

Capacity: Reminder of the importance for charities to make sure donors have capacity

Service area / [Trusts and Private Wealth](#)

Legal jurisdiction / [Hong Kong SAR](#)

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Earlier this year, the Hong Kong Court of First Instance gave its reasons for its decision in the matter of *Re WSY*.¹ As is becoming increasingly common, this case involved the issue of how to deal with the assets of someone who had lost capacity, what is known in Hong Kong as a mentally incapable person, or MIP. One of the issues was whether to make provision for religious charities from the MIP's assets.

In this instance the relevant MIP was known in the proceedings as WSY. Some years ago, when it became clear to the family that WSY had lost capacity, a partner of an accountancy firm was appointed to manage her property.

The Court was asked to set the terms on which a statutory will would be made by WSY's property manager (known in Hong Kong as a "committee"). This is a mechanism by which a will can be made for an MIP despite that person having lost capacity.

Relevant to charities, there was some dispute between the family members over WSY's religious beliefs. One party adduced evidence by a Buddhist monk that WSY formally converted as a Buddhist in 2006. This evidence was not challenged on cross-examination. However, in light of doubts over WSY's mental capacity from 2003, the Court thought it was "very much open to question whether it was her own decision to convert". For the same reason, the Court found that a donation of about £100,000 which had been made by family members allegedly on her behalf after the 2003 stroke was not evidence of WSY's intention for, or predisposition towards, giving to charities.

There was also unchallenged evidence from another branch of the family that WSY had always had reservations when it came to matters of charity and donations. Therefore, the Court found there was insufficient evidence to conclude that WSY, if she were to regain her mental incapacity, would make any provision to charities in her will, whether by including them as direct beneficiaries of her will or by way of the remaindermen provisions in the new trust.

What does this mean for any charitable entities?

First, they should be sure when they receive donations from anyone (whether the settlor of the structure or anyone else, including a member of the public), that the person has the requisite capacity to make the donation. If the person did not have capacity, then that person (when they regain capacity, or through a representative such as an attorney under a lasting power of attorney) may be able to claim the donation back. While the charity may have a change of position defence available if it received the donation and spent it in good faith, no one wants potentially unnecessary and messy litigation. Capacity is presumed at common law and under the Capacity (Bailiwick of Guernsey) Act 2020, but be alert to anything which may indicate someone doesn't have capacity. Capacity is assessed on the balance of probabilities.

A second potential issue relates to making provision for charities either in a statutory will or in a discretionary trust. If the will-maker or potential donor to the trust has lost capacity, then the Court will look for evidence of what the donor's present wishes and feelings in relation to charitable giving are or might be. If there is prior evidence of a consistent history of

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charitable giving, previous wills or letters of wishes which mention charities and the like, this will of course be highly relevant although not decisive.



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