

AGEING, ESTATES PRACTICE AND ETHICS

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The Concept of Ethics

Dr. Simon Longstaff in his book “Everyday Ethics”¹ reminds us that ethics deals with the consequences of human choice and seeks to guide people to what ought to be done in a particular situation.

The structure of ethical human choice is normally informed by three factors:

1. Values,
2. Principles, and
3. Purpose

The various actors in a situation will bring to a choice a perspective driven by these three elements.

Core values of a professional can include some or all of the following:

1. Authenticity
2. Autonomy
3. Competency
4. Creativity
5. Fairness
6. Honesty
7. Justice
8. Leadership
9. Loyalty
10. Openness
11. Responsibility
12. Service
13. Stability
14. Trustworthiness
15. Wisdom

Ethical practice can be seen as evidencing your values in your interactions with others. For example, being a lawyer, and mindful of my values and the Australian Solicitors Conduct Rules (ASCR)², I am bound by these rules (principles) to recognise the following conflict of interest situations:

1. Conflict with a solicitors’ duty to the Court and administration of justice
2. Conflict with the interest of former clients
3. Conflict with the interest of current clients
4. Conflict with the solicitors own interests

These conflicts have the potential to create harm to a client. The fiduciary duty owed by the solicitor to a client is to prefer the interest of the client ahead of the solicitor. The avoidance or resolution of conflict results in the compliance with or discharge of the fiduciary duty to the client. Adherence to the following ethical principles also recognised in ASCR rule 4 produces a similar result and normally advances the interests of the client through engagement with the solicitor concerned:

- 4.1 A solicitor must also:
 - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,
 - 4.1.2 be honest and courteous in all dealings in the course of legal practice,

¹ Ventura Press 2017 ISBN 978-1-925183-42-9

² <https://www.legislation.nsw.gov.au/#/view/regulation/2015/244/part2/divfundamental/rule4>

- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,
- 4.1.4 avoid any compromise to their integrity and professional independence, and
- 4.1.5 comply with these Rules and the law.

So, a solicitors' personal duty to comply with the ASCR and the law, avoid any compromise to their integrity and professional independence and also to adhere to their overriding duty to the court and the administration of justice puts the work of a solicitor on a potential collision course with the will and preference of their client. This is an example of the solicitors own interests potentially conflicting with that of the client.

Solicitors cannot be the mere agent of their clients and on that fact, in my opinion, turns the difference between a professional and a mere commercial service provider.

The purpose of the ASCR is to mitigate the risk of harm to a person working with a solicitor and in so doing help discharge the solicitors fiduciary duty to their client. Professionals are accountable to their particular social licence to operate.

Ethics are the guideposts that assist in the resolution of conflict in the course of an engagement. In the balance of this paper, we unpack a range of situations and provide guidance about resolving the presenting problem consistent with the values and principles I have summarised.

Grounding Principles of Safe Professional Practice

1. Respect the legal assumption of capacity,
2. Act only in the interest of a person (legal or natural) or the common interest of multiple people.
3. Respect the presenting will and preference of your client.
4. Only act within the scope of your ethical obligations for:
 - a. an autonomous decision maker, to the extent of their cognitive ability, or
 - b. through the appropriate personal representative of a person who is not an autonomous and unconstrained decision maker, or
 - c. In accordance with the order of a Court or Tribunal of competent jurisdiction

Elder Law and the Ethics of Ageing – A Practitioner Perspective

Little did Lyndon Johnson know in 1965 when he signed into law, the Older Americans Act³, that his vision for this Act to promote the dignity of older adults to remain engaged citizens within their communities would result in the development of elder law as a field of legal practice in many jurisdictions in the world including Australia.

The Society of Trust and Estate Practitioners (STEP)⁴ represents over 20,000 members worldwide who in turn belong to over 25 professions and occupations which focus on assisting families to manage their wealth across generations and geographies including the United States of America (USA). This professional field is normally described as “estates practice” and includes over 25 professions and occupations in its membership catchment.

³ For more information please see <http://www.ncpssm.org/PublicPolicy/OlderAmericans/Documents/ArticleID/1171/Older-Americans-Act>

⁴ See <http://www.step.org/vision-mission-and-values>

In the USA since 1965, Elder Law has evolved into a formal speciality in the practice of law that is administered by the National Elder Law Foundation (NELF)⁵. In the USA jurisdiction, Elder Law is understood to comprise:⁶

“the legal practice of counselling and representing older persons and persons with special needs, their representatives and families about the legal aspects of health and long term care planning, public benefits, surrogate decision-making, older persons’ legal capacity, the conservation, disposition and administration of older persons’ estates and the implementation of their decisions concerning such matters, giving due consideration to the applicable tax consequences of the action, or the need for more sophisticated tax expertise.”

This is currently summarised by the National Academy of Elder Law Attorneys (NAELA)⁷ in the USA as the provision of legal services to people as they age and people with special needs.

In practicing Elder Law, the USA based practitioner is expected to have the following capabilities:

“recognising issues of concern that arise during counselling and representation of older persons and persons with special needs, or their representatives, with respect to abuse, neglect, or exploitation of the older person, insurance, housing, long term care, employment, and retirement. The certified elder law attorney must also be familiar with professional and non-legal resources and services publicly and privately available to meet the needs of the older persons and persons with special needs and be capable of recognizing the professional conduct and ethical issues that arise during representation.”

The ageing and increasing longevity of the Australian population has resulted in the evolution of legal practice in this country to include Estates Practice and Elder Law. Whilst the scope of functional law in the Elder Law field is similar to the USA, the means by which care is delivered to ageing, disabled and vulnerable members of our society is different to the USA and includes agencies and occupations engaged with:

1. Aged Care
2. National Disability Insurance Scheme (NDIS)
3. Social Security Act
4. Medical decision making and Enduring Guardianship
5. Estate Planning and Administration including access to financial products and services
6. Fiduciary representation and associated care and representation services
7. Client vulnerability, capacity and end of life decision making
8. Decision support and safeguarding

In fostering the development of a positive professional identity for those professional and occupations focus on helping ageing Australians, it is necessary to recognise this field of practice involves more than a lawyer having a functional document writing or advocacy role for the client.

⁵ <http://www.nelf.org>

⁶ <http://www.nelf.org/becoming-a-cela/rules-and-regulations/>

⁷ See <https://www.naela.org>

The ethical dimensions of the practice of elder law necessarily comprise from time to time, all of the following dimensions of practice⁸:

1. Responsible Lawyering
2. Ethics of Care
3. Moral Activism
4. Zealous Advocacy

The authors of the text “Lawyering and Positive Professional Identities”⁹ make the point that the practice of law needs to be considered as a “helping profession”. Our role as lawyer is to advise, guide, support and problem solve. This may be in turn thought of as the role of being of counsel to the client. This counsel role is recognised by the NELF in the standards extracted above. The counsel role of the lawyer can in turn be described as practicing the ethics of care which is in turn defined as the practice of:

“an ethic grounded in voice and relationships, in the importance of everyone having a voice, being listened to carefully (in their own right and on their own terms) and heard with respect. An ethics of care directs our attention to the need for responsiveness in relationships (paying attention, listening, responding) and to the costs of losing connection with oneself or with others. Its logic is inductive, contextual, psychological, rather than deductive or mathematical”

The role of a lawyer is to use their knowledge, skill and experience as a lawyer to address the needs of older or vulnerable clients to preserve and promote their autonomy, safety and wellbeing. The dimensions of well-being to which the professionals serving the needs of such clients need to respond are generally described as:

1. Social
2. Emotional
3. Spiritual
4. Environmental
5. Occupational
6. Intellectual
7. Physical

To complement these outcomes, Estate Practitioners are usually described as being held accountable to the following wealth elements of a client’s objectives and affairs:¹⁰

1. Spiritual

⁸ Parker and Sampford , Legal Ethics : Contemporary Issues, Clarendon Press . 1995 p.73-86 as cited in Assessing Lawyers Ethics, Adrian Evans Cambridge Press 2011 p.85 & 86.

⁹ Lawyers and Positive Professional Identities, Field, Duffy and Huggins, LexisNexis Butterworths 2014, para 12.9

¹⁰ Following Six Dimensions of Wealth: Leaving the Fullest Value of your Wealth to your Heirs. Journal of Financial Planning, D. Jaffe April 2003. Article available at <http://dennisjaffe.com/articles-and-working-papers/>

2. Financial
3. Human
4. Family
5. Structural
6. Societal

When faced with the need to improve the qualitative situation of the client, Elder Law practitioners need to knit together a broad knowledge of not only the substantive law that affects the client but also the supports, sanctions and services which may influence how the legal constructs considered by the lawyer are applied or delivered to the elder or vulnerable client. The lawyer needs to be prepared to respond to client demands that range between “Help me do it”, “Do it with me”, and “Do it for me”. The lawyer may need to collaborate with or integrate services from the following professional fields:

1. Health & Wellness
2. Residential Care and Accommodation Services
3. Social, Community and Occupational Services
4. Accounting, including tax, financial modelling and financial insights
5. Financial Services including insurance, banking, investments and finance
6. Governance, risk and compliance (if companies, trusts, business ownership or family estate accountability is involved).
7. Consulting (as a means of bringing in other services as needed to respond to the needs and objectives of the client.).

The Estates practitioner (including lawyers practicing in the field of Elder Law) is in many cases, required to be a contributor or integrator of services to produce the required result for the client.

For example, an entry into an aged care facility will require some consideration of the client’s medical condition, cognitive capacity, finances, tax issues as well as legal representation, health, medical treatment, contracts, finance as well as estate planning, administration and succession. The actual entry may need medical, transport and other support services.

The estates practitioner is rarely acting in isolation from the client’s family, supporters or representatives. Response to the relationships to which the client is engaged is a necessary feature of this area of ethical professional practice.

Ethics of Ageing – A Client Perspective

In his paper titled “What is the ethics of ageing”¹¹, Dr. Christopher Wareham of the Steve Biko Centre for Bioethics, University of the Witwatersrand reminds us that ageing is a process of life as fundamental as procreation and death. The ethics of ageing traditionally focuses on ageing resulting as a person being and object of ethical discourse that flows from them being seen as an “older member of society” rather than ageing itself as being the subject of ethical discourse. Wareham observes in this paper:

¹¹ See <https://jme.bmj.com/content/44/2/128> - Wareham CS, What is the ethics of ageing? *Journal of Medical Ethics* 2018;44:128-132.

" Perhaps this lacuna is a result of the perceived negative associations between ageing, decrepitude and death. Internet searches for ageing and ethics result almost exclusively in articles about what to do with expensive ageing populations, or end-of-life decisions in old age."

Wareham proposes in this article a proper definition of the ethics of ageing as being:

*"...a field of normative enquiry encompassing ethical issues facing a person in her situation as an ageing person... the ethics of ageing comprises ethical issues that face a person *qua* ageing person."*

Taking this approach means we can rightly examine the rights and duties of ageing persons. This takes up the interconnection between ageing persons and their immediate family or support group. With this approach we can rightfully ask "what is the right of a person to age well?" as well as "what does it mean to age well?" and "what obligations do these questions generate on persons connected with the ageing person?".

Wareham then guides us to consider the following statements:

"Which values, goods and harms are most relevant to the ageing person, and which virtues are most relevant to flourishing as one ages? Good ageing also requires a focus on the circumstances and technologies that may impact on the length of life and well-being of the ageing person."

With this approach the ageing person is the centre of enquiry and the issues of commencement and end of life are related to their appropriate context in the lifetime of a person. This approach also then places an appropriate ethical context for the adoption by Australia of the United Nation Convention on the Rights of Persons with Disabilities¹² and the subsequent proposal by the Australian Law Reform Commission of the following National Decision-Making Principles¹³:

1. Every adult has the right to make decisions that affect their life and to have those decisions respected.
2. Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.
3. The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
4. Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

While these prescriptions may seem aspirational as a national framework, the work of the Australian Law Reform Commission responded to developments in the State law of South Australia and Victoria. Of current note are the following developments:

1. New South Wales -
https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_cap_a_decision.aspx#support and
https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx

¹² <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

¹³ <https://www.alrc.gov.au/publications/3-national-decision-making-principles/national-decision-making-principles>

2. South Australia - http://www.opa.sa.gov.au/resources/supported_decision_making and <https://www.sahealth.sa.gov.au/wps/wcm/connect/public+content/sa+health+internet/abou+ut+us/department+of+health/office+for+the+ageing>
3. Victoria - <https://www.publicadvocate.vic.gov.au/our-services/publications-forms/447-guide-to-supported-decision-making?path=> and <https://www.legalaid.vic.gov.au/find-legal-answers/free-publications-and-resources/supported-decision-making-in-victoria-for-families-and-carers>
4. Queensland - <https://www.qmhc.qld.gov.au/research-review/human-rights-protection/supported-decision-making> and https://www.publicguardian.qld.gov.au/_data/assets/pdf_file/0008/574721/Policy-Structured-Decision-Making-Framework.pdf
<https://www.publicguardian.qld.gov.au/guardianship-and-decision-making/supported-decision-making>
5. Western Australia - <http://waindividualisedservices.org.au/resources/supported-decision-making/>
6. Tasmania - <http://www.utas.edu.au/law-reform/news-and-events/tlri-news/guardianship-laws-overhaul-needed-to-help-promote-peoples-rights-report>
7. Australian Capital Territory –<http://www.adacas.org.au> and <http://www.adacas.org.au/supported-decision-making/supported-decision-making/>
8. Northern Territory - <https://nt.gov.au/law/processes/adult-guardianship-and-orders>

A brief survey of these resources results in a picture of the tension between traditional concepts of substitute decision (as typified by the role of attorneys, guardians, trustees and executors) being challenged by the emerging rights based order for empowering participation in civil society.

As there is no national Bill of Rights in Australia, the move to a rights based model of dealing with the expectations of citizens in civil society remains problematic as a matter of dealing with formal legal rights. Tensions are created by:

1. Australia using its external affairs power to import the United Nations rights based model into the Australian legal framework.
2. The Commonwealth Government advocating a consistent decision-making support and safeguarding model for all Australian legal jurisdictions.
3. The operation of traditional state-based jurisdictions in dealing with attorney, guardian, trustee and executor roles and the variety of approaches and resources to deal with citizens who are not fully autonomous and intact decision makers. The resources listed above evidence this variability of approach.

I propose that in dealing with problems associated with the ageing of a client, we must first look at their ability to be autonomous and intact decision makers, a fact supported by the general assumption in favour of decision-making capacity in civil society, and only in the face of relevant evidence, respond to that evidence with appropriate methods of decision support and safeguarding.

This approach helps society respond to the increasing cohort affected by Mild to Moderate Cognitive Impairment as they age. It is proposed that dealing ethically and responsibly with this cohort will establish commonly held values and principles in the operation of civil society that will reduce the occurrence and impact of elder abuse in our community.

Ethics of Ageing - The Problem

How do we best achieve national coherence in dealing with the rights and responsibilities of Australian residents as they age?

Resolving Conflicts of Interest

For the client or their representatives – framing questions to help...

To what duties are you bound that override your own interests?

How might your decisions affect others to whom you owe a duty?

Who owes a duty or have a responsibility to you?

What external factors may limit your ability to act as you propose?

What personal constraints on may limit your ability to act as you propose? e.g.:

1. **Your will and preference – what is the outcome being sought and why**
2. **Your Ability**
 - a. Personal – including mental health and wellness
 - b. Physical
 - c. Communication
 - d. Cognition – the ability to process information provided.
3. **Technology Access**
4. **Available time and supporting resources**
5. **Social or cultural barriers**
6. **Financial Resources**

To what extent does uncertainty about the future shape your current choices?

For the professional – framing questions to help...

Under what social compact do you operate? What is your social licence to operate? How do these facts facilitate or constrain your ability to help the presenting client?

Who is your client?

- 1) Can the person make an autonomous and informed decision?
- 2) Is the person capable of assuming responsibility for the consequences of their actions?
- 3) Is the person capable of contracting with you?

In whose interest is your client acting?

- a. What will uphold the person's dignity?
- b. What help does the client need to carry out their objectives?
- 4) What is the client outcome being sought?
- 5) Does the outcome sought conflict with your professional obligations? How is any conflict to be resolved?
 - a) To what extent do your professional obligations constrain or facilitate the outcome being sought by your client?
- 6) To what extent is it appropriate to seek information from 3rd parties when acting for your client?
- 7) To what extent is it appropriate to give information to 3rd parties when acting for the client.
- 8) What is the basis on which you believe you can help the client achieve the objectives and comply with your professional obligations? This fuels your engagement proposal to the client.

Appraising Decision Making Ability – Assessing Autonomy

There is a natural ethical tension between the right of an attorney as substitute decision maker to follow their will and preference in making decisions about the donor's affairs rather than supporting the will and preference of the donor.

The decision making competence of the attorney makes it difficult to review a decision otherwise within power.

Attorneys have a fiduciary duty to the donor but implicit in the authority of an attorney is the ability of the attorney to bind the donor to their decisions.

In understanding the duties of an attorney, it is necessary that donors in turn understand the necessary loss of autonomy that flows from the activation of a power of attorney. Evidencing understanding of this fact in turn supports the knowledge and acceptance of the person of the consequences of creating the representation.

In the normal case, it is useful to ask the donor, "do you have reason to believe your representatives have the moral strength to prefer your interests over theirs in all circumstances, notwithstanding you may not be able to control them?" If clients can provide a reasoned explanation of why they believe this is so, a substantial demonstration of autonomous and intact decision making is occurring. The Interview assessment sheet attached to this paper provides a reflective assessment tool that helps record the outcomes of such discussions.

Handling Client Onboarding Risk – Proposed STEP EPP Guidelines

This approach has been proposed by Michael Perkins and Jane Lonie to the Society of Trust and Estate Practitioners (STEP) for adoption by their Employer Partner program in March 2019. It remains under consideration.

This note is offered here as an example of what the authors believe is an ethically sound approach to managing this business risk for those advising ageing clients and their associated parties.

Objective of Note

To help practitioners create and manage their knowledge of their client's capability at the point of initial onboarding or starting an engagement

Presenting problem for consideration

The question – is your client capable of discharging their responsibilities to you as their professional adviser or consultant?

An answer – without looking for evidence of capability at the point of client onboarding or starting an engagement you and your firm bears the risk of the client not being able to function appropriately in the engagement and facilitate you helping them to achieve the result they require from the engagement.

Call to action – consider when talking to the client whether they are providing you with the signals that they are autonomous and intact decision makers. Are they evidencing in their communication with you the attributes of an intact, autonomous decision maker? If so, then your ability to rely on an assumption of capacity then flows.

We live however in a time when a significant proportion of the population is of diminished capacity for one reason or another.

The mischief – we are trying to avoid is simply the over reliance on the right of a person to assume capacity is present unless a trigger is observed resulting in an overly superficial treatment of the client's ability. This superficial treatment of the client's capacity in turn causes problems in achieving the client's objectives or impedes the pursuit of the client's will and preference (objectives).

Professional Obligation Recognised

To identify the will and preference of the client as part of identifying the scope of work to be done in any professional engagement.

To support as appropriate the assessment of risk and preference in developing the scope of work to be accepted by the professional.

To engage as necessary with the supporters and substitute decision makers of the client when responding to the will and preference of their client or as necessary their substitute decision makers.

To support to the extent appropriate, the dignity of risk of the client.

Practice Being Advocated

That at the point of initial client onboarding or engagement commencement the professional communicating with the client take responsibility for the:

- identification of the client
- identification and resolution of any conflict of interest
- reflection on the communication with the client and recording the evidence of the attributes of the client's communication with the professional in accordance with the interview assessment sheet attached to this practice note.
- Recording as appropriate of the results of the professional reflection including the conclusion that no deficits were observed.
- Identification and resolution of any ability constraint that needs support in order to facilitate the client meeting their objectives through the action they propose.
- identification and resolution of any capability deficit identified in the initial communication with the client including the engagement of appropriate supports to neutralize any deficits identified.

Supporting Reasons for this Practice

A population with an increasing cohort of those with compromised ability

As professionals, we need to make sure our clients are able to cognitively engage with us to the extent necessary for us to help them and indeed, for them to be able to effectively contract with us as practitioners or our firms.

We accept that the professional's role in simplifying problems for a client so the client can make effective and appropriate decisions in fulfilment of their will and preference has to respond to and be limited by the cognitive ability of the client.

We accept that there is a grey area of unmanaged cognitive decline which if not recognised, facilitates social environments emerging that facilitate a range of abusive behaviours that compromise a person's rights for economic participation and social inclusion in the communities in which they live.

We live in a society where large segments of the population have impaired decision making for a range of reasons including:

1. Health conditions

2. Age
3. Education
4. Social or cultural factors.

There is general acceptance that mild cognitive deterioration occurs inevitably as we age and there is an extent to which this does not compromise what is considered to be autonomous unimpaired functioning of a person in society.

The privacy that citizens enjoy means that cognitive deterioration is often ignored by family or disguised by the afflicted person so their social engagement and economic participation in society is preserved.

At this time, the law relies on substitute decision making in large measure as the response to a lack of client capacity through the use of instruments such as Powers of Attorney.

With compliance with the United Nations Convention on the Rights of People with Disability¹⁴ now a Federal Government concern in Australia, it is timely to consider how the practices of supported decision making called for by this convention are relevant to the professional practices of members of the Society of Trust and Estate Practitioners (STEP) who as a cohort are engaged in advising families across generations and geographies (commonly called “estate practitioners”).

When considering the rights of people in the general population who are not otherwise engaged as members of the aged care, mental health, medical or disability systems, estate practitioners can consider the obligation to reflect about a clients cognitive ability as simply a response to the professional responsibility to recognise and provide evidence that no trigger exists for the need to make further enquiry about a person’s capacity or capability.

The law’s approach to what is a capacity trigger is evolving substantially

Since the decision of Ryan v. Dalton¹⁵ in 2017 by the NSW Supreme Court, NSW practitioners are required to consider, at least in relation to will-making the following triggers:

In case of anyone:

(a) over 70;

(b) being cared for by someone;

(c) who resides in a nursing home or similar facility; or

(d) about whom for any other reason the solicitor might have concern about capacity.

The assessment framework advocated by this practice note responds in particular to factor (d) above.

The delivery of the NSW Law Reform Commission report in May 2018¹⁶ proposing changes in the Guardianship Act 1987 (NSW) have created the environment to consider more broadly the impact of impaired decision making beyond will making and in the context of the normal interactions citizens have with civil society with appropriate safeguards to client and professional alike.

Empowering people to optimise their social and economic engagement with the communities in which they live should, in my opinion be a common objective for all professionals.

¹⁴ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

¹⁵ [2017] NSWSC

¹⁶ https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Guardianship.aspx

Practicing the ethics of care irrespective of your disciplinary background is rapidly emerging as a common practice that helps unify professional practice around the needs and objectives of clients.

Approaching Estate Planning, Administration and Succession

We can use the response of the private professions to the emergence of the ethics of ageing as a “tuning fork” that can harmonise professional and community responses to the needs of ageing clients, initially across the following domains of concern:

1. Social, Welfare and Day to Day Life Decisions ,
2. Advocacy, Enforcement and Transacting legal rights and obligations
3. Ageing
4. Health Care
5. Personal, Family and Community Well Being and
6. Financial Well Being

An Example – parents planning for a disabled child

Accommodating disability within the practice of estate planning

Introduction

As the National Disability Insurance Scheme (NDIS) scales its operation in Australia, parents with disabled children need to review their approach to supporting their disabled child in the event of their own death, disability or incapacity.

NDIS support of a disabled child is neither automatic nor unlimited. It is however that can make an enormous difference to a parent or family’s ability to help that achieve optimise their quality of life.

Disability may or may not limit the participation of a person in society, the economy or a family.

Estate Planning is a field of professional practice that provides a framework for dealing with decisions such as the welfare of a disabled child and how they may best be supported over time. Their disability may or may not be a normative influence on a parent’s consideration.

This guide draws on the work of the Cognitive Decline Partnership Centre. For more information about its operation please see the resources at <http://sydney.edu.au/medicine/cdpc/>. While the current work of the Centre has been focused on families living with members suffering from dementia, the principled approach that has been taken to its work has produced a range of resources of broader application.

This guide is intended to frame both a parents’ reflection about their situation and intention as well as a professional’s enquiry into the parents intentions about a disabled child.

Defining our terms – estate planning

Since 2010, the Society of Trust and Estate Practitioners (see www.step.org) has recognised estate planning as:

“... a professional service (encompassing strategies, processes and actions) focused on the preservation and transfer of a client’s capital and values for the client and their designated successors”

Estate planning is therefore not primarily focused on death or will making.

Estate planning is a structured enquiry that normally encompasses a person’s objectives and attitude, as appropriate to:

1. Personal and Family Representation and Succession
2. Family Continuity, Governance and Legacy
3. Wealth (Financial and Non-Financial) Preservation, Enhancement and Transfer
4. Business Ownership and Control
5. Financial Security and Compliance

Defining our approach as professionals – irrespective of discipline or occupation

To help our clients establish a clear purpose and method (What and How) for the inclusive care and support of their successors (including those who may have a disability) that results in our clients having a sense of satisfaction and pride in the resulting arrangements.

In taking this approach we practice the Ethics of Care. This is the over-arching ethical modality that should apply to estate planning and administration as well as care delivery and decision support and safeguarding activities¹⁷, irrespective of the background of the concerned person. It is:

“An ethic grounded in voice and relationships, in the importance of everyone having a voice, being listened to carefully (in their own right and on their own terms) and heard with respect. An ethics of care directs our attention to the need for responsiveness in relationships (paying attention, listening, responding) and to the costs of losing connection with oneself or with others. Its logic is inductive, contextual, psychological, rather than deductive or mathematical.”

The first competency that must be deployed by a person concerned by the decision-making ability of another is paying attention to what the person of concern is saying or communicating. These observations will generally be taken by sight or sound.

The first obligation of observation is to accurately record what is being seen or heard as you pay attention to the person of concern.

Observation therefore has priority over recording. A “checklist” mentality to observation has to be avoided. Using audio or visual recording as an aid so the observer can focus on their observation is to be preferred where practical.

Consider also the particular obligations of Financial Planners under the Corporations Act 2001¹⁸ viz.:

- (a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;
- (b) identified:
 - (i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and
 - (ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the **client's relevant circumstances**);
- (c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;
- (d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;
- (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

¹⁷ <https://ethicsofcare.org/carol-gilligan/>

¹⁸ http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s961b.html

- (i) conducted a [reasonable investigation](#) into the [financial products](#) that might achieve those of the objectives and meet those of the needs of the [client](#) that would reasonably be considered as relevant to advice on that subject matter; and
- (ii) assessed the information gathered in the investigation;
- (f) based all judgements in advising the [client](#) on the [client's](#) relevant circumstances;
- (g) taken any other step that, at the time the advice is [provided](#), would reasonably be regarded as being in the best [interests](#) of the [client](#), given the [client's](#) relevant circumstances .

Note: The matters that must be proved under [subsection](#) (2) relate to the subject matter of the advice sought by the [client](#) and the circumstances of the [client](#) relevant to that subject matter (the [client's](#) relevant circumstances). That subject matter and the [client's](#) relevant circumstances may be broad or narrow, and so the [subsection](#) anticipates that a [client](#) may seek scaled advice and that the inquiries [made](#) by the [provider will](#) be tailored to the advice sought.

3 Guideposts for Initial Enquiry

Concern

What concern has brought you here?

What objective or need is evident?

With what are you being asked to help?

In whose interest is this request?

How are concerns being communicated?

Explicitly, or

Implicitly

How is this occurring?

Need

What is the initially presented need?

What is the subject matter of concern?

An Issue

An Objective

A Challenge

A Change

What is (as relevant to the subject matter of concern) the living situation, financial situation and needs of the person of concern?

Are all these considered as those matters that would reasonably be considered as relevant to the subject matter of the concern?

What are the key facts and evidence that detail the concern to be considered in more detail?

What response is sought or proposed by the person being evaluated to the concern being presented?

What impact does that proposal have on the person proposing it and others.

What other response may be needed to the concern?

Competence to Respond?

What competence is needed to respond with the concern?

Who has that competence? What arrangements need to be made to access that competence?

How are these choices to be further evaluated?

How are these choices to be communicated to the person of concern?

What are the next steps?

Proposing a Parent's Approach to Establishing Support of Their Successors

Parents are inevitably wealth holders who hold decision making authority over the inheritance path of their successors. What is the appropriate method of support? Normally, this requires a consideration of the intention of the parent and the ability of the child. The five choices that receive the most attention are:

1. Is the successor an autonomous and intact (independent ?) decision maker. If so, is a direct gift appropriate or is a longer term wealth preservation and management option needed to meet an identified risk or care objective of the parent of the successor?
2. Is the successor in need of support in wealth management or administration to meet a particular care objective of the parent or risk or
3. objective of the successor?
4. Is the successor under a substantial constraint or disability that requires the inheritance to be managed by a substitute decision maker who may also work in conjunction with the supporters of a successor?
5. Should an inheritance, otherwise to be provided on death, to be accelerated and made available during the person's life?
6. Where there is more than one successor, how do you shape the proportion of benefit across successors having regard to family provision claim risk and representation risk that may be created during a parent's life?

Examination of these options normally needs an initial consultation with the client. This is the first phase of an estate planning engagement.

Estate Planning – an exercise in supported decision making

What Decisions?

1. Identifies the client's objectives, needs and values that have estate planning implications. These can include:
 - the identity of the client including their competency to act;
 - the territorial connections of the client
 - the family environment of the client;
 - the extent and form of direct and indirect property ownership of the client;

risks laid off by the client to insurance;

the nature and extent of the accountability and representation of the client;

the management strategies applied to the inheritance path and tax payment obligations of the client;

the extent and nature of the estate administration and succession objectives of the client; and

the extent and nature of the maintenance and support requirement of the client, their household, dependants and successors.

2. Identifies the information required for the estate plan including the client's interests and goals
3. Identifies the client's legal and other issues that affect the estate plan including issues relating to healthcare, lifestyle, financial management and everyday lifestyle support of beneficiaries

Preparation

1. Identifies material changes in the client's personal and financial situation since the last review and in response to the key risks and intentions identified.
2. The planner prepares information to enable analysis This may include some or all of the following:

Identifies family dynamics and business relationships that could impact estate planning strategies

Collects legal agreements and documents that impact estate planning strategies

Projects net worth at death

Considers constraints to meeting the client's estate planning objectives

Considers potential estate planning strategies

Calculates potential expenses and taxes owing at death

Assesses the specific needs of beneficiaries

Assesses the liquidity of the estate at de

Develops estate planning strategies

Evaluates the advantages and disadvantages of each estate planning strategy

Optimizes strategies to make estate planning recommendations

Prioritizes action steps to assist the client in implementing estate planning recommendations

3. Planner generates creative options that respond to the client's objectives, needs and values.

Communication

1. Planner assists client to evaluate options which are consistent with the principles of the client and estate stakeholders and satisfies appropriately their common and individual interests
2. Clients and Planner consider the alternatives and assists the client to resolve any conflicting interests and objectives identified in the planning process.

Choosing

1. Planner documents any agreement between the parties and the final strategy selected by the client.

Putting into Practice

1. Planner supports the client to implement estate representation and management consistent with the estate plan

Review and Follow Up

1. Planner and client periodically review the performance of the agreement or as otherwise required by law. Adjust the performance of the agreement as necessary.

A Parent's Approach to Decision Making – Initial Questions to Get the Most Out of Your Professional Supporters

Wealth Transfer Intention Outline – following death for direct property

- 1 Please describe any objectives or wishes you have about the following subjects:**
Affairs Management

By you For you

Representation Wealth Preservation Wealth Transfer

Management Succession Ownership Succession

Legacy / Social and Community Contribution

- 2 What are your goals or concerns about these subjects?**

Family Governance and Continuity Wealth Preservation and Transfer Financial Security and Legal Compliance Personal Representation and Succession Family Business Retention or Disposal

Managing family wealth for long term family benefit irrespective of the business in which a family is engaged from time to time.

Releasing business capital now for retirement or family support needs. Managing the retirement needs of your generation.

Something else? (Please describe)

- 3 What strategies and / or objectives are you trying to implement?**

Immediate Family Support by primarily supporting the surviving spouse for their life and then breaking up the estate through direct gifts to nominated successors. No concern is held for the re-partnering risk of the surviving spouse.

Social Contribution by making direct gifts to charities and other philanthropic targets Support for vulnerable beneficiaries by creating special purpose trusts

Multi generation wealth management by creating long term discretionary financial wealth management structures

Other strategies (please provide description)

- 4 When and under what conditions should wealth transfer occur?**

Please provide details:

- 5 What benefits do you want to create following your death?**

Simple direct gifts short term trusts

Special Purpose trusts e.g. for residence, education or dealing with the welfare of vulnerable beneficiaries?

Long Term wealth management trusts Other?

6 Who do wish to appoint as the Attorney, Guardian, Executor or Trustee of your estate?

6.1 **PRIMARY**

- (a) Primary 1
- (b) Primary 2

6.2 **SUBSTITUTE**

- (a) Substitute 1
- (b) Substitute 2

7 Specific bequests

- (a) within will:
- (b) by Memorandum of Wishes:

8 Residuary Bequests

- (a) to spouse/partner/other then if spouse/partner/other has predeceased,
- (b) to surviving children, if none then,
- (c) to surviving grandchildren, if none then,
- (d) final gift over:
 - (i) Scenario:
 - (1) my family, or
 - (2) spouse/partner/other's family, or
 - (ii) charity.

9 What Powers are to be given to a Trustee

- (a) Vesting Dates:
 - (i) income (eg at 18 years of age), and
 - (ii) capital (eg at 21, 25, 30 etc years of age).
- (b) Power to maintain infant beneficiaries
- (c) Power to invest
- (d) Power to borrow (particularly relevant if there are infant beneficiaries)
- (e) Power to partition, appropriate and postpone sale
- (f) Negate section 144 *Conveyancing Act* (To assist in apportionment of income streams after death of testator or life tenant.)
- (g) Power to carry on business (relevant if you are the proprietor of a business).
- (h) CGT and GST charging clause.

10 Testamentary Guardians in the event of infant children?

11 Funeral Arrangements - any particular requests?

12 Have you appointed a professional person to act as your executor (e.g. accountant, solicitor?) If so the following needs to be considered:

- (a) charging provisions,
- (b) nomination of representation?, or
- (c) review of executors commission rights.

13 Other clauses and provisions which may be need to be considered in your Will

13.1 **ASSETS**

Collectables are those assets that are used mainly for your personal use or enjoyment which have an acquisition cost excess of \$500.00 and which fall within a list which includes, artwork, jewelry, an antique or a coin or medallion, a rare folio, manuscript or book, a postage stamp or first day cover.

Personal use assets are those personal use assets which are used or kept mainly for your personal use or enjoyment and include furniture, household appliances, boats used for pleasure, sporting equipment which have an acquisition cost in excess of \$10,000.00.

13.2 LIABILITIES

Dealing with external structures:

- (a) companies,
- (b) trusts,
- (c) superannuation, and
- (d) life insurance.

Are there any guarantees or sureties or like obligations surviving death?

Are there contractual liabilities which will survive death e.g. commercial or professional risk?

What is the contemplated time scale for administration of the estate? ie. How long lived are the provisions of the testamentary estate intended to be?

A Parent's Approach to Will Making For Long Term Objectives

A primer about Testamentary Trusts

General notes

What is a testamentary trust?

A testamentary trust is simply a trust that is established by operation of the will of a person.

It can be a trust for a short or long term purpose. An example of the description of the purpose of a testamentary trust is:

- 3 *"I request the Trustees to have regard to the following objectives and wishes:*
- 3.1 *The purpose of the Trust Fund is to provide for the health, welfare, education, and other needs of the Primary Beneficiary during his or her lifetime including the welfare of the immediate family of the Primary Beneficiary*
 - 3.2 *I request the Trustees to treat the interest of the Primary Beneficiary (or if he or she fails to survive me, his or her children) as paramount over the interests of any other Beneficiaries. In making this determination, the Trustees can have regard to any other financial and other resources available to the Primary Beneficiary and any other family member to provide for the health, welfare, education and other needs of the Primary Beneficiary. The costs of making any such a determination are to be paid out of the Trust Property. Where than more than one person comprises the Primary Beneficiary, then the needs of each person comprising the Primary Beneficiary will be determined on an individual basis reflecting the actual needs of each such person and all financial and other such resources available to them."*

What is the purpose of a testamentary trust?

There is no magic in the words that describe the purpose of a trust other than fidelity to the intention of the will maker. The following principles may assist in defining the purpose of a trust:

1. *The trust is a means for delivering a benefit to people identified by the will maker.*
2. *The purpose of the trust is the delivery of the benefit intended by the will maker.*

In describing that intention, a number of choices need to be made by the will maker.

1. *Is the purpose of the trust to retain assets and only distribute benefits when safe to do so (a crisis protective trust), or*
2. *Is the purpose of the trust to provide a reliable income stream or residence services that are needed by one or more beneficiaries, or*
3. *Is the purpose of the trust to provide a mechanism to distribute income earned to a broad beneficiary group on the terms set out in the trust terms.*

This primer describes the initial choices that need to be made by a will maker about the operation of their estate following their death.

The terms of the testamentary trust are set out in the will and provide, in conjunction with ancillary legislation such as the Trustee Act of the State in which the trust operates, the rules that govern the administration of the trust property.

Who will be in charge of the trust?

It is the Trustee who has legal custody of the trust property.

The trust property may normally comprise a single asset, e.g. a house, a collection of assets, e.g. a share portfolio or a share of the residue of the estate of the will maker.

The trustee may be a commercial company e.g. Perpetual, a private company or one or more private individuals.

What is the property of the trust?

Trust terms must be impressed on defined and legally certain property.

This must be decided on a case by case basis.

Who will benefit from the trust and on what terms?

The beneficiary is the person to whom the trustee is accountable for delivering the benefit desired by the will maker. This person may be:

1. A dependant
2. A person with a just and moral claim on the deceased
3. A person or organization for whom the will maker might reasonably be expected to have made provision

This may be a very focused obligation, e.g. "I give \$XX (the fund) to the trustee on trust to pay that amount to "Y" (the beneficiary) on that person attaining the age of 18 years and until that age to use any part or all of the income or capital of that fund for the maintenance, education, advancement in life of the beneficiary.

Any funds expended before the beneficiary is aged under 18 years may be paid to the parent or guardian of the beneficiary and the trustee is not bound to see to the application of the funds paid for the support of the beneficiary.

What are my other options in making gifts under my will?

The trust is really a means of making a deferred gift under a will.

The alternative is to make a gift that is made, subject to the administration of the estate, in the short-term following death.

This may take the form of a gift such as “I give all my Residual Estate to my spouse once they have survived me by no less than 30 days”.

Some food for thought ...

Once a gift is made, it becomes subject to the life risks of the recipient (e.g., relationship or creditor risk). Is this appropriate.

Is creditor protection for a beneficiary a substantial concern?

Does the beneficiary want to treat their inheritance as an investment fund to benefit more people than just themselves?

What is the financial situation of the beneficiary, might a direct gift and their contribution to superannuation be a better strategy than a long term testamentary trust?

Is their special property (e.g. a holiday home) that needs special treatment (long term preservation as a resource for a broad family group)?

How do estate structuring options like the use of Special Disability Trusts affect developing estate administration strategies that deal with the rights of ageing persons?

Some closing thoughts...

The will intent outline attached to this paper gives a worksheet that can be used when considering how a client led conversation can shape how a will should be structured. I have also attached a interview evaluation sheet from Autonomy First that is used, once a professional is trained, for collecting evidence of decision making ability at the point of client onboarding or interview.

Whilst a lawyers experience may provide a framework that can inform a client's approach to their will making, it is the client who has to be the primary decision maker when deciding the work that is to be done for them.

Clients who do not have the ability to be actively engaged as consumers of professional services need the help of supporting or substitute decision makers unless the presenting decision or situation can be reduced in complexity to come within the demonstrable decision making ability of a client.

Conclusion

Clients need to be able to demonstrate their decision making ability so that attending professionals have authoritative reasons to assume the client's decision making ability is unconstrained or objective criteria which demonstrate the need for decision making ability to be understood in the context of the decision or situation at hand.

Indeed, it is probably a generally applicable principle that decision making ability is inevitably evaluated in the context of a particular decision or situation. With this in mind please note:

From NSW Department of Justice Guidance¹⁹:

You can't decide that a person lacks capacity just because they make a decision you think is unwise, reckless, or wrong.

Everyone has their own values, morals, beliefs, attitudes, likes and dislikes. You might think a decision is bad yet someone else will think it is good.

The majority of people take chances or make 'bad' decisions once in a while. The right to make a decision includes the right to take risks and to make decisions with which others disagree. This is known as dignity of risk.

However, you may question a person's capacity to make a decision if they make a decision that either:

- *puts them at significant risk of harm or mistreatment*
- *is very different from their usual decisions.*

When questioning a person's capacity, you may also consider:

- *the person's past decisions and choices*
- *whether they are easily influenced or pressured by others*
- *whether they have developed a medical condition which might affect their decision-making*
- *providing more information to assist them to understand what's involved in the decision, and its consequences.*

So, the dignity of risk held by a decision maker is the source of concern for representatives and supporters of the person about how defensible if the action proposed or that has occurred?

Asking the decision maker to describe the advantage they seek to gain from taking a particular decision is a useful starting point when evaluating what is otherwise thought of as a questionable decision. A person who demands a particular result without offering a rationale for their objective must be approached with great caution.

¹⁹ See http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/divserv_assess_principles.aspx

Guidance to Be Taken Away

1. *Identify the interest each party has in the outcome of the transaction proposed.*

It is not just conflict of interest that has to be identified and resolved but the unconscionable pursuit of personal interest against another party suffering a special disadvantage or vulnerability. The fact of diminished capacity being present lowers the threshold for undue influence being an operational risk in an engagement.

2. *Accept that diminishing cognition and capacity to function as a human being is a normal function of ageing and must be assessed as part of working with ageing clients.*

Are their triggers present that indicate diminished capacity, not just lack of capacity? Is the decision being sought within the operating cognitive span of the individual concerned? Get help if there is concern about the executive decision-making ability of the client. Acquiescence to an agreement cannot be confused with consent. Can the person concerned explain the impact of the decision on them?

3. *Can the vulnerable explain the advantage of the transaction to themselves and / or its impact on others?*

How is the person's understanding expressed and how will it be recorded and assessed?

What lay evidence of capacity is to be preserved about this transaction?

4. *Is the person pursuing an advantage as Attorney or other fiduciary?*

How then are the heightened responsibilities of such representatives and alternate decision makers to be evidenced and discharged in the course of the matter?

A Final Note: Will making is only one aspect of estate planning and administration.

In managing their affairs, people can become overwhelmed and as a result their decision-making ability can be impaired. It is a mark of resilience and decision-making capacity that a person can recover from such events.

The ability to recover from impaired decision making is a normal function in life. A person becomes a vulnerable decision maker when that resilience is itself impaired with the result the person cannot make a decision unaided.

Research by the European Commission teaches us²⁰:

While there is no agreement on a single definition of vulnerable consumers, the concept of consumer vulnerability that emerges from the academic literature, including sociology, marketing and law is wider than that defined in the UCPD. Key themes mentioned in the

²⁰ [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI\(2021\)690619_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690619/EPRS_BRI(2021)690619_EN.pdf) at page 2 and 3.

definitions are **powerlessness, not having control** over the interactions on the marketplace and higher risk of suffering **harm or detriment**.⁵

Vulnerability can take different forms. One taxonomy suggests that consumers can become vulnerable because of **information vulnerability** (linked to the ability to obtain and understand information or to make the right choice); **pressure vulnerability** (greater liability to hard pressure selling techniques); **supply vulnerability** (inability to afford essential goods or services or having less choice within an affordable price range); **redress vulnerability** (difficulty in seeking remedies for wrongs suffered); and **impact vulnerability** (being more affected by making bad choices).

Australian consumer law teaches us that a person's inability to advocate what is in their best interest put them at a special disadvantage with the result that providers of goods and services owe them a higher duty of care than the general population of those with unconstrained decision making ability.

Bringing objectivity to the understanding of the demonstrated decision making ability of people is a core mission of Autonomy First²¹.

Supporters and fiduciaries working with the vulnerable need to consider how the decision making rights of the decision makers to whom they are accountable are best protected and administered.

Those working with the normal population need to understand why they believe their clients are not vulnerable and on what basis they are assuming the decision making capacity of their client is unrestricted.

The law and supported decision making are uneasy bed fellows at present. Nonetheless, the supporters' concern about optimizing the welfare of their vulnerable connections should ideally result in deeper engagement with the emerging social support frameworks in the communities in which they live.

Embracing the national decision making principles is a fine starting point for this journey. These principles are, subject to applicable laws: (following the SDM Policy Guidelines):

PRINCIPLE 1: All adults have an equal right to make decisions that affect their lives and to have those decisions respected;

PRINCIPLE 2: Persons who require support in decision making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives;

PRINCIPLE 3: The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives;

PRINCIPLE 4: Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

²¹ <https://autonomyfirst.com>