A question of capacity

Professional standards

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Claire Johnson explains what advisers need to know if their client's mental capacity becomes impaired

Key Points

What is the issue?

What happens if your client seems to be losing mental capacity to make decisions

What does it mean to me?

Having a working knowledge of the Mental Capacity Act 2005 (MCA), being able to identify if there may be an issue with your client's capacity and being aware of steps to take in that case

What can I take away?

An understanding of the test of mental capacity under the MCA, an understanding of who can make decisions about property and financial matters for someone who lacks capacity; and awareness of some common pitfalls around estate planning for someone who lacks capacity

Your longstanding client, a retired businessman who is also a very private person, comes into the office for the annual review of his tax affairs. During the meeting you notice that he is not his usual astute self; he loses the thread of the conversation several times and doesn't engage with you in his usual manner. Alarm bells start to ring when he doesn't appear to remember a telephone conversation you had with him a couple of weeks earlier about his tax affairs. What do you do?

Mental capacity issues may not be something you come across regularly in your professional life. However, for anyone who advises clients on their property and financial affairs, a working knowledge of the Mental Capacity Act 2005 (MCA) is essential.

The question of capacity is time-and-issue specific. Is a person, at that moment, able to understand and retain information? Can they weigh-up the information to make and communicate a decision about the issue in question? For example, a person whose mental faculties are in some way impaired may have capacity to make simple decisions about weekly spending from a current account, but not to make them about complicated tax matters. That person's capacity may fluctuate from one day or one week to the next.

At the heart of the MCA is the principle that, when individuals lack capacity, any decisions made on their behalf must be taken in their best interests. Importantly, when it comes to property and financial matters, only certain categories of people can make decisions for the person without capacity. They are:

- Attorney(s) under a registered enduring power of attorney (EPA) validly made before 1 October 2007.
- Attorney(s) under a registered property and affairs lasting power of attorney (LPA).
- A property and affairs deputy appointed by the court of protection.

The court also has jurisdiction to make decisions for the person who lacks capacity.

If you have any concerns about your client's capacity to instruct you about his property or financial affairs, it is essential that you address those concerns before any further action. The steps you can
take include:

- Initially broaching the subject with your client, perhaps by asking whether they have any health concerns that could affect their capacity now or in the future and asking whether they have an EPA or LPA in place.
- If your client has close family, someone else is likely to be aware of any problems and share your concerns, although you must be aware of the sensitivities around client confidentiality. More particularly, if your client has an EPA or an LPA, there is an onus on the attorney(s) to step in if it is thought that he is losing, or has lost, capacity to make decisions.

- If you are unsure whether there is a problem, involve someone with experience of assessing mental capacity. Solicitors regularly go through this process with clients who are making a will or lifetime gift. If they have any cause for concern, they will seek input from the client's GP or another medical expert. Even if the solicitor is satisfied that the client has the necessary capacity to make the decision in question, it may still be appropriate to have on file a formal assessment of capacity by a GP or other suitably qualified medical professional. This may be particularly relevant if the provision the client wishes to make is one that a disaffected family member or other disappointed beneficiary may later seek to challenge.

Ultimately, the court of protection has jurisdiction to determine whether an individual has capacity to make particular decisions and has the authority to make a declaration to that effect.

If there is no valid EPA or LPA, an application to the court of protection will generally be needed so that a suitable person, usually a family member or sometimes a professional, may be appointed as deputy. The court keeps a list of 'panel deputies'– professionals who may be appointed if there is no one else able or willing to take on the role. The application process to appoint a deputy is likely to take several months.

If your client has lost capacity, his attorney(s) or deputy may continue to instruct you to look after his tax affairs and other financial matters.

Managing property and investments and undertaking estate planning on behalf of a person who lacks capacity requires special consideration. Decisions made for such a person must always be in their best interests. That may well be different from what the attorney or deputy might choose to do 'if it were me' and is not even necessarily the same as what the person who now lacks capacity would have done.

When it comes to estate planning and financial management, the following should be taken into account:

- Ideally, attorneys and deputies should know what is in the will of the person. This is to avoid inadvertently skewing the provision made in the will by selling assets that were specifically intended for a particular beneficiary (or, if it becomes necessary to do so, to consider steps it may be relevant to take to redress the situation).

- If a person lacks testamentary capacity, an application may be made for the court of protection to authorise a 'statutory will' to be drawn up on that person's behalf. This may apply if the person doesn't have a will at all, or if a change of circumstances means that the current will is no longer in that person's best interests. If there is a will, a strong rationale is required for the court to interfere with it. All potential beneficiaries whose interest may be affected by what is proposed will need to be involved in the proceedings. The court will consider the best interests of the person when deciding whether a statutory will should be drawn up and if so, on what terms.
- It is important for attorneys and those taking instructions from them to be aware of statutory limitations on their powers to make gifts on behalf of the person who has lost capacity. Deputies are similarly limited by the terms on which they are appointed (which are set out in the 'first general order'). Attorneys and deputies cannot simply continue to make gifts along the lines of those that the person was in the habit of making. Any gifts must be within the limited scope of the statutory authority (in essence being limited to reasonably-sized gifts on occasions such as birthdays and weddings), as set out in the first general order if a deputy is acting, or otherwise expressly authorised, by the court of protection. In particular, gifts made by attorneys or deputies for inheritance tax planning purposes require the express approval of the court of protection subject to a de minimis exception, which was outlined in the case of *MJ and another v The Public Guardian* [2013] EWHC 2966 (COP).
- The case of *Buckley* [2013] WTLR 385 contains useful guidance about investing money for people who lack capacity with the benefit of advice from a qualified and regulated financial adviser. The case also highlights the need for specific court of protection approval for transactions involving an element of self-dealing (the attorney in this case had invested £72,000 of the funds she looked after for her aunt to establish her own reptile breeding business).
- There is a general principle against delegation by an attorney or deputy. This can, for example, preclude arrangements for discretionary management of investments unless the attorney or deputy is expressly authorised to make such arrangements.
- If an application to the court of protection is being contemplated, for example, for a statutory will to be made or for approval of inheritance tax planning, it is sensible to have input from a solicitor or counsel specialising in this work. Careful consideration must be given to whether the application and the associated costs are justified in the best interests of the donor. This may have a

bearing on what order the court makes about who will meet the costs. Those associated with applications about property and financial matters are generally met from the estate of the person to whom the application relates, although the court has discretion to make other costs orders. This means that a person making an ill-conceived application could find themselves liable for the costs, including those of other parties, making it an expensive exercise indeed.

Although it is unlikely that you have encountered many clients who are losing capacity, such a condition caused by accident or illness can happen to anyone at any age. If your clients haven’t already made any power of attorney arrangements you should encourage them to do so. This is the only way for people to make sure their property and financial affairs would not be frozen should an unexpected loss of capacity happen. Many people are unaware that even a spouse or partner cannot automatically access and manage the finances of someone who has lost mental capacity and that even joint bank accounts may be frozen.

An order from the Court of Protection appointing a deputy to manage the property and finances of a person who has lost capacity can take several months. The cost of court fees and professional help with the application can typically be at least twice as much as the one-off cost of putting in place and registering a lasting power of attorney. Once a deputy is appointed there are additional costs and form filling on an annual basis.

By planning ahead, clients can avoid extra costs

Importantly, they can also safeguard against delays that could leave their property and financial affairs in limbo at the worst possible time. Instead, should a time ever come when your client loses capacity, it will be possible for you to continue to provide a seamless service to him through those he has chosen to take decisions about his property and financial affairs.