INTRODUCTION
Capacity is one of those words we rarely need to worry about until certain things happen in our lives at which point it becomes very important. In that sense most of us have it and use it every day but we rarely realise its significance.

WHAT DOES CAPACITY MEAN?
Capacity is the ability to do something. Not the physical ability (though that may come into it) but rather the level of understanding required to decide to do something – to make a decision. We make decisions all the time – what to wear and eat, who we share our lives with and where to invest our money. Such choices and decisions are commonplace. We may not always make the best decision but no one would seriously doubt that we have the right to make it. We decide what is best for ourselves.

However not everyone is in that category. For some, making decisions is fraught with problems. This is not because they are indecisive, but because they don’t fully understand the issue they are called upon to decide, or the consequences of the decision they make.

WHY IS CAPACITY IMPORTANT?
The question of whether someone has capacity crops up in many different ways. Here are some of the more frequently encountered situations:
1. Making a Will.
2. Managing one’s financial affairs.
4. Selling a house.
5. Consenting to or refusing medical treatment.
6. Choosing where to live.
In each case, establishing whether a person has capacity to take the action proposed is important. This is especially so for those who are seeking to advise and assist them, e.g. solicitor, doctor or social worker. It is not difficult to imagine the implications of someone making a Will who does not know how much they own or who should benefit, or agreeing to make a gift of a large amount of money without realising its true value. Such persons are vulnerable to those who would seek to use the person’s lack of capacity for their own gain or advantage. Regrettably this can occur even within a family.

WHAT ARE THE TESTS FOR CAPACITY?
The Mental Capacity Act 2005 sets out a two-part test for capacity:

1. Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain (e.g. a condition or trauma that affects the way their mind or brain works)? If so,
2. Does such impairment or disturbance cause the person to be unable to make a specific decision at the time it needs to be made?

The impairment or disturbance can be temporary as well as permanent (e.g. under the influence of drink or drugs). In deciding whether it causes the person to be unable to make a decision, four factors must be considered:

1. Does the person understand the information relevant to the decision to be made?
2. Can he or she retain that information in their mind?
3. Can the person use or weigh that information as part of the decision-making process?
4. Can they communicate the decision?

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Failure to be able to do any of these four things means that the person does not have capacity to make the decision in question. However, it is important to remember that whether a person has or lacks capacity must be assessed on his or her ability to make a specific decision at the time it needs to be made. It may be a Will or the sale of a house, or as simple as what colour of shoes to wear – a person may have capacity to make one or more of these decisions at a particular time or none of them. That position may change with an improvement in health or with medical treatment, in which case the person’s capacity to make that decision would need to be re-assessed.

As well as the above, various tests of capacity (e.g. the capacity to make a Will) have been produced by decisions in court cases over many years. These continue to be relevant and can also assist an assessment of a person’s capacity.

WHO ASSESSES MENTAL CAPACITY?
It is up to the person who wishes to make a decision on behalf of another who may lack capacity who is responsible for assessing that person’s capacity. Sometimes that will be straightforward and routine. At other times a more formal assessment is called for because the decision in question is a serious one. In those circumstances, a professional such as a doctor, psychiatrist, or solicitor is asked to provide an opinion on mental capacity.

BEST INTERESTS
Finally, where someone lacks capacity to make a particular decision then any action or decision made on their behalf must be taken in that person’s best interests. This requirement includes a number of factors which have to be considered to come to a conclusion that the best interests of that person are being met. Guidance on this is given in the Code of Practice which was issued to assist in carrying out the principles in the Mental Capacity Act.