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MARCH MASTERY
a month of intensive cpd learning

ELDER AND SUCCESSION LAW AFTERNOON

WEDNESDAY 18 MARCH 2026

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The 3 faces of CAPACITY

What every wills and estates practitioner needs to know

ACT Law Society
March Mastery CPD

Julia Bridgewater

DISCLAIMER:

The content of this presentation does not constitute legal advice, is not intended to be a substitute for legal advice and should not be relied upon as such.

This presentation is provided for educational and informational purposes only.

CAPACITY

- Rule 8 *Legal Profession (Solicitors) Conduct Rules 2025*
- Section 5 *Guardian & Management of Property Act 1991*
- *Section 6A GMP Act 1991: limits*
- *Court Procedure Rules 2006: “person with a legal disability”*
- *“Functional” capacity to manage their own affairs: broader than mental incapacity*



CAPACITY

Gibbons v Wright [1954] HCA 17 extract from the judgment by
Dixon CJ and Kitto and Taylor JJ (emphasis added)

“... The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation. ...

... [The] mental capacity required by the law in respect of any instrument is **relative to the particular transaction** which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained. ... [One] cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and subject-matter of the particular case.”



CAPACITY

Why does it matter?

- Shift of **responsibility** and **risk** due to privatisation of management via 'Enduring' agency agreements
- Professional obligations: valid and enforceable documents
- Impact on not only client but their family or dependants
- Community obligation – the Court has a protective jurisdiction



Overview

1. Legal capacity

1. Adult 18+
2. Statutory exceptions
3. Bankruptcy
4. Criminal convictions





2. Physical capacity

Statutory requirements

- Sign in person with witnesses
- Give direction to another to sign
- Functional capacity to manage their own affairs



3. Mental Capacity

- Practitioner's observations
- Treating medical practitioner certificate
 - Green v Green [2024] NSWSC 1442
- Guidelines

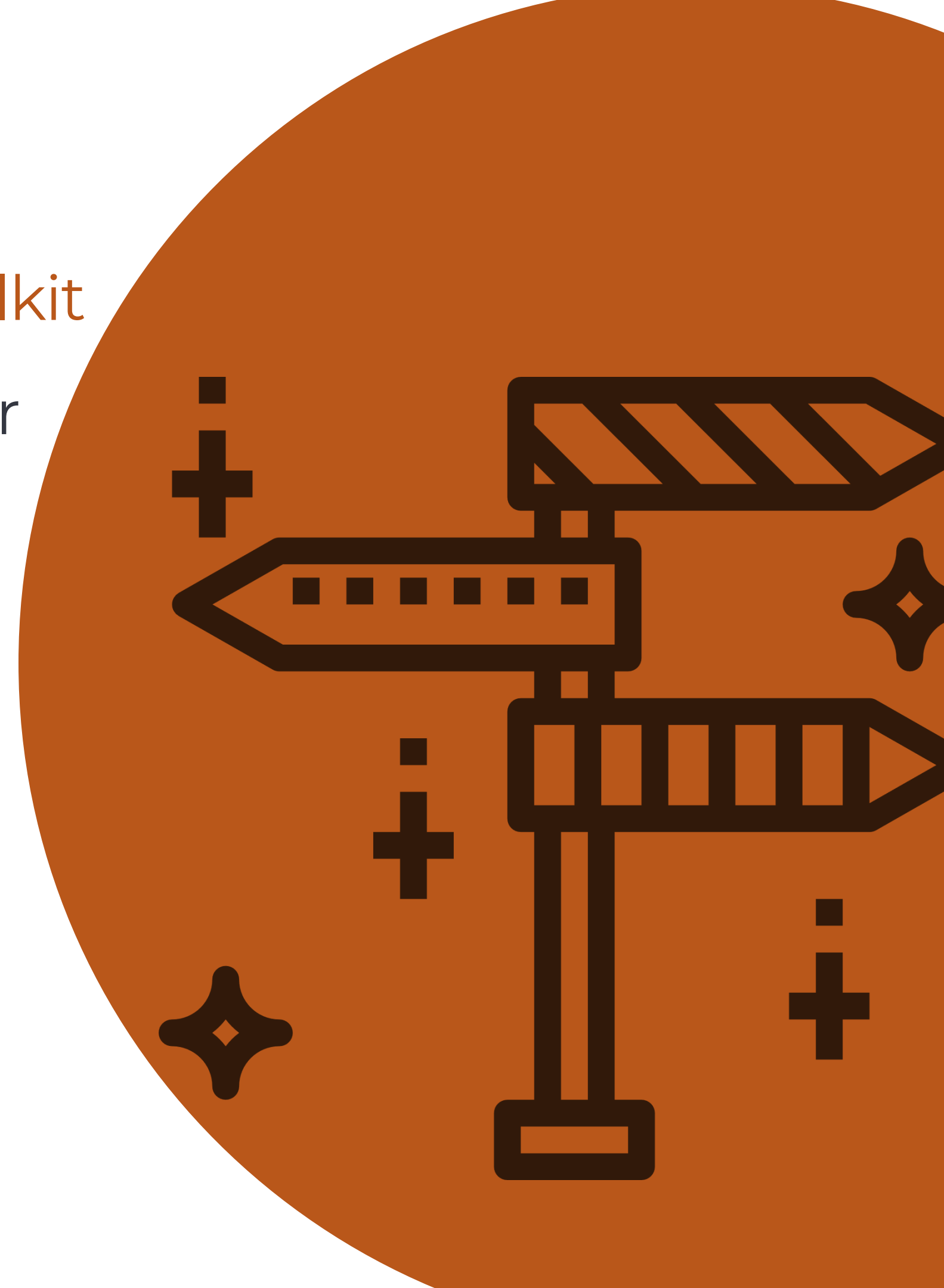
RISK MANAGEMENT

ACT Law Society Capacity Guidelines & Toolkit

- Certificate of treating medical practitioner
- Legal practitioner assessment
- Client familiarity; individual assessment

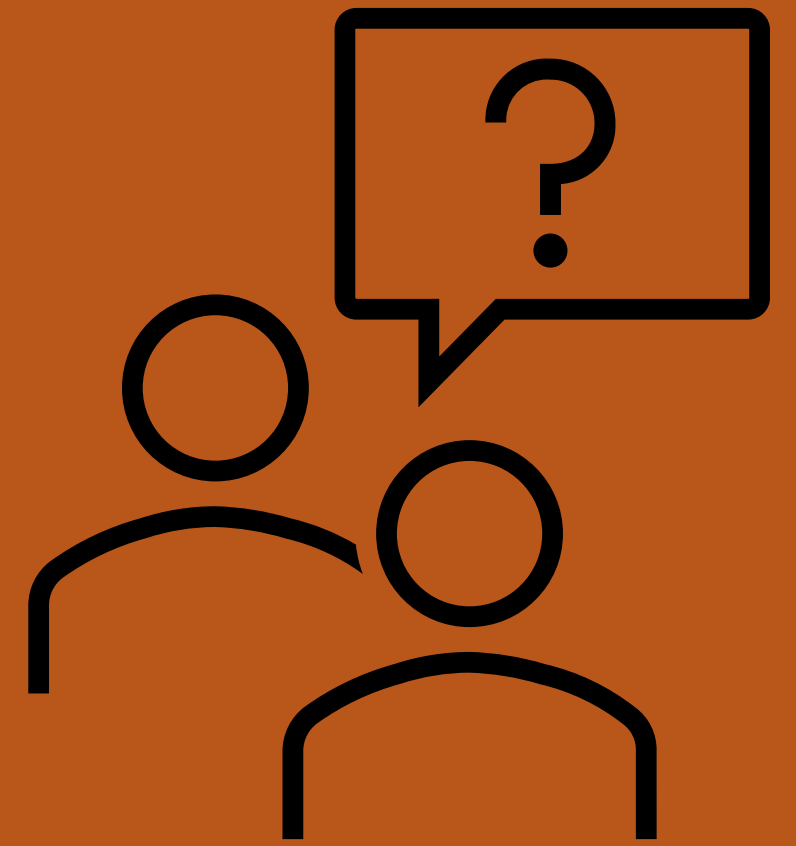
How do you say no?

- Legal professional obligations
- Firm policy
- Prepare a 'script'



Ryan v Dalton Kunc J

Guidance to solicitors when supervising execution of a will



Testamentary Capacity

The test in *Banks v Goodfellow* (1870) LR 5 QB 549

Walker v Walker (No2) [2025] ACTSC 9

- Developments UK, Wales & NSW
- “Unfettered knowledge & approval”
- Fraud
- Undue influence





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