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AUTHORS

Herberto Robinson

Micaela Cagnoli

estudiomcewan.com.ar

Restrictions On Capacity: Complexities and Challenges at a Global Level

The issues surrounding estates – and the capacity to make decisions regarding the estates – have garnered attention from people in many countries. This is primarily due to the increasing life expectancy of the human population worldwide. More importantly, various mental changes are observable but do not lead to significant alterations in a person's mental status. These subtle changes can pose challenges for lawyers and notaries when it comes to determining whether an individual has full awareness of their actions.

Planning is crucial when individuals who may have a disability are involved in decision-making. Additionally, family law professionals face challenges in establishing consistent rules to assess the validity of decisions made by individuals with limited capacity – or, when necessary, by their relatives – in order to safeguard their personal and financial interests. This is where the emphasis should be placed.

The notion of disability as such has undergone changes over time, and it is thus conceived of as "a permanent or prolonged functional alteration – whether this is a motor, sensory or mental alteration – that, when weighed with age and social environment, implies considerable disadvantages hindering family, social, educational or work integration".

According to the United Nations Convention on the Rights of Persons with Disabilities, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments that – in interaction with various barriers – may hinder their full and effective participation in society on an equal basis with others (United Nations, 2006).

There are situations in which a person may not be classified as having a disability, yet they experience some level of change or decline in their intellectual capacity. This can affect their decision-making, especially regarding their property and assets, in a manner similar to the challenges faced by elderly adults.

In Argentina, a person is presumed to have capacity; this is a general principle. Any restrictions on capacity will be exceptional, will be prescribed either by statute or by a judge, and will inure to the benefit of subjects themselves (Chapter 2 of the Civil and Commercial Code of the Nation (CCCN)).

Restrictions may apply to certain simple acts or specific legal actions, limiting what is considered necessary for an individual for a certain period. To address this, a judge may appoint support personnel or caregivers to help convey the wishes of the restricted person.

Some of the circumstances bringing about disability may be either inherent to the person, self-inflicted, or from birth. Some can develop over time as a person ages – for example, neurodegenerative diseases. External factors, such as addictions, may cause others.

How can a person in such a state plan their estate? Is that planning treated as valid? Or, on the contrary, is it likely to be invalidated? Legal scholars have no consensus on this matter, and positions and decisions are sometimes inconsistent in comparative law. Some specific aspects are analysed here.

Reduction of capacity over time

Global life expectancy has been steadily increasing, as follows.

• In Argentina, men have an average life expectancy of 73 years, whereas women live to an average age of 79.
• In Spain, men live an average of 70 years, whereas women have a significantly longer life expectancy of 86 years.
• In Mexico, men reach an average age of 72 years, whereas women live six years longer (reaching an average age of 78 years).
• Overall, the world averages are slightly lower – with men living to about 70 years and women to about 75 years.

The increase in life expectancy does not prevent some neurodegenerative diseases from appearing during adulthood. Neurodegenerative diseases are disorders that affect the brain and nervous system, causing progressive and irreversible deterioration, even to the extent of neuronal death. These disorders can affect memory, mobility and cognitive function, thus taking their toll on the life quality of those who suffer from them by causing the progressive loss of mental and/or physical faculties, and even lead to death.

Progressive neurodegeneration can lead to significant disabilities, as it results in limited

functions and an increasing inability to manage environmental demands, which often require varying degrees of external support and assistance. When people begin to detect a deterioration of this type, they often take proactive steps to secure their wishes for the future, entering into agreements that reflect their intentions for times when they can no longer express them.

In light of these challenges, the most effective solution is to seek legal tools that enable individuals to plan for their later years, prepare for their succession, and proactively distribute their assets. This involves assessing their belongings and ensuring that each heir is fairly compensated. Several options (such as testamentary trusts, trusts for inheritance purposes, agreements on future inheritance, advance directives, or wills) have been analysed in previous iterations of this Chambers guide, which is worth returning to.

Elderly people as vulnerable testators

What happens when a person disposes of their assets, such as by drafting a will, while their mental capacity is uncertain? In Argentina, a will can be drafted in handwritten form (in the testator's own handwriting) or by public instrument before a notary. When creating a will through a public deed, the notary must verify the testator's capacity, confirm their condition, and ensure they express their genuine last wishes. However, what occurs when the testator writes the will by hand? In this case, no one can confirm the testator's capacity or ensure that the will was made freely and without coercion.

What happens when the testator makes a will while in a hospital? Is this factor sufficient to invalidate it? Not really, as the mere fact of being hospitalised in an institution does not merit challenging the validity of an act. To do so, it is necessary to analyse the general condition of the testator.

An interdisciplinary assessment of the patient must be executed prior to granting the act per se. If, after this assessment, the medical doctors decide that the patient is conscious and their autonomy of will is not affected, the notary could attest that the person is fully capable of making a will.

The age of the patient – combined with an illness for which drugs, morphine, or anaesthesia

must be administered – weakens the patient's general state and psychic functions, thus substantially reducing their capacity to reason, understand, and express their will. Under this state, the testator could be influenced to make the will in the way that they do.

The term "vulnerable testator" is commonly used in Spain to describe a situation where an elderly person may be influenced to create a will that is not entirely their own or a true reflection of their intentions. This does not necessarily imply that the testator lacks the mental capacity to make a will; rather, owing to their age and condition, they may be susceptible to influences that compromise their freedom and autonomy when making the decision.

For this reason, the Code of Civil Laws of Catalonia, Section 412, subsection 5 establishes that they are incapable of creating a succession unless the following situations are configured: "Natural or legal persons and the caregivers who depend on them who have provided assistance, residential or similar services to the deceased under a contract may only be favoured in the succession of this if it is ordered in an open notarial will or a succession agreement."

That is to say, testators who wish to favour professional caretakers or the persons in charge or employees of the care centres where they are admitted must necessarily resort to a notarial will. This way, the notary will attest to the testator's capacity and their own will.

Undue influence

Under common law, "undue influence" refers to the excessive pressure that one person exerts on a testator, leading them to create a will that differs from what they would have chosen if such strong influence had not been present. This situation typically arises in relationships built on trust with the testator, such as those involving a friend, neighbour, partner, or caretaker (excluding relatives). This makes it different from testamentary fraud, as no physical or mental will is exercised, nor has fraud in the inducement been provoked.

According to Madoff, there are four elements that American case law takes into account to determine undue influence:

• a relationship of trust between the testator and the person who allegedly exerts the influence;
• the person being relied on has been involved in the making or drafting of the will;
• the testator was vulnerable to undue influence and, by this, their age and mental and physical conditions are taken into consideration;
• the testator makes some "unnatural" attribution in favour of the trusted person, so that the more unexpected the testamentary attribution is, the greater the likelihood of undue influence.

As with the vulnerable testator, undue influence does not necessarily presume the lack of natural capacity of the testator because – if such is the case – the will will be held completely unenforceable. However, as there is no legally established legitimacy in the United States, the testator could distribute their assets as they wish. So, if the theory of undue influence was commonly applied (thereby invalidating the will), the testator's ability to express their will would be limited and therefore the freedom to make a will would be curtailed.

In this dubious situation, judicial precedents in Spain reflect that if the will is granted to a legitimate heir, even if it goes against equal distribution, the court will not determine the testator's lack of capacity or undue influence. On the other hand, when the beneficiary is not a legitimate heir, there is a higher chance of influence; even so, courts usually declare them valid. In conclusion, unlike in the United States, the annulment of the will based exclusively on the deceit or distortion of the will of the vulnerable testator is not applied. The freedom to make a will prevails, as opposed to undue influence.

In cases of nullity or a contested will, American law is inclined to be more prone to maintaining assets within the family, whereas European law values the autonomy of the will.

SOLUTIONS

This article briefly discusses the complexity of restrictions on individuals' capacity and the limited solutions available to professionals, including lawyers and public notaries. The above-mentioned can vary significantly and may even contradict one another. This presents a considerable challenge, highlighting one of the primary issues that must be addressed in family law at an inter-jurisdictional level.

In the meantime, and as effective as it may be under these circumstances, the best alternative is to be one step ahead and conduct estate planning in advance so as to avoid future inconveniences for relatives and future generations.

By way of example, effective planning might involve granting powers of attorney to trusted relatives or individuals who can carry out a person's wishes in the event that the person is unable to do so. Granting powers of attorney for use during the grantor's lifetime is commonly practised in situations involving degenerative mental illness. The appointed agent can manage and oversee the grantor's assets when the grantor has limited capacity and cannot freely manage their own affairs.

Alternatively, advance directives may be issued – through which, a person can define their wishes in all aspects not involving their valuable assets. Examples of such wishes include:

- how they want to spend their final days;
- if they want to reject invasive treatments; or
- if they prefer to receive medical care at home.

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