

Acting in a client's best interests

For a solicitor the greatest problems arise where a client's lack of capacity becomes an issue. In this situation client care and professional conduct matters are particularly difficult to resolve, says **Araba Taylor**.



One of the common law principles now enshrined in the new Mental Capacity Act is that “an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests”. The concept of “best interests” is then further elaborated on in section 4. The Act does not offer any definition of “best interests”, no doubt because of the extremely wide range of circumstances covered by the Act. Section 4 does, however, explain how to determine the best interests of a person who lacks capacity.

Given that the Act relates to health and welfare decisions and not merely the property and financial issues with which solicitors are generally principally concerned, there is much in this aspect of the Act which will not be directly relevant to the private client solicitor. In addition, the problem for the solicitor generally arises where the client's capacity is in issue, not where it has been established that the client lacks capacity. At that point, for the solicitor, decision-making generally becomes much more straightforward, since instructions cannot be accepted and, under existing law, any EPA will have become registrable. It is where the client's capacity is in doubt and where, for example, a client has fluctuating capacity, that client care and professional conduct issues become particularly difficult to resolve.

Guidance is to be had from the common law, whose principles have been enshrined in the Act, and existing case-law can reasonably be expected to be of continuing relevance and application, although this is likely to be of greater assistance in relation to the issue of capacity itself, rather than the concept of “best interests”. With regard to testamentary capacity, there is nothing in the Act to suggest that the threefold test in *Banks v Goodfellow* (1870) LR 5 QB 549, which is of specific application, has been overridden. However, in this respect, both solicitor and client are likely

to have taken it for granted that making a will is in the client's “best interests”; the issue will rather be whether the client is juristically able to carry this out.

In addition, there is professional conduct guidance available in the *Guide to the Professional Conduct of Solicitors*, Chapter 24. Rule 24.04 provides that: a solicitor cannot be retained by a client incapable of giving instructions. However, there is a legal presumption in favour of capacity – and bear in mind that different levels of capacity are required for different activities. If in doubt, consider seeking an opinion from the client's doctor (with the client's consent), having first explained the relevant test of capacity. You should also make your own assessment and not rely solely upon the doctor's assessment.

Solicitors may also find assistance from the BMA/Law Society publication *Assessment of Mental Capacity – Guidance for Doctors and Lawyers*.

What is new in the Act, however, is the checklist provided in section 4 and this is considered below. In addition, section 4(8) and the Government's Draft Code of Practice for Consultation (see para. 4.48) make it clear that the best interests principle also applies where the person concerned does not in fact lack capacity in relation to the act or decision in question, that is:-

- where an attorney is acting under a Lasting Power of Attorney (for example, in relation to financial matters while the donor still has capacity); and
- where someone exercising powers under the Act “reasonably believes” that the person lacks capacity.

The existing law

Private/elderly client solicitors will be familiar with dealing with varying degrees of capacity, for example:

- clients who are capable/competent and from whom instructions can and must be accepted, but who are disinclined to manage their property and affairs;
- those who are becoming mentally incapable, including those whose capacity varies, perhaps according to the time of day or the state of their general health; and
- those who are incapable but in respect of whom an EPA has been registered.

If a solicitor is to act in the best interests of such a client, he/she must – without being qualified in either medicine or social work – be astute to detect health and social issues relevant not only to capacity including testamentary capacity, but also to vulnerability in general. In particular, a solicitor should be on the lookout for:

- lack of independence in decision-making;
- suggestibility, perhaps falling short of undue influence;
- undue influence itself, which in this context of lifetime

giving and transactions is a lesser creature than coercion and therefore harder to detect;

- duress/coercion;
- conflicts of interest; and
- mental capacity to perform a juristic act, especially where this is of the fluctuating kind.

The Law Society's *Elderly Client Handbook* recommends as being of "crucial importance":

- identifying the client, something which can be made very difficult by elderly people acting through agents or attorneys;
- taking instructions from that client and seeing that client for confirmation of any information or instructions coming from an intermediary;
- seeing the client alone on at least one occasion and ensuring that the client can always give instructions freely without being subject to the influence of another;
- ascertaining that the client has capacity for the task in hand;
- identifying potential conflicts of interest at an early stage; and
- continuing to act in the best interests of the client, even if instructions are communicated by the client's attorney or receiver

In addition to this, a continuing assessment of the client's level of understanding is essential.

The new law

There is so much common sense and practicality in the existing guidance/common law that it would be surprising if the Act departed from it in any fundamental sense. What is useful, however, is the mandatory checklist approach set out in section 4, particularly sub-sections (3) to (7).

Section 4 addresses the role of "the person making the determination" – otherwise known as "the decision-maker" – of what is in a person's best interests. This will not always be the legal adviser and will often be the carer or the attorney under an LPA: see section 4(8). If however, a solicitor is acting as such attorney or advising such an attorney, the checklist provides an essential yardstick for assessing the merits of any particular decision. The applicable principles likely to be relevant to the solicitor, taken from para. 4.10 of the Government's Draft Code of Practice for Consultation, are as follows:

- Consideration of all relevant circumstances (section 4(2));
- The possibility of regaining capacity (section 4(3));
- Permitting and encouraging participation (section 4(4));
- The person's wishes and feelings, beliefs and values (section 4(6)); and
- The views of certain specified other people entitled to be consulted (section 4(7))

Section 4(2) is a general provision, underpinning the more specific considerations contained in the following sub-sections.

Under section 4(3), the decision-maker must consider:

- whether it is likely that the person will at some time have capacity in relation to the matter in question; and
- if it appears likely that he will, when that is likely to be.

In the Draft Code of Practice for Consultation, the Government explains this principle as entailing an appropriate degree of delay. Solicitors will be familiar with this where a client has fluctuating capacity and, for example, may be better able to deal with their draft will when they have recovered from a debilitating bout of 'flu or when they are having "a good day".

- Under section 4(4), the next step is to ensure that the person is involved in the decision-making process to the fullest possible extent. Solicitors are familiar with this in relation to clients who have capacity, where the test is the capacity to perform a juristic act "with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction": see *Re Beaney* [1978] 1 WLR 770. In relation to clients who have lost capacity and where their affairs are being administered by an attorney under an LPA or a Court of Protection appointed deputy, the solicitor should take due notice of the Government's observation that "the fact that the person lacks capacity does not mean that s/he can be cut out or ignored" (see para. 4.21 of the Draft Code of Practice). This may impose on the solicitor a higher duty of consultation than currently exists under the EPA/receivership rules.

- The person's "wishes and feelings", "beliefs and values" and "other factors that he would be likely to consider if he were able to do so" must also be taken into account (see section 4(6)). The Draft Code of Practice makes it clear that what is in contemplation is something fairly concrete – such as a written statement of wishes – or known beliefs, such as religious or political convictions. Nevertheless, less specific matters might undoubtedly fall to be considered under this sub-section, such as prejudices, attitudes towards particular family members and so on.

- Under section 4(7), the Act establishes a right for family members, partners, carers and other relevant people to be consulted on decisions affecting a person who lacks capacity to make those decisions. Although such persons need only be consulted "if it is practicable and appropriate", this requirement is likely to sound alarm bells for solicitors, familiar with the hostility that applications to register EPAs are capable of arousing within a family. The extent of the new duty to consult is likely to be a contentious area and the decision-maker who has to determine whether it is "practicable" or, worse, "appropriate", to consult a particular individual will have an unenviable task.

It remains to be seen whether the concept of "best interests" as elaborated on in the Act constitutes a real or substantive change to the law. What is clear is that there are now specific matters to which the decision-maker must have regard and while this may make some aspects of client care clearer, there are also likely to be new opportunities for contention.

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