



THE LAW SOCIETY
OF NEW SOUTH WALES

WHEN A CLIENT'S MENTAL CAPACITY IS IN DOUBT

A PRACTICAL GUIDE
FOR SOLICITORS

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1. INTRODUCTION

It is common to refer to capacity and mean only one of the three types of capacity, that being mental capacity. However, there are three different types of capacity: legal capacity, mental capacity and physical capacity. This is a short, practical guide for solicitors on what to do and what resources are available to assist them if they are concerned that their client may lack mental capacity to give instructions or make their own legal decisions.

While there is a basic common law presumption that every adult person has mental capacity to make their own decisions, in some cases solicitors may find they have doubts about whether their client does have the required legal level of mental capacity.

This may be for a range of reasons - the client may have an intellectual disability, an acquired brain injury or a mental illness. As the proportion of older people in the community increases, so does the likelihood that an older client may have an age related cognitive disability, such as Alzheimer's disease, which impairs their mental capacity to make decisions.

Dealing with a situation where a person's mental capacity is in issue is often a complex area however there are some basic principles which can guide solicitors in responding to these situations.

2. WHAT IS THE SOLICITOR'S ROLE IN MENTAL CAPACITY ASSESSMENT?

It is not the role of a solicitor to be an expert in mental capacity assessment of their client. However, a solicitor can be involved in carrying out a "legal" assessment of their client's mental capacity which involves:¹

- Making an preliminary assessment of mental capacity - looking for warning signs or 'red flags' using basic questioning and observation of the client.²
- If doubts arise, seeking a clinical consultation or formal evaluation of the client's mental capacity by a clinician with expertise in cognitive capacity assessment.³
- Making a final legal judgment about mental capacity for the particular decision or transaction.⁴

People whose cognitive capacity is impaired may be vulnerable to exploitation by others and may not be able to protect their own legal interests. Solicitors have ethical duties to the court, their clients and to the administration of justice to ensure that the interests of their clients are promoted and protected at all times. Rule 8 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provides that a solicitor must follow a client's lawful, proper and competent instructions. This may suggest that a solicitor assess whether a client has the requisite mental capacity before either taking instructions or assisting them to make a legal decision which will affect their interests.

There are several cases in which the Supreme Court of NSW has considered the role of a solicitor when taking instructions from an older client where their mental capacity to understand a specific legal task is in question.⁵

1 The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at p 3 http://www.apa.org/pi/aging/diminished_capacity.pdf

2 Ibid.

3 Ibid.

4 Ibid.

5 See *Anastasia Pates v Diane Craig and the Public Trustee: Estate of the Late Joyce Jean Cole No. 106306/94 Wills-Solicitors* [1995] NSWSC 87, *Winefield v Clarke* [2008] NSWSC 882 and *Edith White v Judith Liane Wills* [2014] NSWSC 1160.

3. WHAT IS “MENTAL CAPACITY”?

There is no single legal definition of mental capacity in New South Wales. Rather, the legal definition of mental capacity depends in each case on the type of decision which is being made or the type of transaction involved⁶.

This means there are a variety of legal tests of mental capacity. Some are contained in legislation such as the *Guardianship Act 1987* (NSW) and others have been developed in common law, such as the test for testamentary capacity.

The different legal tests for mental capacity mean that a client may have the mental capacity to make some decisions, such as deciding whether to make small purchases like groceries, but may lack the mental capacity to make other decisions such as deciding whether to enter into more complicated financial arrangements.

A finding of incapacity in one area does not automatically mean that mental capacity is lacking in another area; for example, the Supreme Court of NSW has found that a person who is incapable of managing their financial affairs may still be mentally capable of making a will⁷. It has been suggested that the same mental capacity may not be necessary to revoke a will as to make one⁸. Similarly, lesser mental capacity may be needed for a codicil than a will⁹. A person may not be capable on managing their affairs but have the mental capacity to make an enduring power of attorney¹⁰. A person may not have the mental capacity to make a contract but have capacity to make a will¹¹. Similar, if not greater, mental capacity is needed to make a power of attorney compared to that required for a will¹².

Appendix A to this Guide lists some of the more common tests for mental capacity in different legal areas but solicitors must ensure they keep up to date with the most recent statutory or common law mental capacity tests in the particular area involved.

Despite the many different legal tests for mental capacity, the fundamental issue is whether the client is able to understand the general nature of what they are doing¹³.

If a client has ongoing difficulty in demonstrating this level of understanding then this may indicate a lack of mental capacity which warrants further exploration by the solicitor.

6 *Gibbons v Wright* [1954] HCA 17.

7 *Re Estate of Margaret Bellew* [1992] Supreme Court of NSW, Probate Division (Unreported) McLelland J, 13 August 1992.

8 *d'Apice v Gutkovich - Estate of Abraham* (No. 2) [2010] NSWSC 1333, [96], *Public Trustee v Elderfield; estate of Poole* (Supreme Court of NSW, Young J, 26 April 1996, unreported).

9 *Hay v Simpson* (1890) 11 LR (NSW) Eq 109.

10 *Re K* [1988] 1 Ch 310.

11 *Banks v Goodfellow* (1870) LR 5 QB 549 citing *Stevens v Vanleve* (1822) 23 F. Cas. 35.

12 *Szozda v Szozda* [2010] NSWSC 804.

13 In *CJ v AKJ* [2015] NSWSC 498 at [32] the court stated: “The general law does not prescribe a fixed standard of “capacity” required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person’s capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438”.

4. KEY PRINCIPLES

Whenever a client's mental capacity may be in issue, it is important to remember and follow the following principles which are set out in *The Capacity ToolKit*¹⁴ issued by the NSW Department of Justice:

- **Always presume a person has mental capacity**
Under common law you must presume that a person has the mental capacity (sometimes called sanity) to make all their own decisions.
- **Mental capacity is decision-specific**
Apply the presumption of mental capacity for every decision a person makes. If a client can make some but not all decisions, then they have a right to make as many decisions as possible.
- **Mental capacity is fluid**
A person's mental capacity can fluctuate over time or in different situations, so you will need to assess their mental capacity for each decision whenever there is doubt about mental capacity. Even where a client lacked the ability to make a specific decision in the past, they might be able to make that decision later on. Clients might also regain, or increase their mental capacity, for example by learning new skills or taking medication. Other factors such as stress, grief, depression, reversible medical conditions or hearing or visual impairments may also affect a person's decision-making mental capacity.
- **Don't make assumptions that a person lacks capacity because of their age, appearance, disability or behaviour**
A person's mental capacity should not be assessed solely on the basis of:
 - the way a person looks
 - the way a person presents
 - the way a person communicates
 - a person's impairment
 - the way a person acts or behaves
- **Assess a person's decision-making ability – not the decision they make**
A client cannot be assessed as lacking mental capacity merely because they make a decision you think is unwise, reckless or wrong. Individuals have their own values, beliefs, likes and dislikes, and the majority of people take chances or make 'bad' decisions occasionally.
- **Respect a person's privacy**
Assessing a person's mental capacity means dealing with personal information about them and there are a variety of legislative and ethically based privacy principles which are involved. In most cases, a client must consent to their personal information being provided to others.
- **Substitute decision-making is a last resort**
A client may be able to make a particular decision at a certain time because they have support during the decision-making process (assisted decision-making). Before concluding lack of mental capacity, ensure that everything possible has been done to support the client to make a decision. Only seek the appointment of a substitute decision-maker such as a tutor, guardian or financial manager as a last resort.

These principles provide solicitors with a useful, practical and flexible approach to exploring issues of mental capacity according to the individual circumstances of each client. The *Capacity Toolkit* contains a wealth of information and guidance about mental capacity assessment and is available on-line or from the NSW Department of Justice or the Law Society.

14 New South Wales Department of Justice *Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales*, (Sydney, 2008) at http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx

5. INDICATORS OF LACK OF MENTAL CAPACITY – WARNING BELLS AND RED FLAGS!

It will often be difficult to know when a client's mental capacity may be an issue. On the one hand, solicitors need to take great care to avoid making assumptions that a person lacks mental capacity because of their disability or their advanced age. As Gleeson CJ wrote in *Easter v Griffith* (1995) 217 ALR 284, at 290, in the context of testamentary mental capacity but seemingly applicable to all instances of challenged mental capacity: "a determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter". This suggests that a conclusion about lack of mental capacity should not be "produced by inexact proofs, indefinite testimony, or indirect inferences": *Briginshaw v Briginshaw* [1938] HCA 34 per Dixon J.

On the other hand, there are certain indicators of a lack of mental capacity which should cause "warning bells to go off" if a solicitor becomes aware of them.

In some cases, the signs of a person's lack of mental capacity will be straightforward - they may be severely disoriented and confused about where they are and clearly unable to comprehend what is being said to them or to communicate in a rational way.

However, in other cases, it will not be obvious that a person may lack mental capacity. Many people with age-related cognitive disabilities may present extremely well to people who do not know them well and can appear capable.

It will only become apparent on closer, sometimes expert, examination that their mental capacity is impaired. A person with dementia may have excellent long term memory and be oriented in time and space but have poor short term memory with deficits in their judgment or ability to plan. They may be able to hold intelligent, lucid and entertaining conversations but not remember any details of that conversation a short period later.

There are some general warning signs or 'red flags' that point to the need for further investigation but they are not exhaustive and should not be used as grounds for a definite diagnosis.

These include¹⁵:

- A client demonstrates difficulty with recall or has memory loss
- A client has ongoing difficulty with communications
- A client demonstrates a lack of mental flexibility
- A client has problems with simple calculations which they did not have previously
- A client is disoriented
- There is a sense that "something about the client has changed", including deterioration in personal presentation, mood or social withdrawal
- A client is in hospital or a residential aged care facility when instructions are taken
- A client has changed solicitors several times over a short period, particularly if there has been a change from a solicitor who has advised the client for many years
- A client is accompanied by many other friends, family or carers to interviews with the solicitor but is not given the chance to speak for themselves
- A client shows a limited ability to interact with the solicitor
- A client shows a limited ability to repeat advice to the solicitor and ask key questions about the issues

Appendix B is a Capacity Worksheet developed in the United States which gives more examples of "warning signs" that mental capacity may be an issue.

15 The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at above n1 at page v and pp13-16 at http://www.apa.org/pi/aging/diminished_capacity.pdf

6. COMMUNICATION WITH CLIENT

Communication with clients – approach and questions

It is vital that a solicitor approaches their consultation with their client in a way which will help the solicitor gain as much useful information as possible about whether the client has mental capacity to instruct a solicitor or make a legal decision.

There are a number of techniques which solicitors can use to provide a comfortable environment for clients which maximises their ability to understand the discussion and to accommodate any disabilities or impairments they may have¹⁶. These include giving clients more time to read documents, putting a client at ease and providing aids where the client has hearing or vision impairments.

Appendix C discusses some techniques which solicitors can use to assist clients to be at their best during a consultation with their solicitor.

The way in which questions are put to the client and their responses, both verbal and non-verbal, will also give a crucial indication of their ability to understand what is being discussed and how it affects them and their interests.

When asking questions, it is important to remember¹⁷:

- **Ask open-ended questions rather than questions which can be answered by “Yes” or “No”**
Such as: What sort of decisions will your attorney be able to make for you?
- **Do not ask leading questions which suggest the answer**
Such as: You probably would rather have someone in your family look after your money than a public official wouldn't you?
- **Frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker**
Such as: Will anyone else be affected by the contract or benefit from the contract? Who? Tell me about some of the important parts of the contract.
- **It is important to ensure it is the person being assessed who answers the questions**
In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.

7. SOLICITOR'S RECORDS OF INITIAL MENTAL CAPACITY ASSESSMENT

It is fundamental that solicitors take thorough, comprehensive and contemporaneous file notes of any consultation with clients where mental capacity is in issue or where the solicitor is exploring this issue through questioning and by observing the client.

These notes will be invaluable if the issue of mental capacity is subsequently raised in legal proceedings where the question of the client's mental capacity is challenged.

These challenges may not be made for some years after a solicitor has taken instructions, as is often the case when wills are disputed many years after they have been made.

A solicitor's notes may also be of assistance to any professional clinician who is engaged to undertake a professional assessment of the client's mental capacity.

¹⁶ The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) above n1 at pp27-30 at http://www.apa.org/pi/aging/diminished_capacity.pdf

¹⁷ The questions listed here and more can be found in the *Capacity Toolkit*, above n14 at pp110-137.

8. WHEN TO REFER AND TO WHOM

If there are still doubts about a client’s mental capacity after the solicitor’s “initial assessment”, there may be a need to request a formal mental capacity assessment from a medical professional with experience in assessment of cognitive capacity.

There is a range of medical professionals whose role is to undertake mental capacity assessments and they use a variety of methods or tools to complete this task. A solicitor needs to consider the client’s particular circumstances and possible disability before making a referral to an appropriate professional.

The crucial question in making a referral is how much experience does the medical professional have in the area of mental capacity assessment of older people or people with a possible mental illness/ intellectual disability/ acquired brain injury?

The following types of professionals may be able to carry out a mental capacity assessment:

PROFESSIONAL ASSESSOR	EXPERTISE
Psychiatrist	A medical doctor who specialises in the study, treatment and prevention of mental disorders.
Psychologist	A person engaged in the scientific study of the mind, mental processes and behaviour. They are not medical doctors and are not qualified to prescribe drugs.
Neuropsychologists	A psychologist skilled in conducting assessments that determine the presence or nature of brain dysfunction, for example after a head injury or where dementia is suspected. The assessment is conducted through interview, observation and psychological testing and generally involves the administration of tests of memory, concentration, other thinking skills and language.
Psychogeriatricians	A psychiatrist who specialises in the diagnosis, treatment and prevention of mental disorders occurring in the aged.
Geriatrician	A medical doctor specialising in the diagnosis and treatment of disorders that occur in old age, and with the care of the aged.
Gerontologist	A scientist who studies the changes in the mind and body that accompany ageing and the problems associated with them.
Neurologist	A scientist who specialises in the study of the structure, functioning and diseases of the nervous system.
ACAT (Aged Care Assessment Team)	A multi-disciplinary team of health care workers who assess people in their own home to determine the level of assistance the aged person needs to remain living there independently. The team is also responsible for assessing people for admission into nursing homes. The team is comprised of a nurse, social worker, occupational therapist and physiotherapist and may also include a geriatrician or psychogeriatrician. ACAT’s are attached to major hospitals.

9. WHAT TO INCLUDE IN THE REFERRAL LETTER

A solicitor needs to take great care in drafting the referral letter for a mental capacity assessment. Many medical professionals will have a different approach to the task of mental capacity assessment than the legal approach and will not necessarily understand the specific legal tests which must be satisfied. A general request to provide a report about a client's "mental capacity" might elicit a report which addresses whether a person is able to remain at home and attend to their personal care needs but does not address the central issue about the client's mental capacity to make a particular legal decision.

It is therefore crucial that the referral letter sets out:

- The client's background
- The reason the client contacted the solicitor
- The purpose of the referral - what is the legal task or decision being considered
- The relevant legal standard of mental capacity to perform the task at hand
- Any known medical information about the client
- Information about the client's social or living circumstances
- The client's values and preferences if known

It may also be useful to invite the medical professional to telephone the solicitor for clarification if needed.

The Law Society is developing referral resources for solicitors. These resources will be made available on the Law Society's website.

10. HOW TO RAISE THE ISSUE WITH THE CLIENT

It will often be a sensitive, if not unpleasant, task to suggest to a client that there may be concerns they do not have mental capacity to make their own decisions. The loss of capacity is frightening and stigmatising to most people, and many clients will be offended, angry and defensive when this issue is raised.

However, it may make this task easier if it can be explained to the client in terms of the legal need to make sure that the client's mental capacity is adequate for the task at hand. The formal assessment could be suggested as a kind of "insurance" to protect against possible future legal challenges to the validity of the legal transaction involved.

11. MAKING THE FINAL LEGAL JUDGMENT WHEN THE CLINICAL MENTAL CAPACITY ASSESSMENT IS AVAILABLE

A mental capacity assessment report sent to a solicitor may conclude that the client is or is not capable of the particular legal task in issue, for example, that they have testamentary capacity. However it is important to remember that these findings are only clinical opinions which are distinct from a legal assessment about mental capacity. They are simply one source of evidence about the issue which the solicitor must consider before finally advising the client.

The solicitor must take time to thoroughly read and understand the report and to clarify any technical terms or language with the report's writer if necessary¹⁸.

The clinical report could also be used to discuss clinical intervention or treatment options with the client or their family¹⁹. It may be possible that these interventions could improve the client's functioning and/or their mental capacity. For example, the client could be given antipsychotic medication to address psychiatric symptoms impairing understanding²⁰.

12. WHEN TO SEEK THE APPOINTMENT OF A SUBSTITUTE DECISION-MAKER

If a client is incapable of providing instructions or making a legal decision, it may be appropriate for a substitute decision-maker to be appointed who can stand in the client's place and ensure their best interests are protected.

Both the Supreme Court of NSW and the NSW Civil and Administrative Tribunal Guardianship Division can appoint a guardian and/or a financial manager to make substitute decisions for people with a decision-making disability. However, this should be pursued as a last resort when all other options have been explored.

A financial manager has the authority to give instructions to a solicitor and to initiate, continue or defend legal proceedings on behalf of an incapable person. However, it may not be necessary to seek the appointment of a financial manager if a tutor or guardian ad litem can be appointed under the rules of the particular court or tribunal involved.

There may be ethical issues involved when a solicitor makes an application for a financial manager or a guardian to be appointed for their client. The NSW Court of Appeal has commented that an application that a client is unable to manage his or her affairs should not be brought by solicitors if there is any reasonable alternative: *R v P* [2001] NSWCA 473 at [63]. However, in *P v R*, as no relative, church member or social worker was a reasonable alternative the solicitor was found to have properly brought the defendant's plight before the court and, in doing so, enabled the court to obtain an appreciation of the whole of the defendant's circumstances of disability and vulnerability: *P v R* [2003] NSWSC 819 at [82]. The solicitor was "a person who has gained a close appreciation of the defendant's circumstances and difficulties generally in the course of dealing with her": [81].

Issues of client confidentiality may arise when a solicitor is considering whether to provide information to a court or tribunal about a client's lack of mental capacity.

18 The American Bar Association Commission on Law and Aging and the American Psychological Association, above n1 at pp39-40.

19 Ibid.

20 Ibid.

The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* provide as follows:

9. Confidentiality
- 9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:
 - 9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice or
 - 9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,
- EXCEPT as permitted in Rule 9.2.
- 9.2 A solicitor may disclose information which is confidential to a client if:
 - 9.2.1 the client expressly or impliedly authorises disclosure,
 - 9.2.2 the solicitor is permitted or is compelled by law to disclose,
 - 9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,
 - 9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,
 - 9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or
 - 9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

13. CONCLUSION

It is fundamental to the solicitor/client relationship that a solicitor must rely and act on instructions of their client. However, where a solicitor considers that key indicators point clearly to a client's lack of mental capacity to give competent instructions, it is their responsibility to explore this issue further. This Guide aims to assist solicitors to take a principled approach to this task which is thorough, thoughtful and respectful of each client's particular circumstances. Solicitors who inform themselves of the issues surrounding client mental capacity and who are aware of the available resources in the area will be better equipped to face the challenges which often arise in this area of practice, while still providing a high standard of legal service to their client.

APPENDIX A

DIFFERENT MENTAL CAPACITY TESTS

Decision-specific test for mental capacity

In *Gibbons v Wright* [1954] HCA 17, (1954) 91 CLR 423, the High Court of Australia (at 437 per Dixon CJ, Kitto and Taylor JJ) defined a decision-specific test for mental capacity to enter into a contract:

“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation.”

The same approach was explained as follows in *Scott v Scott* [2012] NSWSC 1541 at [205]:

“It is not, literally, a matter of imposing, or recognising, a different ‘standard’ of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of ‘mental capacity’ must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review”.

Mental Capacity to give instructions to a solicitor

The *Uniform Civil Procedure Rules 2005* (NSW) have provisions regarding the appointment and removal of tutors and the manner in which those tutors will represent the person under legal incapacity. Rule 7.18 is the principal provision. It states that any person under legal incapacity may have a tutor appointed by the Court and the Court may remove a tutor and appoint another tutor.

Section 3 of the *Civil Procedure Act 2005* (NSW) defines “person under legal incapacity” as any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the *Felons (Civil Proceedings) Act 1981*) and, in particular, includes:

- (a) a child under the age of 18 years, and
- (b) an involuntary patient or a forensic patient within the meaning of the *Mental Health Act 2007*, and
- (c) a person under guardianship within the meaning of the *Guardianship Act 1987*, and
- (d) a protected person within the meaning of the *NSW Trustee and Guardian Act 2009*, and
- (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

The NSW Court of Appeal considered the need to appoint a tutor for litigation in *Murphy v Doman* [2003] NSWCA 249.

The Court noted at [35]:

“The cases do not consider the level of mental capacity required to be a “competent” litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.”

In *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 Chadwick LJ described the issue when it was necessary to determine the mental capacity to give legal instructions in these terms:

“the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem.”

In *Dalle-Molle by his Next Friend, Public Trustee v Manos and Anor* [2004] SASC 102, Debelle J reviewed the common law in this area and noted at 26:

“The level of understanding of legal proceedings must, I think, be greater than the mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise those proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes, and the risks in costs which of course is but one of the possible outcomes.”

Mental capacity to manage affairs

(section 41 *NSW Trustee and Guardian Act 2009* and section 25G *Guardianship Act 1987*)

Originally courts adopted an objective test for inability “to manage his or her own affairs”. For instance, in *PY v RJS & Ors* [1982] 2 NSWLR 700 at 702 Powell J stated that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

- (a) that he or she appears incapable of dealing in a reasonably competent fashion with the ordinary routine affairs of man; and
- (b) that by reason of that lack of competence there is shown to be a real risk that either:
 - (i) he or she may be disadvantaged in the conduct of such affairs, or
 - (ii) that such monies or property which he or she shall possess may be dissipated or lost; it is not sufficient merely to demonstrate that the person lacks the higher level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.

Later decisions appeared to move away from that approach: see *H v H* (Supreme Court of NSW, Young J, 20 March 2000, unreported) and *Re GHI* (a protected person) [2005] NSWSC 581. Most recently the courts have adopted a subjective approach which pays close attention to the text of the legislation: see *Re D* [2012] NSWSC 1006 at [46]-[62]; *PB v BB* [2013] NSWSC 1223 at [4]-[9]; *Re R* [2014] NSWSC 1810 at [84]-[94]; *CJ v AKJ* [2015] NSWSC 498 at [22]-[24]. This has been the approach consistently adopted by Victorian courts to the same issue: see *Re MacGregor* [1985] VicRp 85; [1985] VR 861. The subjective approach requires the examination of the particular person’s affairs (meaning his or her legal and financial interests). An assessment is then made about whether that person can manage those affairs.

In *Ability One Financial Management Pty Limited v JB by his Tutor AB* [2014] NSWSC 245 at [144] Lindsay J stated that whichever approach is adopted “there must be a factual, functional deficiency in a person’s capacity for self-management in order to qualify for an exercise of protective jurisdiction”.

Testamentary capacity

The formula for determining testamentary capacity is stated in the judgment of the Court (Cockburn CJ, Blackburn, Mellor, and Hannen JJ) delivered by Sir Alexander Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 as follows:

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound, would not have been made.”

Mental capacity to make a power of attorney

In *Scott v Scott* [2012] NSWSC 1541 at [199] Lindsay J stated the following approach to the assessment of mental capacity to make a power of attorney:

“Attention must be focussed on all the circumstances of the case, including the identities of the donor and donee of a disputed power of attorney; their relationship; the terms of the instrument; the nature of the business that might be conducted pursuant to the power; the extent to which the donor might be affected in his or her person or property by an exercise of the power; the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may ostensibly have been prepared; and the circumstances in which it was executed: [199].

“An exploration of all the circumstances of the case will, not uncommonly, call for consideration of events leading up to, and beyond, the time of execution of the disputed power of attorney, as well as on the focal point of the time of execution itself. A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject’s mental capacity in context. Medicos and lawyers, alike, tend to embrace that approach. It is difficult to do otherwise. Context has a temporal as well as spacial and relational dimensions: [200].

...

“Where an Enduring Power of Attorney confers on an attorney power to dispose of the principal’s property to or for the benefit of the attorney or third parties, the nature and degree of mental capacity required to grant such a power may approximate that required for the making of a valid will. In that event, the “standard” laid down by *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 might apply or be approximated: [202].

...

“An Enduring Power of Attorney limited in its terms, or effect, to authorisation of acts for the benefit of the principal may require consideration of factors different from those considered upon an assessment of mental capacity for the making of a valid will”: [204].

In the English case of *Re K* (1988) 1 Ch 310 at 316, the Court referred to the understanding which a person should have to be capable of making a power of attorney as follows:

“Firstly, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor’s affairs. Secondly, (if such be the terms of the power) that the attorney will in general be able to do anything with the donor’s property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.”

Mental capacity to consent to medical treatment

The *Guardianship Act 1987* makes provision for substitute consent for medical treatment if an adult (over 16 years of age) is incapable of consenting to that treatment.

Section 33(2) of the *Guardianship Act 1987* states:

“... a person is incapable of giving consent to the carrying out of medical or dental treatment if the person:

- (a) is incapable of understanding the general nature and effect of the proposed treatment, or
- (b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out.”

Mental capacity to make health-related privacy decisions under the Health Records and Information Privacy Act 2002 (NSW) (HRIPA)

The HRIPA establishes a test for mental incapacity as follows (section 7 HRIPA):

“(1) An individual is incapable of doing an act authorised, permitted or required by this Act if the individual is incapable (despite the provision of reasonable assistance by another person) by reason of age, injury, illness, physical or mental impairment of:

- (a) understanding the general nature and effect of the act, or
- (b) communicating the individual’s intentions with respect to the act.”

Mental capacity to consent to marriage

In *Babich & Sokur and Anor* [2007] FamCA 236, Justice Mullane stated: “the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony [244] ... It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences [249] ... a valid consent involves either a general understanding of marriage and its consequences, or an understanding of the specific consequences of the marriage for the person whose consent is in issue [251].”

APPENDIX B

CAPACITY WORKSHEET FOR LAWYERS

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, American Bar Association Commission on Law and Ageing & American Psychological Association (2005).

Please read and review the handbook prior to using the worksheet.

Client Name: _____

Date of Interview: _____

Attorney: _____

Place of Interview: _____

A. Observational signs

COGNITIVE FUNCTIONING	EXAMPLES
Short-term Memory Problems	<ul style="list-style-type: none"> Repeats questions frequently Forgets what is discussed within 15-30 min Cannot remember events of past few days
Language Communication Problems	<ul style="list-style-type: none"> Difficulty finding words frequently Vague language Trouble staying on topic Disorganised Bizarre statements or reasoning
Comprehension Problems	<ul style="list-style-type: none"> Difficulty repeating simple concepts Repeated questioning
Lack of Mental Flexibility	<ul style="list-style-type: none"> Difficulty comparing alternatives Difficulty adjusting to changes
Calculation/ Financial Management Problems	<ul style="list-style-type: none"> Addition or subtraction that previously would have been easy for the client Bill paying difficulty
Disorientation	<ul style="list-style-type: none"> Trouble navigating office Gets lost coming to office Confused about day/time/year/season

EMOTIONAL FUNCTIONING	EXAMPLES
Emotional Distress	<ul style="list-style-type: none"> Anxious Tearful/distressed Excited/pressured/manic
Emotional Lability	<ul style="list-style-type: none"> Moves quickly between laughter and tears Feelings inconsistent with topic

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BEHAVIOURAL FUNCTIONING	EXAMPLES
Delusions	<ul style="list-style-type: none"> • Feels others out “to get” him/her, spying or organized against him/her • Fearful, feels unsafe
Hallucinations	<ul style="list-style-type: none"> • Appears to hear or talk to things not there • Appears to see things not there • Misperceives things
Poor Grooming/Hygiene	<ul style="list-style-type: none"> • Unusually unclean/unkept in appearance • Inappropriately dressed
Other Observations/ Notes of Functional Behaviour	
Other Observations/ Notes on Potential Undue Influence	
MITIGATING/QUALIFYING FACTORS AFFECTING OBSERVATIONS	WAYS TO ADDRESS/ACCOMMODATE
Stress, Grief, Depression, Recent Events Affecting stability of client	<ul style="list-style-type: none"> • Ask about recent events, losses • Allow some time • Refer to a mental health professional
Medical Factors	<ul style="list-style-type: none"> • Ask about nutrition, medications, hydration • Refer to a physician
Time of Day Variability	<ul style="list-style-type: none"> • Ask if certain times of the day are best • Try mid-morning appointment
Hearing and Vision Loss	<ul style="list-style-type: none"> • Assess ability to read/repeat simple information • Adjust seating, lighting • Use visual and hearing aids • Refer for hearing and vision evaluation
Educational/Cultural/Ethnic Barriers	<ul style="list-style-type: none"> • Be aware of race and ethnicity, education, long-held values and traditions

B. Relevant legal elements

The legal elements of capacity vary somewhat among states and should be modified as needed for your particular state.

GENERAL LEGAL ELEMENTS OF CAPACITY FOR COMMON TASKS	NOTES ON CLIENT'S UNDERSTANDING/ APPRECIATING/FUNCTIONING UNDER ELEMENTS
Testamentary Capacity [Insert elements of relevant tests]	
Contractual Capacity [Insert elements of relevant tests]	
Mental Capacity to give gifts [Insert elements of relevant tests]	
Other Legal Tasks Being Evaluated & Capacity Elements	

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C. Task-specific factors in preliminary evaluation of capacity

THE MORE SERIOUS THE CONCERNS ABOUT THE FOLLOWING FACTORS	THE HIGHER THE FUNCTION NEEDED IN THE FOLLOWING ABILITIES
<p>Is decision consistent with client's known long-term values or commitments?</p> <p>Is the decision objectively fair? Will anyone be hurt by the decision?</p> <p>Is the decision irreversible?</p>	<ul style="list-style-type: none"> • Can client articulate reasoning leading to this decision? • Is client's decision consistent over time? Are primary values client articulates consistent over time? • Can client appreciate consequences of his/her decision?

D. Preliminary conclusions about client capacity

After evaluating A, B and C above:

<ul style="list-style-type: none"> • Intact No or very minimal evidence of diminished mental capacity 	<p>Action: Proceed with representation and transaction</p>
<ul style="list-style-type: none"> • Mild problems Some evidence of diminished capacity 	<p>Action:</p> <ol style="list-style-type: none"> 1. Proceed with representation/transaction, or 2. Consider medical referral if medical oversight lacking, or 3. Consider consultation with mental health professional, or 4. Consider referral for formal clinical assessment to substantiate conclusion, with client consent
<ul style="list-style-type: none"> • More than mild problems Substantial evidence of diminished capacity 	<p>Action:</p> <ol style="list-style-type: none"> 1. Proceed with representation/transaction with great caution, or 2. Consider medical referral if medical oversight lacking, or 3. Consider consultation with mental health professional, or 4. Refer for formal clinical assessment to substantiate conclusion, with client consent
<ul style="list-style-type: none"> • Severe problems Client lacks capacity to proceed with representation and transaction 	<p>Action:</p> <ol style="list-style-type: none"> 1. Referral to mental health professional to confirm conclusion 2. Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests 3. If an existing client, consider protective action consistent with MRPC 1.14(b)

Case notes

Summarize key observations, application of relevant legal criteria for capacity, conclusions and actions to be taken:

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APPENDIX C

TECHNIQUES LAWYERS CAN USE TO ENHANCE CLIENT MENTAL CAPACITY

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, American Bar Association Commission on Law and Ageing & American Psychological Association (2005). An excerpt from this publication is provided below.

Note: Attorneys should be read in the NSW setting as meaning lawyers.

V. Techniques lawyers can use to enhance client capacity

Clients with evidence of diminished capacity may still be able to make or participate in making a legal decision. The Comment to Model Rule 1.14 notes that “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” How can a lawyer maximize the capacity of an older client who may be limited by one or more of the cognitive, emotional, behavioral, or mitigating factors

This chapter highlights practical techniques that lawyers can use to accommodate sensory and cognitive changes that become more prevalent with age, and to engender the trust and confidence of older clients with diminished capacity.

This chapter describes an approach of “gradual counseling” by which the attorney may help the client to understand and make choices through a process of clarification, reflection, and feedback that is respectful of client values.

A key message of this chapter is that attorneys must be sensitive to age-related changes without losing sight of the individuality of each older person. Although functional limitations do increase with age, most older adults do not have physical, sensory, or cognitive impairments. Therefore, one must not assume impairments in older clients, but one must be prepared to address these issues when they arise. Moreover, attorneys should examine their own attitudes toward aging to ensure that “ageism” does not inadvertently influence their judgments about client capacity. Lawyers also should be alert to ethnic and cultural factors that might be a barrier to communication, subliminally affecting perceptions of client abilities and behavior.

Finally, attorneys should do everything possible to make their office and their counselling approach “elder friendly” and accessible to individuals with a range of disabilities. Under the Americans with Disabilities Act (ADA), law offices as “public accommodations” are required to make reasonable modifications to their policies, practices, and procedures to make services available to people with disabilities. Beyond this, many older clients whose impairments do not reach the level covered under the ADA will be aided by the kinds of techniques listed below to optimize their functioning.

A. Engendering client trust and confidence

Attorneys can take steps to build the trust of older clients, allowing them to be at their best during the interview process and bolstering their decision-making ability.

- Upon introduction, take time to “**break the ice**” and, if appropriate, make a few brief remarks about areas of common interest such as weather, sports, or mutual connections.
- **Interview the client alone** to ensure confidentiality and to build trust. However, consider the important role support persons can play. If the client is more at ease with a friend or family member in the room, **consider including the support person for a portion** of the interview or at least during an introductory phase. Be sure to *talk to the client rather than past the client* to the others.
- Stress the **confidentiality** of the relationship. Some older adults may be fearful of losing control of their affairs if they divulge information. Assure the client that information will not be shared with others, including family members, without prior consent.
- Encourage maximum **client participation** to increase a sense of investment in the process.
- Respond directly to the client’s feelings and words, making the client **feel respected and valued**, which enhances trust.
- Use **encouragement** and verbal reinforcement liberally.

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A. Engendering client trust and confidence (continued)

- Take **more time** with older clients so they are comfortable with the setting and the decision-making process to be undertaken.
- Conduct business over **multiple sessions** to increase familiarity and opportunities for trust building.

B. Accommodating sensory changes

While not all older adults have hearing and vision loss, these deficits are common for a substantial proportion of Americans over the age of 65. Sensory problems, particularly in hearing, sometimes result in older individuals pretending that they know what is under discussion, becoming socially withdrawn, and in some instances, depressed. As stated in Chapter IV, lawyers should not mistake sensory loss for mental confusion. Rather, sensory changes and the older adults' response to them are mitigating factors that should be taken into consideration when assessing signs of diminished capacity.

To address hearing loss

- Minimize **background noise** (e.g., close the office door, forward incoming calls) as individuals with hearing loss have difficulty discriminating between sounds in the environment.
- **Look at the client** when speaking. Many individuals with hearing loss read lips to compensate for hearing loss.
- **Speak slowly and distinctly.** Older adults may process information more slowly than younger adults.
- **Do not** over-articulate or **shout** as this can distort speech and facial gestures.
- Use a **lower pitch** of voice because the ability to hear high frequency tones is the first and most severe impairment experienced by many older adults with compromised hearing.
- Arrange seating to be conducive to conversation. **Sit close** to the client, **face-to-face**, at a table rather than on the far side of a desk.
- Focus more on written communication to compensate for problems in oral communication. Provide **written summaries** and follow-up material.
- Have auditory **amplifiers** available.

To address vision loss

- Increase **lighting**.
- **Reduce** the impact of **glare** from windows and lighting as older adults have increased sensitivity to glare. Have clients face away from a bright window.
- **Do not** use **glossy** print materials, as they are particularly vulnerable to glare. Format documents in **large print** (e.g., 14- or 16-point font) and double-spaced as presbyopia (blurred vision at normal reading distance) becomes more prevalent with age.
- Give clients **additional time** to read documents, as reading speed is often slower.
- Give the client adequate **time to refocus** his or her gaze when shifting between reading and viewing objects at a distance, as visual accommodation can be slowed.
- Be mindful of **narrowing field of vision**. A client may not be aware of your presence in the room until you are directly in front of him or her.
- Have **reading glasses** and magnifying glasses available on conference tables.
- Arrange furnishings so **pathways** are **clear** for those with visual or physical limitations.

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To accommodate hearing/vision loss, address

- Background noise
- Seating position
- Lighting
- Large print materials
- Hearing and vision aids
- Speaking style and pace

C. Accommodating cognitive impairments

For clients with some evidence of cognitive impairment who may be in the murky gray area of “questionable capacity,” the practical steps suggested below may offer significant support:

- Begin the interview with **simple questions** requiring brief responses to assess client understanding and optimal pace, as reaction time is often slower among older adults, particularly for more complex tasks.
- Conduct business at a **slower pace** to allow the client to process and digest information, as information-processing speed declines with age.
- Allow **extra time for responses** to questions, as “word-finding” can decline with age.
- **Break information** into smaller, manageable segments.
- Discuss **one issue at a time**, as divided attention between two simultaneous tasks, as well as the ability to shift attention rapidly, shows age-related decline.
- **Provide cues** to assist recall rather than expecting spontaneous retrieval of information.
- **Repeat, paraphrase, summarize**, and check periodically for accuracy of communication and comprehension. The importance of repeated testing for comprehension has been documented in research of informed consent procedures showing that comprehension is sometimes incomplete even when individuals state that they understand. This inconsistency is more pronounced among older adults, particularly those with low vocabulary and education levels.
- If information is not understood, incompletely understood, or misunderstood, **provide corrected feedback** and check again for comprehension.
- **Provide summary notes** and information sheets to facilitate later recall. Include key points, decisions to be made, and documents to bring to next meeting.
- Schedule appointments **for times of the day** when the client is at peak performance. Peak performance periods change with age and for many older adults **mornings** are often best.
- Provide time for **rest** and bathroom breaks.
- Schedule **multiple, shorter appointments** rather than one lengthy appointment, as older adults may tire more easily than younger adults. Multiple testing sessions can also assist in identifying the client’s performance rhythms and cycles.
- Whenever possible, conduct business in the **client’s residence**. This often makes the client more relaxed, optimizes decision-making, and provides the attorney with clues about “real-world” functioning.

D. Strengthening client engagement in the decision-making process

Linda F. Smith, in her seminal article “Elderlaw: Representing the Elderly Client and Addressing the Question of Competence,” describes a technique of *gradual counselling* that is useful in compensating for age-related differences in memory and problem-solving ability, and when there are questions about capacity. It provides a method for inquiring into and understanding the client’s decision-making process, and may assist such clients in thinking through their underlying concerns, goals and values, and choosing a consistent course of action.

“The attorney for the limited client should engage the client in a process of gradual decision-making, which will involve clarification, reflection, feedback, and further investigation Gradual counselling requires the attorney to repeatedly refer to the client’s goals and values in assessing each alternative and in discussing the pros and cons of an alternative. This will involve a great deal of clarifying and reflecting of the clients’ thoughts and feelings The attorney should proceed to explain each relevant option and elicit the client’s reactions.”

Smith outlines steps in the process of “gradual counselling” and maintains that if attorneys are vigilant in pursuing these steps with a client of questionable capacity, it may assist a limited client in reaching an informed decision.

Gradual counselling	<ul style="list-style-type: none"> • Identify goals • State problems • Ascertain values • Compare options to goals • Give feedback
----------------------------	---

- Confirm or reconfirm the client’s basic **goal** or problem to be solved.
- **Get feedback** from the client to ensure he or she agrees with the lawyer’s statement of the problem. Listen for important client values.
- Ascertain **the most important** values the client expresses. Restate these values and confirm with the client. Recognize that the values of an older client may differ from those of the attorney.

“For example, a young attorney may begin to doubt the competence of her elderly client who does not wish to contest a right to income or benefits or does not wish to take a relatively simple legal action to preserve his assets. However, if the particular client has a limited life expectancy, minimal need for assets, or an emotional focus upon internal or spiritual things, that client’s decision may be quite reasonable. Because the underlying values are so important, throughout the counselling process the attorney should continue to reflect the feelings and thoughts that the client expresses . . . to understand the client’s values as fully as possible.”

- Describe the **best option** for attaining the client’s goal. Ask for the client’s feeling about that option.
- **Explain each relevant option**, and get the client’s reaction. This will enable the attorney to see whether the client understands the information and how the client responds. It will also check for consistency of values. The attorney may need to “present fewer choices and only the most salient features for or against each alternative.” This “weeding out” may allow a client of questionable capacity to reach a reasoned judgment.
- Give the client **feedback** that might be helpful. For example, if the client appears inconsistent in goals or decisions over time, pointing this out may help the client to remember and focus. If a client chooses a course that seems harmful, the attorney could express worry and concern, and get the client’s reactions to this.
- Even when there is no clearly enunciated choice by the client, the lawyer still may be able to find capacity for the limited decision at hand from the **client’s reactions** during the course of the session.

Such a “gradual counselling” approach is respectful of the client’s autonomy. Moreover, an attorney taking these steps will be assured that he or she has made a thorough attempt to find client capacity before taking any more precipitous action. However, if despite all of these techniques and accommodations, the client’s capacity for the decision or transaction is still questionable, the attorney may need assistance from a clinician.

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APPENDIX D RESOURCES

The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at http://www.apa.org/pi/aging/diminished_capacity.pdf

Darzins P, Molloy W and Strang D (eds) 2000 *Who Can Decide: The six step capacity assessment process*, Memory Australia Press: Adelaide

New South Wales Attorney General's Department, *Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales*, (2008) at http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx

Law Society of NSW *Powers of Attorney Act 2003: A Commentary* at <https://www.lawsociety.com.au/resources/areasoflaw/ElderLaw/index.htm>

To locate a private practitioner see the following websites:

Law Society of NSW
www.lawsociety.com.au

The Guardianship Division of NCAT
<http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx>

NSW Trustee & Guardian
<http://www.tag.nsw.gov.au/>

Alzheimer's Australia
<https://fightdementia.org.au/>

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