

SWW Guidance on Vulnerable Clients

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No member can rely on these notes from the SWW in the event of a complaint or an external investigation.

We have taken every care to ensure that these notes are accurate and up to date but The Society of Will Writers accept no responsibility or legal liability in relation to them. Therefore it is the responsibility of the member to ensure they adhere to good practice and relevant legislation when dealing with clients.

WHO IS CLASSED AS VULNERABLE?

The term vulnerable and vulnerability are used throughout this guide to refer to a range of situations which may affect a client who is at a disadvantage because of factors that affect their ability to access and use your services.

The Society of Will Writers Code of Practice (at paragraph 5.4) defines the vulnerable client as:

“someone who is elderly, infirm, with a disability or learning difficulty or someone purchasing Will Writing Services at a time of illness or distress or with insufficient knowledge to understand a document that may be produced or advice that may be given to him or her, but who is nonetheless adjudged by the Member, with or without supporting medical opinion, to be of sufficient capacity to act on the advice given by the Member.”

As a Will Writer you are likely to encounter clients who could be defined as vulnerable, however there are differing types of vulnerability and this will affect how you provide your services to vulnerable clients. You may come across vulnerable clients whose vulnerability is expressed in different ways and who therefore require differing levels of support to access your services.

When dealing with vulnerable clients Society members should consider the ten mandatory principles recently introduced by the SWW which apply to all Society members as of October 2015. These principles can be found on the Society website at the following address:

<http://www.willwriters.com/the-society-of-will-writers-member-principles/>

WHAT TO LOOK OUT FOR WHEN ASSESSING VULNERABILITY

The possibility of vulnerability should always be considered whenever you meet with a client to take instructions. There are certain factors that should be considered as indicative of potential vulnerability, and these factors may be short or long term or may fluctuate over time. Below is a list of indications of potential vulnerability.

- Advanced age
- Sensory impairment – deafness, blindness

- Physical disabilities or ill health
- Mental or cognitive impairment
- Learning disabilities
- Dementia or Alzheimer's
- Mental impairment caused by brain injury
- Long term alcohol or drug abuse
- Difficulty communicating – Due to sensory impairment, cognitive impairment or simply because English is not the clients native language
- Illiteracy – inability to interpret and understand written information
- Difficulty understanding information due to emotional factors such as stress or grief (See *Key v Key* [2010] EWHC 408 (Ch)).

A vulnerable client may be affected by a number of the above risk factors as some factors are inherently linked. For example, advanced age brings with it a higher risk of dementia, sensory impairment and susceptibility to coercion or exploitation.

The presence of any of these risk factors may mean you are dealing with a vulnerable client who may require extra assistance in order to properly instruct you and ultimately receive the same benefit from your services as a client who is not vulnerable. It may also mean that they lack the required testamentary capacity to give you instructions.

Identifying vulnerability is not always a straightforward task. While in some cases risk factors will be obvious and easily identified through simple observation, other factors are not outwardly obvious and will require further investigation. A client may be suffering from a less obvious mental or physical impairments or have other difficulties that potentially make them vulnerable but may not be open with you about this. You should not assume that a client will inform you of any difficulties they may have, but nor should you refrain from asking for more information for fear of being intrusive; it is in the clients best interests to be open with you about their disabilities and special requirements so that you can cater for their needs more effectively.

RECOGNISING THE VULNERABLE CLIENTS SPECIFIC REQUIREMENTS

Once you have identified your client as potentially vulnerable you should take reasonable steps towards accommodating their needs and identifying any special requirements they may have to access your service. Effectively assessing the vulnerable clients' needs will help them overcome any disadvantage caused by their vulnerability and allow them access to your services.

When assessing the vulnerable clients' needs you should consider a number of factors:

Do they have any physical disabilities inhibiting access to your service?

A client who is physically disabled and uses a wheelchair may be unable to access your offices if it is not feasible to provide the correct facilities such as accessibility ramps or elevators; you may have to schedule appointments in the client's own home or other suitable location.

Do they have any special requirements or preferences for communication?

A client who speaks limited English as a foreign language may require an interpreter. Similarly a client with a hearing impairment may need to communicate with you using a sign language interpreter.

Do they require documents to be written in simple language, or explained to them clearly?

A client with learning disabilities, mental impairment or who is otherwise unable to understand complex English language may benefit from having material presented to them in simple language and explained clearly to them

Are they capable of understanding and acting on the advice you provide them?

Do they need additional support from a carer, a family member or interpreter? Do you need to make extra time for their appointment to explain your advice to them and ensure they understand?

HELPING VULNERABLE CLIENTS ACCESS YOUR SERVICE

As a member you have a duty to help vulnerable clients access your services. This duty is set out in paragraph 5.5 of the SWW Code of Practice:

“While it is accepted that Wills and other documents prepared by the Member may be complex in nature and couched in legal language, a Member must be prepared to explain to the vulnerable client terminology used in any such documents and in language that such client is likely to understand at no additional cost and in writing if requested. Failing which the Member shall rescind the contract for the provision of Will Writing Services and refund any fees paid if the vulnerable client so requests.”

To provide an effective service to vulnerable clients you will need to consider various aspects of your business and how these areas can be developed to properly accommodate the specific needs of vulnerable individuals and make your services more accessible.

You may want to consider how you market your services and how you can advertise the ways in which you can assist vulnerable clients. How accessible is your promotional material, information packs and website? If the information is difficult to understand you may alienate potential clients. You should ensure that your written communication such as leaflets and client care letters are clear and easy to understand and preferably free of legal jargon.

If you have physical premises how easy are they to find and access? Clients with physical disabilities may struggle to access your services if your offices are upstairs and there is no access by lift. Likewise a deaf client who relies on sign language or lip reading may struggle to communicate with you if your premises are not properly lit.

Members should be aware of their statutory obligations to make reasonable adjustments and avoid disability discrimination under the Equality Act 2010. The duty to make reasonable adjustments aims to make sure that a disabled person’s use of your services is as close as it is reasonably possible to get to the standard usually offered to non-disabled people and that they are not placed at a *substantial disadvantage*.

As a service provider your duty to make reasonable adjustments is anticipatory. This means that you should consider what reasonable adjustments you can make to ensure your services are accessible *before* a disabled person attempts to use your services.

The duty to make reasonable adjustments is also a continuing duty and you should regularly review your reasonable adjustment provisions.

What is a reasonable adjustment will depend on your businesses' resources and size, the cost of making the adjustment, whether the adjustment can actually be made and how effective the change will be in actually assisting vulnerable people in general.

Below are examples of possible reasonable adjustments and auxiliary aids that could make your services more accessible for vulnerable clients:

- Greater flexibility around appointments with clients, for example conducting home visits with clients who cannot access your premises, and allowing longer appointment times for clients with learning disabilities or mental impairments.
- Providing information in simple language and explaining documents clearly.
- Providing information in braille or in an audio format for blind clients.
- Providing a sign language interpreter or deaf-blind communicator.
- Providing an interpreter for client's who speak a foreign language (you must ensure however, that the Will is read to them in both English AND their native language).
- Setting up a loop system in your meeting rooms for clients with hearing impairments.
- Providing a designated disabled parking space if you have an office with onsite parking.

MENTAL CAPACITY

Mental capacity, broadly speaking, is a person's ability to make their own decisions. Capacity can be decision specific; for example a person may be capable of making simple day to day decisions for themselves but may lack the requisite capacity to make complex decisions about how to distribute their estate by will, as they are incapable of appreciating the significant legal consequences.

A client must have full testamentary capacity in order to execute a valid will. If you as a will writer or instruction taker have any reasonable doubt as to a client's capacity to give instructions then it is your professional duty to satisfy yourself that the client has, or does not have, the required testamentary capacity. When assessing a client's capacity you must have regard to the common law test as well as the statutory test.

The relationship between the common law and statutory test has been debated for some time. The general view is that the statutory test should be used to complement the common law test but does not displace it. The High Court has recently provided some clarity on the position on the test for capacity in the recent case of *Walker v Badmin* [2014] where it was confirmed that the correct test is the common law test established in *Banks v Goodfellow* [1870].

[The Common Law Test](#)

The classic statement of a test of a client's testamentary capacity is contained in the judgment of Cockburn CJ in *Banks v Goodfellow*:

“It is essential...that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

The test in *Banks v Goodfellow* requires the testator to understand 3 things:

1. The nature of his act and its effects, (but not necessarily their precise legal effect)
2. The extent of the property of which he is disposing
3. The nature of the claims to which he ought to give effect

Furthermore, the client should not be suffering from any disorder of the mind that “shall poison his affections” or any other delusions that may influence the provisions of his will.

A ‘delusion’ is a belief in something that no rational person could hold, and that a person maintains despite contradiction by rational argument. A delusion will effect a client’s testamentary capacity if it influences or is capable of influencing the provisions of their Will. If a client holds a delusion that cannot effect the provisions of their Will then they may still have testamentary capacity.

[The Statutory Test](#)

The Mental Capacity Act 2005 contains the statutory test of capacity. Section 1 of the MCA 2005 sets out the main principles of the starting point of assessing capacity:

1(2) a person must be assumed to have capacity unless it is established that he lacks capacity

1(3) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

1(4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision

There is a presumption of capacity. It must at first be presumed that an adult client possesses the requisite capacity to make their own decisions and provide you with good instructions. Where there is doubt as to the client’s capacity the burden of proof is on the person seeking to establish a lack of capacity.

The statutory test for capacity is set out at section 2 of the MCA 2005:

(1) ...a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or disturbance in the functioning of, the mind or brain

(2) it does not matter whether the impairment or disturbance is permanent or temporary

The statutory test for capacity is therefore time specific as well as decision specific. There may be certain times of day where a client is more lucid and will have capacity to give instructions. As a will writer you should be aware of this and willing to make adjustments to accommodate a vulnerable client.

It is also important to note that although advanced age is a risk factor when assessing a client's vulnerability, a lack of capacity cannot be established merely upon a person's age or appearance, or their condition or an aspect of their behavior (s2(3) MCA 2005).

A person's inability to make a decision is set out in section 3 of the MCA 2005:

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).

An explanation of the information relevant to a decision must be given in a way appropriate to the client's circumstances, for example in simple language, large print or braille.

Dependent upon the nature and effect of the decision in question the fact that a client is only able to retain the relevant information for a short period does not necessarily mean they should be regarded as unable to make a decision.

Finally, the information relevant to a decision includes information about the reasonably foreseeable consequences of deciding one way or another, or failing to make a decision (s3(4)).

You must give a client the appropriate help and support to make their own decisions. All necessary steps must be taken to enable them to make a particular decision unaided.

THE GOLDEN RULE

The Golden Rule applies where there is doubt as to a client's ability to give valid instructions to the will writer. This rule was expressed by Templeman J in *Kenward v Adams* [1975] and also in *Re Simpson* [1977] and states that when a solicitor (or other professional draftsman) is drawing up a will for an aged testator, or a testator who has been seriously ill, the making of the will should be "witnessed or approved by a medical practitioner who is satisfied of the capacity and understanding of the testator, and records and preserves his examination of the testator and findings".

Although it may seem tactless or difficult to explain this precautionary measure to your client or their family or carer you should not feel inhibited. The purpose of the Golden Rule is to prevent any later challenge to the will on the grounds of lack of capacity.

The medical practitioner present should keep accurate records of his assessment of the client's capacity. It is also imperative that you keep detailed contemporaneous notes confirming the steps that you have taken to assess the client's capacity, any evidence, and the reason for your decision.

ASSESSING CAPACITY

It is your duty as a will writer to satisfy yourself that a client has the requisite testamentary capacity in order to provide you with instructions. As capacity is decision specific, the relevant tests for capacity must be applied in respect of each decision being made.

How you assess a client's capacity is important. If possible your assessment, or at least part of it, should be conducted with the client alone. If a family member or carer accompanies the client then it may be useful to you to observe how they interact in order to identify a potential risk of undue influence.

A vulnerable client may feel more at ease if you visit them in their own home or other place where they feel most comfortable. As capacity is time-specific and can fluctuate throughout the day you should also identify the periods when the client is likely to be most lucid and endeavour to take instructions then.

To assess capacity you may make general conversation with the client or ask a series of questions. The questions you ask could be about current affairs and past events that the client could reasonably be expected to have some knowledge of. If possible try to learn something of the client's personal history from other family members or carers and ask questions to test their recollection.

Take note of the client's responses and at later appointments try to discuss the same matters again. If the client is inconsistent with their answers or provides vastly different instructions upon a second meeting then it is possible that the client may lack capacity and you will be unable to act upon any instructions they provide you.

Even if you are satisfied of your client's testamentary capacity, you may need to consider the risk of the client being susceptible to undue influence.

UNDUE INFLUENCE AND TESTAMENTARY DISPOSITIONS

You may find a client who is unable to make their own decisions not because of a disturbance in their mind or brain but because significant pressure is being exerted over them by another in order to influence their decisions.

Undue influence means coercion, not merely persuasion. It is necessary to prove that the pressure was severe enough to overwhelm the client's own wishes, and lead to them making a will that they did not wish to make.

Undue influence is more readily inferred where the client is physically or mentally weak, so elderly or ill clients may be at a higher risk of being susceptible to undue influence and you should be aware of this possibility when dealing with these categories of vulnerable clients.

The law treats these vulnerable individuals differently to those lacking capacity for the purposes of the MCA 2005 or the common law tests as they do have the capacity to make their own decisions, and therefore no one else is able to make decisions on their behalf.

You must ensure that your instructions originate from your client and are not being provided by a third party through undue influence. Although other family members may communicate information to you

on behalf of a client who is vulnerable and has difficulties effectively communicating, you should not assume that these people have the client's best interests at heart and should seek to confirm any instructions with the client directly and alone.

Unlike capacity, there is no presumption of undue influence. Persuading an individual to make particular gifts to them or include them in their will by warning them they are reliant on their inheritance, or hinting that they deserve to be rewarded for caring for them is not necessarily undue influence. There must be coercive behaviour.

If you are concerned that the client is being subjected to undue influence and they want to continue with instructions that appear to be against their best interests then you should see the client alone. If they need assistance communicating with you then enlist the help of a neutral third party such as an advocate or interpreter.

You should also be aware of a further core principle of the MCA 2005 (section 1(4)): "A person is not to be treated as unable to make a decision merely because he makes an unwise decision." A decision that you feel is unwise or against their best interests is not necessarily a decision brought about by lack of capacity or undue influence.

Your duties in relation to assessing the possibility of undue influence bearing upon your client are underpinned in Section 5 'Instructions' of the Society of Will Writers Code of Practice.

OUR CONCLUSION

Vulnerable clients should be afforded additional support and it is your duty as a Will Writer to make reasonable adjustments to ensure the vulnerable client can access the same services as a client who is not vulnerable, and is not placed at a disadvantage. Not to do so would be negligent. It is also important that you are aware of the various tests for capacity and your duty to ensure that the client's you are dealing with possess the requisite capacity to provide you with instructions.

The Society of Will Writers Code of Practice makes reference to your dealings with vulnerable clients, we fully expect Members to be compliant with our Code of Practice.