IM LAWYERS



Estate planning challenges for someone who has lost capacity

Date: Sunday September 14, 2025

Losing the ability to make legal and financial decisions, known as losing capacity, can create serious challenges for estate planning. Without a valid Will or Enduring Power of Attorney in place, family and friends may face lengthy and complex processes to manage your affairs.

This article explains what capacity means, why it is essential for estate planning, and the legal options available in Queensland if someone loses capacity before putting documents in place.

Estate planning challenges if a loved one becomes incapacitated

It is not unusual that a person reaches a state of their life where they no longer have capacity (see meaning below). Likewise, a person could unexpectedly lose capacity, including younger adults, due to illness or accident.

Often at this stage, their friends and family will look for particular documents to understand the incapacitated person's wishes in relation to managing their affairs or administering their estate should they die. These are documents that the incapacitated person may have prepared in a process referred to as estate planning.

If estate planning documents have been created (at a time when the person had capacity), then the path may be straight forward and set out in those documents. If the documents haven't been created though, and the person lost capacity before they were able to create them, then there can be some uncertainty for their family and friends about how to proceed.

What is capacity in reference to estate planning

Capacity refers to an adult's ability to make decisions for themselves. The level of understanding or capacity required for a

particular decision will change, depending on the type of decision that needs to be made and the incapacitated person's ability to make that decision at that time.

For example, someone may have capacity to make decisions about their meal preferences, but is not able to make decisions about their accommodation or whether to buy or sell significant assets. Alternatively, a person may not have capacity to make a decision while they are intoxicated but may regain that capacity the following day when they are no longer under that influence.

You can learn more in our earlier blog on the topic: "Understanding testamentary capacity".

The Queensland Government's 'Capacity Assessment Guideline 2020' also provides more information about these concepts.

Why is capacity important for estate planning?

Capacity is one of the most essential parts of estate planning because all estate planning documents require the person making them to have capacity at the time they are made.

This includes appointing an Enduring Power of Attorney and making a Will. If a person does not have capacity at the time they create their estate planning documents, then it is possible that they will not be able to be honored.

This is something that is frequently required to be considered by the court in disputes regarding deceased estates.

If you're unsure about the capacity of your loved one who is considering estate planning needs, you can speak to one of team for guidance and assistance.

FREE ADVICE FROM AN ESTATE PLANNING LAWYER: 1800 001 339

Losing capacity before appointing an Enduring Power of Attorney

An Enduring Power of Attorney is a document, which an adult with capacity can create, appointing a person or multiple people to be their authorised representative/s and make decisions for them in the event they lose capacity to do so. In order to appoint an Enduring Power of Attorney, the adult **must** have capacity.

If someone loses capacity before they are able to make an Enduring Power of Attorney, then their family and friends may need to apply to the Queensland Civil and Administrative Tribunal ('QCAT') to be appointed as an administrator and/or guardian empowering them to make decisions on that incapacitated adult's behalf.

The QCAT process can be complex and lengthy. It can take several months before QCAT is able to make an order appointing a representative(s).

In the meantime, there may be some decisions that cannot be made on behalf of the incapacitated adult. For example, if the adult requires expensive medical treatment and their assets such as their house need to be sold to fund that treatment, there may be limited available ways to do so until QCAT has duly authorised the representative.

If the adult is at immediate risk of harm while waiting for the appointment, then QCAT may allow an ‘interim order’ to be made, which is a temporary order that can be made more quickly by QCAT.

Even in the quicker process of an interim order, this takes time and creates unnecessary stress for those involved. This highlights the importance of adults planning for these things early so that that they have more choice of who will be their representatives, and how they can make decisions on their behalf. To avoid this happening to you or your loved ones, it is highly advisable that all adults make an Enduring Power of Attorney.

Losing capacity before making a Will?

A Will is a document that sets out a person’s wishes for the distribution of their estate, and other important administrative matters, after their passing. A person **must** have capacity in order to make a Will.

If a person dies without a Will then then they are said to have died intestate. Therefore, their estate will be dealt with pursuant to the Succession Act 1981(Qld). This legislation sets out a very structured way of distributing assets based on familial relationships.

There is no flexibility to distribute the estate of the deceased in any other way that might be in line with the adult’s wishes, unless that person made a Will before they passed, and while they had capacity.

You can read more about the challenges when someone dies without a valid Will in our earlier blog, “Applying for Letters of Administration when someone dies without a Will”.

Why should you consult a lawyer about your estate planning?

All of these matters highlight the complexity and timing requirements of estate planning. It is important to engage an experienced Wills and estates planning lawyer to assist with this process to ensure that you understand it all fully.

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.