usual way
- You discuss the super death benefit & investment switches





Case Study 2 – Roy and Karen

Your meeting with Roy and Karen

- Karen advises that she has been to her accountant and solicitor and:
 - Karen is now a co-trustee with Roy for the SMSF
 - \$500K of Patricia's death benefit has been withdrawn by Roy
 - The balance \$500K has been taken as a reversionary pension





Case Study 2 – Roy and Karen

Your meeting with Roy and Karen

- You query with Roy why he withdrew \$500,000 - he looks at Karen and says he bought a car
- Roy has changed his Will leaving everything to Karen
- Roy no longer speaks with his other daughter, Jane
- Roy has made an EPoA nominating Karen as his sole attorney (starts on incapacity)
- Karen and Roy are requesting a further \$300,000 to be withdrawn





Case Study 2 – Roy and Karen

Roy's Asset position

Assets	Roy Inherited	Roy has now
Home (PPR)	\$3M	\$3M
Superannuation in SMSF (<i>shares + cash</i>)	\$2M	\$1.5M - \$1.2M
Cash at Bank	\$100K	\$??
TOTAL	\$5.1M	\$4.2M - ??



Mini Quiz Break – Case Study 2

How many capacity triggers and red flags have you spotted so far?

- 1) 1 - 3
- 2) 4 - 6
- 3) 7 - 8
- 4) More than 8



Mini Quiz Break – Case Study 2

How many capacity triggers and red flags have you spotted so far?

1) 1 - 3

2) 4 - 6

3) 7 - 8

4) More than 8



1. Karen answers the phone and is reluctant to see you (isolates Roy)
2. Karen uses her own advisor (Accountant)
3. Roy is frail and may not recognise you
4. Large lump sums being withdrawn from his super
5. Roy thinks it's to buy him a car
6. Roy has fallen out with the other daughter
7. Roy has left a Will leaving everything to Karen
8. Roy has given Karen control via an EPoA
9. Karen wants to withdraw a further \$300k



What should advisors do?

What to do as an advisor in this situation:

- Make sure you are getting instructions from Roy (he is your client, not Karen)
- Ask to see Roy alone
- If you feel Roy lacks capacity - ask for medical and/or legal evidence before taking instructions from Karen as attorney
- Even if the EPoA is activated, capacity is decision specific, so always try to obtain instructions from Roy first (if practicable)





What should advisors do?

What to do as an advisor in this situation:

- Do not blindly follow Roy's or Karen's instructions. Make enquiries about where the money went, what it was used for (Standard 2 – client's best interests)
- Document thoroughly (Standard 8 – complete & accurate records)
- Be on the look out for financial elder abuse
- Follow your compliance protocol





Elder Abuse

- Any action, lack of action, deliberate or unintentional, occurring within any relationship where there is an expectation of trust, which causes distress, harm, or serious risk of harm to an older person.
- 1 in 6 older people experience elder abuse in Australia
 - ~50% of cases perpetrated by a family member (commonly adult child)
 - Usually intentional



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Estate Planning considerations for Roy





- Will – leaving all to Karen:
 - Excluded daughter has a family provision claim
 - Did Roy have capacity to make the latest Will?
- Did Roy have capacity to make a new EPoA?
 - When was it made?
 - Who signed the witness certificate?
- Transactions/gifts during Roy's lifetime:
 - Are they void for lack of capacity?
 - Are they voidable for undue influence?





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Pulling it all Together

Pulling it all together

- As trusted Advisors, we have a duty to act in our client's best interests
- This becomes particularly important when our clients, due to age, become more vulnerable
- Having strong estate planning for incapacity as well as for death is an important protective measure
- Take extra precautions





ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

WHEN TO REFER TO US?



Ann Janssen
FOUNDER
& DIVISIONAL HEAD



Kylie Costigan
SPECIAL COUNSEL



Josh Philo
SENIOR ASSOCIATE



Betty Leung
SENIOR ASSOCIATE



Sam Janssen
LAWYER, ASSOCIATE
& GENERAL MANAGER



Melissa Foote
LAWYER & ASSOCIATE



Rosie Everaarts
(nee Walters)
LAWYER



Chloe Berger
LAWYER



Ella Evans
LAWYER & ASSOCIATE

- Fixed fee initial consult/EP review- \$350 + GST (up to 1.5 hours)
- Fast turnaround times – 3 to 6 weeks for most estate plans
- Fixed quote given at first meeting – 94% proceed
- Typically we see clients with net assets of \$1.5M plus
- Servicing clients Australia wide



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

EASY PROCESS AND FASTER TURNAROUND



Make An Appointment

Phone: 1300 132 567

Email: info@estatefirst.com.au

Online Request Form



Meet With Your Lawyer

Whether we meet virtually or face to face, we will listen, answer your questions, craft your estate plan and provide you with a fixed fee quote.



We'll Keep You Updated

You will receive draft documents to review. You can discuss your plan with us at any time you want.



Final Document Meeting

We will go through all of your final documents together to ensure the plan is exactly what you want.



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

FACE TO FACE OR VIRTUAL MEETINGS?

Location	Initial Meeting (advice & quoting)	Sign Up Meeting
Brisbane (150km surrounds)	Face to Face or Virtual	Face to Face or Virtual
Sydney	Virtual	Face to Face or Virtual
Melbourne	Virtual	Face to Face or Virtual
All other locations	Virtual	Virtual

Virtual Signing = Witnessing requirements are relatively easy to meet. Wills (x2 ordinary witnesses), enduring powers of attorney for most states is Justice of Peace, CommDec. Sometimes even GP (Doctor)



What do clients value in estate planning?

- TDT Wills, blended family solutions and Super/ tax advice
- 2024 Feedback [rating of strongly agreed/agreed]:

	2021	2022	2023	2024
I have peace of mind regarding my Estate	99%	99%	100%	100%
The professional fees reflected value	90%	92%	91%	90%
Positive experience with my lawyer	100%	99%	100%	99%
Positive experience when booking	99%	96%	99%	95%
Positive experience on arrival	96%	98%	99%	98%



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

YOUR GOAL: GETTING CLIENTS TO DO IT!

94%

**Clients accept the fixed
fee quote and proceed**



ESTATE FIRST LAWYERS

THE ESTATE PLANNING EXPERTS

Presenters : Ann Janssen & Sam Janssen

Phone : 1300 132 567

Email : info@estatefirst.com.au

Web : www.estatefirst.com.au