Adult Social Care

Mental Capacity Act – Mental Capacity Assessments and Best Interests Decisions Practice Guidance

Version 3

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If you would like to make any comments, amendments, additions etc. please email ASCH.AdultCare.Policy@derbyshire.gov.uk

Introduction

First Principles

Five statutory principles are at the core of the Mental Capacity Act 2005 (MCA). All staff working with people who may lack capacity should familiarise themselves with these principles.

1) *A person must be assumed to have capacity unless it is established that they lack capacity*

2) *A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success*

3) *A person is not to be treated as unable to make a decision merely because they make an unwise decision*

4) *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 their best interests*

5) *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*

The MCA Code of Practice is secondary legislation. It provides guidance about how the MCA should be put into practice. Social care workers are legally required to have regard to the Code of Practice when supporting people who may lack capacity to make a decision. In addition, workers must follow the 39 Essex Chambers guides (described below), since these explain where the Code of Practice has been superseded by case law.

Scope of the Mental Capacity Act

The Mental Capacity Act (MCA) applies to people aged 16 and over. A few rules only apply to over 18s. For example, only over 18s can make advance decisions. Also, DOLS (The Deprivation of Liberty Safeguards), introduced as an amendment to the MCA, can only be used to safeguard over 18s. Only the courts can give authority to deprive 16–17-year-olds of their liberty.

The MCA can cover most day-to-day decisions such as what to wear or what to buy when doing the weekly shopping. It also covers many life-changing decisions such as whether to move into a care home or to undergo major surgery.

There are certain decisions that can never be made in someone's best interests under the MCA, either because they are governed by other legislation, or they are too personal. These include consent to marriage, placing a child up for adoption and sexual relationships. Legally, sex must always be consensual. Therefore, if a person has been assessed as being unable to consent to sex, a best interests decision cannot be made for that person to have sex.

The courts have determined which factors are relevant when assessing capacity in these (and several other) situations and, importantly, which factors are not. For our capacity assessments to be lawful, workers need to be aware of these salient factors, particularly when assessing capacity for residence, contact and sexual relationships.

39 Essex Chambers write invaluable guides for social workers who assess capacity. These are updated when case law changes. For example, the current version included a change on how capacity for hoarding must be assessed.

The most recent versions can be found on this link. The following three key guides are essential reading for all social workers who assess capacity.

Mental Capacity Guidance Note: Assessment and recording of Capacity

This details how case law has altered how we must assess capacity, including the re-ordering the stages of capacity assessments, and the third stage, which is not in the MCA Code of Practice.

Mental Capacity Guidance Note: Best Interests

This detail changes to how best interests must now be weighed, different to the MCA Code of Practice (for example, more consideration of people's wishes and feelings).

Mental Capacity Guidance note: Relevant Information for Different Categories of Decisions

This lists what the courts have determined are and are not, relevant factors when assessing capacity for key decisions including residence, contact, social media, care, sex and hoarding – see page 2 of the guidance note for the list.

Authors of the 39 Essex guides have also created the Capacity Guide website.

Who Undertakes Mental Capacity Assessments?

The person who assesses an individual's capacity is usually the person (be that a family member or professional) who would be responsible for that decision if that person were found to lack capacity.

This does not absolve Adult Care from responsibility for people who self-fund, especially when significant decisions regarding their care are made by family. For instance, if a person, assessed in hospital as lacking capacity for residence were placed by their family for the first time in a care home, a referral should be made to the area team for a timely review. Otherwise, their rights may be neglected, and they may suffer harm. For example, they may regain capacity to decide to return home. Their family may consider this unwise and not realise this is the person's right.

Social care workers should not take responsibility for assessing capacity for medical decisions, such as whether or not a person should be resuscitated or given covert

medication. Medical decisions should be made by health professionals. However, workers may contribute to such assessments, using their knowledge of the person.
When there are disagreements over who should assess, and the matter comes within the remit of Adult Care, the general rule is that if an assessment needs to be undertaken, clarification about the most appropriate person can be dealt with later.

Workers could offer to be joint assessors and joint decision-makers. If in doubt, refer to your line manager if you feel you are being inappropriately excluded from or pressured into undertaking a mental capacity assessment.

When assessing capacity, certainty is not required. The law requires a reasonable belief that, *on the balance of probabilities*, the person has, or has not, got capacity for that specific decision. You do not have to be certain *beyond reasonable doubt* (the criminal standard of proof).

Planning for the Future

Any person may lose capacity to make important decisions. The MCA enables people to determine how they wish to be supported and how their finances should be managed if they lose capacity. This can be done via an Advance Decision, Advance Statement or Lasting Power of Attorney (LPA).

There are two types of Lasting Power of Attorney (LPA) or Court Appointed Deputyship order:

- *Property and Financial Affairs* (these give powers to manage finances such as selling the family home or managing investments).
- *Health and Welfare* (these give powers to decide where a person should reside, and what treatment they refuse, from options available. They may give specific consent to decisions about life-sustaining treatment).

Very occasionally, you may come across someone with an *Enduring Power of Attorney* (EPA). These only relate to financial matters and are largely equivalent to LPAs for *Property and Financial* Affairs. They are valid if registered with the Office of Public Guardian.

If someone is in the early stages of a deteriorating illness, it is good practice to advise them of their legal rights to make such plans for their future. This becomes much more important as people begin to decline cognitively or approach end of life.

It can feel difficult raising such topics. It becomes easier with practice as you find a personal style that feels appropriate. There are few people who have not considered such questions, and many who do not know how to ensure their wishes will be respected. Such a conversation can reduce that person's anxiety about the future and ensure they retain control.

When working with someone who lacks capacity in a key area, workers should check if there is an Advance Decision, Advance Statement or Lasting Power of Attorney (LPA).

Copies of such documents should be uploaded to MOSAIC. Within MOSAIC, LPAs should be recorded as *Roles in Personal Relationships,* and be clear if it is an LPA for *Health and*

Welfare or/and for *Property and Financial Affairs*. People often inadvertently believe that they have legal authority when this is not true. If a copy of legal authority to make decisions on a client's behalf is not available, workers should check with the Office of the Public Guardian, using their quick, free and simple service. Urgent enquiries can be made via this Office of the Public Guardian link, and a response is usually returned within the hour.

If someone lacks capacity to decide whom they want to make decisions for them, they cannot make an LPA. If they have contentious care needs, own a property, or have a considerable amount of money, the Court of Protection might appoint a Deputy to manage their affairs. This may be a family member, solicitor or, as a last resort, the Council's Deputyship team.

LPAs are powerful instruments. Legal advice may be needed if there is a disagreement with an attorney over a key decision. If appropriate, the Court of Protection may be asked to suspend the attorney's powers, pending a hearing on whether they should remain as attorney. For example, if the attorney was authorising excessive force or did not agree the person has regained capacity.

The courts are now reluctant to appoint family members as health and welfare deputies if there are ongoing issues between family members or very contentious issues. Likewise, the courts rarely appoint a local authority as a Health and Welfare Deputy as the courts prefer to make decisions in contentious situations.

Advance Decisions

Advance decisions, sometimes known as living wills, enable people to refuse specific types of treatments in case they lose capacity in the future. Whilst they are rare, they are gaining in popularity. Consequently, do not assume one does not exist if you need to make a best interests decision.

Chapter 9 of the MCA Code of Practice provides detailed guidance on advance decisions. In brief, an advance decision is legally binding if:

- The person was aged 18 or over and had the capacity to make the decision at the time it was made
- It specifies clearly which treatments are to be refused
- It explains the circumstances in which those treatments are to be refused
- The advance decision has been made of the person's own accord, without pressure from others; and
- The person has not said or done anything that would contradict the advance decision since it was made. For example, by saying that they have changed their mind

Advance decisions can be oral or written. However, advance decisions to refuse life-sustaining treatment, such as CPR (cardiopulmonary resuscitation) or ventilation, must meet strict criteria to be legally binding, and be:

- Written down

- Signed in the presence of a witness
- The witness must sign to that effect; and
- Include a clear statement that the advance decision is to apply to the specific treatment, even if life is at risk

An advance decision can cease to be applicable if:

- The person withdraws it while they still have the capacity to do so
- Their behaviour is inconsistent with the advance decision (e.g., they give permission for the specified treatment before losing consciousness)
- Unpredicted circumstances (e.g., pregnancy or new advances in medication or treatment which, it is reasonable to believe, could have affected the decision made by the person when they made the advance decision)
- A lasting power of attorney for health and welfare was made after the advance decision, and the attorney has been given the authority to make decisions about the same treatment. A court appointed deputy cannot overrule a valid and applicable advance decision. The court itself can rule on the existence, validity, and applicability of an advance decision, but cannot override it if it is valid and applicable
- Advance decisions to refuse treatment for a mental disorder are not applicable during periods of detention under the Mental Health Act 1983

What about Emergencies?

If time permits, legal services may contact the Court of Protection for an urgent order day or night (and Call Derbyshire can access solicitors out of hours). However, in an emergency, what steps are reasonable may differ from those in non-urgent cases. For example, it will almost always be in the person's best interests to receive urgent treatment without delay. One exception is when the person has a valid advance decision to refuse that specific treatment.

Restraint may be needed in an emergency before a formal capacity assessment can be completed. If so:

- The person taking action must reasonably believe that the person lacks capacity, and that restraint is necessary to prevent harm to that person; and
- The amount or type of restraint used and the time it lasts must be a proportionate response to the likelihood and seriousness of harm (for example, brief physical restraint may be necessary if a person, unaware of traffic, ignored warnings and was about to walk into a road)

Tips for Assessing Capacity

A capacity assessment is, in many ways, an attempt to have a real conversation with the person on their own terms, applying the person's own value system. Empathy, kindness, and patience are key. In your mind, frame any request to assess capacity as an opportunity to best support that person to make their own decision, as per principles 1 and 2.

(1) Be clear about the decision that is being assessed

(2) Ensure the person (and you) have concrete details of the choices available (e.g., between living in a care home and living at home with a realistic package of care)

(3) Identify the salient details the person needs to understand (ignoring the peripheral and minor details). For most decisions, these are listed in the 39 Essex Chambers MENTAL CAPACITY GUIDANCE: RELEVANT INFORMATION FOR DIFFERENT CATEGORIES OF DECISIONS

(4) Agreement with a decision does not, in itself, mean that the person has capacity to make that decision, or that a capacity assessment is not required

(5) Avoid the protection imperative (the perceived need to protect the person, to the detriment of their rights)

(6) Demonstrate and record the efforts you take to promote the person's ability to decide

(7) Demonstrate balance in your assessment – evidence both sides of the argument. Show what the person could and could not understand/weigh up … etc. Otherwise, your assessment will look one-sided. Use quotes, when possible, to help describe your conversation

(8) Evidence each element of your assessment:

  i. Why could the person not understand, or retain, or use/weigh the information relevant to the decision, or communicate the decision, in spite of the assistance given?

  ii. What is the impairment/disturbance? Is it temporary or permanent?

  iii. How is the inability to decide *caused* by the impairment/disturbance (as opposed to something else)?

(9) Capacity assessments should be proportionate. Consider using a balance sheet approach if it is a complex assessment, or if it is likely to be scrutinised by a court (see page.18 onwards for details, and an example balance sheet on page .19).

An assessment concluding that a person lacks capacity to make a decision must never be based simply on:

- The person's age.
- Their appearance.
- Assumptions about their condition; or
- Any aspect of their behaviour.

Reasonable Belief

To obtain protection from liability under Section 5 of the MCA, assessors need to be able to evidence that it was reasonable for them to believe that the person lacked capacity to make the decision, and that they were acting in the person's best interests at the time that they

made their decision. To be confident of this, familiarity with the MCA is key.

To Assess, or Not to Assess?

Assessing capacity can be intrusive and involve topics that are intensely private. You must always have grounds to consider that your assessment is necessary.

Conversely, you must be prepared to justify a decision not to carry out an assessment when there is a reason to consider the person could not make the relevant decision. Whilst the first principle of the MCA directs us to presume capacity unless established otherwise, you cannot hide behind this to avoid responsibility for a vulnerable adult. This issue often arises when people self-neglect and decline services.

Nobody should be forced to undergo an assessment of capacity. If the person lacks capacity to agree or refuse assessment, it can normally go ahead as long as the person does not object. If the person refuses to be assessed and a conclusion cannot fairly be reached regarding capacity, legal advice may be necessary.

Causation and Stages of Assessment

To lack capacity under the MCA, the person's inability to make the decision needs to be *because* of an impairment or disturbance. The courts have stressed that the MCA Code of Practice is wrong in how it set out two stages of capacity assessments. The correct legal order is now:

Stage 1: Can the person make that specific decision themselves (can they understand, retain, use/weigh and then communicate). If not then,

Stage 2: Is there an impairment or disturbance in the functioning of the person's mind or brain? If so then,

Stage 3: Is the person's inability to make the decision because of the identified impairment or disturbance?

This change was made because the courts found workers incorrectly concluded people lacked mental capacity when they began by asking if the person had a mental impairment.

Inherent Jurisdiction

A person may be at risk and have diminished capacity because of pressure or coercion from another person, as opposed to an impairment of the mind or brain. In such cases, the MCA cannot be used as there is no causal link, as per above.

A judgement may be needed under the *inherent jurisdiction* of the High Court. Refer to Legal Services for advice if you find yourself in this position; these are rare situations and the threshold for cases to be heard is high.

Safeguarding or VARM (Vulnerable Adults Risk Management) procedures may be appropriate. The person may be entitled to an advocate under those procedures.

Recording

As a worker, you may need to decide whether a person has the capacity to understand and agree to their Care and Support Plan. The courts have determined that the following factors are relevant to capacity assessments for care:

(a) What sort of support is needed.

(b) Who will provide such support.

(c) What would happen without support, or if support were refused.

(d) That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

Mental capacity assessments should be recorded proportionately. A worker will come across many significant decisions where formal capacity assessments are required. For example:

- Accommodation for care and treatment, in short and long-term placements.
- Ability to manage finances.
- Consent to sexual relationships (As noted earlier, legally, sex must always be consensual. Consequently, if you assess that a person cannot consent to sex, a best interests decision cannot sanction a sexual relationship).
- Decisions about contact (seek legal advice if contact ever needs to be restricted, since court approval is probably needed for this restriction to be lawful).
- Restrictions on liberty, movement, and behaviour
- The ability to decide about personal care where physical restraint may be required

For day-to-day care decisions, written mental capacity assessments are not usually required every time, since this would be impractical. Personal Service Plans enable managers of Direct Care staff to ensure that the principles of the MCA are followed. For example, a Personal Service Plan may advise staff that a person has capacity as to what to wear or eat if they are shown pictures or the relevant clothes or packets (objects of reference).

Guidance for Completing FACE Mental Capacity Assessments

It can be particularly important to record a robust capacity assessment when there is a disagreement about capacity, or if other professionals or family members disagree about a best interests decision. The guide below has been written with particular regard for times when detailed mental capacity assessments are required. You may find it appropriate to refer to information you have already written in previous sections to avoid unnecessary repetition.

Below are the headings from the FACE Mental Capacity Assessment form.

What prompted the assessment?

Brief relevant history related to the need to assess capacity for this specific decision at this time. For example, a change of accommodation may be needed because the person has had a stroke and is ready for discharge.

What is the specific decision to be made?

Examples of specific decision to be made:

- Can P decide where they live in order to receive care or treatment?
- Does P have the capacity to manage their finances?
- Does P have the capacity to consent to sexual relations?
- Does P have the capacity to decide about contact with X?

Key Roles / Powers of Attorney / Court Appointed Deputies

Please see page 4 - 5, of this guidance for details.

Is there an impairment or disturbance in the functioning of the person's mind or brain?

This question relates to the *diagnostic test*, the first of two stages when assessing capacity. A formal diagnosis is desirable but not always essential. There are a wide range of conditions that may cause impairments or disturbances. For example, dementia, depression or, if a decision cannot be postponed, the short-term effects of drug or alcohol misuse.

If the person has such a condition, and this impairs their ability to make the decision in question, you may move onto the second stage to determine capacity.

The second stage considers whether the impairment of mind or brain makes the person unable to make the specific decision or not. This is called the *functional test*. It has four parts: understanding, retaining, using / weighing, and communicating. To demonstrate a lack of capacity, a person must fail at least one of these tasks.

Is the person able to understand information related to the decision?

It is important not to assess someone's understanding before they have been given relevant information about the decision in question. Information should be given in a manner and format that best enables the person to understand. Relevant information is likely to include:

- The nature of the decision
- The reason the decision is needed; and
- The likely effects of deciding one way or another, or of making no decision at all

It is not necessary for the person to understand every element of what is explained to them, only the salient factors. The courts have determined which factors are salient (or not) for several decisions, including residence, contact, sexual relationships and receipt of care,

detailed at the end of this guide.

Are they able to retain information related to the decision?

The person only needs to be able to retain relevant information long enough for them to make their decision. Items such as notebooks, photographs, posters, videos, and voice recorders may help people record and retain information.

The assessor may wish to record how many times this part of the assessment was repeated and the consistency of the responses.

Are they able to use or weigh the information whilst considering the decision?

This is often the most difficult part of the assessment, especially when capacity is borderline. It can determine that the person lacks capacity even though they have the ability to retain, understand and communicate. The evidence that goes in this section will include what the person sees as the likely consequences of the different options, and the weight they place upon them.

The person may need to be assisted to explore the consequences of their actions, but this in itself does not mean they are unable to weigh up information. However, the worker should not ask only leading questions where the likely answer will be yes or no as, if the outcome of the assessment were challenged, the worker may be accused of overly influencing the answers.

It is important that the assessor does not judge the person as being unable to weigh up salient information simply because their thought processes, values and conclusions are different from the professionals involved in their care. Consider whether the person could consider the pros and cons of their decision: can they conduct their own 'risk assessment.'

A person might be found to lack capacity to weigh up information if they deny the risks are even present or experience impulsive or compulsive behaviour due to an underlying condition.

It may be necessary to consider a person's actions together with their answers. For example, a person with an acquired brain injury may give superficially coherent answers to questions. However, it may be clear from their actions that they are unable to carry into effect their expressed intentions. This may because their *executive function* is impaired.

It can be difficult in such cases to identify whether the person lacks capacity within the meaning of the MCA. A key factor can be whether they are aware of their own deficits. Are they able to use or weigh (or understand) the mismatch between their ability to respond to questions in the abstract and their actions when faced by concrete situations? Failing to carry out a sufficiently detailed capacity assessment in such situations may expose the person to substantial risks.

Examples - Weighing up:

A person able to weigh up information:

I informed Mrs X of concerns from home carers that she may not be able to keep herself warm in her house. They are worried that her bedroom is very cold, has no heating and that she has very little bedding.

I asked if she ever feels cold in her house. Mrs X replied that she rarely feels the cold and she has always slept with few bedclothes. I asked what she would do if she were cold at night and Mrs X accurately said to me where she has extra blankets and that she would get them if she needed them. She told me that she had never had heating in her bedroom. She has a mobile heater that she could switch on if she needed it, but she rarely uses it. Mrs X described accurately how she would switch the heater on. I asked Mrs X if she is worried about heating bills and if this prevents her from using the heater. Mrs X did not know how much her bills were, but thought she has enough money, and she does not owe anybody anything (this is correct). I asked Mrs X about her daily routines. She described correctly that carers come each morning, light the fire in the lounge for her and, between them, they keep it going with coal placed by the fire. She remains in the same room throughout the day and goes to bed early. When I asked her, Mrs X thought there is a possibility she could fall when tending the fire, but said she is careful, and she takes her time. Mrs X thought that there are always risks in life and, even though she could fall and sustain a significant injury, she wants to live in her own home for as long as possible.

A person not able to weigh up information:

Mrs X did not think that her bedroom is ever cold. She said she has plenty of bedding. She tried, without success, to show me where she keeps extra blankets. When asked if she could remember being found by her neighbour on the stairs shivering, only in her nightie, she denied that this had happened and thought the neighbour must have been talking about someone else. Mrs X said that during the day she makes the fire herself and she is not at risk of falls. She said she is fine at home, and we do not need to worry about her …

Are they able to communicate their decision by any means?

Any residual ability to communicate is enough, so long as the person can make themselves understood. In a subsequent section, you may need to demonstrate the steps you took to facilitate communication. For instance, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of any relevant carers or friends who may assist with communication.

Is the impairment or disturbance the reason that the person is unable to make this specific decision at this time?

Please see the section on Causation on page 8 for details.

Example - Mr X has vascular dementia. His hospital notes dated dd*/mm/yy identifies his latest MMSE score as 15 (undertaken on dd/mm/yy). Despite all practical and appropriate support being given to him, his dementia results in him not being able to retain or weigh up*

salient information for long enough for him to make a decision about where he should live in order to receive necessary care.

Were all reasonable steps taken to maximise the person's capacity to make the decision?

You may need to consider:

- Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?
- Have different methods of communication been explored, if required, including non-verbal communication?
- Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?
- Are there particular times of day when the person's understanding is better?
- Are there particular locations where they may feel more at ease?
- Repeated visits – if practicable.

Can the decision be delayed because the person is likely to regain capacity in the future?

Put a tick in the appropriate box and complete details.

Example - Mrs Y had an accident which has resulted in an acquired brain injury. Her capacity to make a decision about leaving the home unaccompanied may be increased following rehabilitation. Although she does not have the capacity to make this decision at the moment, the mental capacity assessment will be repeated in three months' time, or earlier if appropriate.

Who was consulted?

Everyone consulted, including family, informal carers and professionals should be listed.

Decision-makers must balance the duty to consult others, with the right to confidentiality of the person who lacks capacity. If confidential information is to be discussed, the decision-maker should only seek the views of people with whom it is appropriate to discuss, and whose views are relevant to the person and decision concerned.

Advance decisions to refuse treatment

When consulting with a person's family or friends, it is important you ask about that person's past wishes. Please see page 5 - 6 for guidance regarding Advance Decisions.

Is an Independent Mental Capacity Advocate (IMCA) required?

If there is someone (not a paid carer) who knows the person well enough to have an insight into the person's views, feelings, and beliefs in relation to the decision, and who is contactable and willing to be consulted, then an IMCA will not be needed.

The appropriate person to instruct an IMCA is normally the decision-maker. The role of IMCAs is detailed in Chapter 10 of the MCA Code of Practice. IMCAs are specialist advocates that support people lacking capacity who have no family or friends that are appropriate to consult with. IMCAs act independently and help by representing the person and advocating on their behalf. They can make recommendations to decision-makers. Their reports should be considered when making best interests decisions, but IMCAs do not make the actual decision.

If the person has no one appropriate to consult, an IMCA **must** be involved whenever either of the following two situations arises**:**

Decisions about long-term care moves

An NHS body or a local authority is proposing to arrange accommodation (or a change of accommodation) in a hospital or care home, where it is proposed that the person will stay in hospital more than 28 days, or a care home for more than eight weeks.

Again, the only exceptions are when a move needs to be made as a matter of urgency, or in situations covered by the Mental Health Act 1983.

Serious medical treatment

The Mental Capacity Act defines serious medical treatment as: new treatment, stopping treatment that has already started or withholding treatment that could be offered in circumstances where:

- If a single treatment is proposed, there is a fine balance between the benefits, burdens, and risks to the patient
- There is a choice of treatments, and a decision as to which one to use is finely balanced; or
- What is involved is likely to involve serious consequences for the patient

The only exceptions are where the proposed treatment needs to be provided as a matter of urgency, or where treatment is provided for mental disorders under the Mental Health Act 1983. It is preferable that health professionals make a referral to the IMCA service for treatment issues rather than social workers.

Failure to instruct an IMCA in such circumstances is a breach of the Mental Capacity Act. Should you come across an instance where another body has not appointed an IMCA, prompt the body to refer to the IMCA service as a matter of urgency.

An IMCA **may** be instructed in the following circumstances:

- To support the person in care reviews about accommodation where there is no one appropriate to be consulted; or
- In safeguarding cases, even if there are family and carers to consult and it is believed that the person would benefit from the IMCA services
- If the person lives within Derbyshire, a referral form can be found here. A different IMCA service will be needed if the person is out of county or in Derby city

Determination of Best Interests

Principle 4 of the MCA requires that all decisions be made in the best interests of the person lacking capacity. This is irrespective of what may be in the best interests of other people, for example, other patients, residents, or the general public. Best interests decisions can only be based on realistic, available options.

The MCA does not define *best interests*. Instead, it prescribes a process that must be followed. The decision-maker must have regard to the best interests checklist (from para 5.13 of the MCA Code of Practice):

- Working out what is in someone's best interests cannot be based simply on someone's age, appearance, condition, or behaviour
- All relevant circumstances should be considered when working out someone's best interests
- Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision
- If there is a chance that the person will regain the capacity to make a particular decision, then it may be possible to put off the decision until later if it is not urgent
- Special considerations apply to decisions about life-sustaining treatment.
- The person's past and present wishes and feelings, beliefs and values should be taken into account
- The views of other people who are close to the person who lacks capacity should be considered, as well as the views of an attorney or deputy

Using the best interest checklist:

- The decision-maker is responsible for the decision
- The decision-maker must consult and involve others, when appropriate

The decision-maker does not have to follow the views of anyone else, but would need good, reasoned arguments for discounting the views of others

- Do not avoid discussion with people who may disagree with the decision maker
- Involvement of people who might disagree with the best interests decision often provides reassurance and helps them to accept the final decision.
- Our legal team advised we must always refer to best "interests" i.e., the plural, even though the capacity form refers to best "interest."
- As mentioned earlier, 39 Essex Chambers has produced a guide to completing best interests decisions, which can be found here.

What is most important to the person with regard to the decision?

Here you must reflect the past and present views of the person. People's rights do not evaporate when a person lacks capacity. As Mr Justice Peter Jackson wrote, "To state the

obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important."

In 2017, The Law Commission proposed that the MCA should be amended to place greater emphasis upon identifying and, where possible, following people's wishes and feelings. Where possible, it is good practice to identify the course of action that the person would have taken had they had capacity. Any departure from that course of action must be justified by the professionals involved. The greater the departure, the more compelling must be the reason.

The wishes of a person with a borderline lack of capacity, who is very opposed to the proposed decision, should be given careful consideration, particularly if you disagree with those wishes. Legal advice may be required. For example, when the person's strongly expressed wish is to return home from hospital, but you as the decision- maker propose that they move to residential care. It may be necessary for Legal Services to consider issuing welfare proceedings to ask the Court of Protection to decide the residence issue.

The consistency of the views of the person about a proposed decision may be important. Strongly held views may change frequently. A person's awareness that their wishes are not going to be implemented may also be relevant.

A person's *right to respect for private and family life* (Article 8, Human Rights Act) often needs to be considered when making best interests decisions for residence and also contact. To remove someone from their family, in their best interests, requires a heavy burden of proof if they or their family are objecting. You must have strong evidence to support such a move. Legal advice may be necessary. The local authority may need to seek the Court of Protection's urgent agreement if your best interests decision will breach that person's Article 8 rights.

Views of Interested Others and Views of Professionals Involved

Interested others include family, friends and paid or unpaid carers. They can also include IMCAs, attorneys and deputies. For significant or controversial decisions, it is usually important that as many of these people are consulted as possible, and their views sought and accurately recorded. Otherwise, the best interests decision could be open to challenge. If necessary, record the reason for failing to consult a significant person.

Views should be recorded, along with the person's name and role or relationship. It may be relevant to give a brief rationale of why they hold the view. Be specific, for instance, rather than writing 'risk of harm,' name the specific harm and the perceived likelihood of this happening.

The MCA does not prescribe a hierarchy within families or specifically state that families have rights to make decisions for people lacking capacity. The concept of 'next of kin' has no legal standing although health professionals commonly use it. The views of all family members involved with the person may be relevant, even though they may have opposing views. For example, a daughter of an older man may not want the partner of that man to be consulted as they are not married. The worker must still consult with that partner as much as the daughter even though the daughter and partner are in conflict.

However, if a family member has been appointed under a Lasting or Enduring Power of Attorney (see page 4), they have legal powers to make decisions set out in those documents that must be respected over and above other family members. This should be clarified by checking the document and seeing its scope. If in doubt, consider obtaining legal advice on how to interpret the document.

A best interests decision needs to consider the individual in a holistic manner. For instance, if a move from one care home to a different one is being considered, it could be that someone's individual needs might be better met in a different setting, but this needs to be balanced against the stress of moving and the geographical distance from family who visit. However, if there is a conflict between the interests of important family members and the best interests of the person, then you must place the best interests of the person lacking capacity before those of their spouse.

Describe any possible conflicts of interests with regard to this decision

Differences of opinion should be respected and recorded factually. There could be a conflict of interest between the best interests of the person and the best interests of their partner, who may also lack capacity. An adult family member may oppose an accommodation decision because it will reduce their inheritance. When possible, be explicit about potential conflicts of interest.

Decisions Requiring Arbitration

This question in the form will almost always require a tick in the 'no' box. In the form's context, the word "arbitration" connotes a formal legal decision-maker who studies the information from the perspectives of the various person's involved and who makes a decision that they will respect. An arbitrator is a private decision- maker chosen by the parties to make decisions to resolve a dispute and which the parties agree shall be legally binding on all of them. It is usually used for commercial disputes.

Chapter 15 of the MCA Code of Practice deals with dispute resolution and refers specifically to mediation. A trained *mediator* is not a decision-maker, but a conflict resolver who is independent of the parties in dispute and assists them to come to a written agreement which may later be converted into a consent court order.

Sometimes a social worker may consider that they have "mediated" a dispute, but this process should be regarded as informal mediation. Social workers are unlikely to be specifically trained to act as formal mediators and they are not independent. They represent the Council in communicating with the person lacking capacity and their family members.

The decision-maker should do all they reasonably can to arrive at an agreement with any opposing parties. This is particularly important if the decision-maker and family are in disagreement. The Court of Protection should be viewed as a last resort.

However, when parties cannot agree, urgent advice should be sought from the Legal Department. They will advise on the decision-maker's responsibilities and who, if anyone, should consider recourse through the courts.

Considering all the Factors, what Final Decisions have been Reached?

The rationale for the best interests decision should be recorded here. Ideally, it should include the advantages and disadvantages of each alternative being considered. This is called a *balance sheet approach* or a *welfare appraisal checklist*. Only viable options need to be considered. An example of balance sheet is included at the end of this document.

It may be easiest to do this in table form (in Word, as an appendix to your FACE assessment), or in lists with bullet points, so the reader easily can see the issues and compare the various options under consideration. Include practical implications for the person as well as less tangible factors such as relationships with family members and care home staff.

For each viable option, it can be helpful to set out (with reasons):

- The risks and benefits to the person
- The likelihood of those risk and benefits occurring; and
- The relative seriousness and/or importance of the risk and benefits to the person

It is possible for there to be many apparent risks to the person of a particular course of action and only one benefit, but that that benefit may be of overriding importance. Such a benefit is sometimes called the factor of "magnetic importance." Each person has their own priorities.

There is no set hierarchy of factors. The weight to be attached to different factors will be individual to each case. However, you need to be careful not to attach too much weight to the avoidance of risk and attach weight to the strongly expressed wishes of the person.

It is helpful to set out separately a conclusion about which option you consider to be in the person's best interests and why. Otherwise, it may not be clear what weight you ascribe to each factor. This is particularly important when there is a dispute which entails significant disadvantages to the person. For example, loss of independence, intrusion into a longstanding relationship or distress caused by a change of environment. In such a case, it is also important to be clear why no less restrictive course can be chosen so as to comply with the fifth principle of the MCA.

If the person is later deprived of their liberty, for example, because they are detained in a care home where they do not wish to be, then a DOLS BIA will look at the capacity assessments completed on residence and care. They will expect to see that alternatives to a care home were properly explored, such as a large support package.

The name and designation of the person completing the form refers to the assessor and also the decision-maker on best interests even though, in many situations, the decision will have been made at a multi-disciplinary meeting, but the capacity assessment may only have been conducted by a social worker.

Example of a Balance Sheet

Below is an example of a balance sheet approach, used in ***A London Local Authority v JH & Anor*** **[2011] EWHC 2420**
The table below summarises some of the main advantages of a home or nursing home placement:

IN FAVOUR OF HER HOME	IN FAVOUR OF A NURSING HOME
Consistent with her consistent wishes and feelings.	There would be no possibility of interrupted nursing care.
Positive psychological and emotional benefits.	There would be no possibility of inadequate catheter care or of avoidable admissions to hospital due to problems of access
Consistent with her values as a partner to a long marriage.	There would be no possibility of professionals not being able to access Mrs H.
Continual contact with a devoted husband who can offer her affection and emotional warmth, and to whom she is devoted.	All hoisting will be done by two persons, as advised by PH (OT Team Manager)
Likely to have more social contact and stimulation than in a nursing home. She enjoys her husband's company and has a small, close-knit, circle of friends.	Mrs H will not be allowed to sit in her sling when she consents to sit in an armchair, as advised by PH.
Benefits of being at liberty, which is a matter of fundamental importance.	Any medical emergencies are more likely to be promptly dealt with, other than possibly at night
She will receive care from her husband, who she trusts and allows to provide care, who knows her routines and what causes her happiness, pain, or discomfort.	Mr H will not be able to affect aspects of the care package with which he disagrees.
It is what her husband wishes, and she wishes him to be happy.	Mrs H will be offered three regular meals a day.
The home is clean and tidy and a homely environment for her.	
She is functioning at the same level as prior to admission and Dr K felt that she should remain at home shortly prior to admission.	
She does not have a primary need for healthcare, according to NHS assessments.	

Her nursing or other health service needs are no more than incidental or ancillary to the provision of accommodation, according to NHS assessments.	
Her needs can be met by a suitable package of care at home, according to NHS assessments.	
Her current admission is not attributable to any lack of care at home.	
She will have GP support and district nurse visits.	
There will be an occupational therapy assessment of her need for equipment.	
Her husband will now receive a carer's assessment and may be entitled to services in his own right.	
The community matron will visit fortnightly.	
Mr H has demonstrated that he can use the hoist at home on his own.	
As a matter of fact, she has not suffered injury when using a sling to support her in the armchair.	
She often refuses to be turned in bed by professional carers, shouting and telling them to go away.	
In hospital, and in all likelihood in a nursing home, she remains in bed most of the time, unengaged, not accepting any therapy, not taking part in activities, refusing assessments, at times declining food, liquids, and medication. She is unhappy and in return receives little of benefit other than basic security. She has no quality of life.	
Her husband will abide by the decision about the usefulness of a Linkline or some similar system.	
An emergency key-holder is not essential during the duration of the interim order.	

The care package will be reviewed after six weeks. The case will not be allowed to drift.	
Any significant problems can be dealt with swiftly and effectively by returning the matter to court, and by various other legal means.	
A placement in a nursing home would be likely to be final; few people return home, many become institutionalised.	
Deprivation of liberty is premature and contrary to the least restrictive principle; there is still an alternative that may be viable.	
It is likely that she will be miserable in a nursing home.	

The court concluded she should return home.

Author History

Approval and Authorisation History

Authored by Sue Pearson	Service Manager – DoLS	November 2015
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Approved by Carol Robinson		November 2015
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