

Mental Capacity

The guiding principles

The Mental Capacity Act 2005 ("MCA 2005") establishes the following key principles:

1. A person must be assumed to have capacity unless it is established that he or she 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.
4. An act done, or decision made, for or on behalf of a person who lacks capacity must be done, or made, in his 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.

What is mental capacity?

A person's mental capacity refers to a person's ability to make specific decisions or to take actions that influence their life. Capacity is date, time and decision specific. For example, a person may have the capacity to decide where to live or to receive care but may lack capacity to make decisions about their finances.

Presumption of capacity

A fundamental principle of the MCA 2005 is that any person must be assumed to have capacity to make a decision, unless it is established otherwise. P has to prove nothing. To determine a lack of capacity to make a particular decision requires an assessment.

What does 'all practicable steps' mean?

A person must be supported and encouraged to make their own decisions where possible.

Questions to be considered include:

- Does the person have all the relevant information needed to make a decision?
- If they are making a decision that involves choosing between alternatives, do they have information on all the different options?
- Would the person have a better understanding if information was explained or presented in another way? Different methods of communication should be explored, such as the use of visual aids or the assistance of a Speech and Language Therapist.

- Are there times of the day when the person's understanding is better?
- Are there locations where they may feel more at ease?
- Can the decision be put off until the circumstances are different and the person concerned may be able to make the decision?
- Can anyone else help the person to make choices or express a view (such as a family member, carer or advocate)?

If after all practicable steps to support a person to make a decision have been taken there is concern that a person lacks capacity to make a specific decision, their capacity must be assessed.

How is a lack of capacity determined?

The law gives a very specific definition of what it means to lack capacity for the purposes of the MCA 2005. This is a legal not medical test. Section 2 of the MCA 2005 states as follows:

A person is deemed to 'lack capacity' in relation to the decision in question if he or she 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.

This test can be broken down into three questions to help with its application:

1. Is the person unable to make a decision? If so:
2. Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:
3. Is the person's inability to make the decision because of the identified impairment or disturbance?

It must be possible to explain how the impairment or disturbance has caused the inability to make a decision. In other words, there must be a causal link.

What does 'being unable to make a decision' mean?

Section 3 of the MCA 2005 states that a person is unable to make a decision for himself if he unable to:

- Understand the information is relevant to the decision; or
- Retain that information; or
- Use or weigh that information as part of the process of making the decision; or
- Communicate his decision whether by talking, using sign language or any other means.

What does an 'impairment or disturbance in the functioning of the person's mind or brain' mean?

This will be a medical diagnosis from a clinician setting out the nature of the person's cognitive impairment.

The nature of the impairment or disturbance can also include medical conditions causing confusion, drowsiness, concussion, and the symptoms of drug or alcohol abuse.

It is also worth noting that the impairment or disturbance in the functioning of the mind or brain can be temporary or permanent. If the impairment is temporary, it may be necessary to consider whether the decision at hand can be delayed to allow the person to regain capacity.

What does an 'inability to make the decision because of the impairment or disturbance in the functioning of their mind or brain' mean?

There has to be a causal link between the disturbance or impairment and the inability to make the decision(s) in question.

Partial or temporary loss of capacity

Loss of capacity can be partial or temporary. For example, a urinary tract infection may cause a temporary loss of capacity because of severe confusion.

Fluctuating capacity

Capacity may fluctuate due to a person's medical condition. For example, a person with bi-polar disorder's capacity is likely to fluctuate as their conditions changes over time.

Who makes the decision if the person has capacity?

If a lack of capacity cannot be established, it is for the person themselves to make the decision, not a third party.

What if others disagree with the person's decision?

Unless the person is vulnerable and potentially under duress, a person has the right to make an unwise decision regardless of whether others disagree with that decision.

What if a person may be vulnerable and under duress?

A person's inability to make decisions may stem from the influence exercised over them by others. For example, an adult with learning difficulties subjected to heavy persuasion by an estranged family member may require protection.

In a situation of vulnerability and duress, it may be that the person requires the protection of the High Court, known as the 'inherent jurisdiction'.

Who should make the decision if the person lacks capacity?

If it is established that the person lacks the capacity to make the specific decision, the decision will need to be made in the person's 'best interests'. For decisions relating to medical treatment or care, the decision maker is usually the treatment or care provider.

What issues commonly arise?

- Often a person with a disability, illness or injury, is presumed to lack capacity. This is wrong. The fundamental principle is that a person is to be assumed to have capacity unless it is established otherwise.
- Supported decision making is frequently misunderstood.
- Assessing capacity is complex. It is very rarely clear-cut. It takes time and often a number of assessments are required to gain an accurate picture of a person's capacity. Disputes often arise in difficult cases of fluctuating capacity.
- Professionals may lack the time and resources to adequately assess capacity and investigate all of the potential options. This causes delays and leads to ill-informed best interests meetings.
- Sometimes families, Attorneys, and Deputies feel best interests decisions are made without taking into account their views, experiences and knowledge of P.

How can Lester Aldridge assist?

At Lester Aldridge we have significant experience of supporting families and their loved ones in respect of all mental capacity matters. We can provide:

- An initial, free consultation to discuss your circumstances and how to ensure best interests decisions are made properly when a person lacks capacity.
- The role of an intermediary. We can liaise with all the people involved, obtain all of the information and evidence required to facilitate a meaningful best interests meeting.
- A draft balance sheet which neatly details all of the available options and the advantages and disadvantages of each option based on the evidence. This can be used to support a best interests meeting and to evidence decision-making.
- Advocacy at best interests meetings to ensure views are represented and taken into account.
- Access to independent Experts to help challenge a capacity assessment if the evidence suggests a capacity assessment may be flawed.
- Advice at each key stage and with regard to what steps can be taken to resolve disputes. This may involve an application to the Court of Protection.