

ESTATE AND TAX PLANNING COUNCIL PRESENTATION

6 September 2017 - Andrew Steele and Catherine Atchison – Martelli McKegg

Notes from managing incapacity and diminished responsibility

Andrew discussed the increasing incidence of capacity issues arising with an aging population. The recent high profile case of *Green vs Green* is an example. A precautionary approach should be adopted by professionals to manage the risk that clients may not understand advice. Legal tests of capacity vary according to the type of transaction for which instructions are being given. For example, the tests for making a will (proscribed in *Banks vs Goodfellow*) are different to those that apply to engaging in litigation.

If capacity is challenged during the probate process the burden of proof falls on the person challenging. But once evidence has been raised that there are questions of capacity the burden passes back to the people propounding the will. The 'golden rule' to apply is that the professional is not the expert to determine capacity. So if there is some uncertainty it is best to arrange for the will to be evidenced by a medical practitioner. That practitioner should preserve their examination notes.

A lawyer should presume they can act on instructions and comply with them. The lawyer cannot pre-determine capacity but should strongly recommend involving a medical practitioner if there are concerns. One typical warning sign is dealing with a client who cannot see their lawyer on their own. Professionals have to be self-starters in identifying issues and instigating medical consultation.

Catherine illustrated situations where different capacity tests are relevant: a decision to marry at 16; executing a will; or buying a business at 24. And there are different capacity limitations such as: dementia; injury; alcohol impairment; or victim of accident. About 12% of people over 80 (and 20% of people over 90) suffer from dementia of varying severity.

In referring to a medical practitioner or geriatrician it is important to be clear what the intended application of capacity is. A good checklist is available from

https://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html

Professionals who have acted for a client for many years are better placed to observe concerns. They may notice: memory loss; communication problems; inflexibility; difficulty with simple calculations they did not have before

9a common test being to ask someone to count backwards from 100 minus 7); mood and social withdrawal; being in hospital when issuing instructions; a change of lawyer after many years; limited ability to interact; questioning advice or difficulty in repeating it.

Situations can arise where a person partly lacks capacity. For example, they may be able to manage a bank account but not an investment portfolio. There is a high threshold for invoking an enduring power of attorney for personal care and welfare. Government policy encourages keeping people in their homes but the assumptions around their welfare are not always valid. It is important to observe whether the person can make decisions; whether they do so consistently; and any evidence of abuse. The holder of an EPA should be an advocate for the represented person in the time before the power is invoked. For example, Catherine said she knew of circumstances where some doctors had admitted elderly people to hospital to get them away from abusive families.

There are significant demands on the holders of powers of attorney for property. They must keep accounts and consult with advisers. Banks prefer to deal with joint holders of such a power. Where that is the case the deed of appointment needs to be clear on where the power has to be exercised jointly. Lawyers should question the decisions of attorneys.

These are general comments in an area of potential difficulty. Specialist advice should be obtained in each case.

ISSUES AROUND MENTAL INCAPACITY AND DIMINISHED RESPONSIBILITY

Over the last 150 years there has been a material increase in the proportion of elderly in the population of all developed countries including New Zealand.

Factors driving this include:

- smaller average family size
- decreasing mortality through early and midlife
- an increase in life expectancy of the people who reach later life.

Current projections are that over the next 50 years the population pyramid will have become a population oblong – see **attached** graphs. This means professionals advisors can expect to have a longer life than our seniors' and through our practicing life we will be dealing with a higher percentage of elderly clients than our predecessors have had to.

Consequently, capacity issues will loom large. Can you recognise and do you understand:

- Delirium - an acute confusional state i.e. muddled and confused.
- Impaired cognition - the process of thinking i.e. include memory, understanding and using language, being able to make sense of the sensory world, conceptual thinking and complex decision making.
- Dementia - is a clinically defined syndrome which can be can be static or progressive. where, in the absence of delirium or of other reversible cognitive impairment, a person's permanent impairment in memory, and in at least one other cognitive domain.
- Alzheimers - the commonest of the brain illnesses leading to dementia. It is not "normal ageing". Before the age of sixty it is often a rapidly progressive illness with early impairment in a variety of cognitive functions alongside memory problems.

You may well have to!

Capacity

This paper is about the capacity of clients (often but not always elderly) to instruct their professional perhaps to prepare a Will, an EPOA and/or to make changes to Family Trusts or take other significant steps in their affairs.

In 2009, the Court of Appeal:

... this case brings out the uncertainty, delay, cost and distress caused by failure of professional advisors to educate themselves in the basic precautions required to achieve the result sought by the patient or client - to adopt a test supported by expert experience which will withstand future investigation. Failure in future to adopt such practices may give rise to claims by those who have suffered as a result.

The comment there was directed at lawyers, but as easily includes other professionals.

These are some of the juristic acts for which a person must have a particular degree of mental capacity:

- Engaging in litigation.
- Making a Will.
- Cancelling powers of attorney.

- Granting powers of attorney.
- Applying to divide relationship property.
- Initiating proceedings to dissolve a marriage.
- Entering into a marriage.
- Making a gift.

The degree of mental capacity that is required for each of these actions is different and the degree of mental capacity that may be required for each one of them may differ, depending upon the complexity of the action that is required. I select some for comment below.

1. Testamentary capacity

The classic statement of the elements of testamentary capacity is contained in the judgement of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549.

In order to establish capacity, when in issue, those seeking probate must demonstrate the maker of the will had sufficient understanding of three things:

- a. that he or she was making a will and the effect of doing so; ("the nature of the act and its effects")
- b. the extent of the property being disposed of;
- c. the moral claims to which he or she ought to give effect when making the testamentary dispositions.

The issue of capacity in relation to wills is fought out in probate proceedings.

Burden of proof - those propounding the will do not have to establish that the maker of the will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity.

If there is evidence which raises lack of capacity as a tenable issue however, then the onus of satisfying the Court that the maker of the will did have testamentary capacity rests on those who seek probate of the will.

Whether the onus has been discharged will depend amongst other things, upon the strength of the evidence suggesting lack of capacity.

The Court recently noted:

If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the Court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution.

The law provides the test for capacity, but Medicine usually provides the evidence. The Doctor is the expert. Our task as professionals is not to attempt to assess the client's capacity but to refer them to a medical practitioner for the assessment where there is an issue of capacity raised.

One Judge put it as follows:

In the case of an aged testator or a testator who has suffered a serious illness there is one Golden Rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest the cautions be taken: [the rule is that] the making of a Will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.

2. Protection of Personal and Property Rights Act 1988 - capacity

For orders

Under s.5 of the Act, people are 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.

And s.24 states that people shall be presumed, until the contrary is proved, to be competent to manage their own affairs in relation to their property.

These presumptions must be rebutted, before the Court will act to appoint welfare or property managers for a person.

For EPOAs

A different test applies to EPOAs. S.93B provides that every person is presumed, until the contrary is shown,—

- (a) to be competent to manage his or her own affairs in relation to his or her property:
- (b) to have the capacity—
 - (i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and
 - (ii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and
 - (iii) to communicate decisions about those matters.

(In red – a difference without substance?!)

A person must not be presumed to lack the competence just because

- + they manage their affairs in relation to their property; or
- + make a decision in relation to their personal care and welfare;

that a person exercising ordinary prudence would not do / make

Sometimes the subject person say they are managing perfectly well and are adamant they do not need help and certainly do not go into care and that their wishes had to be honoured. This will be propounded by their lawyer.

Sometimes, the medical professional say in regard to such persons:

He lacks the capacity to understand the nature and foresee the consequences of decisions because his ability to know what has been happening recently and what risks his current behaviour poses is so impaired that he does not have a realistic enough understanding of his actual situation to form the basis on any competent decision making.

And

He is still able to communicate his decisions, however they are based on such a flawed understanding of his situation that they can in no way be relied upon.

3. Contractual capacity

In short, capacity in this context revolves around whether or not the subject person had sufficient mental capacity to understand the transactions when entering into them.

Hence a person may not have the capacity to rebut the presumption in the Protection of Personal and Property Rights Act, yet have enough general capacity to grant and revoke the EPOA.

The understanding is to the general nature, as opposed to the details, of the transaction. At once can see that the understanding required for, say, a simple contract to buy an item may be less than that required to buy a business with the aid of mortgage finance and guarantees.

Before such a contract may be set aside however, it must also be established that the other contracting part knew the subject person did not have mental capacity. Knowledge is not required where the contract is objectively unfair to the subject person (mere contractual imbalance will not suffice).

Conclusion

To sum up (and recommendations):

- Population trends mean that professionals like us will increasingly face mental capacity issues.
- The client will not come to us because the face these issues, but we will have to address them nevertheless. If we don't we could well become embroiled in costly/lengthy litigation and worse – criticism of our role in the matter.
- We aren't plumbers, but generally know when to call one in. We aren't doctors, but with care ought to be able to determine when one may be required as part of the advice we must give or to ensure that advice withstands challenge down-the-line.
- Be 'on guard' with older clients (post-65) or those facing serious illness or death. And those with tell-tale signs (possible delirium or impaired cognition) – see **attached** Capacity Worksheet for Lawyers – a guide not a template!. Perhaps, new clients brought to you by children or caregivers with instructions regarding trusts and wills.

- Capacity is a sliding scale which depends on the circumstances and the particular transactions that the client wishes to embark on. Be ready to research the differences and be guided by the law as to how to proceed.
- Remember the 'golden rule' - however straightforward matters may appear, and however difficult or tactless it may be to suggest that cautions be taken: the making of a will or the entering of a significant transaction in circumstances where you have 'mental capacity' concerns ought to be witnessed or approved by a suitably qualified medical practitioner who satisfies themselves of the capacity and understanding of the client, and records and preserves their examination and finding.

Martelli McKegg

Andrew Steele

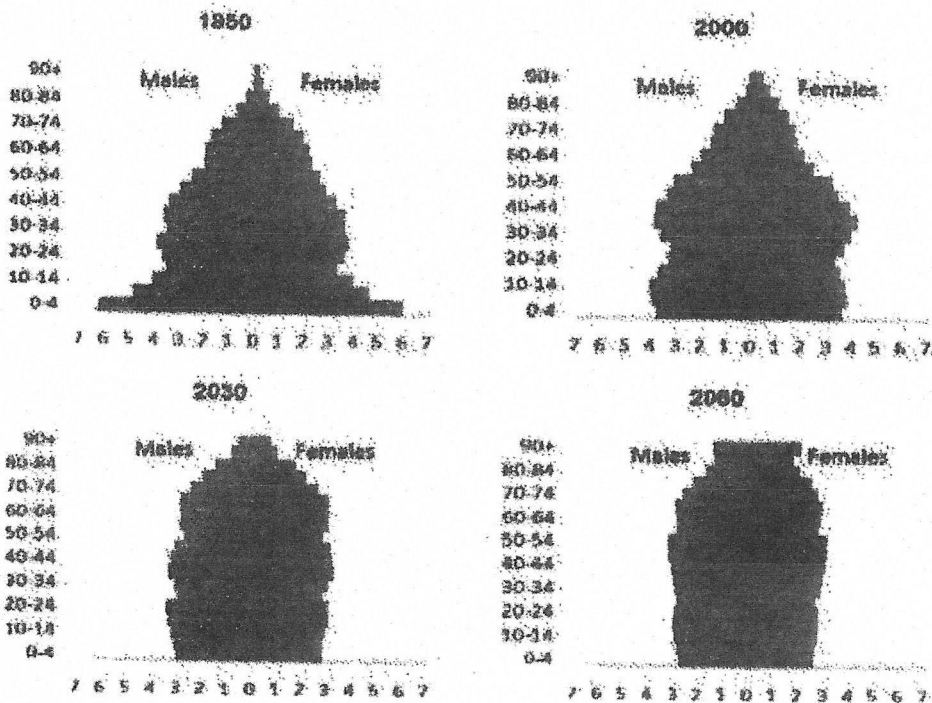
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**The changing shape of New Zealand's population
(% of the total). Statistics New Zealand 2010.**



APPENDIX 3: CAPACITY WORKSHEET FOR LAWYERS

Capacity Worksheet for Lawyers

Source: *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, by the ABA Commission on Law and Aging and the 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	Repeats questions frequently Forgets what is discussed within 15-30 min. Cannot remember events of past few days
Language/Communication Problems	Difficulty finding words frequently Vague language Trouble staying on topic Disorganized Bizarre statements or reasoning
Comprehension Problems	Difficulty repeating simple concepts Repeated questioning
Lack of Mental Flexibility	Difficulty comparing alternatives Difficulty adjusting to changes
Calculation/Financial Management Problems	Addition or subtraction that previously would have been easy for the client Bill paying difficulty
Disorientation	Trouble navigating office Gets lost coming to office Confused about day/time/year/season
◆ Emotional Functioning	Examples
Emotional Distress	Anxious Tearful/distressed Excited/pressured/manic
Emotional Lability	Moves quickly between laughter and tears Feelings inconsistent with topic

Capacity Worksheet for Lawyers

◆ Behavioral Functioning	Examples
Delusions	Feels others out "to get" him/her, spying or organized against him/her Fearful, feels unsafe
Hallucinations	Appears to hear or talk to things not there Appears to see things not there Misperceives things
Poor Grooming/Hygiene	Unusually unclean/unkempt in appearance Inappropriately dressed
Other Observations/Notes of Functional Behavior	
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	Ask about recent events, losses Allow some time Refer to a mental health professional
Medical Factors	Ask about nutrition, medications, hydration Refer to a physician
Time of Day Variability	Ask if certain times of the day are best Try mid-morning appointment
Hearing and Vision Loss	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	Be aware of race and ethnicity, education, long-held values and traditions

Capacity

Assessment of capacity

Capacity is not difficult to assess with a cooperative person. It can be viewed as a conversation with a person to see whether he or she can explain and understand a situation and the decision-making surrounding it. It is in effect a robust taking of instructions from a client, the capacity assessment being an extension of the conversation that ordinarily would take place.

Capacity can be viewed as a spectrum, rather than being neatly divided into "capacity" and "incapacity".

As advisers it is useful when taking instructions to assess separately the four components of capacity:

- Understanding (e.g. what are your assets? Do you have a will? Who are your beneficiaries?);
- Reasoning (e.g. why is your daughter being excluded from the will? Do you think she will bring a claim?);
- Appreciation (e.g. if you appoint your son as property attorney will the family object?); and
- Communication (e.g. we have explained how an E.P.A operates, based on this, who would you appoint welfare attorney?).

Where it can become difficult is when the client will not or cannot cooperate, and where it becomes problematic as to whether the correct information is being provided. There may be numerous reasons why a client may be unable to communicate effectively, and it may be a permanent or semi-permanent state.

Indicators of mental impairment

An advisor should be alert to the following symptoms:

- A restricted vocabulary
- A short attention span
- Difficulty understanding questions
- Inappropriate answers
- Memory problems

Level of capacity required for the specific decision

The presence or absence of capacity can only be asserted in relation to a particular decision to be made. A person may have capacity to make one decision (e.g. give instructions for their will) but not other decisions (e.g. revoke a power of appointment). In general, the higher the risk and more complex a decision, the more likely it is that a person with some degree of cognitive impairment will fail to demonstrate adequate capacity.

Many people may experience fluctuation in capacity, due to mental disorders, alcohol or drug abuse, dementia, mini-strokes and other conditions, such as the time of day. Generally however, most people who have some form of capacity and very few will be assessed as being mentally incompetent or incapable.

Capacity features in the PPPRA

Under the PPPRA the jurisdiction to make an order is dependent upon a determination regarding whether the person has capacity. There are four legal tests and corresponding interventions.

- **"partly" lacks capacity** (for making a personal order and appointing a property manager - s 6, personal order, s 10, order for administration of property s 11, order for appointment of property manager).
- **"wholly" lacks capacity** (for appointing a welfare guardian. Subsections 6 and 12)
- **"not wholly competent"** (for activating EPA for property. Section 94(1))
- **"lacks the capacity"** (for activating EPA for personal care and welfare related Section 94(2))

Known or public history

Where a person has been a client for a number of years, there may well be information in the record that might suggest that he or she is at risk for capacity issues. This might include histories of learning disability, mental health problems or significant physical health issues such as stroke, dementia, alcohol or substance problems, head injury or neurological disorders.

Observing your client

There may be red flags regarding the person's cognitive ability. These include obvious frailty and outward signs of physical health problems such as stroke or Parkinson's disease. Do not presume that a person of advanced age lacks capacity as many

people over the age of 90 retain their capacity. Statistically, 12% of people in their early 80s have dementia, rising to around 20% between ages 85 and 90 (Alzheimers New Zealand: 2017, 24).

Difficulties experienced when interviewing

There may be difficulty in obtaining instructions. A client may appear to be slightly bewildered regarding the purpose of the meeting, may struggle to communicate clear instructions and may not be able to provide details from memory. They may not appear to recall the explanations just provided and ask for it to be repeated.

Surprising irrational instructions

The instructions given or the explanations provided by your client may not be convincing. The instructions may be at odds with your knowledge of the person's values or previously held wishes. A disjunction between the decision and the justifications for the decision may become apparent. This may indicate that the person is not able to reason through the options or risks, or it may indicate that there is some other undue influence. Surprising decisions do not necessarily mean that a person lacks capacity, but it may prompt an assessment of the instructions given.

Signs to look for if capacity is questionable

There are some general warning signs which will alert you to the need for care and the possibility of further investigation. These are not exhaustive and they are not grounds for definite diagnosis but they may assist you in deciding whether there is likely to be a capacity issue, duress or "benign" influence affecting the donor. The American Bar-Association Commission on Law and Aging and the American Physiological Association *Assessment of Older Adults with Diminished Capacity: a Handbook for Lawyers* Washington, 2005¹ has set out a number of factors to consider. These include:

A client demonstrates difficulty with recall or has memory loss;

- A client has ongoing difficulty with communication;
- A client demonstrates a lack of mental flexibility;
- A client has problems with simple calculations which they did not have previously;

¹ The American Bar-Association Commission on Law and Aging and the American Physiological Association *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* Washington, 2005 <http://www.apa.org/pi/aging/resources/guides/diminished-capacity..pdf> at 3.

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- A client is disorientated;
 - There is a sense there is something about the client which 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 lawyers or advisors several times over a short period, particularly if there has been a change from the lawyer who has advised the client for many years;
 - A client is accompanied by many other friends, family or caregivers at the interview with the lawyer or advisor but is not given the chance to speak for themselves;
 - A client shows a limited ability to interact with a lawyer or advisor; and
 - A client shows a limited ability to repeat advice to the lawyer or advisor and ask key questions about the issues.

When one or more of these red flags are present, or there has been difficulty in understanding the person's instructions, it is advisable to consider whether the person does have capacity to proceed with the matter. The options are either for the lawyer to conduct a capacity assessment or to make a referral for a second (usually medical) assessment.

An advantage of a capacity assessment by a lawyer or long term advisor is that, where there has been previous contact with the person, they may well be 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, one can ask the person many questions about his or her situation and wishes (therefore assessing their capacity).

Referring to medical professionals

Referral to a medical practitioner is advisable when the advisor is uncertain of the person's capacity, and essential when the person has a complex medical history, or there is evidence of dementia was not apparent at previous meetings, or there is some risk or surprise in the person's decision-making, that indicates deteriorating capacity.

It is important to recognise that many practitioners are not confident with conducting capacity assessments, especially about a legal-related decision. Find out which practitioners are able to provide a useful opinion, and this is most often geriatric, psychiatric or neurology specialists. Although, the clients general practitioner may be able to do the assessment if a condition is mild.

If a referral is made by a lawyer to a medical practitioner, the lawyer should specify what the legal issue and threshold are for that decision. It is useful to include some background information as well to clarify what type of capacity you want tested – is it capacity to execute E.P.A's, wills, or to manage and understand their affairs.

Your client may refuse to be assessed or be uncooperative when being assessed, so more than one meeting may be required. 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 at a later time.

Documentation

It is vital that lawyers and advisors carefully document the capacity assessment so that the process and content is apparent if assessment is later received in court. This demonstrates how the lawyer made the determination regarding capacity

Process of requesting a capacity assessment from a medical practitioner

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

- Schedule the medical capacity assessment close to the time that the will or E.P.A will be made.
- In the letter to the practitioner, detail the legal test that is at issue (e.g. the relevant legal criteria for testamentary capacity regarding E.P.A's or assessment to invoke an E.P.A).
- Request a clear, detailed report regarding whether the person has the requisite capacity for that decision, based on those specific criteria.
- Ask the practitioner to record the person's words verbatim.
- Request that the practitioner ask the person about previous wills and why potential beneficiaries were included or excluded, and about previous E.P.A's.
- If in doubt, you may request a second medical opinion (Medical Protection, n.d.).

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

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Educational/Cultural/Ethnic Barriers	Be aware of race and ethnicity, education, long-held values and traditions
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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/Appreciation/Functioning Under Elements
<p>Testamentary Capacity - Ability to appreciate the following elements in relation to each other:</p> <ol style="list-style-type: none"> 1. Understand the nature of the act of making a will. 2. Has general understanding of the nature 	
<p>Contractual Capacity</p> <p>The ability to understand the nature and effect of the particular agreement and the business being transacted.</p>	
<p>Donative Capacity</p> <p>An intelligent perception and understanding of the dispositions made of property and the persons and objects one desires shall be the recipients of one's bounty.</p>	
<p>Other Legal Tasks Being Evaluated & Capacity Elements:</p>	



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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...
Is decision consistent with client's known long-term values or commitments?	Can client articulate reasoning leading to this decision?
Is the decision objectively fair? Will anyone be hurt by the decision?	Is client's decision consistent over time? Are primary values client articulates consistent over time?
Is the decision irreversible?	

D. PRELIMINARY CONCLUSIONS ABOUT CLIENT CAPACITY - After evaluating A, B, and C above:

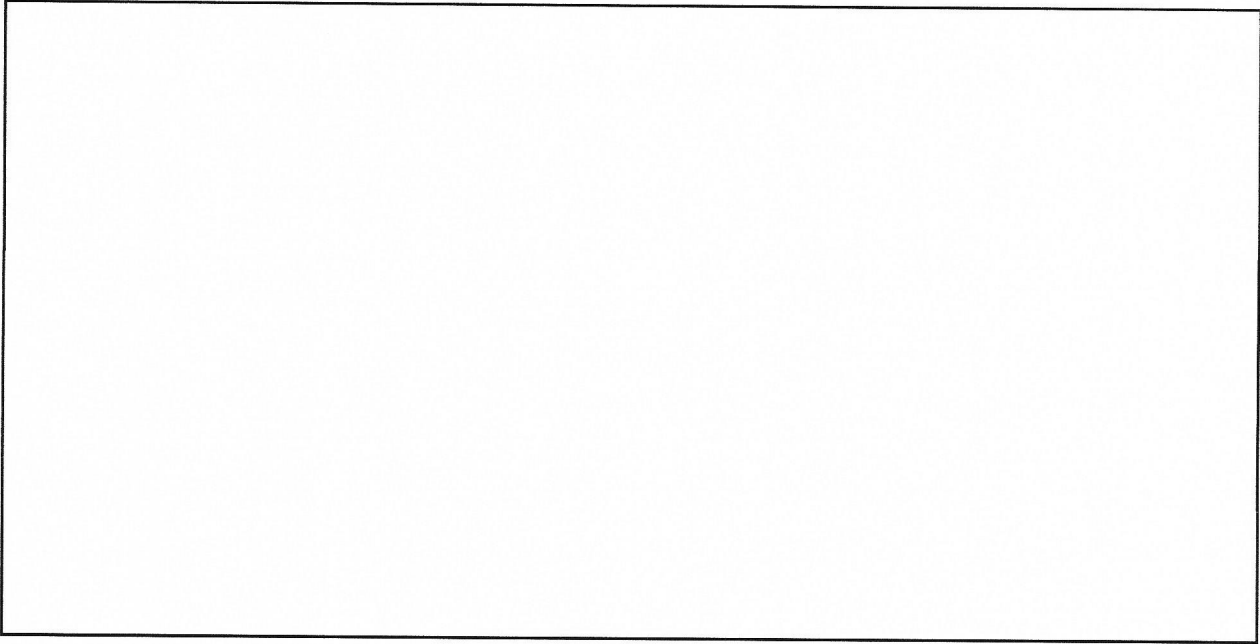
<input type="checkbox"/> Intact - No or very minimal evidence of diminished capacity	Action: Proceed with representation and transaction
<input type="checkbox"/> Mild problems - Some evidence of diminished capacity	Action: Proceed with representation/transaction, or Consider medical referral if medical oversight lacking, or Consider consultation with mental health professional, or Consider referral for formal clinical assessment to substantiate conclusion, with client consent
<input type="checkbox"/> More than mild problems - Substantial evidence of diminished capacity	Action: Proceed with representation/transaction with great caution, or Medical referral if medical oversight lacking, or

<input type="checkbox"/> <u>Severe problems</u> - Client lacks capacity to proceed with representation and transaction	Action: Referral to mental health professional to confirm conclusion Do not proceed with case; or withdraw, after careful consideration of how to protect client's interests
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CASE NOTES: Summarize key observations, application of relevant legal criteria for capacity, conclusions, and actions to be taken:

A large, empty rectangular box with a thin black border, intended for the user to write case notes. It occupies the central portion of the page below the introductory text.

Issues to consider when acting as an attorney

These steps are only guidelines, as an attorney must use his or her judgement at the time they take over the position of attorney.

How does the attorney work out what the “best interests” of the donor are?

Some ideas include:

- Trying to identify the things the donor would have taken into account if they had made the decision themselves.
- Try to find out the donor's views from, say, their past and present wishes and feelings, which might be expressed verbally, in writing or through their behaviour or habits. What are their beliefs or values (including religious, cultural, moral or political).
- Avoiding transference of your own assumptions or prejudices if taking into account the donor's age, appearance (including skin colour, dress, visible medical problems etc.), condition or behaviour.
- If capacity may be regained, can the decision wait? Medical specialists can advise in respect to the possibility of regaining or developing capacity and the possible timeframe for this.
- Consultation with others will often shed light on the matter. Such “others” may include any current medical or other form of carer, close friends, relatives or other interested persons. In some cases, the welfare attorney could gather interested people together for a “best interests” meeting thereby facilitating discussion between interested people, especially where there is disagreement, and avoiding cumbersome “consultation” round-robins. Care plans may be usefully developed in cases where ongoing intensive care is required.

The welfare attorney is statutorily bound in deciding any matter relating to the donor's personal care and welfare, to consider the financial implications of that decision in respect of the donor's property (section 98(4)).

It is worth considering the kinds of decisions that may be faced to mind ourselves of the challenges facing a welfare attorney such as:

- Where the donor should live and who with.
- Their daily care, diet and dress.
- Who they can have contact with.
- Their medical, dental and optical care.
- Possible community care.
- Social activities, education and leisure.

- Their correspondence and papers.
- Rights of others to access to personal information about them.

Even this less than exhaustive list demonstrates the burden that could fall on the attorney and the responsibility on the lawyers to properly advise the donor when choosing an attorney and in advising the attorney what they potentially take on.

The Duty to Consult the Donor

The attorney (property and or welfare) is bound to consult with the donor (and any other person specified in the attorney) before exercising their powers under the attorney (section 99A(1)).

Before embarking on consultation, the attorney should equip themselves with:

- An understanding of all relevant facts.
- An understanding of the main choices available.
- How the choices may be compared in terms of their consequences.

In many instances the attorney will need to make their own assessment as to whether or not the donor is becoming or has become mentally incapacitated before they can take the next step of obtaining a medical certificate. As mentioned previously, a person's capacity can fluctuate and attorneys may often need to assess the donor's capacity for each decision made.

How does one consult with a person who has reached the stage of lost capacity such as to trigger the enduring power of attorney?

Try:

- Using simple language and information broken down to easy to understand points.
- Use illustrations or photographs to help understanding of the options.
- Ask open ended questions (not leading questions i.e. those that can be answered with a yes or no).
- Time and locate the consultation when the donor will feel most at ease.
- Use specialist interpreters or signers or someone who has proven their capacity to "get through" i.e. a friend or relative.

Communicate:

- Is the donor tired? Are they able to make decisions in the morning but not in the afternoon?

- The type of decision – is the donor unable to make financial decisions but quite capable of making health decisions or other types of decisions?
- The complexity of the decision. Is the matter the attorney is dealing with too complicated?
- Is there effective communication between the attorney and the donor? If the attorney is family and the relationship is becoming strained would an independent party assist them to reach decisions?
- Health – is the client suffering an illness which affects their ability to make decisions and is it temporary or is it likely to continue?
- Physical matters – is the donor unable to make decisions because they are losing their hearing or they are having difficulties communicating verbally?
- Personal stress – is the attorney or donor dealing with family or social stresses which are making it difficult for decisions to be made?

It is important that the attorney assesses a person's decision-making ability, not the decision that they make. This is particularly so for attorneys for personal care and welfare. Often children may take exception to the environment and conditions a parent may be living in and wish to invoke the power of attorney purely because they believe they are more competent to make decisions about their parent's welfare than the parent themselves.

As a matter of prudence the attorney ought also to consult (while otherwise keeping the donor's affairs confidential) with:

- Immediate family or close personal friends;
- Service providers;
- Any professional adviser to the person.
- Anyone involved in caring for the donor.

Suspending an Attorney's Authority

Section 100A provides that if a donor regains their capacity, he or she may suspend the attorney's authority by written notice

100A(1) A donor of an enduring power of attorney who has been, but is no longer, mentally incapable may suspend the attorney's authority to act under the Enduring Power of Attorney by giving written notice to the Attorney.

Suspension does not revoke the EPA, although the donor may formally revoke it under section 106A.

The difficulty with this section is the level of capacity required to suspend the authority and obtaining a new medical certificate of capacity.

In *Treneary v Treneary* (2008)²⁷ FRNZ 78 the Court when considering whether it had the discretionary jurisdiction to review an attorney's decision, had to first consider whether the donor had become mentally incapable: Murfitt J said;

*"One may be incompetent to make decisions (or communicate them) in relation to one aspect of life, but not others, because different decisions will involve assimilation of information of different levels of complexity. An individual who is naïve is dealing with financial matters may have a lower threshold of incapacity in relation to financial matters than one with a lifetime of professional involvement in dealing with money, and retained a vestige of those skills. It is a matter of assessment of each individual."*¹

Establishing capacity is complex. The common law presumption of capacity, *Re K* and *Re Tony* applies a low threshold of capacity so donors can appoint and revoke the appointment of an attorney despite being unable to manage their property and personal affairs. The suspension of an attorney's authority is not done lightly and is probably not done very often, generally because the donor may still have some cognitive functions which makes it difficult to communicate their intentions e.g. stroke, dysphasia. Sometimes a urinary infection may cause delirium and a consequent diagnosis of incapacity. Capacity is re-established once the infection is treated. Often attorney will refuse to accept capacity is re-established and will not obtain a new assessment.

Attorney's role on Invoking a Property EPA

1. Establish incapacity (if EPA activated on incapacity) and obtain a medical certificate or if necessary court order.
2. Establish when (and whether) the Attorney should take over property affairs if EPA is not subject to incapacity. If a donor's competency is diminished but capacity in fact is it in **the donor's best interests**, for the EPA to be invoked?
3. If there are one or more attorneys, are their powers joint or several? Is there any restriction on their ability to act severally e.g. are there financial limits on their use of money? Is it intended that one Attorney take prime responsibility of finances?
4. What is the scope of the powers in the deed (s97) –are they general or limited? An attorney's actions will be accepted as those of the donor if the EPA does not include conditions or restrictions. In *Moffat v Police* [2011] NZFLR 747 the donor executed an EPA in favour of her daughter in respect of certain property. The daughter served a trespass notice on her brother who then entered the property and changed the locks. He was convicted of trespass and argued a "general" power did not mean the donor's wishes were irrelevant and that she was mistaken in believing she had to "defer to the power of attorney". The Judge confirmed the daughter's authority to act.

¹ Ibid [31]

5. Attorney's duty to consult (s99A) – who other than the donor is to be consulted? Are members of the family, the welfare attorney and financial advisors to be provided with information such as EPA's, advance directives, and statements of property once the attorney is invoked? How does the attorney intend to consult with the donor? What consultation is expected between property and welfare attorney?
6. Is there any duty to provide information to other parties (s99B) i.e. lawyers, family members and welfare attorney if they request information.
7. The Attorney has a duty to keep records of transactions (s99C). - Do they understand the responsibility to account and how to do so? Are they aware of the penalties for failing to do so? Do they have basic accounting ability? Are they in a conflict position i.e. do they have joint accounts or partnerships with the donor? Are they financially dependent on the donor?

It is fundamental to the issue of trust in the Attorney/Donor relationship that there is consultation between them and interested parties and to be transparent in all matters concerning property and financial matters.

Personal Care and Welfare EPA

The donor of an EPA for personal care and welfare has their mental capacity determined at the time a decision concerning their personal care and welfare is made or is proposed to be made. Their capacity is tested against a particular position. The donor is deemed incapable if they:

- lack the capacity to **make a decision about a matter** relating to personal care or welfare; or
- lack the capacity to **understand the nature of decisions** about matters relating to their personal care and welfare; or
- lack the capacity to **foresee the consequences** of decisions about matters relating to their personal care and welfare or any failure to make such decisions; or
- lack the capacity to **communicate decisions** about matters relating to their personal care and welfare.²

The attorney must not act in respect of a significant matter unless a relevant health practitioner has certified, or the Court has determined the donor is mentally incapable. A significant matter is a matter which is likely to effect the donor's well-being, health and general enjoyment of life. This could be a change in residence, a major operation, or moving into long term residential care.

² s94(2)

The attorney must not act in respect of any matter relating to the donor's personal care and welfare unless they believe there are reasonable grounds that the donor is mentally incapable. In reality, many attorneys begin to assist or make decisions for the donor once signs of infirmity become apparent. This is especially so if they are a spouse, child, close friend, or relative.

Attorneys often have difficulty assessing mental capacity as general health and dementia conditions, can fluctuate with aging and compromise a person's state of mind, without necessarily wholly lacking capacity. Often familiarity of the donor's position clouds the ability of the attorney to make a judgement. Hence the need to consult medical practitioners, even if it may take numerous assessments before mental incapacity is diagnosed.