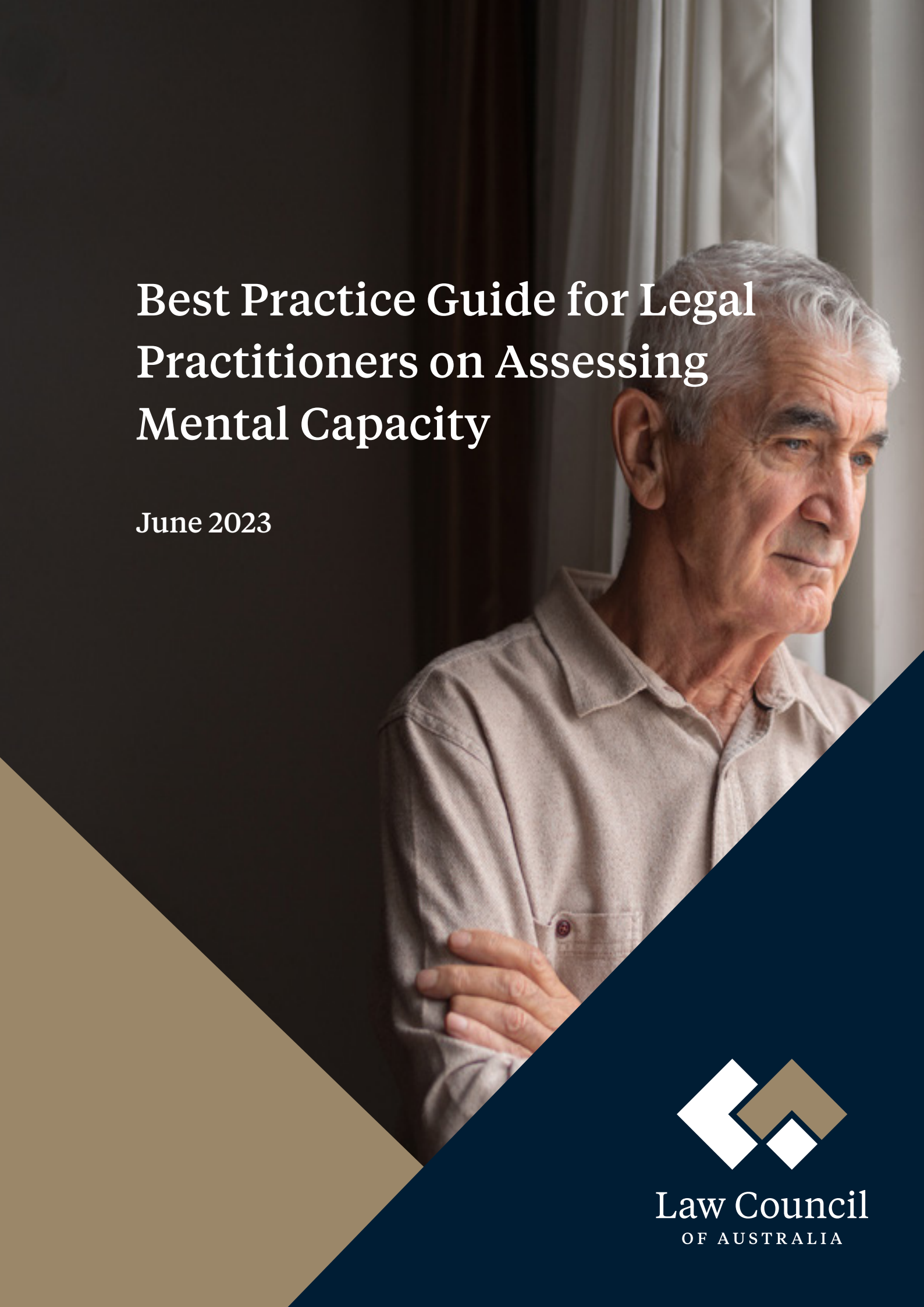

Best Practice Guide for Legal Practitioners on Assessing Mental Capacity

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Law Council
OF AUSTRALIA

Background

The Best Practice Guide for Legal Practitioners on Assessing Mental Capacity is an attachment to the Law Council's 'Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse'.

The Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse was developed in response to a recommendation by the Australian Law Reform Commission, in its 2017 report, Elder Abuse: A National Legal Response, that the Law Council develop best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents.[1]

Clause 2.6 of the Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse provides [footnote retained from the original]:

> **2.6 Has the legal practitioner checked for mental capacity?**[2]
>
> It was said in *Ryan v Dalton; Estate of Ryan [*2017] NSWSC 1007 that 'A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases'. There can be significant disciplinary and civil consequences for a legal practitioner who fails to do this.

The purpose of the Best Practice Guide for Legal Practitioners on Assessing Mental Capacity is to provide further detail to practitioners as to their obligations in assessing mental capacity in various circumstances and some practical guidance as to how this obligation may be performed.

It is important to recognise that the respective roles of the legal practitioner and health professionals are very different. A legal practitioner should not attempt to make a medical diagnosis or be involved in a client's treatment. However, it is solely the legal practitioner's responsibility to decide whether the client has the necessary mental capacity to undertake the legal task at hand. In undertaking that responsibility, a legal practitioner may be assisted by an expert opinion about the client's medical condition. Any such opinion does not release the legal practitioner from the responsibility of forming an independent opinion concerning their client's mental capacity.

All transactions except wills

1. There is a presumption of mental capacity for all legal activities except will-making.[3] However, courts are reluctant to decide an issue like mental capacity on the basis of a presumption and closely look at the facts.[4] A legal practitioner should adopt the same approach.

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1 Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131), May 2017.

2 In relation to a will, mental capacity is called 'testamentary capacity'. In some jurisdictions there are legislative definitions of mental capacity and different names can be used, such as 'decision-making capacity'.

3 It has been described as both 'long cherished': *Masterman-Lister v Brutton &Co* [2003] 1 WLR 1511, 1520, [17]; [2003] 3 All ER 162, 169 and 'longstanding': *Owners Strata Plan No 23007 v Cross* [2006] FCA 900 [66]. In *Szozda v Szozda* [2010] NSWSC 804 its origins were attributed to *Attorney-General v Parnther* [1792] Eng R 2455; (1792) 3 Bro CC 441; (1792) 29 ER 632. Another early example is *Burrows -v- Burrows (*1827) 1 Hag Ecc 109. See also *Murphy v Doman* [2003] NSWCA 249 (2003) 58 NSWLR 51, [36]; *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114; (2006) 233 ALR 432, 437-38 [20]; *A v City of Swan* [No 5] [2010] WASC 204, [66]; *Owners of Strata Plan No 23007 v Cross* [2006] FCA 900; (2006) 153 FCR 398, 414-15 [66]-[68]; *Slaveski v Victoria* [2009] VSC 596, [25]-[26]; *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, [546].

4 *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95; *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] FCAFC 81; (2012) 289 ALR 237; *Ashton v Pratt* [2015] NSWCA 12; *Veall -v- Veall* [2015] VSCA 60, fn [71].

2. For all legal activities other than a will, the relevant issue is whether the client has the mental capacity to understand the nature of the legal activity, being its general purport, when it is explained.[5]
3. The following facts may be relevant to the assessment of whether the client has the mental capacity to understand the nature of the legal activity:

   3.1 the identity of the party(ies);

   3.2 the relationship of the parties, if relevant;

   3.3 the terms or content of the legal activity;

   3.4 the effect, both positive and negative, of the legal activity;

   3.5 the context or circumstances in which the legal activity arose;[6] and

   3.6 where relevant, the context or circumstances in which the legal activity was prepared.[7]
4. Generally, the burden of proving a fact lies with the person asserting the existence of the fact, namely the person alleging must prove the allegation.[8] However, as a result of the presumption of mental capacity, the onus of establishing impaired mental capacity lies on the party who seeks to rebut the presumption.[9]

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5 *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423.

6 The legal activity could be as diverse as making a contract (see *Blomley v Ryan* [1956] HCA 81, [18] per Kitto J; (1956) 99 CLR 362, 422); executing a power of attorney (see *Szozda -v- Szodza* [2010] NSWSC 804); severing a joint tenancy (see *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423); acting as a director, shareholder, trustee, attorney, appointor (see *Allen -v- Smalberger* [2021] WASC 306), and any other legal position; making a donatio mortis causa, consenting to medical treatment (see *Attwell -v- Morgan* [2019] WASC 182) and conducting court proceedings (see *Dalle-Molle -v- Manos* (2004) 88 SASR 193; [2004] SASC 102).

7 This list has been prepared by reference to observations made in *Scott v Scott* [2012] NSWSC 1541, [199]; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30 and *Stivactas v Michaletos* (No 2) (1993) NSW ConvR 55-683.

8 *Wallaby Grip Limited v QBE Insurance (Australia) Limited* [2010] HCA 9, [36]; *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125; *White v Johnston* [2015] NSWCA 18, [87]; BPE Solicitors and another (*Respondents) v Hughes-Holland (in substitution for Gabriel*) [2017] UKSC 21, [53].

9 *Lake v Crawford* [2010] NSWSC 232, [13]; In *re W [Enduring Power of Attorney]* [2000] Ch 343; [2001] Ch 609, 347-348; 615-616.

Wills

5. The ultimate issue for a probate court is whether the propounded will was made by a free and capable testator.[10] This involves, at least, proof of mental capacity (called testamentary capacity where the issue relates to a will), and knowledge and approval.
6. The party who propounds a will bears the onus of proving the ultimate issue that it represents the last will of a free and capable testator, and the subsidiary elements of testamentary capacity and knowledge and approval.
7. While there is no automatic presumption of testamentary capacity when it comes to a will, a (rebuttable) presumption of testamentary capacity will arise if the propounder of the will proves that the will is regular on its face and has been duly executed.[11] In these circumstances the evidentiary burden shifts to the party challenging the will to point to circumstances that raise a suspicion that the testator did not have testamentary capacity. If suspicion is established, the onus is put back on the propounder of the will to satisfy the court that the testator had testamentary capacity.[12]
8. When preparing a will for a client, a legal practitioner should be satisfied of the relevant issues, being:
    - 8.1 that the testator is aware, and appreciates the significance, of the act in the law which he or she is about to embark upon;
    - 8.2 that the testator is aware, at least in general terms, of the nature, extent, and value of the estate over which he or she has a disposing power;
    - 8.3 that the testator is aware of those who may reasonably be thought to have a claim upon his or her testamentary bounty, and the basis for, and nature of, the claims of such persons; and
    - 8.4 that the testator has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.[13]

10 *Tobin v Ezekiel* (2012) 83 NSWLR 757, [44]; *Mekhail –v- Hana* [2019] NSWCA 197.

11 *Blake v Knight (*1843) 3 Curt 547, 561, 564; *Symes -v- Green* (1859) 1 Sw & Tr 401, 402, 164 ER 785, 785-6; *Sutton -v- Sadler* (1857) 140 ER 671; *Smith v. Tebbitt (*1867) LR 1 P & D 398, 436-7; *Smee v. Smee* (1879) 5 PD 84; *Gornall v Masen [*1887] UKLawRpPro 18, (1887) 12 PD 142; *Bailey v Bailey [*1924] HCA 21; (1924) 34 CLR 558, 570; *Palin -v- Ponting* [1930] P 185, 188; *Timbury -v- Coffee* (1941) 66 CLR 277, 283 (Dixon J); *Bull v Fulton* [1942] HCA 13; [1942] 66 CLR 295, 343.

12 *Scaffidi v Scaffidi* (No 2) [2022] WASC 227 [94].

13 *Read v Carmody* [1998] NSWCA 182; *Re Sebasio* [2020] QSC 247; *Duncan v Gibson* [2020] QSC 204; *Rowe v Sudholz* [2019] QSC 306; *Re Buchanan* [2016] QSC 214; *Re Toulitch (Deceased)* [2016] QSC 219; *Fraser v Melrose* [2016] QSC 213; *Re an application for the authorisation of the making of a will on behalf of MPL* (2016) 15 ASTLR 527; *The Public Trustee of Queensland v Martin* [2012] QSC 279; *Frizzo v Frizzo* [2011] QSC 107; *Frizzo v Frizzo* [2011] QCA 308; *Hamill & Anor v Wright & Ors* [2018] QSC 197, [140]; *Public Trustee in and for the State of Western Australia –v- Attorney General of Western Australia* [2019] WASC 258, [37]; *Greer -v- Greer* [2021] QCA 143, [44]; *Chronis -v- Karan* [2021] SASC 87, [189]; *Re Jones* [2021] VSC 273, [11]; *Re Massey (deceased)* [2021] QSC 205, [21]; *Grynberg v Muller* [2001] NSWSC 532, [18]; *Re Dohle* [2022] QSC 4, [10]; *Estate of the late Genevieve Bryan* [2022] NSWSC 965, [437].

9. Proof that a will is rational on its face and duly executed also gives rise to the presumption of knowledge and approval by the testator of the contents (and probably the effect)[14] of the will.[15] This presumption can be displaced by any circumstances which creates a well-grounded suspicion or doubt as to whether the will expresses the true intentions of the testator. Once the presumption is displaced, the proponent must prove affirmatively that the testator knew and approved the contents of the will.[16]

10. The best method for a legal practitioner to establish that the testator knew and approved the will is to read the will to the testator.[17] Discussion of the contents and effect of the will is often then appropriate.

Generally

11. It has been held that '[a] determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter'.[18] This suggests that a conclusion about lack of mental capacity should not be 'produced by inexact proofs, indefinite testimony, or indirect inferences'.[19]

12. Assessing mental capacity is task, time and content specific. This is because mental capacity may fluctuate over time. Accordingly, a decision made at a different time, a decision at the same time about a different task, and a decision made at the same time about the same task but with different contents does not preclude the opposite conclusion about mental capacity.

15 *Barry -v- Butlin* (1838) 2 Moo PC 480, 484; *Cleare -v- Cleare* (1869) LR 1 P & D 655, 657 – 658; *Atter -v- Atkinson* (1869) LR 1 P & D 665, 668, 670; *Nock -v- Austin* [1918] HCA 73, (1918) 25 CLR 519, 522, 528; *Tobin -v- Ezekiel* (2012) 83 NSWLR 537, [2012] NSWCA 285, [44]; *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706; *Wheatley v Edgar* [2003] WASC 118; (2003) 4 ASTLR 1, [24]; *In the Estate of Hassan* [2008] SASC 14, [9]; *Fisher v Kay* [2010] WASCA 160, [85]; *Hornsby v Hornsby* [No 2] [2014] WASC 434, [118]; *Brown -v- Barber* [2020] WASC 84, [389]; *Gerovich -v- Gerovich* [2021] WASC 77, [27]; *Re Jones* [2021] VSC 273, [76].

16 *Scaffidi v Scaffidi* (No 2) [2022] WASC 227, [95].

17 *Barry -v- Butlin* (1838) 2 Moo PC 480, 484; *Gregson -v- Taylor* [1917] P 256, 261; *Re Fenwick* [1972] VR 646, 652; *Tobin -v- Ezekiel* (2012) 83 NSWLR 537, [2012] NSWCA 285, [47]; *Estate of George Aeneas McDonald; Howard v The Sydney Children's Hospital Network (Randwick & Westmead)* [2015] NSWSC 1610, [35]; *Veall -v-Veall* [2015] VSCA 60; (2015) 46 VR 123, 178 [179]; *Re Prien* [2019] VSC 47, [49]; *Albury -v- Sammut* [2019] QSC 105, [52].

18 *Easter v Griffith* (1995) 217 ALR 284, 290.

19 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336; *Evidence Act 1995* (Cth), s140(2).

13. As examples of different findings of impaired mental capacity in relation to different tasks, a person who has been found incapable of managing their financial affairs may still be mentally capable of making a will[20] or making an enduring power of attorney,[21] and may have mental capacity to make a contract.[22]

14. A finding of impaired mental capacity at one point of time does not mean that mental capacity is lacking at another point in time.[23] One reason is that a person's 'deterioration [does] not necessarily follow a straight line: there were periods of exacerbation and fluctuation'.[24] Another reason is that a person's health and circumstances can change over time.[25]

15. As to the relevance of content, mental capacity may depend on the purpose,[26] complexity,[27] officiousness[28] of the legal activity, and the extent to which it departs from earlier thinking.[29]

16. Where there are doubts about a person's mental capacity after making other suitable enquiries (such as obtaining a medical opinion if time, circumstance and instructions allow), if appropriate, an application could be made for a declaration of validity, judicial advice, the appointment of a manager or tutor, a statutory will or a declaration about mental capacity.[30]

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20 *Re Estate of Margaret Bellew* [1992] NSW Supreme Court, Probate Division (Unreported) McLelland J, 13 August 1992; *Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377; *P -v- NSW Trustee and Guardian* [2015] NSWSC 579, [347]; *Barakett -v- Barakett* [2016] NSWSC 1257, [54].

21 *Re K [*1988] 1 Ch 310; *Perpetual Trustee Company Ltd v Fairlie-Cunninghame (*1993) 32 NSWLR 377; *P v NSW Trustee and Guardian* [2015] NSWSC 579, [347].

22 *AEW -v- BW* [2016] NSWSC 905, [20].

23 *Guthrie v Spence* [2009] NSWCA 369; (2009) 78 NSWLR 225, [174] - [175]; *Perpetual Executors Trustees & Agency Co (WA) Ltd v Deacon* [1935] WALawRp 37; (1936) 38 WALR 31; *Edna May Collins by her next friend Glenys Lesley Laraine Poletti v May* [2000] WASC 29, [54]; *Lampropoulos -v- Lynne Kolnik As Executor of the Will of Gerard Thomas Foley* [2010] WASC 193, [92]; *Rappard v Williams* [2013] NSWSC 1279, [76]; *Estate Cockell; Cole -v- Paisley* [2016] NSWSC 349; *Re WS* [2017] NSWSC 745, [25]; *Daniel Walton v Terence George Hartmann as executor of the Estate of Wanda Resler* [2017] NSWSC 1432, [32]; *Attwell -v- Morgan* [2019] WASC 182, [87]; *Ip -v- Chiang* [2021] NSWSC 822, [110].

24 *Rowe -v- Sudholz* [2019] QSC 306, [30].

25 *Re N* [2017] 2 WLR 1011, 1022 [25]; *PBU & NJE -v- Mental Health Tribunal* [2018] VSC 564, [149].

26 *Crago -v- McIntyre* [1976] 1 NSWLR 729; *Szozda -v- Szozda* [2010] NSWSC 804, [31].

27 *Craig-Bridges -v- NSW Trustee and Guardian* [2017] NSWCA 197, [138].

28 *Bailey v Bailey* [1924] HCA 21; (1924) 34 CLR 558, 571; *Brown v McEnroe* (1890) 11 NSWR Eq 134, 138; *In the Will of Key (deceased)* [1892] VicLawRp 98; (1892) 18 VLR 640, 642; *In the Estate of Park* [1954] P 112, 122; *Woodley-Page v Simmons* (1987) 217 ALR 25, 36; *Ridge v Rowden; Estate of Dowling (Supreme Court of New South Wales, Santow J, 10 April 1996, unreported); Sinnamon v Proe* [1996] QSC 164; *Brown -v- Wade* [2010] WASC 367, [109], [112]; *Virginie-Pitel -v- Campbell; Campbell -v- Virginie-Pitel* [2010] NSWSC 1440, [50]; *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275, [250]; *Estate of Stanley William Church* [2012] NSWSC 1489; *The Public Trustee -v- Nezmeskal* [2018] WASC 394, [41]; *Public Trustee in and for the State of Western Australia -v- Attorney General of Western Australia* [2019] WASC 258, [40]; *Croft -v- Sanders* [2019] NSWCA 303, [126]; *Bracher v Jones* [2020] NSWSC 1024, [415]; *Chisak -v- Presot* [2021] NSWSC 597, [299]; *Re Cassar* [2022] VSC 126, [168].

29 *The Estate of Stanislaw Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934, [372] - [377]; *Roche -v- Roche* [2017] SASC 8, [31]; *Boreham -v- Prince Henry Hospital* (1955) 29 ALJ 179; *Bracher v Jones* [2020] NSWSC 1024, [429].

30 This is available in some jurisdictions, such as Queensland pursuant to *Guardianship and Administration Act 2000* (Qld), s 146(1).

17. A medical opinion will often be the appropriate first step in resolving a doubt about mental capacity.[31] If a medical opinion is sought, a clear statement of the basis for the medical opinion will be more helpful than a statement about the person's mental capacity. This is because the 'tests' for mental capacity are legal tests, not medical tests.[32] As a consequence, a legal practitioner cannot delegate or abrogate the responsibility of assessing mental capacity.[33]

18. It is highly desirable that good procedures be adopted in all circumstances involving legal work, but especially when it is possible that the client's mental capacity will be challenged.[34] Circumstances which point to a possibility of challenge include a client's long-standing diagnosis of dementia,[35] current[36] or recent hospitalisation,[37] a significant medical condition,[38] learning of the client taking medication that may affect cognition,[39] or learning that the client's attorney has exercised their authority.[40] Other circumstances are where the client is over 70 years of age;[41] being cared for by someone; residing in a nursing home or similar facility;[42] or about whom for any other reason the solicitor might have concern about mental capacity.

19. The Law Council of Australia's Best Practice Guide for Legal Practitioners in Relation to Elder Financial Abuse procedures should provide a starting point in this regard.[43]

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31 If a medical opinion is sought, generally this should be from a suitable medical expert. Generally, this is not a general medical practitioner. A legal practitioner should bear in mind that screening tools, like the Mini Mental state Exam (MMSE), are not reliable tests for mental capacity.

32 *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197, [65]; *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369, [196]; *Simon v Byford* [2014] EWCA Civ 280; [2014] WTLR 1097, [17]; *Saunders v The Public Trustee* [2015] WASCA 203; (2015) 13 ASTLR 226, [200]; *Smart -v- Power* [2019] WASCA 106, [60(4)]; *Craig-Bridges v NSW Trustee and Guardian* [2017] NSWCA 197, [133]; *The Estate of Milan Zlatevski; Geroska v Zlatevski* [2020] NSWSC 250, [87].

33 *Romascu v Manolache* [2011] NSWSC 1362, [200]; *Key v Key* [2010] EWHC 408; [2010] All ER 155, [98]; *Daunt -v- Daunt* [2015] VSCA 58, [59]; *Hughes -v- Pritchard* [2021] EWHC 1580 (Ch), [42].

34 *Ryan -v- Dalton; Estate of Ryan* [2017] NSWSC 1007, [106] - [107]; *Bell v NSW Trustee & Guardian; Estate of William Anthony Hickey* [2020] NSWSC 1164, [174].

35 *dÄpice -v- Gutkovitch; Estate of Abraham* (No2) [2010] NSWSC 1333, [4]; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.

36 *In re Beaney* [1978] 1 WLR 770.

37 *McNamara -v- Nagel* [2017] NSWSC 91, [277].

38 *McNamara -v- Nagel* [2017] NSWSC 91, [277]; *Mace -v- Mace* [2015] NSWSC 1659.

39 *Dybac v Czerwaniw; The Estate of the Late Apolonia Czerwaniw* [2022] NSWSC 1279.

40 *Catherine Margaret Thorn, as Executrix of the Estate of the Late Betty McAuley v Ian Geoffrey Boyd* [2014] NSWSC 1159, [42].

41 *In the Matter of the Will and Estate of Joyce Helen Greer, deceased* [2019] VSC 592, [67].

42 *Ryan -v- Dalton; Estate of Ryan* [2017] NSWSC 1007.

43 This can be found at Best practice guide for legal practitioners in relation to elder financial abuse.pdf (lawcouncil.asn.)

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