



## Making sure your loved one is mentally capable when signing their will

What does it mean to have 'mental capacity' when it comes to signing a will or an important legal document? This has recently become a hot topic, with new case law shining some much-needed light on the subject. It's also something that families need to be aware of as their loved ones age.

Mental capacity, as a concept, seems straightforward and self-explanatory. Common sense would suggest that if there is even a slight question as to a will-maker's capacity, an assessment should be carried out to ensure they fully understand the provisions in their will, as well as the possible consequences that could arise from them.

In a perfect world this might be true, but in reality this is not always the case. Increasingly families are disputing the wills of their loved ones as the provisions in the will are different from what they were led to believe. They often feel as though they have been cheated out of their inheritance when their elderly or terminally ill family member signed their will, without having the mental capacity to do so.

### What is mental incapacity?

Mental incapacity can be difficult to define and detect – for families and for others who are doing business with that person. Although there is no single definition of mental incapacity in New Zealand, it is widely acknowledged that a person lacks mental capacity if they cannot understand the nature, or foresee the consequences, of their decisions, or if they are unable to communicate them.

Let's use an example of how diminished mental capacity can impact on making a will.

Mary Seymour phones a law firm that she has never used before. She wants to make changes to her will and the firm is willing to do this for Mary. Mary explains that she is in hospital with terminal cancer so she will email her instructions; her new lawyer (Elizabeth Parr) will draw up the will and visit her in hospital to have the will signed and witnessed. The will is drafted and the following day Elizabeth visits the hospital to have Mary's will signed. When Elizabeth arrives, Mary is in bed and, although she is in considerable physical discomfort, she is chatty and appears lucid. Mary signs the will and this is

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witnessed by two hospital staff. Two days later Elizabeth is told that Mary has died. A few weeks later, Elizabeth receives notice that Mary's family is contesting her will, as they don't believe Mary had mental capacity when it was signed.

This scenario is more common than you may think. Disputes over the distribution of an estate can not only destroy family relationships, but are also costly, time-consuming and emotionally exhausting for all involved. So, how can this be avoided?

## Helping protect families from disputes

Recent New Zealand case law gives us some guidance as to how the courts want lawyers to approach the question of mental capacity to protect families from costly legal disputes.

In a 2017 High Court case<sup>1</sup>, Justice Courtney found the will-maker, whose mental capacity was the main question of the proceedings, to have been mentally incapable when she signed her will. The will-maker was very unwell at the time of both giving will instructions and signing her will. Her health had deteriorated to such an extent that she was regularly taking Oxynorm, an opioid-based painkiller, for comfort measures.

After hearing evidence from multiple expert witnesses, family and close friends, the court found that there was no way that the will-maker could have understood the nature of the changes that she was making to her will, which included entirely excluding certain family members, nor would she have been able to foresee the consequences arising from these changes.

The case was appealed and the Court of Appeal agreed with the High Court, but put significant weight on the fact that the deceased's will deviated significantly from her past wills. The three judges advised that if the provisions of the proposed will are significantly different from a past will, then the lawyer should question the will-maker on their reasoning for these changes. For example, the change referred to in this case was the unreasonable exclusion of a particular group of family members who were both previously included and who would have had a justifiable expectation to inherit.

1 *Farn v Loosley* [2017] NZHC 317

The court pointed out that if a will-maker instructs their lawyer to make major changes to their previous wills with no apparent good reason, this should be treated with considerable caution. It may point to evidence that the will-maker did not fully understand the consequences of making those changes. In this case, the court held that the earlier will was the valid document.

## Suspect mental incapacity?

Looking at our original scenario above, when Elizabeth visited Mary Seymour in hospital it was clear that Mary, in an oncology ward and surrounded by medical staff, was, in fact, terminally ill. Luckily for Mary, Elizabeth asked a doctor who was treating Mary to assess Mary's mental capacity. Although, this meant added costs and time for Mary, having a medical certificate stating that she had been assessed for her capacity to understand the nature of her will and the potential consequences that could arise from her will meant that her last wishes were heard and upheld.

As shown in many cases heard before the New Zealand courts, it's much easier to test for capacity at the time of making a will than it is to prove it retrospectively, which can often be impossible. It is also extremely important that families are protected from messy estate disputes.

## Keep everyone informed

**Families:** For families who have elderly parents who you know are considering making changes to their wills, testing for mental capacity may be something you may want to bring up with them, unpalatable and awkward as it may seem.

**Will-makers:** If you are becoming quite frail, your family may be concerned that you do not have the mental capacity to make and/or comprehend significant changes to your will, even though you may feel perfectly well. They may want you to undergo an assessment to ensure you fully understand the consequences of the changes you are making.

When you die, your family wants to have marvellous memories of your life and times. It would cause extra stress if your will contains some surprises about which no one has known, and that results in a family division over a challenge to your will. \*





# How old do you have to be?

As lawyers, we're often asked the legal age for a variety of things such as agreeing to medical treatment, making a will and so on. We thought it would be useful to pull together some of this information as a guide for the required ages in these situations.

## The younger years

At the age of five, you can be enrolled in a state school, although, under a recent law change, a child can start school at the beginning of the term closest to their fifth birthday, if their school has a 'cohort entry' policy. Youngsters don't actually have to start school until they're six years old.

At just 10, you can be charged with murder or manslaughter and, at 12 years old, you can be charged with a number of other serious criminal offences.

## Teen times

When you're 14 years old, you can be left at home alone. You can also babysit a child, as long as you're capable of providing reasonable supervision and care. You can now also be prosecuted for any criminal offence.

When you turn 15, you can wave goodbye to school, but you will need approval from the Ministry of Education.

On reaching your 16th birthday, you can sit a driving test and get your learner driver licence. Generally, you can leave home without your parents' agreement (unless there are serious concerns about your welfare). You can agree to, or refuse, medical treatment.

At 16, you can get married or enter into a civil union for which you will need your parents' consent – even though you don't have to live in the same house as them. Once you marry, however, your parents will no longer be your guardians.

You can leave school of your own volition at 16, and you're also eligible to work full-time. You can legally consent to have sex, apply for an adult passport, fly a plane solo, apply for a firearms licence and you're eligible for various state benefits. Your parents cannot change your name, unless you agree to it.

## There's more ...

When you're 17 years old, you can join the armed forces if you have your parents' consent. You can apply to join the New Zealand Police, but you can't start training at Police College until you're 18.

In the criminal court system, after you turn 17 you will be treated as an adult and must appear in the District Court or High Court; you no longer appear in the Youth Court.

Your 18th birthday signals the end of your parents (or legal guardians) having any legal responsibility for you. You can make a will; although in some circumstances younger people can do this. You can get married or enter into a civil union without your parents' consent. You can go off to the bank to apply for your own account, credit card and a loan. (You may have a bank account when you're under 18 years old, but it must be in the joint name of a parent or guardian.) You can be called upon to do jury service. You may place bets at the TAB or racecourse, buy Instant Kiwi tickets, vote in national and local body elections and you may stand as a political candidate. You can legally buy alcohol, cigarettes, tobacco or fireworks and can change your name, all without needing anyone's agreement.

## That's not everything

At the age of 19, if you're adopted, you can place a veto that will last a decade on information about you so that your birth parents cannot contact you; this veto can later be removed or renewed.

After you turn 20, your birth parents can ask Oranga Tamariki (Ministry for Children) for information about you. If you don't want them to do that you must apply for a veto; you need to write to the Registrar of Births, Deaths and Marriages saying that you don't want information to be released that could identify you. In the letter, you must say if you'd like counselling about your choice.

By the time you're 20 years old, you have the vast majority of adult rights and responsibilities. If you're adopted, you can apply to the Registrar of Births, Deaths and Marriages to obtain a copy of your birth certificate to find out the names of your birth parents. You can apply to adopt a child who is related to you. You can gamble or work in a casino, and you may drive with a small amount of alcohol in your system.

When you are 25, you can apply to adopt a child who is not related to you, as long as that child is at least 20 years younger than you.

There are, however, a number of things you can do with no minimum age. You can buy contraceptives, own land, purchase a lotto ticket, obtain a passport, have a tattoo and join a trade union.

We hope this helps with some age-related queries, and that the answers haven't come as too much of a shock – particularly to parents! ✨

# Questions you shouldn't ask job applicants



## An employment minefield

In the lead-up to the 2017 election, broadcaster Mark Richardson caused an uproar when he asked the then Leader of the Opposition, Jacinda Ardern, if she had plans to have children. The commonly-held view was that this question was outrageous. While a broadcaster has the liberty to ask a range of questions, an employer or potential employer cannot ask this.

Job interviews can be a challenge for both employers and applicants. There are varying opinions on the best way to interview applicants and which questions will help you ascertain if someone is the right fit for your workplace.

There are a number of questions, however, that simply cannot be asked as they could be considered to be discriminatory.

## Discrimination is illegal

The Human Rights Act 1993 applies to discrimination in all aspects of employment including job advertisements, application forms, interviews and job offers. It applies from the job application stage right through to after the person has been employed.

The prohibited grounds of discrimination are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment status, family status or sexual orientation. Most of these are self-explanatory. 'Family status' refers to any responsibilities for the care of family members. As a future employer, you can't discriminate because an applicant's close relative is a known criminal or simply someone you don't like.

In most cases an existing or recruiting employer can't make a decision based on, or ask a potential employee a question related to, a prohibited ground (such as race, political opinion or sexual orientation) because, generally speaking, this has no relationship to the applicant's ability to perform a job. This also applies to unpaid workers/volunteers and independent contractors.

As in the Jacinda Ardern example above, one issue that commonly arises is the temptation for employers to ask women of a certain age if they are intending to have their first baby, or to have more children. This is absolutely unacceptable.

If there is no date of birth on an application form, you cannot skirt around this and ask an applicant their age or any questions that may indicate their approximate age such as when they left school.

## What you can ask

There are a number of personal questions you can ask when interviewing and employing staff.

Some employers have a policy that they will not employ smokers. They take the view that smokers are more likely to be susceptible to illness. This may also be relevant in certain industries such as health organisations, fitness centres and so on. They may consider that it's not appropriate for staff to smoke as they are required to be role models.

Other employers have strict requirements regarding criminal convictions. It is acceptable to ask future employees if they have previous criminal convictions. Potential employees can be asked to submit to a police check.

Other jobs may require a certain level of fitness or other skills such as the ability to speak a second language. There are no issues with asking questions about any of these things.

When applying for a role as an advisor to a member of parliament or to be employed by a political party, there could be questions about political opinions and affiliations.

There are several exceptions to the prohibition of discrimination on the grounds of religion. The Human Rights Act does not prevent different treatment based on sex where the role is for the purposes of an organised religion, and that religion limits the role to being for one sex only to comply with the established rules of that religion.

There are no restrictions on different treatment of teachers in private schools, or social workers, who will be working solely with a group supporting people of a particular belief.

There are other exceptions that apply to the prohibition of discrimination in employment involving national security and work that is to be carried out wholly or mainly outside New Zealand, as well as on the grounds of age and disability.

## Taking action against discrimination

If you believe you have been unlawfully discriminated against during the recruitment process or indeed when you have signed an employment agreement, you can make a complaint to the Human Rights Commission and then to the Human Rights Review Tribunal.

For employers, if there are any questions you wish to ask potential staff but are unsure about, do check with us first. It's always better to err on the side of caution in these situations. ✨

# Inherited debt? What if your parents die broke?

When you hear the word 'inheritance', what is your first thought? Is it positive or negative? Do you think about what you could receive from your parents, or what you might pass on to your children? Answers will vary, but generally the term 'inheritance' carries positive connotations. The Oxford Dictionary defines an 'inheritance' as 'a thing that is inherited'. More helpfully, Wikipedia defines it as 'the practice of passing on property, titles, debts, rights, and obligations upon the death of an individual'.

For this article, however, we're focussing on 'debts' rather than actual things. What happens when your parents die broke? Can you inherit a debt?

The short answer is 'no'. In most situations it is not possible to inherit debt but there are some exceptions. When a loved one dies, their will should name the executors who are responsible for carrying out the will-maker's instructions. Part of an executor's role is to identify the deceased's assets and liabilities, to pay outstanding debts from the estate and to deal with what remains.

If there is no will, the person has died intestate and there are specific laws to address this situation.

## Executors deal with debt of an estate

Media stories often focus on the disposal of large inheritances. In the 21st century it may be more realistic to consider how our increasing trend towards societal debt (credit cards, mortgages, student loans and finance agreements) might impact on the administration of an estate.

If an estate has debts, the executors must clear those debts before distributing the balance of the estate. If it's necessary, assets must be sold to meet those debts. If there are more debts than assets the debt usually dies with the deceased, unless the debt is:

- Held jointly, in which case the surviving owner/s must pay the debt, or
- Secured by a third party, for instance a guarantee, making the guarantor liable.

While the legal position on inherited debt is clear, debt collectors may still try to seek what is owed to them. Don't fall for this. If you are unsure about your liability, speak with the estate's lawyer.

It's worth noting that if the deceased had a credit card, you should not use it after their death or you risk personal liability and criminal liability for fraud.

## Be organised yourself

If you cannot leave your children an inheritance, you should avoid leaving them an administrative headache or debt by:

- Having a will
- Making sure someone knows the location of that will
- Listing your major assets, investments, bank accounts and insurance policies, and
- Keeping notes about your main liabilities, not having these secured by third parties unless you really must, and ensuring any personal guarantees by others are revoked as soon as they are no longer required.

As society's penchant for personal debt rises and we all live longer, it's becoming less likely that children will inherit large sums from their parents. While that may destroy your dreams of global travel or designer goods, you can at least feel assured that the prospects of inheriting your parents' debt is low – if you distance yourself from their debts during your lifetime. ✨

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# Postscript

## Keeping New Zealand safe from money launderers – AML now in force

As you will already be aware from our article in the Autumn edition of *Fineprint*, from 1 July 2018 all law firms must comply with the requirements of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (AML for short).

This is another reminder that we must now verify the identity of all our clients.

While you are already familiar with providing your driver's licence as ID, we now need additional information such as a copy of your birth certificate and a current bank statement, or rates demand, to verify your full name, date of birth and address.

While in many cases it may be self-explanatory, we must ask you about the nature and purpose of the proposed business relationship with us. We may also request information confirming the source of the funds for a transaction.

The law applies to everyone and all transactions where money is received and/or paid through our trust account – for every new matter.

For our part, we must file regular reports with the appropriate authorities detailing the transactions we have dealt with and notifying them of any suspicious activity. Once these new requirements have been operating for some time we will all become familiar with them and it will then cause little inconvenience. However, it's important to understand the reason for the legislation and why you will be asked for this additional information.

If you have any queries about AML, please don't hesitate to contact us – our details are on the right. \*

## ONEcheck – a useful tool for new business

When you're starting a business, one of the first things you think of is its name. This is a big decision as, ultimately, your brand is built around the name of your business.

There's an easy way to check existing business names using ONEcheck. You can search for possible business names, associated domain names and trade marks, as well as the recent addition of searching social media. ONEcheck gives clear explanations of the difference between a registered business name, trading name and trade mark, guidance on how to best protect your brand and much more.

There are also quick links to the Companies Office, New Zealand Business Number and the New Zealand Intellectual Property Office.

Go to: [www.business.govt.nz/onecheck](http://www.business.govt.nz/onecheck) \*

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