



**Financial
Vulnerability**
Taskforce



CONSUMER
DUTY ALLIANCE

A SAFE PAIR OF HANDS

A practical guide for financial advisers

**Delivering good client outcomes when
decision making becomes a concern**



In partnership with **JUST.**



A SAFE PAIR OF HANDS

6 key messages about vulnerability

1.

Vulnerability relates to circumstances
it is not a category of person

2.

It doesn't just affect those in later life

3.

Anyone can find themselves in vulnerable circumstances
at any point in their lives, whether permanently, temporarily,
periodically or to varying degrees

4.

Not everyone is aware of or willing to disclose their vulnerability
nor the circumstances which are causing their vulnerability

5.

Many recipients of financial advice are vulnerable
due to a lack of relevant knowledge, unfamiliarity with language
used and/or the technical complexity involved

6.

The process of advising clients in vulnerable circumstances
is about recognising additional or alternative needs
and then taking action to meet those needs



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becoming a visible supporter of our Charter. You can register your
<https://www.consumerduty.org/get-involved/support-the-fvt-charter>

Introduction



Tony Miles MBA, DipPFS

Founding Director of the Consumer Duty Alliance and the Financial Vulnerability Taskforce

As a financial adviser, particularly when working with older clients, you're likely to encounter individuals experiencing cognitive decline. Understanding how this may influence decision-making will help you tailor your approach and provide support that meets their individual needs.

Financial advisers aren't generally expected to make a formal assessment of mental capacity. However, they need to consider whether a client appears able to understand, retain, weigh up and communicate information relevant to the specific financial decision being made. Where there are significant concerns about a client's mental capacity, firms need to have adapted processes in place and understand next steps for clearer identification.

This guide focuses on three key areas:

1. *Understanding the legal framework and key principles relating to mental capacity.*
2. *Putting appropriate processes and arrangements in place before, and at the point when, cognitive changes may affect a client's ability to make financial decisions.*
3. *Managing concerns about a client's mental capacity when they arise, including considerations in relation to common financial planning transactions.*

This guide provides an overview of mental capacity and decision making in the context of [Mental Capacity Act 2005](#) (England and Wales) and why this matters to financial advisers, it's designed as an introduction and shouldn't be regarded as a comprehensive guide to the subject, its primary purpose being to highlight the key points and recommend actions to advisers. It also signposts useful resources and sources of support for those who wish to explore the topic in more detail. My thanks to fellow Financial Vulnerability Taskforce Director and subject matter expert, Professor Keith Brown, and the Just Group for reviewing this guide and helping ensure it remains accessible, practical and accurate.

In all cases, we recommend a collaborative approach involving a financial adviser, legal representative and any other relevant professionals, such as a mental capacity assessor, to help achieve the best possible outcomes for the client.

Disclaimer

The Financial Vulnerability Taskforce has taken all reasonable care in preparing this guide. However, we can't guarantee that all information is accurate, complete or up to date. Except in cases of fraud or fraudulent misrepresentation, we accept no liability for any errors or omissions.

This guide is intended as a general source of information only and shouldn't be relied on as a substitute for professional advice.

The Financial Vulnerability Taskforce accepts no responsibility for any loss or damage arising from the use of, or reliance on, the information in this guide, or from the use of services provided by any organisation referred to within it.

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Understanding the theory and legal framework

Key aspects of cognitive decline

How the ageing mind can change

As we age, our thinking and memory naturally change. Some people experience normal age-related changes, while others develop conditions such as Mild Cognitive Impairment (MCI) or dementia. The incidence and effects vary from person to person.



Normal (healthy) cognitive ageing

involves gradual changes in memory, problem solving and processing speed. Some abilities remain stable or even improve with age, while others decline.



Mild Cognitive Impairment (MCI)

involves more noticeable cognitive changes than would normally be expected for a person's age and up to 20%¹ of the population in the UK aged over 65 may be affected. Common signs include memory lapses, difficulty finding words and slower information processing. Some people remain stable for years, some improve, and others go on to develop dementia. Its important to remember that cognitive impairment and dementia are not a normal part of ageing.



Dementia is usually diagnosed when cognitive decline begins to affect day-to-day life. Symptoms are often significant, including confusion and disorientation. It's estimated that around 7% of people in the UK aged over 65 are living with dementia. Amongst those aged over 80, the prevalence is much higher and current data suggests a figure of around one in six people, although the chance of getting dementia in the future has been put as high as 1 in 3 in the UK².

The key distinction is whether cognitive changes are beginning to affect the client's ability to manage everyday life and make specific decisions.

Fluid and Crystallised Thinking

When it comes to thinking about cognition, the two types of intelligence originally identified by psychologist Raymond Cattell in the early 1970s provide a useful concept:



Fluid intelligence

This involves:

- problem solving;
- processing new information;
- verbal learning and
- usually begins to decline from age 60, and more quickly after 70 years old.



Crystallised intelligence

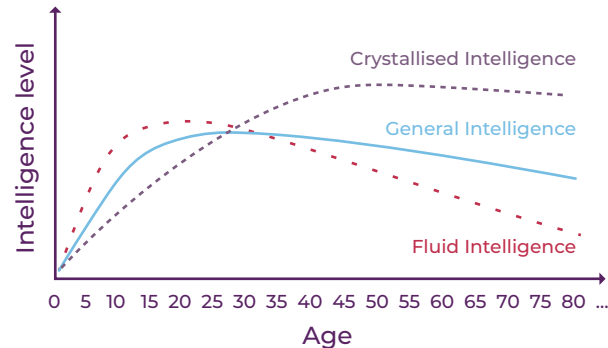
This involves:

- skills gained through experience;
- knowledge built over a lifetime;
- applying lessons learned and
- usually remains stable or even improves until age 70.

Overall, cognitive performance is the combination of these two neural systems. Using an analogy to compare the workings of the brain with the way a manufacturing plant operates:

- **Fluid intelligence** is the machinery that produces products.
- **Crystallised intelligence** is the warehouse where the products are stored and retrieved when required.

Age-related changes to intelligence



i Further information on normal age related changes in respect of specific cognitive abilities (processing speed, attention, language and executive functioning) and how they change with age can be found on page 27 of FCA Ageing Mind – Literature Review Report: <https://www.fca.org.uk/publication/research/ageing-mind-literature.pdf>

¹ Source: FCA Ageing Mind - Literature Review Report

² Source: Age UK, 2016

Understanding the basis of legal decision making

When it comes to making decisions, it's important that we're all capable of understanding information relevant to the decision, retaining that information, using or weighing that information and communicating that decision. If it's determined that we lack the capacity to make a specific decision, legal frameworks ensure that any decisions made on our behalf are carried out in our "best interests".

The meaning of mental capacity

A person with mental capacity has a general understanding of the decision they need to make, why they need to make it and what's likely to happen when they make it. Sometimes people have the capacity to make some decisions but not others.

Mental capacity means the ability to make a specific decision at a specific time, regardless of whether others regard any decision made as unwise.

The law that applies in England and Wales is the [Mental Capacity Act 2005](#) (MCA). The Act involves adherence to five principles:

1. A person must be presumed to have capacity unless proven otherwise.
2. All practicable steps must be taken to support a person to make a decision – for example, choosing the time of day or managing the environment to help the person to meet the four elements of the functional test (see 'How capacity is assessed' - [page 8](#)).
3. An unwise decision doesn't mean a person lacks capacity.
4. Any decision or action taken on behalf of a person lacking capacity must be in their best interests. See more information about this in the next section.
5. Before an act is done or a decision is made, consideration must be given to whether the purpose can be achieved in a way that is less restrictive of the person's rights and freedom of action.

Advisers should be aware that the principles of 'best interests' and 'least restrictive option' won't always lead to the same outcome. The most protective solution may also be the most restrictive. Where this tension arises, consideration should be given as to whether the client's objectives can be achieved in a way that preserves as much choice, control and freedom of action as possible, whilst still safeguarding their best interests.

The [Mental Capacity Act 2005](#) is very specific when defining what it means to lack capacity, for example:

- Capacity is **decision specific**, so a generalised statement such as 'this person lacks mental capacity' without relating it to a specific decision, is meaningless in law. Someone may lack capacity for one decision to be made but at the same time have capacity to make a different and perhaps more straightforward decision.
- Capacity is **time specific**, in other words, if a person doesn't have the capacity to make a decision today it doesn't mean they aren't capable of making it in a week's time.

Understanding best interests

The Mental Capacity Act (MCA) doesn't define best interests as simply asking "What would this person have decided?"

English law has historically rejected a purely substituted judgement approach, that is where an appointed person makes choices on behalf of an individual who has lost or lacks the capacity to make decisions for themselves. Instead, section 4 of the MCA 2005 requires the decision maker to consider a range of factors, including:

- the person's past and present wishes and feelings;
- their beliefs and values;
- other factors they'd be likely to consider if able to do so; and
- the views of family members, attorneys, deputies and others involved in their welfare.

The client's likely decision is therefore an important factor, but it isn't the only factor that must be considered.

Why this matters

For example, someone may have consistently said "I'd never want to move into residential care."

That wish should be given significant weight. However, if remaining at home would place them at serious risk of harm, a decision maker may conclude that moving into residential care is in the person's best interests.

In other words, a best interests decision must take account of the person's wishes and preferences, but it isn't automatically determined by what they would previously have chosen.

We recommend that advisers and attorneys use a 'best interests checklist' to record the decision and what factors were taken into account. Please see the 'additional support' section on [page 28](#) of the guide for a checklist template.

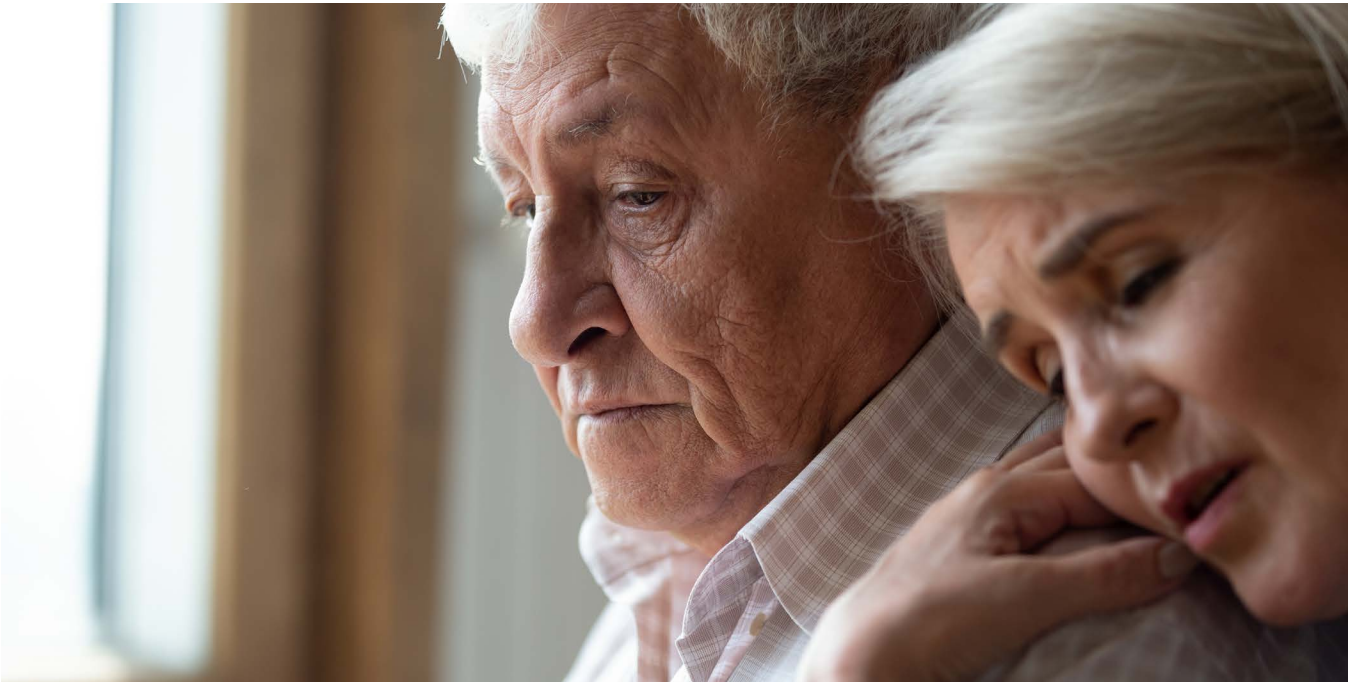
When capacity assessments are needed

A capacity assessment should be carried out when:

- There's reason to believe the individual's capacity is in question for a **specific decision**.
- The person is making decisions that appear **irrational or harmful** to themselves, their best interests, or others.
- Medical, legal, or financial **professionals are concerned** about the person's ability to understand the implications of a decision.

Why capacity assessments are needed

- They ensure that people who lack capacity are **protected**, while **safeguarding** the rights of those who can still decide for themselves.
- They can **provide evidence** to rebut any claims later on from family members who may be disappointed beneficiaries in a will.
- They **support welfare** and safeguarding concerns (for example, investigating situations of self-neglect, severe hoarding, or refusal of essential social support).
- They help underpin **complex** legal and estate planning, financial and property matters, and medical and health care **decisions**.



How capacity is assessed

Assessment isn't about a person's general ability or general understanding, but instead it's about a person's capacity to make a specific decision at a specific time about a specific issue. The MCA sets out a two-stage test of capacity that must be used and the assessor must be able to show it has been applied:

- 1. The diagnostic test.** Does the person have an impairment of or disturbance in their mind or brain, whether as a result of an illness, or external factors such as alcohol or drug use?
- 2. The functional test.** Does the impairment mean the person is unable to make a specific decision when they need to? The functional test consists of four elements, each of which must be tested by an assessor:
 1. The ability to **understand** information about the decision (the 'relevant' information).
 2. The ability to **retain** the information long enough to make the decision.
 3. The ability to **use**, or 'weigh up' the information as part of the decision-making process.
 4. The ability to **communicate** the decision through any means.



Decision-specific capacity

Our ability to process and weigh information changes depending on the complexity of the choice. In other words, people can lack capacity to make some decisions but have capacity to make others. Mental capacity isn't a blanket condition, a person may be able to decide about what they want for breakfast but not make a decision about a financial investment. They may be able to decide to get married but not have capacity to manage their affairs. It operates through the following practical distinctions:

- **Simple vs. Complex.** A person with a brain injury or dementia may lack the mental capacity to make complex, life-changing decisions (such as signing over their Lasting Power of Attorney or selling a house). However, they may fully retain the capacity to make simple, daily decisions (such as what clothes to wear or what to eat for lunch).
- **Capacity Tests.** Under the legal framework, assessing capacity requires evaluating if the person can:
 - **understand** the relevant information (see Threshold of Understanding - page 8);
 - **retain** the information long enough to make the decision;
 - **use** or weigh that information (see Executive Function - page 9) or
 - **communicate** their decision by any means (speech, visual aids, sign language, etc).

The threshold of understanding

The threshold of understanding typically refers to the level of information a person needs in order to grasp a complex subject or make an informed decision.

What the person needs to understand should be identified in advance so that the right information can be provided to support their decision-making. This includes considering the questions needed to assess their understanding and help them communicate their views and responses.

Understanding executive function

Executive function is a clinical term relating to the ability to put knowledge into practice. It includes:

- planning;
- focusing attention;
- remembering information;
- controlling impulses and
- weighing options.

Executive function is generally associated with the frontal lobes of the brain and can be affected by conditions including dementia, acquired brain injury and autism. In capacity assessments, difficulties may arise where a person can explain a decision rationally but struggles to apply that understanding in practice. In simple terms, they can "talk the talk" but not always "walk the walk".

From a capacity perspective, the most relevant aspect of executive function is the ability to use or weigh information when making a decision. This means that relying solely on a structured question-and-answer assessment may not always provide a complete picture. Observing a person's day-to-day actions and decision making can be equally important.

 To understand more about executive function, watch this short video from Professor Keith Brown, who is a Professor of Social Work and government adviser:
https://youtu.be/IQTswFeh7_0?si=DVGKLeWWlQnwiRZm



Fluctuating capacity

Mental capacity can also fluctuate (rise and fall) with time. Someone may lack capacity at one point in time but may be able to make the same decision at a later date. As Ben Slater, MD of independent mental capacity assessment company, Nellie Supports, recently explained:

"A person can understand, retain and weigh a decision clearly on Tuesday morning and be unable to do any of it by Thursday afternoon. Delirium lifts and returns. A relapsing illness moves through phases. Pain, fatigue, medication timing, blood sugar, mood and the strangeness of an unfamiliar room all change what someone can show you in the moment."

Source link, [Click here](#)

Unwise decisions

Under Section 1(4) of the MCA, an individual can't be treated as lacking capacity merely because they make a decision that appears unwise, eccentric, or risky. Disagreeing with a decision isn't a basis for finding that the person lacks capacity.

The MCA recognises that people have the right to make what others may consider unwise decisions. A person shouldn't be assumed to lack capacity simply because they choose a course of action that others disagree with or consider unwise.

Mental health versus mental capacity

Mental health and mental capacity are distinct concepts: mental health relates to a person's emotional and psychological wellbeing. Mental capacity is the specific ability to make a particular decision at a given time. Having a mental health condition doesn't automatically mean a person lacks mental capacity.



Understanding mental capacity assessments

It's important to understand that capacity assessments aren't limited to medical or legal professionals. In principle, anyone can assess capacity provided they follow the requirements of the MCA. However, complex decisions or those with legal implications may require input from a qualified health or social care professional as well as collaboration with private client solicitors, because they're invariably involved in the advice process. Much depends on the nature of the decision and whether the assessor is suitably qualified and properly briefed.

In some cases, specialist expertise may be needed because of a person's condition or communication needs. This could include a psychiatrist, psychologist, speech and language therapist, interpreter, or another professional with relevant experience. Sometimes a multi-disciplinary approach is most appropriate.

At its heart, a capacity assessment is a meaningful conversation with a person, based on their own values and circumstances. Professionals, family members, GPs, private client solicitors (invariably involved in the advice process) or carers who know someone well and have observed them over time may sometimes be better placed to contribute to an assessment than someone brought in solely for that purpose. As a rule of thumb, trained assessors who don't know the client are often preferred for complex legal or financial decisions because they apply the legal test objectively, whereas others who may know the person better may lack specialised legal training. Both approaches have unique strengths depending on the situation.

Although there's no single recognised qualification in mental capacity assessment, experienced specialists can often provide robust and practical assessments. Examples of specialist providers are included in the appendix of this guide ([page 30](#)).

Specialist mental capacity assessments

Mental capacity assessments differ primarily by scope and complexity, split broadly into general everyday evaluations and specialist assessments. These target the exact nuances and risks associated with the specific decision at hand and are, as a result, arguably more robust in the face of any subsequent challenge (for example, a disputed will).

- **Testamentary capacity.** Here a specific assessment can help to ensure that the person creating or changing their will is doing so with understanding and without duress.
- **Capacity to litigate.** Here a specific assessment is designed to establish whether a person is able to engage in legal proceedings.
- **Capacity to make a Lasting Power of Attorney.**
- **Capacity to manage one's own financial affairs.**

- **Capacity to enter into an Equity Release/Lifetime Mortgage.**
- **Capacity to make gifts.** Here a specific assessment can help to identify if the person making the gift has any symptoms of any cognitive impairment, or if the decision may be contentious in some way (for example, likely to be disputed by a family member).
- **Capacity to act as an Executor.** Here a specific assessment can help determine a person's ability to carry out this role.
- **Capacity to act as a Trustee.** Here a specific assessment can help determine a person's ability to carry out this role.
- **Capacity to make a wide range of decisions.** This includes, for example, the capacity to buy and sell property; the capacity to sell a business; or the capacity to enter into a prenuptial agreement.



The impact of cognitive decline on financial decision-making capabilities

Research suggests financial decision-making skills may peak in the early-to-mid 50s and then gradually decline for some people as they age. That said, such deterioration may signal early changes related to abnormal brain health as opposed to age alone.

Either way, this is of particular importance in respect of older people for several reasons, including:

- **The complexity of decisions.** Older people are often dealing with more complex products or planning, for example, equity release, investments, income drawdown, intergenerational wealth transfer, care fees planning etc.
- **The level of risk.** The amounts of money involved can be significant if for no other reason than they represent available assets amassed over a lifespan.
- **The lack of time remaining.** To recover from bad decisions and poor outcomes.

It's easy to see why this can be particularly challenging for some people, especially when combined with a limited understanding of the financial issues that often arise later in life. This can make it harder to draw on crystallised intelligence — the knowledge and experience built up over time. The FCA's [Ageing Mind Literature Review, 2017](#) highlights evidence that some older consumers make poorer investment decisions, such as choosing lower savings rates, favouring less risky but less suitable options, or avoiding decisions altogether and leaving investments unchanged.

i It's important to understand that the age benchmarks used above are generalisations, including the broad range of basic cognitive skills and financial knowledge that they reflect. Cognitive changes vary considerably by individual, including when cognitive decline begins (if at all) and its rate of progression. They're also influenced by many different factors, for example , genetics, education, family relationships, income levels and physical health.

The need for greater involvement in financial products later in life often arises when fluid intelligence (the ability to process new information and solve unfamiliar problems) is declining and crystallised intelligence is beginning to plateau. However, this is only part of the challenge. At the same time, many people become less willing or motivated to learn new information, as emotional goals increasingly take priority over acquiring new knowledge.

Unfortunately, even as financial literacy and numeracy skills begin to decline, people's confidence in their own understanding often remains unchanged. Studies from the United States suggest this can lead to increasing overconfidence in later life (Finke, Howe and Huston, Old Age and the Decline in Financial Literacy, 2014). As a result, people may become more vulnerable to poor financial decisions because their abilities are declining without them recognising either the decline itself or its potential impact.

This reduction in financial decision-making capability highlights the importance of understanding how ageing can affect cognition. Individuals, families and professionals should be able to recognise the early signs of cognitive decline and consider putting appropriate safeguards in place, including the appointment of legal representatives, where appropriate. Ideally, these plans should be established before a person experiences the gradual cognitive decline associated with normal ageing, or the more significant decline that can result from neurological disease or other health conditions.

Understanding 'next of kin' and why it has no legal status



The term 'next of kin' is widely used, and many people assume that naming someone as their next of kin gives that person certain legal rights, such as making decisions on their behalf. For example, some believe that if they're in hospital and unable to consent to treatment, their next of kin can automatically make those decisions for them. However, this isn't the case. In law, the term next of kin has no legal status or authority while a person is alive.

The only time a person's next of kin may automatically have the legal right to make decisions on their behalf is when that person is under 18 and their next of kin is also their parent or legal guardian. Even then, those rights come from being a parent or legal guardian, not from being next of kin.

The term next of kin has a recognised legal meaning only after someone dies without leaving a valid will. In those circumstances, their estate is distributed under the rules of intestacy, with assets passing to their closest blood relatives, who are often referred to as their next of kin.

In practice, this means:

- **Medical and care decisions.** Healthcare professionals will usually consult those closest to a person who lacks capacity to help understand their wishes, feelings and preferences. However, being someone's next of kin doesn't give a person the legal authority to consent to or refuse treatment, make care decisions, or act on the person's behalf. Such authority can only arise through an appropriate legal arrangement such as a Health and Welfare Lasting Power of Attorney (LPA), or through a decision made by the Court of Protection.
- **Financial decisions.** A person's spouse, civil partner, partner, child or other relative doesn't automatically have the right to access bank accounts, manage investments or make decisions about their property and finances simply because they're regarded as the person's next of kin. Such authority can only arise through an appropriate legal arrangement, such as a Lasting Power of Attorney (LPA), Enduring Power of Attorney (EPA), or deputyship order.

i You can find out more about the intestacy rules in England and Wales here: <https://www.thegazette.co.uk/all-notices/content/103523>

Next of Kin

The link below takes you to a video in which Professor Keith Brown in his past capacity as Director of the National Centre for Post-Qualifying Social Work at Bournemouth University, dispels the commonly held belief that being a near relative of someone gives you the right to make decisions on their behalf should they lose mental capacity:

<https://www.youtube.com/watch?v=mSK88qXNz7E>

Mental capacity, vulnerability and Consumer Duty

Why mental capacity matters to regulated financial advisers

Mental capacity isn't merely a legal issue. For regulated financial advisers, it's closely linked to the delivery of suitable advice, the FCA's guidance on the fair treatment of vulnerable customers, and the achievement of good client outcomes.

The FCA has made it clear that firms must understand the needs of their clients and take reasonable steps to support them in making informed decisions. This obligation becomes particularly important when a client's ability to understand, retain, use or weigh information may be affected by cognitive decline, illness, injury or other factors.

A client who lacks capacity to make a particular financial decision may be unable to provide valid instructions regarding that decision. Equally, a client who retains mental capacity may nevertheless require additional support to understand complex financial information and make informed choices.

For this reason, advisers should be able to recognise potential indicators of impaired decision making and understand the processes available to support clients whilst respecting their autonomy and legal rights.

Mental capacity and vulnerability

Under FCA guidance, a vulnerable client is defined as a client who, due to their personal circumstances, is especially susceptible to harm, particularly when a firm isn't acting with appropriate levels of care.

Cognitive decline, divorce, bereavement, dementia, acquired brain injury, learning disabilities, mental illness and certain neurological conditions may all increase a person's vulnerability. However, vulnerability and mental capacity aren't the same thing.

A client may be vulnerable whilst retaining full mental capacity.

Equally, a client may lack capacity in relation to a specific financial decision without necessarily being vulnerable in other aspects of their life.

Advisers should therefore avoid making assumptions about a person's capacity based solely on age, diagnosis, appearance or perceived vulnerability. Any concerns should be assessed against the principles of the [Mental Capacity Act 2005](#).



Consumer Duty considerations

The FCA Consumer Duty requires firms to act to deliver good outcomes for retail customers.

Mental capacity concerns may affect a number of the Consumer Duty outcomes:

- **Consumer understanding**
Firms should ensure communications are designed to meet the needs of their target market and support informed decision-making.
- **Where capacity concerns exist, advisers should consider:**
 - Whether information is being presented in a clear and understandable manner.
 - Whether additional time should be allowed for decision making.
 - Whether information should be provided in alternative formats.
 - Whether the client has genuinely understood the information rather than simply repeated it back.
- **Consumer support**
Firms should provide support that enables clients to pursue their financial objectives and act in their own interests.

This may involve:

- Conducting meetings over multiple sessions.
- Slowing the pace of discussions.
- Involving family members or trusted contacts where appropriate and with consent.
- Considering whether specialist legal or capacity assessment support may be beneficial.

Capacity isn't the same as financial capability

It's important to distinguish mental capacity from financial knowledge or financial capability.

A client may:

- have full mental capacity but very limited financial knowledge;
- have extensive financial knowledge but lack capacity to make a particular decision and/or
- require additional support to understand financial concepts whilst retaining decision-making capacity.

The role of the adviser isn't to assess how financially sophisticated a client is, but whether the client is capable of making the specific decision being considered.

An inability to understand complex financial concepts may indicate the need for additional explanation and support. It doesn't automatically indicate a lack of mental capacity.

- **Foreseeable harm**

One of the core principles underpinning Consumer Duty is the avoidance of foreseeable harm.

Where an adviser has concerns regarding a client's ability to make informed decisions, simply proceeding with a transaction may expose the client to harm and the adviser to regulatory risk.

Examples may include:

- Switching a long-established investment strategy to a significantly higher-risk portfolio.
- Large withdrawals from pensions or investment accounts.
- Significant gifting arrangements.
- Equity release or lifetime mortgage transactions.
- Trust creation or variations.
- High-value investment or inheritance planning decisions.

In such cases, advisers should carefully document the reasons why they believe the client has, or doesn't have, the capacity to make the decision in question.

Demonstrating good adviser practice

Where capacity concerns arise, advisers should be able to demonstrate that they have acted reasonably, professionally and in accordance with both the [Mental Capacity Act 2005](#) and FCA expectations.

Good practice may include maintaining a file note covering:

- the specific decision being considered;
- any concerns identified;
- steps taken to support the client's decision making;
- questions asked to confirm understanding;
- the client's responses;
- any third parties involved;
- safeguarding or undue influence concerns and
- why the adviser believed the client either did or didn't possess capacity in relation to the decision.

Clear documentation can help demonstrate that the adviser acted appropriately, treated the client fairly and took reasonable steps to avoid foreseeable harm.

Adviser tip

Don't ask yourself:

"Does this client have mental capacity?"

Instead ask:

"Does this client have capacity to make this specific decision, at this specific time, after I've taken all reasonable steps to support their decision making?"

That question reflects the requirements of the [Mental Capacity Act 2005](#) and provides a useful framework for meeting both legal obligations and Consumer Duty expectations.



Mental capacity considerations in common financial planning transactions



Understanding the principles of mental capacity and the requirements of Consumer Duty is only part of the challenge facing financial advisers. In practice, concerns about capacity are most likely to arise when clients are making significant financial decisions involving pensions, investments, property, trusts, gifting or later-life planning. These decisions often involve complex information, significant financial consequences and, in some cases, irreversible outcomes.

Whilst not every transaction requires a formal assessment of mental capacity, advisers should be alert to situations where there's reason to question whether the client can understand, retain, use and weigh the information relevant to the decision being made. The greater the complexity, value, irreversibility or potential impact of a transaction, the more important it becomes to evidence the client's understanding and decision-making ability.

The following examples highlight common financial planning scenarios, where additional care, enhanced record keeping or specialist support may be appropriate:

• Pension drawdown and retirement income planning

Decisions regarding pension drawdown require **clients to understand** a range of interrelated issues, including investment risk, the sustainability of withdrawals, potential tax consequences and the possibility of exhausting pension funds during their lifetime.

Advisers should be alert to situations where clients request significant withdrawals that **appear inconsistent** with previously stated objectives, demonstrate difficulty distinguishing between capital and income, or appear unable to explain the rationale behind major changes to established plans.

Where concerns arise, advisers should carefully **document the discussions** held, the client's understanding of the risks involved, and any actions taken to support decision making. In situations involving substantial withdrawals or evidence of cognitive decline, consideration should be given to obtaining specialist input before proceeding.

• Pension transfers

Pension transfers are amongst the **most complex decisions** many clients will make and often involve surrendering valuable benefits that can't be reinstated once lost.

Clients should be able to **demonstrate an understanding** of the benefits being given up, the reasons for the transfer, the risks associated with the receiving arrangement and the potential impact on their future retirement income.

Where a client either **struggles to explain** the purpose of the transfer, appears unduly influenced by family members or fails to appreciate the significance of the benefits being surrendered, advisers should proceed with caution. Detailed file notes should be maintained evidencing the client's reasoning, understanding and responses to discussions regarding risks and alternatives.

• Equity release and lifetime mortgages

Equity release and lifetime mortgage arrangements can provide **valuable solutions** for some clients, but they also involve long-term commitments and potentially significant reductions in the value of a client's estate.

Clients considering such arrangements should be **able to understand** the effect of compound interest, the impact on inheritance, the alternatives available and the long-term implications for their financial position.

Particular care should be taken where family members are closely involved in discussions or where the client appears focused solely on immediate access to capital without understanding the **longer-term consequences** of the transaction.



• Care fees planning

Later-life financial planning frequently involves **complex decisions** concerning the funding of future care and support needs.

Advisers should ensure clients **understand the implications** of any proposed arrangements, including the potential consequences of gifts, trust arrangements and other transactions that may affect future assessments of financial means. Clients should also understand the distinction between legitimate financial planning and arrangements that could subsequently be considered a deliberate deprivation of assets by a local authority.

Where substantial asset transfers are being considered, particularly in circumstances where care needs are foreseeable, advisers should ensure **comprehensive records** are maintained and that appropriate legal advice is obtained where necessary.

• Investment risk profiling and portfolio management

Investment recommendations rely heavily upon a client's **ability to understand** risk, reward, volatility and the potential for loss.

A sudden or **unexplained change** in a client's risk tolerance may be an indicator that further exploration is required. For example, a long-standing cautious investor wishing to move their entire portfolio into high-risk investments may warrant additional questioning to establish the reasons behind the change and whether the client is able to properly evaluate the associated risks.

Advisers should avoid assuming that a client's apparent confidence equates to understanding. It's often more important to establish whether the client can **explain the implications** of a proposed course of action than whether they appear confident when discussing it. As referenced in the earlier section on the impact on cognitive decline on financial decision-making capabilities, even as financial literacy and numeracy skills begin to decline, people's confidence in their own understanding often remains unchanged.



• Gifts and inheritance tax planning

Bestowing gifts, particularly substantial gifts, requires clients to **balance competing considerations** including their own future financial security, the needs of family members, potential inheritance tax consequences and the impact upon other beneficiaries.

Concerns may arise where gifting decisions represent a significant departure from established patterns of behaviour, where a client **struggles to explain** the reasons behind the gift, or where there is evidence of pressure from relatives or third parties.

In circumstances where substantial gifts are proposed, advisers should ensure that **detailed records** are maintained showing the client's intentions, understanding and reasoning process.

• Trust creation

Trust planning often involves sophisticated legal and financial concepts. Clients establishing trusts should **understand the purpose** of the arrangement, the role of trustees, the potential tax implications and the extent to which they may or may not retain control over the assets placed into trust.

Advisers should pay particular attention where clients **struggle to understand** the distinction between legal ownership and beneficial ownership, or where they're **unable to explain the objectives** that the trust is intended to achieve. Most importantly, it should be understood that a person can only settle a trust if they've mental capacity.

As trust planning frequently involves both legal and financial considerations, **close collaboration** with appropriately qualified legal professionals is strongly encouraged.

• Trust administration and trusteeship

Where clients act as trustees, they must understand the duties and responsibilities associated with the role, including their obligation to **act in the interests of beneficiaries** and to exercise powers appropriately.

Particular challenges may arise where trustees experience cognitive decline. Advisers should be aware that a person acting under a Lasting Power of Attorney **can't automatically exercise trustee powers** on behalf of a trustee who has lost capacity. This can create practical difficulties in the ongoing administration of trusts and may, in some circumstances, require **legal intervention**. If they're a trustee, and they don't have the capacity to make a decision in their role as a trustee, an application to the courts may be required to replace them as trustee.

Where trusts form part of a client's financial planning arrangements, advisers should **work closely** with private client solicitors to ensure that both legal and practical issues are considered.

• Adviser good practice

As a general principle, the greater the complexity, value, permanence or potential impact of a financial transaction, the more important it becomes for **advisers to evidence** that the client has been able to understand, retain, use and weigh the relevant information when making their decision.



Putting understanding into action



Putting appropriate processes in place for a stage when cognitive changes may affect a client's ability to make financial decisions.

Most people will retain the ability to make financial decisions throughout their lives. However, firms should prepare for situations where a client may experience cognitive decline.

- Ensure that the subject of cognitive decline and decision making is embedded within your firm's **training programmes** and vulnerable person policies.
- These should cover dealing with common tricky situations such as **conflicts of interest** that can arise between the attorney and the donor client – including supporting attorneys in understanding their obligations under the MCA and keeping them on track.
 - Include **talks by subject matter experts** and initiatives such as '[Dementia Friends](#)' to widen and embed understanding of issues and relevant legal frameworks.

- Consider how the matter of **cognitive decline** might be raised with clients before there are any signs. For example, via raising the subject at the earliest opportunity during the client/adviser relationship and formalising this. This way, the adviser knows who to contact should they have significant concerns about the client's capacity to make informed decisions about their finances in their best interests.
- Learn how to have conversations about **capacity assessments** in a way that reassures clients, removes barriers, and helps them understand why an assessment may be beneficial.
- Establish professional connections for **related legal services**, for example, legal firms experienced in drafting lasting powers of attorney (LPAs), trusts and wills.
- Establish professional connections in respect of **specialist mental capacity assessments** (see section entitled 'Sources of Additional Knowledge and Support' examples of specialist firms - [page 11](#)).

- Establish clear **step-by-step procedures** within your business for responding to concerns about significant cognitive decline. Having agreed processes in place can help reduce the risk of foreseeable harm and ensure concerns are handled consistently and appropriately. Examples might include:
 - Encouraging clients (or family members, with the client's consent) to seek a **medical assessment** at the earliest opportunity where cognitive decline is suspected.
 - Maintaining **detailed records** of all conversations, meetings and decisions involving the client.
 - Requiring clients to put a **lasting power of attorney (LPA)** in place before implementing financial products that may require important decisions to be made in the future, such as flexible drawdown or equity release drawdown arrangements. The Office of the Public Guardian offers a useful infographic on the importance of LPAs that can be shared with clients:
- **Escalating concerns** internally so that more complex or higher-risk situations can be reviewed by senior colleagues or specialist teams before decisions are made.
- Consider the use of **practical diagnostic tools**. For example, a firm called [Comentis*](#) provides an online, clinically developed mental capacity assessment tool tailored for professionals in the legal, financial, and care sectors. It enables objective, consistent evaluations in line with the [Mental Capacity Act 2005](#), providing documented, evidence-based reports for decisions such as care planning or financial matters.

[Click here for infographic](#)

i *It's important you understand that if you decide to engage any third party, you're responsible for ensuring the suitability, nature and quality of their services are acceptable and the cost incurred is affordable.

Responding to specific concerns regarding a client's capacity

For financial advisers, it's important to be alert to factors that may affect a client's ability to make informed financial decisions. While adults must be presumed to have capacity unless there is reason to believe otherwise, advisers should be able to recognise potential signs of cognitive impairment and understand when further consideration or specialist assessment may be required.

Where concerns arise, maintaining appropriate records and evidence of the steps taken can help demonstrate that decisions were made in the client's best interests and in a safe way that recognises the legal requirements of the Mental Capacity Act as well as regulatory expectations.

Red flags

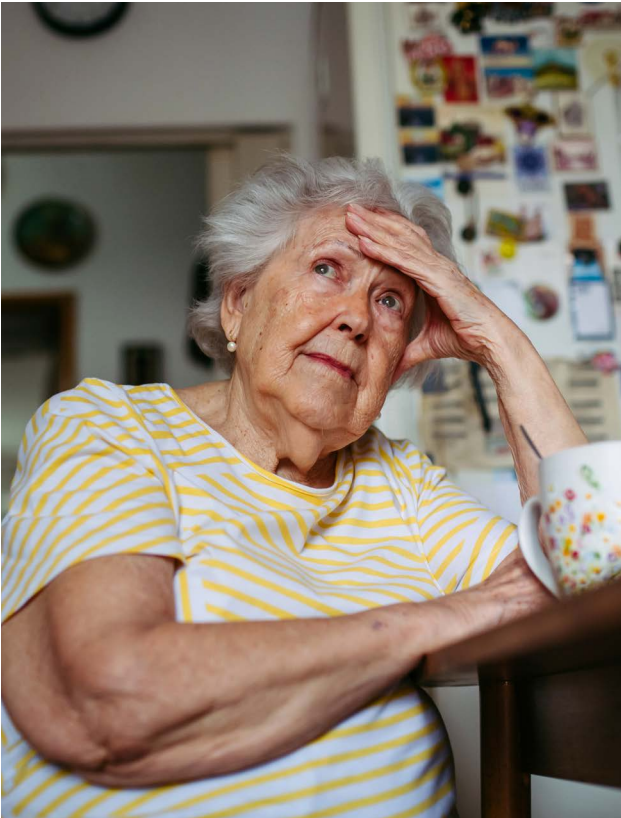
The key 'red flags' that should prompt action by advisers in their dealings with clients include:

- **Confusion or memory loss.** When the client is disoriented, forgets recent discussions, or is confused about personal information, for example their address or date of birth.
- **Level of engagement.** If an existing client, are they asking the same level of questions they usually ask? Do you get a sense that they're really understanding information being imparted?
- **Irrational decisions.** Where a client makes significant departures from previous long-term financial strategies without reasonable explanation, such as uncharacteristic investments or excessive giving.
- **Inability to understand risk.** Where a client appears unable to grasp key risks, such as losing money on an investment, even after repeated explanations.
- **Signs of undue influence.** Where someone else is dominating the client conversation, forcing decisions, or answering questions on the client's behalf.
- **Erratic emotions.** Where the client displays pronounced emotions that are inconsistent with their usual behaviour.
- **Inconsistent responses.** Where the client exhibits extreme confusion or sudden changes in financial goals that contrast with a client's established long-term preferences.

Initial response to concerns

Initially, assume your client has mental capacity (in line with the MCA 2005) unless established otherwise and take initial steps to help them make the necessary decisions.

- **Slow down.** Allow the client plenty of time to weigh up information and offer to defer complex decisions to a later date.
- **Delay decisions.** If the client is distressed or confused, allow time to see if capacity returns, for example, if it's a temporary condition.
- **Break into steps.** Avoid overwhelming clients with lots of information and multiple decisions at once. Instead, guide them through one step and one decision at a time.
- **Encourage support.** Suggest that the client be supported by a family member or trusted friend.
- **Adapt information.** Provide information in different formats (simpler language, visual aids) to help them make the decision.
- **Ask sensitive questions.** Gently ask the client if they have any health concerns affecting their decision-making or if they have a relevant LPA (lasting power of attorney) already in place?



Steps to take when concerns persist and/or escalate

If concerns persist and/or you identify specific health triggers, for example, sudden onset of conditions like dementia, brain injuries, or severe medication side effects:

- **Document everything.** Record all conversations, changes in behaviour, and the steps taken to assist the client and assess capacity.
- **Seek third-party input.** With permission, speak to a family member, carer, or GP to confirm if the behaviour is normal for them.
- **Medical evaluation.** If doubts persist, explain your concerns to the client and ask for their written consent to request a mental capacity assessment from their GP or a qualified medical professional/mental capacity assessor.
- **Check existing documents.** Check whether the client has an **enduring power of attorney**(EPA) or **lasting power of attorney** (LPA). If they do, confirm it's valid and registered where required, identify the appointed attorney(s), and understand the authority they have been given (see Verifying a Lasting Power of Attorney on page 25).
- **Court of Protection (CoP).** If they lack an appointed attorney, work with their family or a solicitor to guide them in applying to the [Court of Protection](#) to assign a deputy. Note that the CoP will only consider an application where the client has lost capacity.
- **Financial abuse.** If you suspect an attorney or family member is committing fraud or other types of financial abuse, report your concerns immediately to the [Office of the Public Guardian](#) (OPG) or adult social care safeguarding teams.

The nature of the capacity assessment landscape needn't be something financial advisers should fear. After all, it's there to enable them to carry out their work effectively and prioritise their clients' interests and wellbeing. However, staying ahead of the curve when it comes to justifying decisions will be made much easier if advisers use the right processes, and employ the right technology.

<https://www.financialreporter.co.uk/five-ways-financial-advisers-can-assess-mental-capacity-in-vulnerable-customers.html>

Verifying a lasting power of attorney

Advisers often deal with attorneys when capacity has been lost. In such circumstances it's important they verify a lasting power of attorney (LPA) by confirming that the document is legally registered and that the person presenting it has the authority to make any financial decisions needed on the client's behalf.

As a professional adviser, you can verify an LPA via two primary methods: the secure government online portal or physical paper documentation.

Method 1: Verification via the gov.uk online portal

This is the fastest and most secure verification method for all LPAs registered in England and Wales on or after 1 January 2016.

- **Request an access code.** Ask the attorney to generate a secure access code for your firm. They can do this by logging into their personal use a [Lasting Power of Attorney Account](#).
Note: The code will be 13 characters long, starting with the letter V, and is valid for 50 days.
- **Review the digital summary.** The system will display a single-page breakdown. You must carefully check:
 - **Validity status.** Confirm the portal shows the LPA is currently active, registered, and hasn't been cancelled.
 - **LPA type.** Ensure it's a property and financial affairs LPA. A health and welfare LPA doesn't give them the authority to make financial choices.
 - **Attorney names.** Confirm the identity of the person you're communicating with matches an attorney listed on the screen.
 - **Decision-making structure.** Check if the attorneys are appointed "jointly" (meaning all appointed attorneys must sign off on every decision) or "jointly and severally" (meaning this specific attorney can legally act alone).
 - **Instructions and preferences.** Review any specific restrictions or conditions the donor included that limit the attorney's financial powers.

Method 2: Physical paper verification

If the LPA was registered before 1 January 2016, or if the attorney prefers not to use the digital system, you must review physical documentation.

- **Ask for official documents.** You must request either the original paper LPA issued by the [Office of the Public Guardian \(OPG\)](#) or a legally certified copy. Don't accept standard photocopies.
- **Check for the OPG validation stamp.** Look at the bottom of the pages for the official, raised ink stamp that reads "Validated - OPG". An unstamped form isn't registered and carries no legal power.
- **Verify certification rules.** If using a certified copy, ensure each page displays the standard legal wording certifying it's a true copy, signed and dated by the donor (while they had capacity) or a practicing solicitor.
- **Manual clause check.** Manually read through the document to locate the same critical constraints checked in the online portal: the correct LPA type, full names, restrictions, and whether the attorneys must act jointly.

If a lasting power of attorney can't be located

If a family member claims they have legal authority but can't produce a digital access code or physical paperwork, you can verify their claim by submitting an 'OPG100 search request form' directly to the Office of the Public Guardian to search the official registry.

 You can download the OPG100 form here: <https://www.gov.uk/government/publications/search-public-guardian-registers>

Verifying enduring powers of attorney (EPA)

From 1 October 2007, LPAs replaced EPAs and new EPAs couldn't be made. Any EPAs made before that date remain valid. They can still be used without registration when the donor has mental capacity to make decisions in relation to property and finances. However, attorneys must temporarily stop using the EPA and register it with the Office of the Public Guardian (OPG) if the donor starts to lose or has lost mental capacity.

The core problem attorneys face between a donor losing mental capacity and the OPG registering an enduring power of attorney (EPA) is a legal standstill: attorneys can't lawfully use the EPA to make decisions during the registration gap, yet urgent financial needs often can't wait.

Verifying a registered EPA

Again, this can be done by submitting an [OPG100 search request form](#) directly to the Office of the Public Guardian to search the official registry.

Verifying an unregistered EPA

Verifying an unregistered enduring power of attorney (EPA) requires checking physical document validity, confirming the donor's mental capacity, and inspecting proper signatures. Because unregistered EPAs aren't held on a public online database before registration, you must inspect the physical paperwork directly.

When checking the documents authenticity:

- **Original paper.** Request and inspect the original physical EPA document (signed before 1 October 2007) or a certified copy.
- **Signatures.** Confirm it contains valid, dated signatures from the donor, the attorney or attorneys, and an independent witness who wasn't an attorney.
- **No alterations.** Check that no handwritten edits or unauthorized changes were made after signing, as an EPA is a formal deed.

Matters arising where attorneys act as trustees

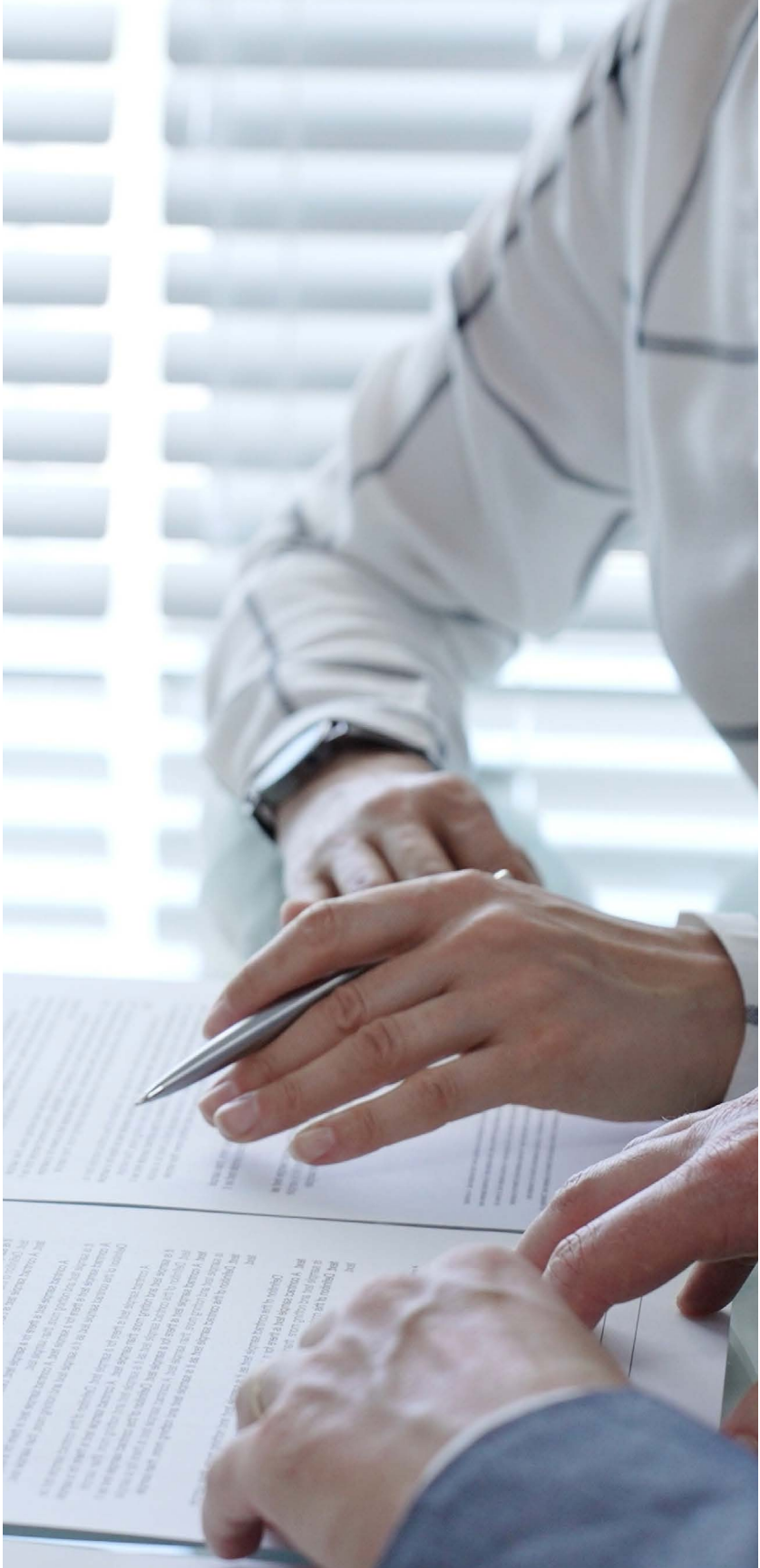
An attorney appointed under a lasting or enduring power of attorney can't automatically make decisions or act for a donor in the donor's separate capacity as a trustee. This is an area of complexity that illustrates the need for financial advisers to collaborate with private client lawyers where they have recommended trusts such as **discounted gift trusts (DGT)**, loan trusts or **flexible reversionary trusts (FRT)**.

Particular complexity can arise when a client loses mental capacity and their attorney is also acting as trustee of a trust linked to a property interest. This commonly happens where a deceased parent's estate includes property held in trust. In some cases, the attorney's powers are limited, creating practical difficulties when the property needs to be sold, refinanced, transferred or otherwise managed.

Financial advisers should be aware that an attorney's authority comes from the donor's lasting power of attorney (LPA) or enduring power of attorney (EPA). Trustee powers, however, derive from the trust deed itself and are governed by trust law.

The fact that an individual acts as attorney doesn't automatically give them authority to exercise trustee powers, nor does their position as trustee necessarily resolve issues arising from the donor's loss of capacity. In some cases, the inability to exercise both roles effectively can prevent valid receipt being given for sale proceeds and may delay or prevent completion of a property transaction.

For advisers, the key risk is that a property or trust arrangement that appeared straightforward during the client's lifetime can become problematic following a loss of capacity. This risk is particularly relevant where trusts form part of wider estate planning arrangements, including discounted gift trusts, loan trusts, flexible reversionary trusts, life interest trusts and property protection arrangements.



Good practice for advisers

Where trust assets or property interests form part of a client's financial planning arrangements, advisers should:

- Identify at an early stage whether any trustees, attorneys, executors or beneficiaries may have **overlapping roles**.
- Consider whether future incapacity could create practical difficulties in the administration of trusts or the sale of trust-owned assets.
- Encourage clients to **review LPAs**, wills and trust documentation together rather than as separate pieces of planning.
- Ensure that recommendations involving trusts are accompanied by appropriate **legal advice** from a suitably qualified private client solicitor.
- Refer clients for **legal review** where there's any doubt about the ability of attorneys, trustees or personal representatives to act effectively following a loss of capacity.

Working with specialist solicitors

These issues are highly technical and frequently depend upon the precise wording of the trust deed, will and power of attorney. Financial advisers should therefore avoid making assumptions about the authority of attorneys or trustees in complex trust situations. Instead, they should collaborate with a suitably qualified private client solicitor who has experience of trust law, powers of attorney, estate administration and Court of Protection matters.

A joined-up approach between the financial adviser and solicitor can often identify potential problems before they arise and allow appropriate drafting solutions to be incorporated into the client's arrangements. Early planning may avoid delays, additional costs, applications to the Court of Protection, or situations where trust assets become difficult to administer because the client's legal documents don't operate effectively together.

Additional support and guidance

Best Interests Checklist

Consider the following:

- ☐ Are you sure the person lacks capacity to make the decision?
- ☐ Have you ensured you haven't made the decision based on the person's age, appearance, behaviour, or condition?
- ☐ Where the decision can be delayed, have you considered whether the person is likely, in the foreseeable future, to recover sufficiently to make the decision?
- ☐ Has the person been able to participate in the decision and, if not, why not?
- ☐ If the decision relates to life sustaining treatment, that is, in the view of the health care professional the treatment is necessary to sustain life, ensure that the motive for refusing treatment isn't to bring about the person's death.
- ☐ What are or were the person's wishes, feelings, beliefs, values, or other factors that they would consider, if able?
- ☐ Is there a written statement and is it applicable to the planned decision?

Have you consulted:

- ☐ Anyone named by the person to be consulted on this decision?
- ☐ Any carer or a person interested in the person's welfare?
- ☐ Any attorney of an LPA or deputy appointed by the court?

Record the following:

- How did you reach the decision?*
- What are the reasons for the decision?*
- Who did you consult and what did they say was in the person's best interests?*
- What factors did you consider when you made the decision, particularly if it conflicts with a consultee or the person concerned?*



Mental capacity assessment specialists

The following list is only an example of specialist firms*:

- **Comentis.** Helping firms identify vulnerability, support clients effectively, and evidence good outcomes under Consumer Duty.
<https://www.comentis.co.uk/>
- **Gain Capacity Experts Ltd.** Providing independent mental capacity and specialist assessments to legal professionals, case managers, and private clients.
<https://gaincapacityexperts.co.uk/>
- **JMW Mental Capacity Act & Assessment Solicitors.** Providing expertise in all aspects of mental capacity law.
<https://www.jmw.co.uk/services-for-you/wills-and-estate-planning/mental-capacity>
- **Mental Capacity Consult Ltd.** Formed by a group of mental health and social care professionals who share a common view that mental capacity assessments should meet the aspiration, intent, and purpose of the [Mental Capacity Act 2005](#).
<https://www.mentalcapacityconsult.co.uk/>
- **Nellie Supports.** An independent social work practice specialising in social care support and mental capacity assessments across the UK.
<https://www.nelliesupports.com/>
- **OFH Care.** Offering mental capacity assessments for financial decisions, health and welfare, Court of Protection, COP3, LPA, legal matters, wills and more.
<https://www.ofhcare.co.uk/>
- **TSF Mental Capacity Assessments.** Specialise in mental capacity assessments in England and Wales.
<https://tsfassessments.co.uk/>
- **Thornton & Lee.** Independent social workers specialising in capacity assessments for wills and LPA.
<https://www.thorntonlee.co.uk/>
- **Stephensons.** A nationally recognised law firm.
<https://www.stephensons.co.uk/site/individuals/>

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Support from Just

The link below provides access to a number of useful resources including a video entitled 'Vulnerability and the impact of cognitive decline. Watch, Martin Lines, Development and Events Director at Just and Beth Yolland-Jones, Clinical Lead at Comentis, provide useful insights into cognitive decline, mental capacity and assessments:

justadviser.com

Further Resources

- **Overview.** carersuk.org
- **Detailed Toolkit.** mentalcapacitytoolkit.co.uk
This toolkit produced by the National Centre for Cross Disciplinary Social Work at Bournemouth University brings together information from a range of professionals working in the field of mental capacity to provide a comprehensive guide to practice.
- **Book (for professionals).** The [Mental Capacity Act 2005: A Guide for Practice](#) (Post-Qualifying Social Work Practice Series)
www.amazon.co.uk
- **Book (for general understanding).** Grandpa on a Skateboard: The practicalities of assessing mental capacity and unwise decisions:
www.amazon.co.uk/



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