

# Capacity in the rear view mirror

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## Falk J's conundrum

*Nothing indicates that determining such a matter [i.e. the validity of a will] is one of the "purposes" of the Act. I also note that it does not straightforwardly fit with all the principles in s 1. Obviously capacity could be presumed in favour of the testator, but s 1(3) in particular presents a potential problem. As Mr Dumont [Counsel for Respondent] points out, it could encourage an approach that is the opposite of the "golden rule" (see [19] above), because if there was no or limited evidence of steps taken to assist the testator in (for example) understanding, retaining, or using or weighing information then capacity would be presumed.*

*Re Clitheroe at para 62 per Falk J*

## How do MCA principles actually apply after the event?

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

Section 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.

## Capacity assessment in retrospect

- Capacity assessment for MCA purposes in fact works the same way as common law
- The same policy goals and the same solutions
- Stress-test with advance decisions to refuse treatment

# Resources

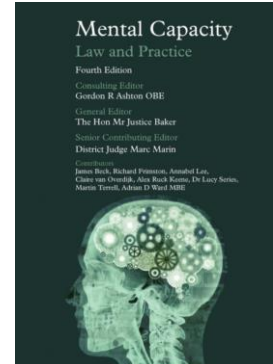
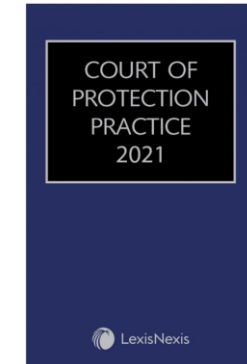
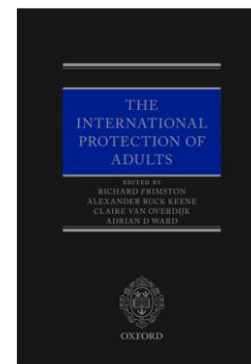
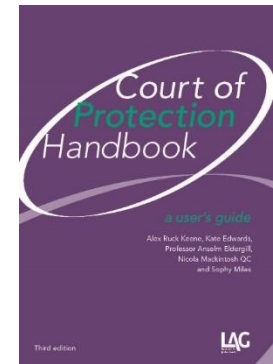
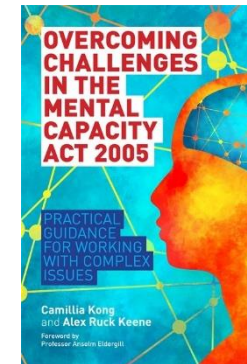
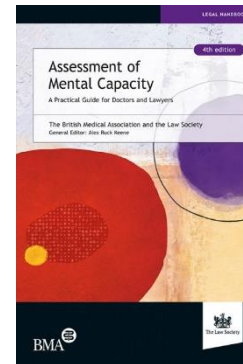
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