

Assessing mental capacity: Who is the best person for the job?



By **Zoe Blomfield**, managing partner and head of personal law at Viberts

THE Capacity and Self Determination (Jersey) Law 2016 is the statutory framework in place in Jersey for those who may lack capacity. A person lacks capacity if, at the material time, they are unable to make his or her own decision because they suffer from an impairment or a disturbance in the functioning of their mind or brain.

While the law is clear in terms of what defines a lack of capacity, it is another question entirely as to who is qualified to make this assessment. Historically, assessing capacity was a job left to qualified medical professionals who had the greatest knowledge on the impairments and illnesses causing a person to lose their capacity.

Now, the responsibility for assessing capacity rests with the individual most involved in the decision to be made. The capacity test itself is formal and prescriptive (and set out in the law).

The Code of Practice to the law provides considerable guidance on the matter, specifically that the person who assesses an individual's capacity

to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made, for example a lawyer for a legal transaction or a doctor for medical treatment.

An expert medical opinion can be sought if the individual concerned is unsure whether there is an impairment or disturbance in the mind or brain.

For more general decisions, individuals are not expected to be professionally qualified. The code confirms that while a professional opinion may contribute to the outcome, the final decision about a person's capacity should be made by the person intending to carry out the action on behalf of the person who lacks capacity.

As the capacity law in Jersey is relatively new, there is limited case law that has been decided in reliance upon it. The corresponding English legislation and case law are thought to be sufficiently similar, and therefore it is useful to look to the English authorities.

In *A Local Authority v SY¹*, the court accepted the capacity assessment of a social worker on whether a young person lacked capacity to litigate – among other issues. The court confirmed that the assessment in this case demonstrated that an appropriately qualified social worker was eminently suited to undertake capacity assessments.

In *Re:Collis*, when considering the evidence of both the solicitor who assessed Mr Collis as opposed to a medical professional, the court preferred the evidence of the solicitor as it was the only evidence that was both time and issue specific.

In *McCabe v McCabe*, the judge looked in detail at the assessments carried out by both the lawyer and the physician and the benefits and downfalls of each. In undertaking this review, rather than focusing on the qualifications of each, the judge focused more on the details specific to the assessor's decision, including whether the assessor had knowledge of the relevant facts.

It is clear that there has been a shift from requiring a medical professional to undertake a capacity assessment, to relying on whoever is most involved with the decision-making process. This is a welcome change in the assessment of capacity.

It should be remembered that the law works on the assumption of capacity. Capacity is time- and decision-specific. Therefore, any assessment of capacity must be based on a person's inability to make a specific decision at the time it needs to be made. The result of such assessments cannot be used to infer a general lack of capacity. A person may lack capacity in relation to dealing with a certain matter but may have the capacity to deal with another.

The law seeks to allow people, as far as possible, to make their own decisions and, if they cannot, it ensures that all steps have been taken to enable a person do so and to maximise their participation in any decision.

¹[2013] EWHC 3485

We're always here for you



Life's journey is full of excitement and challenges. We're here for you every step of the way.

At Viberts we are dedicated to providing outstanding legal advice and customer service. Speak to our experts today.

01534 888666
info@viberts.com
www.viberts.com

VIBERTS