



Minor matters and Senior moments



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Incapacity is the ultimate 'Cradle to the Grave' legal issue. It afflicts both the young by minority, and the old by seniority, with others captured by health and circumstance in between. Increasingly, incapacity is a demographic issue. Why? 'Baby Boomers'. There is no doubt, in the near future, our population will be 'senior heavy', and with that an inevitable increase of mental disability.

The statistics say it all. By 2051, those 65-plus will make up 26 per cent of the population (*Changing Face of New Zealand's Population*, Statistics New Zealand, 2000, at 5). Currently, that figure is around 12 per cent. This marked population aging will be accompanied by a "significant rise of disability with age".

Given this demographic change, age-related client incapacity will inevitably be a growth issue for legal practitioners. With that in mind, this article is part one of an update on property and capacity, in a variety of contexts. The articles will provide an overview of recent statutory and case law developments in the capacity arena.

The terminology for incapacity varies considerably between (and within) statutes, and in general. Notable academic commentator and former Judge BD Inglis QC recorded that semantically, *competence* and *capacity* were used "within the context of the *Protection of Personal and Property Rights Act 1998* as synonyms" (*New Zealand Family Law in the 21st Century*, Thomson Brookers, 2007; and *Re Tony* (1990) 5 NZFLR 609 at 614). Mental disability and impairment are also terms used to describe being incapacitated. The correct contextual

term will be used where possible to convey the agreed meaning – incapacity.

Minors

Arbitrary age barriers determine legal minors' rights, providing a general determination of competence, regardless of the actual capacity of the individual 'minor'.

Many different 'age barriers' exist, depending upon the context. For driving: 15 years. Drinking alcohol, voting, having a tenancy agreement (section 14(1) of the *Residential Tenancies Act 1986*), and completing a contract (section 2 of the *Minors' Contracts Act 1969*): 18 years. And complete release from being a minor: 20 years (section 4(1) of the *Age of Majority Act 1970*).

There has been recent statutory and case law for capacity and minority in the context of the *Property (Relationships) Act 1976* and the *Wills Act 2007*.

Rights of minor or dependent children of the marriage

In *Babylon v Babylon* (2009) 27 FRNZ 622, Justice Heath considered the rights of dependent or minor children under the *Property (Relationships) Act*.

Nineteen and 21-year-old daughters were estranged from their mother and aligned with their father, in occupation of the former family home. They applied to postpone the time of parents' share in relationship property (section 26A) or to obtain an order settling an interest in relationship property on them (section 26).

The issue was whether in proceedings under the *Property (Relationships) Act*, a judge could exercise his discretion to provide for children of the marriage to the financial detriment of one or both their parents.

Justice Heath noted that the purpose of the *Property (Relationships) Act* was to deal with division of

relationship property between spouses et al, and the children's interest in this was subsidiary. He pointed to sections 1C(1) (which records that the aim of the Act is "mainly about how the property of married couples ... is to be divided up when they separate or 1 of them dies") and 1M(c) (which provides "for a just division of the relationship property between the spouses ... when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage").

His Honour then looked closely at the wording of section 26. He examined both jurisdictional issues (minor or dependent child of the marriage) and whether the discretion to make an order should be exercised.

Section 26 provides (emphasis added):

- "(1) ...the Court *must* have regard to the interests of any minor or dependent children of the marriage, ... *and*, if it considers it just, *may* make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, ...
- (2) the Court may reserve such interest (if any) of either spouse ... or of both of them, in the relationship property as the Court considers just."

The jurisdictional issue was whether an order could be made for an independent adult child or for an independent minor child.

His Honour noted that the 21 year old, whilst a child of marriage, was neither a minor nor dependent. She was a university student, and eligible for student loans or able to work to financially support her studies. She was outside the jurisdiction of the *Property (Relationships) Act*.

The 19 year old was regarded as a minor by operation of section 4(2) of the *Age of Majority Act*. For her, the question of *dependency* was considered a matter of fact. Both dependency and minority were relevant considerations.

For example, adult handicapped (intellectually or physically) children could be dependent on their parents. Equally, not all 'minor' children were dependent. "Minors who are no longer dependent or subject to parental guardianship are less likely to receive the benefit of a [section] 26(1) order than those who are," his Honour said at [82]. For example, children under the age of 20 years living independently from their parent/s and meeting their own living expenses from their own earnings.

The 19 year old attended university as a student. She was not eligible for child support, which stopped at 19 years. She was able-bodied, eligible for student loans, and could work to financially support her studies.

Accordingly, his Honour determined it was not appropriate to settle property on the 19 year old, as she was in the same position as her older sister, and not dependent.

Justice Heath noted *obiter* (emphasis added), that "the only circumstance in which it might be appropriate to make an order under [section] 26(1) settling relationship property *on adult independent children* is if the purpose of the order is to benefit those who are



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minor or dependent” (at [77]). For example, by allowing a sibling to protect a minor or dependent child’s interests.

With respect to the claim under section 26A, that may only be exercised if the Court was satisfied immediate vesting would cause undue hardship for the spouse who was the principal caregiver of minor and dependent children.

Section 26A provides:

- “(1) On the division of relationship property ... the Court may make an order postponing the vesting of any share in the relationship property, either wholly or in part, until a specified future date or until the occurrence of a special event if the Court is satisfied that immediate vesting would cause undue hardship for a spouse ... who is the principal provider of ongoing daily

care for 1 or more minor or dependent children of the marriage...

- (2) The Court may order postponement of vesting under this section only for as long as necessary, and only to the extent necessary, to alleviate the undue hardship...”

His Honour found there was no jurisdiction to make an order under the section, as the ‘children’ were not of an age to require a principal caregiver, and the father was not a “principal caregiver”. The 21 year old was neither a minor nor dependent, and there was no evidence of hardship for either “child of the marriage”.

Wills and minors

Recent changes to the *Wills Act 2007* have had an effect on minors who wish to make a Will.

As before, anyone 18 years or over can make,

change, revoke, or revive a will. Minors below the age of 18 can make, change, revoke, or revive a will if they are or were married, in a civil union, or de facto relationship, or if they are a military or seagoing person, or about to comply with an order to go on operational service or join a ship as a seafarer.

One change is that now a minor of any age can, with approval of the Family Court, make a Will. Previously, the minimum age was 16 years. If a minor applies to the Family Court, then the Presiding Judge must be satisfied that the minor understands the effect of making, changing, revoking, or reviving a Will. “The Court’s assessment of the minor’s understanding must therefore be of the minor’s testamentary capacity generally, rather than his or her understanding of the particular testamentary act that the minor wishes to perform” (*Brookers Family Law – Family Property*, Thomson Brookers, 2007, at WB9.03(2)). The usual rules which apply to testamentary capacity apply to minors.

Any minor who has agreed to marry or to enter into a civil union may make a Will without the approval of the Family Court (section 10).

The next part of the Capacity Update will focus on the *Protection of Personal and Property Rights Act 1988*, and statutory and case law updates. A special focus will be on the proposed law reform of Enduring Powers of Attorney and recent statutory amendments.

When Insolvency Occurs

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Williams on insolvency issues #4

Reconstructing a company

Reconstructions imply a rebuilding – almost like tearing a structure down and starting again with a different end result in mind. Of course the process is much more discriminative than the wholesale removal of the pieces of an organisation.

The elements of any good reconstruction are:- in what state does the company want to be at the end of some predefined time frame; what is the structural profile of the company as it stands today; what are the resources required to achieve the outcome.

The motivation for reorganisation is often based in the urgency of an insolvent state. In this setting there will be a need for immediate attention to push back the legitimate demands of creditors seeking satisfaction. A reasonable creditor will stay proceedings but only if the future shows better promise than immediate action.

Misrepresentation will damage the potential for the creditor to engage positively. For the debtor company to remain in charge of its assets, a level of candour and transparency are required. Legal mechanisms are available to companies that want to work through issues, that suppose survival through reconstruction. The end outcome is dependant on how the Directors approach the issues and tackle the inevitable difficulties that will arise if creditor confidence is not restored.