Benchmark

best practice-best evidence with vulnerable people

Responsive practice with Older Persons

1. Introduction

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regarding communication with, or representation of, older persons. No liability is accepted for any adverse consequences of reliance upon it. Further disclaimer information is provided here [link].

1.1 The information in this guideline is intended to assist legal professionals to develop a greater understanding of older people, practical issues that may assist in working with older people, and how to be responsive to their needs in legal contexts. Legal professionals who work with older people are obligated to assist them to participate as fully as possible within the legal system. Given that our population is ageing, we need to have corresponding skills to adapt to older people's needs. Information provided in this guideline may aid lawyers, judges and others who have legal dealings with older people.

1.2 The guideline is designed to raise awareness of the issues that older people may encounter. Given the diversity of older people's conditions, and the diversity of legal matters they may become involved in, this guideline focuses on best practice tips.

1.3 The category of people 65 years of age and older is growing and New Zealand can anticipate a spectrum of social, political, economic and legal impacts. According to Statistics New Zealand, from the late 2020s, the 65 plus age group will constitute over 20% of the population, compared with 13% in 2009.[1] Also, the older population is getting older. By 2061, approximately one in four people aged 65 plus will be 85, compared with one in eight in 2012.[2]

1.4 All people are likely to experience a degree of discomfort associated with legal matters. In part, this is because legal discussions and proceedings may have life-altering effects. For older people, the discomfort may be magnified, particularly if the issues are of great significance to their lives and/or relationships.

1.5 Older people may be involved in the range of legal matters that are experienced by other adults. Also, they may have impairments that warrant accommodation. Therefore, the strategies for best practice contained within other guidelines may be relevant when working with older people.

1.6 Challenges arise in crafting tips for best practice for this population. There is tremendous diversity amongst people 65 years of age and older. Many people in this category are far more able than younger people. Therefore, we must guard against assuming that ageing equates with a decline or lack of capacity.

1.7 Nevertheless, ageing is associated with some changes in memory, sensory, physical, and mental functioning. This guideline aims to prepare

legal professionals to accommodate these conditions. The best practice tips are derived from international research to promote older people's interests within, and beyond, the courtroom doors.

2. Accommodating older people

Slow lawyering

2.1 The concept of slow lawyering was coined by Mary Helen McNeal.[3] She observed that jurisprudence is increasingly taking account of the cognitive development of children and adolescents. Similarly, the cognitive changes that accompany ageing require recognition within our legal systems. The key is not to assume, nor ignore, signs of decline. Rather, the key is to be keenly attuned to, and adjust our practices for, individuals' unique characteristics.

2.2 McNeal's tips are summarised below. She referred to the "gradual counselling" process that was described by Linda Smith.[4] First, the legal professional identifies the person's goals. With feedback from the client, the lawyer states the problem. The lawyer identifies the client's values and then describes and compares options. Finally, the lawyer provides feedback on the options.

2.3 According to Smith, this is a fruitful method when people are unable to clearly express their views due to capacity issues.[5] She recommends that when there is uncertainty, the legal professional may make decisions on behalf of the person that maximise options or can be inferred from the person's values and goals. By the end of the process, the person should have made, or the legal professional inferred, the decision.[6] An example illustrates this process. If a person expressed her preference to live independently as long as possible, and expressed that residing in the current rest home was too restrictive but couldn't identify preferred alternatives, the lawyer could explore less restrictive accommodations. Documentation of this process is advisable.

2.4 Legal professionals' engagement with older clients may take relatively more time than is customary. According to McNeal, this may create a tension for those who are paid for their legal services or face time constraints.[7] Nevertheless, appropriate pacing of these interactions may have significant benefits for older people. Older people may need to ask questions, which may involve several phone calls. This should be discussed with a client as a potential cost issue, or allowances made for the extra time involved in explaining or reiterating information.

2.5 Referring to psychological research, McNeal described diverse forms of memory impairment.[8] Memory may be reduced by interference (processing new information while simultaneously attempting to recall

older information) and divided attention (simultaneously engaging in two tasks). Therefore, a methodical interview process is ideal. Separate topics should be addressed separately. To adjust, older people should be alerted when there is a change in topic.

2.6 Interviews should occur at a time and place where there are minimal distractions. While there are benefits to interviewing within the person's residence, that location may present its own distractions. When a person has not attended a meeting, returned calls or replied to correspondence, follow-up is advisable. Leaving a phone message can be a barrier to someone who does not have credit or technological knowledge to access it. In these cases, a home visit may be necessary.

2.7 Photos, videos, audio recordings, documents or objects may aid recall. Also, by enhancing people's vision and hearing, their memory and cognition may benefit. Information delivered verbally and in writing (in large font) aid memory. Likewise, frequent reminders are helpful.

2.8 Excessive, detailed information may hinder memory. McNeal cites research suggesting that discussion of all potential consequences places a heavy demand on memory.[9]

2.9 While typically all of the potential consequences would be traversed, there may be benefits in focusing on only the most relevant potential outcomes. By reducing discussion of extraneous issues, distractions are reduced. For legal professionals, this involves a balancing exercise and the rationale should be documented.

3. Creating a hospitable setting

3.1 The person is more likely to be able to understand and communicate if the environment is properly prepared. In turn, this sets the stage to determine the level of the person's capacity. For example, if people are impeded by visual or hearing impairments, they are less likely to be able to fully express their understanding and fully engage. In contrast, an accommodating setting increases people's ability to participate and demonstrate capacity.

3.2 Ask before the meeting about physical accessibility requirements. Many offices are not accessible to people who use wheelchairs or walkers. Staff should examine the route from the parking lot through the office and include the toilet facilities. Address each potential barrier e.g. raised thresholds; curbs or steps; elevators; and alternative entrances. Architectural barriers should be eliminated where possible.

4. Building trust

4.1 The following strategies may engender trust and confidence between lawyers and their clients. Ideally, the person is interviewed alone, although the presence of a support person may be beneficial, for example during the introductory stage. Be sure to talk to the client, rather than with others.

4.2 Given that some people hesitate to divulge personal information, emphasise the confidentiality of the relationship and that information will not be shared without the person's consent. Encourage the person's full participation. Dignify the person by respecting his or her feelings and values. Take the necessary time to place the person at ease and expect that there may be multiple meetings to build trust.

5. Accommodating sensory impairments

5.1 People with hearing impairments find it helpful if background noise is minimised. Some may benefit if auditory amplifiers are available. People's understanding may be increased if the speaker sits close by and speaks face to face. For many, slow and very distinct speaking is better than increased volume. A lower pitch may assist.

5.2 Written summaries in simple language enable people to preview and review information. It may also be helpful to have spare hearing aid batteries available.

5.3 People with visual impairments may see better if lighting is increased and glare from windows is decreased. Large font and double line-spacing is ideal. It is helpful if documents written in simple language are sent in advance. Longer meeting times allow people to read documents and raise questions. People with a narrow field of vision have difficulty seeing people outside their direct line of vision and can be startled unless they can hear others approach. Also, clear pathways through the premises reduces risk. Likewise, accessible toilets with handrails and an alarm button are advisable.

5.4 Ask before the meeting about requirements for accessibility to written material.

6. Capacity

Introduction

6.1 Older people face a range of legal issues and many do not result in trial. Therefore, the following content focuses on best practice tips that have universal relevance in, and out, of the courtroom for many older

people. Also, other guidelines provide practical guidance that may be relevant to some older people (e.g. the Intellectual Disability Guideline). Capacity is discussed because ageing is sometimes accompanied by compromised and/or fluctuating capacity. Also, capacity has wide implications across legal settings.

6.2 Legal professionals begin from the position that older people retain the cognitive ability to function and make a range of decisions. Substantial research reports that cognitive alterations often accompany ageing. This may impact memory, decision-making and additional cognitive abilities.[10]

Best practice tips

6.3 These changes can be accommodated by speaking slowly, asking simple questions and repeating information. Understanding may be checked by asking people to explain, in their own words, their understanding of what was discussed. Slow discussion of the topic, one issue at a time, is helpful. Also, multiple but brief meetings to check and refresh the person's understanding may be advisable.

Definition of capacity

6.4 Decision-making capacity (or simply "capacity") refers to a person's ability to make decisions. Our autonomy or self-determination is underpinned by our ability to understand and reason through options, ultimately reaching a decision that we can call our own. This mental ability (or agility) may be described as the person's capacity. This is a legal concept.

6.5 Capacity is referred to in New Zealand legislation and case law.

Code of Health and Disability Services Consumers' Rights 1996

6.6 The presumption of capacity in the health context is fundamental to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (the Code). Older people are entitled to the rights contained within the Code as consumers of health or disability services.

6.7 Pursuant to Right 7 (2) Every consumer must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent.

6.8 A person is deemed to have capacity if she or he has the following:

Understanding

6.9 The person understands the nature of his or her situation and the decision to be made.

Reasoning

6.10 The person is able to describe the options, and reason through the risks and benefits of each, before coming to a decision (or electing not to make a decision). The person should be able to link the decision back to the weighing up of the available options.

Appreciation

6.11 The person appreciates the significance or relevance of the decision, both for himself or herself, and perhaps for the others that might be impacted.

Communication

6.12 The person is able to communicate all of the above, and the decision made, in verbal, written or other forms.[11]

6.13 These four factors are applied in Table 1 below for lawyers' consideration and more detailed guidance is available in the reference list.

6.14 Although the Code refers to, but does not define, competence or capacity. Nor does the Mental Health (Compulsory Assessment and Treatment) Act 1992 (MHCAT Act). However, the concept is defined in legislation for the purposes of adult guardianship and protection legislation.

Protection of Personal Property Rights Act (PPPRA) 1988 and common law definitions

6.15 People who lack capacity and are subject to the PPPRA may be regarded as having the same legal rights as others except to the extent that they are limited by the PPPRA and other law (s 4). Section 5 of the PPPRA 1988 provides:

6.16 For the purposes of this Part, every person shall be presumed, until the contrary is proved, to have the capacity—

(a) to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare; and

(b) to communicate decisions in respect of those matters.

6.17 Until proven otherwise, everyone is presumed to have the capacity to make decisions for themselves about their personal care and welfare and to express their preferences. Further detail on legal tests within the PPPRA can be found in section 11 of this guideline.

6.18 The factors that will determine whether a person has capacity under this Act are set out in *KR v MR* [2004] 2 NZLR 847, also reported in *X v Y* [Mental Health: Sterilisation] (2004) 23 FRNZ 475 (HC) and see generally Bell (2012).[12] The factors are the ability to: "communicate choice; understand relevant information; appreciate the situation and its consequences; and manipulate information".

6.19 Capacity is often seen as an exercise of intellect, due to the emphasis on understanding and reasoning. However, when determining whether a person appreciates the nature of the decision, the assessor may consider whether the decision is consistent with the person's long-standing values and world-view. This is especially relevant where the person is from another cultural background.[13] The assessor may inquire whether the person has contemplated the impact of the decision upon others.

7. Capacity and the "rationality" of the decision

7.1 On occasion, the assessor and the person may have different views on whether the decision is rational, thereby bringing the person's capacity into question. Professor Skegg[14] observed:

"The courts insist the recognition of capacity stands apart from the practitioner's or judge's view about the wisdom of the choice the patient made. Where capacity is clearly established (as it usually can be), this is beyond dispute. However, in borderline cases, the fact that the patient's decision is an understandable one (even though not the one the health practitioner or judge would necessarily make) may well increase the chance of the patient being taken to have capacity to make the decision (See, e.g. Re C (Adult Refusal of Treatment) [1994] 1WLR 290, [1994] 1 All ER 819 (Fam)."

7.2 However, Professor Skegg noted that the converse may also occur:[15]

"Despite judicial denials, decisions that appear to be wholly irrational do raise doubts about the capacity of the decision-maker (See, e.g. Hunter and New England Area Health Sussex v A [2009] NSWSC 761, (2009) 74 NSWLR 88)."

7.3 Of note, the rationality of the decisions made by a woman with mental illness was addressed in *Re SB (A patient; capacity to consent to treatment)* [2013] EWHC 1417 (COP). While the psychiatrists believed

that she lacked capacity, her "range of rational reasons" persuaded Holman J that she had capacity "to the level required to make this decision" (at [44]). The relevance of mental illness to capacity is discussed below.

8. The spectrum of capacity

8.1 Capacity may be viewed as a spectrum, rather than being neatly divided into "capacity" and "incapacity". The spectrum of capacity may be divided, for convenience, into four parts: intact capacity; mildly impaired capacity; moderate impairment (or partial capacity); and severe impairment.

Level of capacity required for the specific decision

8.2 The presence or absence of capacity can only be asserted in relation to a specific decision. Examples include making treatment decisions, drafting a will or executing a contract. A person may have adequate capacity to make one of these decisions but not others. In general, the higher the risk and more complex the decision, the more likely it is that a person with some degree of cognitive impairment will fail to demonstrate adequate capacity.

8.3 The importance of addressing the gravity of the decision was discussed by Lord Donaldson MR, who provided the leading judgment on capacity in the medical context in the English case of *Re T (Adult Refusal of Treatment)* [1993] Fam 95(CA):

"What matters is that the doctors should consider whether at that time (the patient) had the capacity which was commensurate with the gravity of the decisions which he purported to make. The more serious the decision, the greater the capacity required".

8.4 Again, the notion of a spectrum of capacity was addressed in the summary by Lord Donaldson MR at 116: "It may not be a case of capacity or no capacity. It may be a case of reduced capacity. What matters is whether at the time the patient's capacity was reduced below the level needed in the case of a refusal of that importance, for refusals can vary in importance."

8.5 This principle that people may make those decisions that are within their capacity is incorporated in New Zealand's Code and Right 7(3) provides: "Where a consumer has diminished competence, that consumer retains the right to make an informed choice and give informed consent, to the extent appropriate to his or her level of competence."

9. Mental illness and capacity

9.1 Whether a person has, or had, a mental illness is not determinative of whether the person has capacity. The criteria for compulsory care under the MHCAT act is not dependent upon capacity. People do not lose all capacity to consent merely because they have a mental illness or meet the MHCAT Act's criteria for compulsory care.[16]

9.2 Some people may experience fluctuation in capacity, due to substance use, dementing conditions, mental disorders and other conditions. Nevertheless, many will often have capacity to make a range of decisions. The impact of mental illness upon testamentary capacity is discussed in greater detail by Ammundsen.[17]

9.3 A fundamental feature of the capacity to consent is the ability to understand the proposed intervention. "*The capacity to understand need not extend beyond what is required to give a legally effective consent…A fairly basic understanding often suffices*".[18] Professor Skegg reinforced that if this threshold is set too high, people will be deprived of control over their lives.

10. Undue influence

10.1 Legal professionals should be aware of the potential for undue influence. Courts have sometimes concluded that people lacked capacity because they were "unduly influenced by the views of others or by undue concern for the burden their condition imposed on others" (Re Z (Local Authority: Duty) [2004] EWHC 2817 (Fam), [2005] 1 WLR 959 at [13] per Hedley J.

10.2 Although beyond the scope of this guideline, legal professionals should be mindful of the influences of others, whether they are present or absent. This includes other professionals, family members and carers. For example, financial decisions may be the result of coercion.[19] Substantial research is located on the Age Concern website and the matter may warrant discussion with a member of the Elder Abuse Response Service.[20]

11. How capacity features in the PPPR Act (1988)

11.1 The jurisdiction to make any order under the PPPRA is dependent upon a determination regarding whether the person has capacity. Capacity is relevant in four regards under the PPPR Act and this codifies the prior common law. The four legal tests and corresponding interventions are:

(a) "partly" lacks capacity: for making a personal order and appointing a property manager. (Generally at s 6, personal order at s 10, order for administration of property at s 11, and order for appointment of property manager ("wholly or partly") at s 25 (2)(b)).

(b) "wholly" lacks capacity: for appointing a welfare guardian at ss 6 and 12.

(c) "not wholly competent": for activating a property-related enduring power of attorney at s 94(1).

(d) "lacks the capacity": for activating a care and welfare-related enduring power of attorney at s 94(2).[21]

12. Evaluating client's understanding regarding legal elements of capacity

12.1 The key issue is whether the person has capacity for the proposed decision. This requires a direct comparison of the client's understanding with each of the elements of capacity in the relevant statute or with reference to the relevant common law.[22]

12.2 Often the issue of a person's capacity for medical decision-making is raised when a welfare guardian has been appointed or an enduring power of attorney (EPOA) has been acted upon under the PPPRA 1988. However, nothing in New Zealand's legislation provides that, merely because either of the above have occurred, the person necessarily lacks all capacity to make any medical care decisions.[23]

13. Understanding testamentary capacity

13.1 This section of the guideline provides an overview, but not definitive legal advice, regarding testamentary capacity. Although the content may be relevant to judges, it frequently refers to lawyers and clients for efficiency.

13.2 As noted above, the person does not need to be free from mental health or cognitive impairments to have testamentary capacity.

13.3 Testamentary capacity was set out in the English case of *Banks v Goodfellow* (1870) LR 5 QB 549. (Notably, the testator in this judgement was psychotic, but nonetheless, his delusional beliefs were held by the court to have not impaired his testamentary capacity). The person must understand the nature of making a will, its effects, and the extent of the person's property and possessions. Also, the person must be "free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural functions; 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". (A summary of subsequent cases that cited *Banks v Goodfellow* is listed at http://swarb.co.uk/banks-v-goodfellow-qbd-1870/.

13.4 *Swinfen v Swinfen* [1858] EngR 157 held that the person need not have the expertise of a lawyer. It is not necessary "that the person view his will with the eye of a lawyer, and comprehend its provisions in their legal form". However, it is necessary that the person has a general understanding of the factors above.

13.5 More recent New Zealand cases include *Woodward v Smith* [2009] NZCA 215; *Moleta v McFadzean* [2013] NZHC 2694, Collins J; and *Green v Green* [2015] NZHC 1216, Winkelmann J. Also, the importance of a person understanding the moral claims to the estate under New Zealand's Family Protection Act 1955 is addressed by Ammundsen (2013).[24]

When to be concerned

13.6 Impairments in capacity are most often linked with limitations in cognitive abilities such as reasoning, memory and communication. There is a relationship between a cognitive impairment and capacity. People with more profound cognitive difficulties are less likely to be able to demonstrate capacity. However, there is no magic threshold (score) on common forms of cognitive testing that separates those with capacity from those who lack it.

13.7 Red flags may alert the legal professional that the person is having trouble with cognition and consequently may have compromised capacity. First, the professional may be alerted if the person has a history of compromised capacity. Secondly, issues may be detected in the initial interactions with the client. Thirdly, issues may be observed during the interview. Also, surprising or apparently illogical decisions may be a red flag. Examples of red flags are detailed below.

Known or public history

13.8 The lawyer may be well acquainted with the client and have information that indicates that capacity may be an issue. This might include histories of learning disability, mental health problems or significant physical health issues such as stroke, dementia, vascular disease, alcohol or substance dependence, head injury or neurological disorders.[25] The lawyer may be aware of these conditions or they may become apparent through casual inquiries and informal conversation at the start of the session.

Observing the person

13.9 Even if the lawyer did not previously know the person, there may be red flags regarding the person's cognitive ability. These include obvious frailty and outward signs of ill health such as stroke or Parkinson's disease. Importantly, one must not presume that a person of advanced age lacks capacity; many people over the age of 90 retain their capacity. Nonetheless, 12% of people in their early 80s have dementia, rising to around 20% between ages 85 and 90.[26]

Difficulties experienced in the interview with the person

13.10 Another red flag is when the lawyer has difficulty getting to grips with the person's decision. The person may be slightly bewildered regarding the purpose of the meeting, struggle to communicate clear instructions, be unable to provide details from memory, and not recall information that was recently imparted. At the end of the meeting, the lawyer may be confused about exactly what matters require legal attention.

Surprising or seemingly irrational instructions

13.11 The lawyer may be surprised by the client's instructions and not persuaded by the client's explanations. Also, the lawyer may be aware that the instructions are at odds with the lawyer's knowledge about the person's values or previously held wishes. A disjunction between the decision and the justifications for the decision may emerge, indicating that the client is unable to reason through the options or risks. Alternatively, this may indicate that there is undue influence. However, as noted above, surprising decisions by a client do not necessarily indicate that the person lacks capacity, but it may prompt the lawyer to assess the person's capacity.

13.12 When one or more of these red flags are present, or there has been difficulty in understanding the person's instructions, it is for the lawyer to undertake, and document, a capacity assessment. Where there is uncertainty or dispute regarding the results, the person should be advised to also obtain a medical capacity assessment from a qualified, specialist health professional.

14. Assessment of Capacity

Assessment by a lawyer

14.1 In some respects, lawyers are well placed to undertake preliminary assessments. Many lawyers have had previous contact with their clients and therefore are able to check the accuracy of the person's recall.

Examples include details of the person's estate and the relationships within the family. While obtaining instructions, the lawyer will have asked many questions about the client's situation and wishes (and will therefore have already started a capacity assessment). Lastly, it is relatively quick and easy to do a capacity assessment, once assessors understand the process.

Referral for a formal medical capacity assessment

14.2 When the lawyer is uncertain about the client's capacity, referral to a medical practitioner is advisable. Often, this is a wise decision when the person has a complex medical history. Also, it is recommended where there is some risk or surprise in the person's decision-making that indicates deteriorating capacity.[27]

14.3 When making such a referral, it is important to recognise that many health practitioners are not confident about, or experienced in, conducting capacity assessments, particularly with reference to legal decisions. It is important to determine which practitioners can provide a useful opinion; often geriatric, psychiatric or neurology specialists have this expertise. Also, some clinical psychologists may undertake such assessments. While referral to the person's general practitioner may be useful in some circumstances, referral to a specialist is usually advisable.[28] Preliminary contact with the specialist will determine whether the clinician has the requisite experience.

14.4 When such a referral is made, the lawyer should specify what the legal issues are and the threshold of capacity that is required for that decision. It is beneficial for the lawyer to relay background information and specify the legal test that is relevant. Clear communication and collaboration between the lawyer and clinician is essential when the person's capacity is difficult to assess or may be contested.[29]

15. How do medical and legal capacity assessments differ?

15.1 A *medical* capacity assessment is broadly similar to a legal capacity assessment. Both involve interrogating the person about the specific decision that needs to be made. (However, the lawyer will have a greater understanding of the relevant legal thresholds and may have greater knowledge of the person's financial or legal situation). However, both types of assessments involve an interview with a series of questions that explore the person's wishes, values, reasoning and appreciation.

15.2 The *medical* capacity assessment differs because the health practitioner may inquire about the medical histories, medications and overall level of functioning. Practitioners may also order investigations

such as blood tests or a CT scan. Also, people may more willingly consent to a clinician's request to contact family members, in contrast to a lawyer's request. Lastly, the medical practitioner will be able to formally assess the person's cognition using standardised cognitive tests. This may involve, for example, a Mini-Mental State Examination, a Montreal Cognitive Assessment or a Addenbrookes Cognitive Examination (3rd version).

15.3 The background medical history and performance on cognitive tests are not definitive evidence of the capacity level. Capacity is determined by examining the person's understanding, reasoning and communication vis-a-vis the specific decision. However, the background medical information is instructive in making the assessment.

16. Assessment of capacity – a summary

16.1 There are two parts to a capacity assessment: the process of assessing capacity and the determination of whether the person meets the relevant criteria for legal capacity.

16.2 Often legal professionals are uncertain about what the process of assessment looks like. But capacity is not difficult to assess with a cooperative person. At its simplest, a capacity assessment is a conversation with the person to see whether she or he can explain the situation and the decision-making. The assessment takes the form of a *careful and robust* taking of instructions from a client. Therefore, the interview is merely an extension of the conversation that ordinarily would take place. Ideally, the lawyer should proceed as if she had never met the person before. For example, the lawyer takes instructions about the will "from the beginning", as if she does not know about the person's estate or family relationships.

16.3 Clients' instructions need to be examined for inconsistencies, loose ends, inaccuracies and radical departures from previous wishes. The lawyer may need to press for more information, greater accuracy, and better explanations. Sometimes clients may find this process confronting or challenging. But unless the lawyer probes, it may be difficult to understand and document the person's reasoning, for example when there is a substantial change in a will. Also, the lawyer must determine whether the person understands the law and has incorporated that understanding into her or his reasoning. Ideally, lawyers ask clients to recall the information and, if there are inaccuracies, remedy the errors and repeat the process.

16.4 This assessment conversation should investigate and document the four components of capacity: understanding; reasoning; appreciation; and communication.

16.5 More problematic issues arise when the person is not cooperative, where the assessor cannot check the accuracy of information, and where the person has fluctuating capacity. As noted, clients' communication difficulties may require more time, including multiple shorter meetings.

17. Assessment of capacity – the stages

Before the assessment

17.1 Prior to the assessment, it is helpful to gather information so that the person's statements can be checked against what is known about the "true facts" e.g. the person's property and investments. This may be done by reviewing the legal file, by contacting (with consent) family members or even other professionals. Sometimes this fact-checking occurs after the assessment. It is also vital that the assessor checks the legal tests required for the specific decision, for example the common law and relevant sections of the PPPRA 1988 and Family Protection Act 1955.

17.2 Before the assessment, it is advisable to inquire whether the person has communication difficulties such as hearing, visual or speech impairments. Interpreters may be necessary for people who use English as a second language, even if their communication is understandable. To help express themselves or for moral support, some people benefit from the presence of others. Therefore, the assessor should inquire whether the person wishes to have support from a family member or friend. If so, monitoring of the interaction may safeguard against undue influence.

The capacity assessment itself

17.3 The assessor puts the person at ease by explaining what is happening and why it is happening. If a support person is requested, the assessment might be delayed. The process of assessment may take 20 to 30 minutes if there are no communication barriers. With consent, the interview may be audio recorded and transcribed.

17.4 The assessment interview itself takes the form of the careful and robust taking of instructions, as described above. The interview may proceed from genial to more probing. Often it is wise to start with relevant background facts, such as the composition of the family and the person's occupation. The person should be asked what legal issue has arisen.

17.5 Often, the person needs to be prompted with information that he or she does not know. For example, the person may not understand or appreciate the implications of the Family Protection Act 1955 in making a new will. When new information is imparted, it is useful to ask the person to repeat back the information in his or her own words, to check that the

information has been understood and retained. Also, it is helpful if the assessor summarises information at intervals to confirm the person's understanding. This may be supplemented with written information. Towards the end of the interview, it is often necessary to gently probe to ascertain whether the person has truly appreciated the alternatives and risks.

17.6 In the interview, it may be useful for the assessor to have a set of semi-structured questions to cover the relevant factors. The table below contains typical questions for a testamentary capacity assessment. These should be viewed as "starter questions" to prompt further questions.[30]

Table 1.

Area of Inquiry	Typical Questions
1. Understanding	• What is the purpose of a will? • When would your will have effect? • Do you currently have a will? • Why do you want to change the will? • What are your goals in making a new will? • Do you have any other property, rentals, investments, shares, etc? • Who are your family members? • Do you want to leave anything to others, e.g. friends or charities? • Who might be expecting to receive an inheritance from you? • What do you know about the Family Protection Act 1955? (Provide an explanation when appropriate). • Could you please repeat back to me that explanation of the Act?
2. Reasoning and Deciding	• How do you want to divide the inheritance? • Is there anyone else that should be included? • Your previous will left something to X. Do you still want to do that? • Could you explain why you are leaving less / nothing to Y? • Is he or she expecting that from your will?

	• Why is Z getting more than the others? • Why did you make that choice? • Given what I have told you about the law, do you think that there is a risk that this might end up in court? • How could this be avoided?
3. Appreciation (foresee the consequences)	• Why do you want Y to be excluded? • Can I check with you why that was so upsetting for you? • Why is it important to do this now? • How would this new will be better or fairer than the last one? • How will Y react to this new will? • What about the rest of the family? • Do you anticipate any trouble because of this will? • Are you concerned about any future challenge to the will?
4. Communication: Communicating a choice	• We have talked through several issues around this new will. • What have you decided about your will? If there are difficulties with the person communicating, then this will be evident from the entire process. The lawyer needs to ask about assistance, aids, interpreters, and supports. Other means of communication, such as in a simple written form, may be required. This is an effort to enhance the person's communication.

17.7 Several meetings may be required if: the person felt uncomfortable; the assessment was difficult or incomplete; and/or relevant information was not available. Also, a second appointment may ascertain whether the person's decisions are consistent. If there is a reasonable suspicion of undue influence, it may be prudent to interview the person alone later.

17.8 If the lawyer does not know the client well, it may be necessary to obtain information from others. Usually the lawyer obtains consent by explaining that accurate information is needed. This may secure the relevant information and indicate the status of those relationships.

Making a judgement about the person's capacity

17.9 Following the assessment interview, it is necessary to make a judgment regarding whether the person has the requisite capacity. This process is described with reference to the spectrum of capacity below.

Normal or mildly impaired capacity

17.10 For people in this range, the assessment interview usually progresses relatively smoothly. People are able to supply relatively accurate information, explain their wishes and defend their decisions. It is apparent to the lawyer that they incorporate new information into their reasoning. People may need to be prompted for information or asked to better explain themselves, but they respond without difficulty. Therefore this typically takes as long as the normal process of taking instructions. The lawyer may be relatively confident that the person has capacity.

Severely impaired capacity

17.11 At the other end of the spectrum, the person has very significant impairments. Again, lawyers probably have little difficulty determining this because of the severity. The assessment interview can be a frustrating exercise because people are uncertain about their legal situations, unable to explain their reasoning, and do not comprehend the implications or complications of their decisions. If offered new information or options, they struggle to integrate it.

17.12 Alternatively, lawyers may observe that people are too biddable, and that the decisions are not genuinely their own. Also, within a short interval, people may have forgotten either the conversation or new information. Lawyers may confidently determine that the person lacks capacity and explain this to clients and, with consent, their family members. Often lawyers will not need a medical opinion. However, disputes within the family or resistance from the person may make another opinion desirable.

Moderately impaired capacity

17.13 The middle range is complex. The assessment interview may take longer to complete because, while the person has some understanding of the situation, the lawyer perceives that the interview did not go smoothly. The person may have made too many errors in his or her understanding

of the situation or struggled to incorporate new information. Similarly, the client may exhibit noticeably concrete thinking or offer superficial explanations. Also, the person may be avoidant, explaining why he or she cannot remember relevant information, or defer to another person to explain. These deficiencies are especially worrying where: people are proposing significant changes to their previous instructions, where there is a high risk of legal challenge or their circumstances are complex.

17.14 In these situations, often lawyers will request a medical capacity assessment. Alternatively, referral to an additional, experienced lawyer for an assessment may suffice.

Documentation

17.15 It is vital that lawyers carefully document the process and results of the capacity assessment in the event it is submitted as evidence. Frequently, this type of detail is not evident in file notes that are submitted to court. (A very useful Capacity Worksheet for Lawyers was produced by the American Bar Association is available page 23 of http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.) Also, a guide for assessing capacity by health practitioners in New Zealand is available from Douglass, Young and McMillan (2016).[31]

Expectations of lawyers

17.16 Lawyers should be able to conduct a reasonable capacity assessment to identify those clients who clearly have capacity and those who have only a mild impairment that does not impact upon the legal decision. Also, lawyers should be equipped to identify those with severely compromised capacity that interferes with the person's decision-making. If lawyers detect a moderate impairment that interferes with the relevant decision-making, a referral for a medical capacity assessment by a medical practitioner is warranted.

Referral for a capacity assessment

17.17 Raising the issue of capacity with a client is a delicate matter. One suggestion is to open the discussion in this fashion:

(a) My job as a lawyer is to do everything possible to ensure that your action cannot be successfully challenged now or later. Your will may be legally challenged in the future on the grounds of legal incapacity. The likelihood of a challenge is higher when family members (or other interested persons) are left out of a will or given a significantly lesser benefit than that which they expected. A key preventive step is to have a capacity assessment as close as possible to the time the legal transaction is completed.[32]

(b) Before proceeding, it is advisable to disclose that the cost will be borne by the person.

Process of requesting a capacity assessment from a medical practitioner

17.18 The lawyer should communicate with the practitioner orally and in writing to clarify the purpose and specifics of the assessment.

(a) Schedule the medical capacity assessment close to the time that the will be made

(b) In the letter to the practitioner, detail the relevant legal test (e.g. the relevant legal criteria for testamentary capacity)

(c) Request a clear, detailed report regarding whether the person has the requisite capacity for that decision, based on those specific criteria

(d) Ask the practitioner to record the person's words verbatim

(e) Request that the practitioner ask the person about previous wills and why potential beneficiaries were included or excluded

(f) If in doubt, request a second medical opinion.[33]

A checklist of lawyer referral letter elements is available at http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf

Techniques lawyers can use to enhance client capacity

17.19 The following guidance was summarised from the American Bar Association Commission on Law and Aging & American Psychological Association (2005) Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers. Attention to these factors may increase the clients' abilities to effectively demonstrate capacity.[34]

18. Conclusions

Best practice requires continuing attention to the client's capacity

18.1 Vigilance to determine capacity and to recognise when it may not be there is essential both in the service of clients as well as in the maintenance and protection of professional reputations. The prudent professional should have systems in place to assess such matters.[35]

18.2 Lawyers need to be alert to the possibility that their clients may lack capacity for the decision being made. This will be an ever-increasing issue as the population ages. Lawyers should be able to undertake an

assessment of the person's capacity levels and know how to respond best to the findings. Lastly, ideally lawyers are flexible in their interaction with their clients, adjusting their style to accommodate their clients' needs and supporting clients to exercise their autonomy.

19. Acknowledgements

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