

# Mental Capacity Act and Court of Protection procedure

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# Capacity: the MCA 2005 (1)

## Section 1: The Principles

The following principles apply for the purposes of this Act.

- (1) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (2) 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
- (3) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

[...]

# Capacity: the MCA 2005 (2)

## Section 2: People who lack capacity

- (1) For the purposes of this Act, 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 a disturbance in the functioning of, the mind or brain.

[...]

## Section 3: Inability to make decisions

- (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).

# Capacity: the sparkly principles (1)

*King's College Hospital NHS Foundation Trust v C and V*  
[2015] EWCOP 80 [2016] COPLR 50:

- (1) Presumption of capacity, and the burden and standard of proof
- (2) Capacity is decision-specific
- (3) All practicable steps must be taken to support the person without support
- (4) Merely because a person takes an unwise decision does not mean they do not have capacity to make it, and the outcome is irrelevant
- (5) There must be an impairment/disturbance which renders the person **unable** to do one (or more) of the functional things required to make a decision

# Capacity: the sparkly principles

- (7) A person cannot be considered to be unable to use and weigh information simply on the basis that he or she has applied his or her own values or outlook to that information in making the decision in question and chosen to attach no weight to that information in the decision making process.
- (8) There must be a causal connection between the impairment/disturbance and the inability: and you should consider whether there is a functional inability first
- (9) [If you go to court]: whilst the evidence of psychiatrists is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of s 2(1), the decision as to capacity is a judgment for the court to make

# Capacity: the eight sparkly principles (2)

And the capacity assessment guide:

<http://www.39essex.com/mental-capacity-law-guidance-note-brief-guide-carrying-capacity-assessments/>

# Best interests: the MCA 2005 (1)

## Section 1: The Principles

The following principles apply for the purposes of this Act.

[...]

- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

# Section 4 MCA

## Section 4: Best interests

- The factors that must be taken into account in determining what is in a person's best interests can broadly be summarised as follows:
  - equal consideration and non-discrimination;
  - considering all relevant circumstances;
  - considering whether (and when) that the person may regain capacity;
  - permitting and encouraging participation;
  - the person's wishes and feelings, beliefs and values;
  - the views of other people;
  - special considerations for life-sustaining treatment;
- It cannot be emphasised enough that s.4 MCA 2005 never gives the answer, it just makes us (hopefully) ask the right questions.
- The best interests guide: <https://www.39essex.com/mental-capacity-guidance-note-best-interests-july-2020/>

# The approach to best interests

- “The purpose of the best interests test is to **consider matters from the patient’s point of view**” *Aintree v James* [2014] 1 AC 591
- Putting yourself in the shoes of P
- Not a ‘what P would have done test,’ but if it is clear what P would have done will carry (at a minimum) very great weight absent compelling reasons to contrary
  - *Briggs v Briggs* [2016] EWCOP 53; *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26
  - Contrast *Wye Valley NHS Trust v B* [2015] EWCOP 60 and *East Lancashire NHS Trust v PW* [2019] EWCOP 10

## Informal decisions: the s.5 defence

*“Section 5 of the 2005 Act gives a **general authority**, to act in relation to the care or treatment of P, to those caring for him **who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P’s best interests for the act to be done**. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court.”*

*Re MN [2017] UKSC 22, per Baroness Hale*

- In fact a defence not specific authority but treated as authority in practice, and the most used bit of the Act.

# Deprivation of Liberty Safeguards

- (Unfeasibly complicated) mechanism for administration of authorisation of deprivation of liberty in hospitals and care homes of those with impaired capacity
- May well be necessary to consider in the case of birth arrangements in relation to individuals whose particular psychiatric conditions may make them unable to make decisions about those arrangements: *R (Ferreira) v HM Senior Coroner for Inner South London and others* [2017] EWCA Civ 31
- If a **planned** admission (especially transfer from psychiatric hospital) very likely that will need to have authorisation in place before the person arrives: *NHS Trust & Ors v FG* [2014] EWCOP 30
- To be replaced by Liberty Protection Safeguards in due course – current ETA April 2022

## Advance planning

- No such thing as an advance directive in English law
- Advance Decisions to Refuse Treatment
- Powers of Attorney (welfare / property and affairs)
- Advance statements

# The Court of Protection (1)

- Specialist court charged with determining questions in relation to those who lack capacity to take their own decisions.
- Key task (1): to decide whether person concerned ('P') has or lacks the capacity to take a specific decision or decisions (for instance as to where they should live or as to the management of their financial affairs)
- Key task (2): Where P lacks capacity to take a specific decision, either:
  - To take the decision on their behalf and in their best interests;
  - To appoint a deputy to take the decision, again in their best interests.
- Key Task (3): To declare whether acts done or yet to be done in relation to P are or are not lawful (for instance, whether life-sustaining medical treatment can be withdrawn or withheld from P)
- Key Task (4): To consider applications relating to deprivation of liberty

## The Court of Protection (2)

- Different tiers of judge –serious medical treatment cases before judge of the High Court (“My Lord”/”My Lady”)
- Patient usually represented by Official Solicitor as ‘litigation friend’ – judge may or may hear them (increasing trend in medical cases to visit hospital)
- Hearings usually in public with reporting restrictions
- Can get to court 24 hours a day 7 days a week, but more complicated outside business hours
- Guidance available: Serious Medical Treatment Guidance [2020] EWCOP 2
- Do not wait if you know a crisis is coming which will need the involvement of the court

## The Court of Protection (3)

- Contingency planning in the perinatal context:  
*Guys And St Thomas NHS Foundation Trust v R*  
[2020] EWCOP 4
- Court can address the position of a woman who currently has capacity to make relevant decisions but is anticipated to lose capacity in the run-up to / during labour
- Critical – what else have you tried (e.g. advance care planning) and come to court early

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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