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GOOD QUALITY ASSESSMENTS AND RECORDING

A good record of a capacity assessment will show that you have:

✓ Been clear about the 'matter' that P is being asked to decide upon, and what decision they are being asked to take.

✓ Identified why you have reason to doubt their capacity to make this decision. This is just as important where the outcome of the assessment is that you con- sider that they have capacity.

✓ Identified the information that is relevant to the decision to be made, because it is this that P has to show they can understand, retain and use.

✓ Ensured P (and you) have the concrete details of the choices available i.e., between living in a care home and living at home, with a realistic package of care.

✓ Avoided the protection imperative.

✓ Demonstrated the efforts taken to promote P's ability to decide and, if unsuccessful, explained why.

✓ Recognised that assessment is not necessarily a one-off matter, and that you have taken the time to under-take to gather as much evidence as is required to reach your conclusion, including, for instance, returning to have a further conversation with P or obtaining corroborative evidence (particularly important in deficits in executive functioning).

Evidence each element of your assessment:

✓ Why could P not understand, or retain, or use/weigh, or communicate in spite of the assistance given?

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

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

And answer the question: why is this an incapacitated decision as opposed to an unwise one?

Verbatim notes of questions and answers can be particularly valuable in the record of the assessment, because they can allow the reader to get a picture of the nature of the interaction and judge for themselves, both the nature of the questions asked and of the responses received.

If you are assessing a person's capacity to make a number of different decisions, it is important to take a step back and ask before reaching a conclusion whether they all make sense logically together. This point was reinforced by the Court of Appeal in B v A Local Authority, in which it emphasised the danger of approaching decisions in 'silos' and reaching mutually incompatible conclusions.

In addition to the specific points mentioned above, as with all documentation, **the key general points to re-member are:**

✓ Contemporaneous documentation is preferable to retrospective recollection.

✓ Do not assert an opinion unless it is supported by fact.

✓ 'Yes/no' answers in any record are, in most cases, un-likely to be of assistance unless they are supported by a reason for the answer

What is reasonable to expect by way of documentation will depend upon the circumstances under which the assessment is conducted. An emergency assessment in an A&E of whether an apparently brain-injured patient has the capacity to run out of the ward into a busy road, will not demand the same level of detail in the assessment/recording as an assessment of whether a 90 year old woman has the capacity to decide to continue living in her home of 50 years, where the concerns relate to her declining abilities to self- care.

Conclusion:

As the court memorably put it in Heart of England NHS Trust v JB, 'do not allow the tail of welfare to wag the dog of capacity.' An extremely foolish or irrational decision is still a decision, and one that P is entitled to make if they have capacity to make it. An action can only be taken either in reliance on the general defence in S.5 MCA 2005 (or a decision made by the court) if (1) P is unable to take the decision in question, and (2) this inability is because of an impairment or disturbance in the functioning of the mind or brain.

And finally, it is possible to overcomplicate capacity assessments. Especially in the context of those with learning disability and dementia. Key to a successful assessment is patience and empathy. Those are not skills that are the province of particular professionals, but they are ones that can be taught, and need to be nurtured in settings in which it is understood that assessment of capacity to take complex decisions necessarily takes time.

Useful resources:

Mental Capacity Resource Centre | 39 Essex Chambers

Mental Capacity Law and Policy

Home - Capacity guide

Liberty Protection Safeguards (lpslaw.co.uk)

Source: 39 Essex Chambers

Contact dols@ Contact dols@northlincs.gov.uk for case discussion or further guidance. If legal advice is sought, contact legal services.

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LASTING POWER OF ATTORNEY

Introduction

The Act replaced the Enduring Power of Attorney with a new form of power, a Lasting Power of Attorney. An LPA allows the individual (the donor) to give authority to someone else (the attorney) to make decisions on the donor's behalf. The donor decides who the attorney should be and how wide ranging the power should be. More than one attorney can be appointed and they may be appointed to make some decisions jointly and some decisions independently. If the LPA does not specify this then the attorneys must act jointly.

There are two types of LPA, the property and affairs LPA and the health and welfare LPA. The health and welfare LPA covers personal, welfare and healthcare decisions, including decisions relating to medical treatment. Although an LPA in relation to property and affairs can be used by the attorney even when the donor still has capacity if the donor consents, an LPA dealing with health and welfare can only operate if the individual lacks capacity in relation to the issue in question.

Requirements of an LPA

The Act allows an individual aged 18 or over who has capacity to appoint an attorney under a health and welfare LPA, to make decisions on their behalf once they lose capacity. In order for it to be valid, a specific form must be used for an LPA. This must be in writing and include:

✓ Information about the nature and extent of the LPA.

✓ Statement signed by the donor stating that they have read/understood the information, and that they want the health and welfare LPA to apply when they lose capacity.

✓ Names of anyone other than the attorney who should be told about an application to register the LPA. Statement signed by the attorney stating that they have read the information and understand the duties,

✓ Certificate completed by a third party, confirming that, in their opinion, the donor understands the nature and purpose of the LPA and that no fraud or pressure has been used to create the LPA. Registered healthcare professionals can be certificate providers, GPs in particular, may find they are asked by patients to fulfil this role.

Registration of an LPA

An LPA must be registered with Office of the Public Guardian (OPG) before it can be used. It does not give the attorney any legal power to make decisions before it is registered. OPG maintains a register of LPAs and, where there is doubt as to the existence of an LPA, anyone can apply to search the register.

Powers of an LPA

The powers granted to an attorney will depend on the wording of the LPA. If a health and welfare LPA has been registered, the attorney will have no authority to make decisions about the donor's finances or property.

On the other hand, if a property and affairs LPA has been registered, the attorney will have no power to make any decisions about the medical treatment of the donor.

The donor may also have included specific restrictions on the attorney's powers. It is therefore important that healthcare professionals carefully check the wording of the LPA.

Even where a health and welfare LPA has been created and no restrictions have been imposed by the donor, an attorney cannot:

× Make treatment decisions if the donor has capacity.

× Consent to a specific treatment if the donor has made a valid and applicable advance decision to refuse that treatment, after the creation of the LPA.

× Consent to or refuse life-sustaining treatment, unless this is expressly authorised by the LPA.

× Consent to or refuse treatment for a mental disorder where a patient is detained under mental health legislation.

× Demand specific treatment that health professionals consider is not necessary or appropriate for the donor's particular condition.

Where an attorney is acting under a health and welfare LPA and they are making decisions in relation to medical treatment, they must act in the donor's best interests. If there is any doubt about this and it cannot be resolved locally, an application can be made to the Court of Protection.

LPA versus EPA

The fundamental difference is that EPAs covered decisions relating to property and financial affairs only, whereas there are two types of LPA, one to deal with financial affairs and one to deal with personal welfare and medical treatment decisions. Although no new EPAs can be made, any that were made before 1 October 2007 and are registered, remain legally effective. LPAs will eventually replace the existing system of EPA, but this will inevitably take some years during which time the two systems will coexist.

Find out if someone has an attorney, deputy or guardian

Apply to search the Office of the Public Guardian (OPG) registers to see if someone has another person acting on their behalf.

This can be: an attorney under a lasting power of attorney, an attorney under an enduring power of attorney, a court appointed deputy, a guardian for someone who is missing appointed by the High Court.

You need to fill in a form (OPG 100) to search the register. This is a free service. Send your completed form to: customerservices@publicguardian.gov.uk, Fax: 0870 739 5780. You can contact OPG by post: Office of the Public Guardian, PO Box 16185, Birmingham, B2 2WH.

If there is a registered LPA, you should see the document to ascertain if there is more than one attorney and/or there

Source: 39 Essex Chambers

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particularly the duty to act in the donor's best interests.		are any limitations to the power.

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INDEPENDENT MENTAL CAPACITY ADVOCATES

What are the powers of an IMCA?

In order to provide necessary support to the incapacitated individual, an IMCA will have powers to:

✓ Examine health records which are relevant and necessary to deal with the issue.

✓ Consult other persons who may be in a position to comment on the incapacitated individual's wishes, feelings and beliefs.

✓ Ascertain what alternative courses, actions and options may be available to the incapacitated individual.

✓ Obtain an alternative medical opinion.

An IMCA is required to write a report to the NHS body or local authority responsible for the individual's treatment or care. The IMCA's report must be taken into account before the final decision is made.

What is an IMCA?

IMCAs support and represent particularly vulnerable adults who lack capacity to make certain decisions, where there are no family members or friends available or willing to be consulted about those decisions. An IMCA is independent of the health care professional making the decision, and represents the patient in discussions about whether the proposed decision is in the patient's best interests. An IMCA can also raise questions or challenge decisions which appear not to be in the patient's best interests.

When should an IMCA be instructed?

An IMCA must be instructed in relation to individuals who lack capacity and who have no family or friends whom it is appropriate to consult when:

✓ NHS body is proposing to provide, withhold or stop 'serious medical treatment,' or

✓ NHS body or local authority is proposing to arrange/ change accommodation in a hospital or care home, and the stay in hospital will be more than 28 days, or the stay in the care home more than 8 weeks.

An IMCA cannot be instructed if an individual has previously named a person who should be consulted about decisions that affect them, and that person is willing to assist, or they have appointed an attorney under a health and welfare LPA, or the Court of Protection has appointed a welfare deputy to act on the patient's behalf.

There is also no duty to instruct an IMCA where there is a need to make an urgent decision, for example, to save a patient's life. If a patient requires treatment whilst a report is awaited from an IMCA, this can be provided in the patient's best interests. It is also not necessary to instruct an IMCA for patients detained under mental health legislation.

Responsibility for instructing an IMCA lies with the NHS body or local authority providing the treatment or accommodation.

Source: 39 Essex Chambers

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CAPACITY TO CONDUCT PROCEEDINGS

Introduction

It is extremely important that if a question of capacity to conduct proceedings arises, it is resolved as a matter of priority.

The test is whether the party is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings.

This requires the ability to recognise a problem, obtain and receive, understand relevant information including advice, the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision.

The courts have emphasised that the nature of the dispute is not the only component of the relevant subject matter required to be considered in the context of determining whether a litigant has capacity to conduct proceedings.

The nature of legal proceedings themselves, and in particular, the specific demands they make on litigants, also fall to be considered. Legal proceedings are not being simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled.

Instructions to be given, advice to be received and decisions to be taken. Potentially, on a number of occasions over the span of the proceedings as they develop.

It is unusual, but not impossible, for a person to lack capacity to make a decision, but not lack capacity to con- duct proceedings about that issue. In some contexts, a person may well have capacity to make the application (or require it to be brought on their behalf) but not have capacity actually to conduct them.

In the DoLS context, for instance, it has been held that the capacity to ask to issue proceedings simply requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings.

Case law

The leading authority on capacity to conduct proceedings remains that of Masterman-Lister v Brutton & Co Masterman -Lister v Brutton & Co [2002] EWCA Civ 1889 (19 December 2002) (bailii.org), cited with approval by the Supreme Court in Dunhill v Burgin (Nos 1 and 2) 2014 Dunhill v Burgin (Rev 1) [2014] UKSC 18 (12 March 2014) (bailii.org)

TB v KB and LH (Capacity to Conduct Proceedings) | 39 Es- sex Chambers

Sheffield City Council v E & Anor [2004] EWHC 2808 (Fam) (02 December 2004) (bailii.org)

Source: 39 Essex Chambers

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INTRODUCTION TO CAPACITY ASSESSMENT

Capacity assessments key principles

The core principles of the MCA 2005 are set out in S.1. They are:

✓ S.1(2) - A person (P4) must be assumed to have capacity unless it is established that he lacks capacity.

✓ S.1(3) - P 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.

✓ S.1(4) - P is not to be treated as unable to make a decision merely because he makes an unwise decision.

✓ S.1(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.

✓ S.1(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.

Proving capacity

The presumption that P has capacity is fundamental to the Act. It is important to remember that P has to 'prove' nothing. The burden of proving a lack of capacity to take a specific decision(s) always lies upon you, as a person who may make a decision on their behalf. The standard of proof which must be achieved is on the balance of probabilities S.2(4). It will always be for the decision maker to prove that it is more likely than not that P lacks capacity.

Rationale should be clearly documented on how the decision has been made regarding capacity. By following the steps under S.5 of MCA 2005 this will protect the decision maker from liability.

Who is the decision maker?

In a court setting, the decision-maker is the judge, outside the court setting, it is the person who is proposing to take the decision on the basis that it is in P's best interests.

The decision maker would depend on the decision to be made such as:

✓ Manual lifting and handling would be the occupational therapist.

✓ Medication would be the prescriber.

If there is a deputy or LPA that person 'steps into the shoes' of P and makes any decision on their behalf, provided it is covered i.e., health and welfare or property/ affairs. If there is no Deputy or LPA, then the decision maker is the person who is best placed to make the decision.

What does it mean to lack capacity to make a decision?

The law gives a very specific definition of what it means to lack capacity for purposes of the MCA 2005. It is a legal test, and not a medical test, and is set down S.2(1) MCA 2005, which provides that: 'a person lacks capacity if they are unable to make a decision for themselves in relation to a matter because of an impairment of, or a disturbance in the functioning of, the mind or the brain.'

To apply the test, it can best be broken down into three questions:

✓ Is the person able to make a decision? If they cannot,

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

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

Is the person able to make a decision?

S.3(1) states that P is unable to make a decision for themselves if they are unable to:

✓ Understand the information 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 their decision by any means (words etc.)

✓

What is an impairment of, or a disturbance in the functioning of, the mind or brain?

Examples of how a person's brain or mind may be impaired include:

✓ Mental health conditions such as schizophrenia or bipolar disorder

✓ Dementia

✓ Severe learning disabilities

✓ Brain damage i.e., from a stroke or other brain injury

✓ Physical or mental conditions that cause confusion, drowsiness or a loss of consciousness

✓ Intoxication caused by drugs or alcohol misuse

✓

Useful resources:

Mental Capacity Resource Centre | 39 Essex Chambers

Mental Capacity Law and Policy

Home - Capacity guide

Liberty Protection Safeguards (lpslaw.co.uk)

Mental Health Law Online

Source: 39 Essex Chambers

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CAPACITY TO MARRY

What's relevant

The test for capacity to marry is a simple one, and the issue is act specific (or status), rather than person specific- see below. The wisdom of the marriage is irrelevant, and the courts have emphasised that the bar must not be set high so as to avoid discrimination.

The information relevant to the test is:

✓ The broad nature of the marriage contract.

✓ The duties and responsibilities that normally attach to marriage, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other.

✓ That the essence of marriage is for two people to live together and to love one another.

✓ That marriage will make any existing will invalid.

✓ It has also been held that the person must not lack capacity to enter into sexual relations, although another judge has said that this rule is not an absolute rule.

What's not relevant

Information that has been held to be irrelevant includes:

× That in a family which facilitates arranged marriage, the person is much more likely to find a spouse than if they were unaided.

× How financial remedy law and procedure works and the principles are applied. A person who lacks capacity to conduct proceedings in relation to any financial aspects of divorce proceedings does not necessarily lack capacity to marry.

× That (at least in the context of entry clearance) a spouse may require entry clearance.

Case law

In light of the decision of the Supreme Court in A Local Authority v JB [2021] UKSC 52, emphasising that there is no such concept as 'act-specific' tests of capacity, this may be revisited A Local Authority v JB (Rev1) [2021] UKSC 52 (24 November 2021) (bailii.org)

Hedley J A, B & C v X, Y & Z | 39 Essex Chambers

The first three relevant information points come originally from the judgment of Munby J in Sheffield City Council v E [2004] EWHC 2808 (Fam) Sheffield City Council v E & Anor [2004] EWHC 2808 (Fam) (02 December 2004) (bailii.org) as applied subsequently by Court of Protection judges LB Southwark v KA (Capacity to Marry) | 39 Essex Chambers

Re DMM | 39 Essex Chambers

LB Southwark v KA (Capacity to Marry) | 39 Essex Chambers

Source: 39 Essex Chambers

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MAKE A DECISION TO ENTER INTO OR TERMINATE A TENANCY AGREEMENT

In relation to the move from ABC to supported living,

Case law LB Islington v QR [2014] EWCOP 26, [2014] MHLO 80

the judgment states: the relevant information that QR needs to understand, use and weigh is:

✓ She will have to give up the tenancy of her flat.

✓ The terms of the Community treatment order (CTO) will determine where she lives.

✓ IAOT will not at this stage allow her to live in her flat or in any other accommodation which does not provide on site 24-hour support.

✓ The move to supported accommodation will offer her greater independence and control over her life than are currently available at ABC.

✓ She is at risk of falling ill again, with life.

✓ She will have self-contained accommodation threatening consequences, if she does not take her medication.

In relation to the decision to give up her secure council tenancy, in my judgement the relevant information that QR needs to understand use and weigh is:

✓ By surrendering her tenancy she loses the right to live or return there, and thus the opportunity to exchange that tenancy for another secure council tenancy.

✓ She cannot move to a less restrictive environment than ABC unless she gives up her tenancy.

✓ For the foreseeable future the terms of the CTO will not permit her to live in her flat.

✓ She needs 24-hour support in her accommodation in order to remain well.

✓ Giving up her tenancy does not preclude the grant of a council tenancy by LBI in the future, if she is well enough to live completely independently.

In relation to the decision to sign a tenancy agreement for supported living accommodation, in my judgment the relevant information that QR needs to understand use and weigh is:

✓ Her obligations as tenant to pay rent, occupy and maintain the flat.

✓ The landlord's obligations to her under the contract.

✓ The risk of eviction if she does not comply with her obligations.

✓ The purpose of and terms of the tenancy, which is to provide her with 24-hour support so that she takes her medication and can maintain her mental health.

✓ The landlord/support staff's right to enter her flat without her permission in an emergency, if there is serious physical danger or risk to her.

✓ If she moves to supported living accommodation the CTO will be changed to require her to live there.

Please note that these questions are not prescriptive, and you are likely to ask less or more questions based on the individual:

✓ Can you tell me where you live?

✓ Can you explain what a tenancy agreement is?

✓ Have you seen a tenancy agreement before?

✓ Can you tell me who the tenancy agreement is between?

✓ Who will be the tenant?

✓ When will the tenancy start?

✓ How much rent will you pay?

✓ Who will pay this rent?

✓ Who will you pay the rent to?

✓ How will you make payment?

✓ What services would you be provided with?

✓ What other services do you have to pay for?

✓ How will you pay your council tax?

✓ How will you apply for your housing benefit?

✓ The right to end tenancy if conditions are breached.

✓ Who is responsible for repairs and maintenance?

✓ Do you understand your tenancy obligations and the risk of eviction, should you not comply?

✓ What are your tenancy rights?

Case law

LB Islington v QR [2014] EWCOP 26, [2014] MHLO 80

LBX v K, L and M [2013] EWHC 3230 (Fam)

Source: 39 Essex Chambers

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Deprivation of Liberty

Deprivation of liberty

The Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards 2009 Code of Practice makes it clear that people who lack the ability to consent to treatment should be cared for in accordance with the 'less-restrictive principle.' There will be times when this might involve imposing restrictions on a person's liberty.

There will be circumstances, however, in which appropriate and necessary care or treatment that is in an individual's best interests can only be provided in circumstances that will amount to a 'deprivation of liber- ty.' Any such deprivation of liberty will only be lawful if it is authorised in accordance with procedures set out in the Deprivation of Liberty Safeguards (DoLS), which were added to the Mental Capacity Act 2005 by amendments introduced by the Mental Health Act
2007.

This card gives a brief outline of relevant factors to take into account when assessing whether an individual is or might be deprived of liberty, and outlines the procedure for seeking authorisation. Although individuals may be deprived of their liberty in a variety of settings including domestic ones, this card focusses on deprivation of liberty in hospitals and care homes.

This is a complex area of law and practice and where health and social care staff identify individuals who may be, or who may need to be, deprived of their liberty, they should refer to local protocols, consult the Deprivation of Liberty Team, or take appropriate legal advice.

Key points for health and social care staff/ professionals:

The fact that care or treatment amounts to a deprivation of liberty does not mean that it is inappropriate. It means only that it reaches a certain threshold of restriction such that authorisation is required.

✓ The focus of decision making must remain the best interests of the person.

✓ Nothing in the Act or DoLS is designed to prevent the provision of timely and appropriate care or medical

treatment. In an emergency, treatment must not be delayed for the purposes of identifying whether a deprivation of liberty has taken place, or seeking its subsequent authorisation.

✓ An authorisation for a deprivation of liberty does not provide legal authority for treatment. Treatment for adults unable to consent must be given on the basis of an assessment of their best interests, or in accordance with another legal provision of the Act.

When might it be appropriate to deprive a person of their liberty?

The Mental Capacity Act Deprivation of Liberty Code of Practice states that depriving a person of liberty may be justifiable if:

✓ It is in their best interests to protect them from harm.

✓ It is a proportionate response when compared with the harm faced by the person.

✓ There is no less restrictive alternative.

What constitutes a deprivation of liberty?

The concept of 'deprivation of liberty' is not straightforward. The Act does not provide a definition of 'deprivation of liberty,' but refers instead to the meaning of Article 5 of the European Convention on Human Rights.

The Supreme Court judgment in Cheshire West in 2014 introduced an 'acid test' for what constitutes a deprivation of liberty, for the purposes of Article 5. When considering whether an individual may be deprived of their liberty, health and social care professionals should ask three key questions:

Is the person subject to 'continuous supervision

How do you authorise a deprivation of liberty?

control?'

✓ Is the person 'free to leave?'

✓ Does the person lack the capacity to consent to their care and treatment in those circumstances?

If the person is under continuous supervision and control and is not free to leave, and lacks the capacity to consent to their care and treatment in those circumstances, then the acid test is met. The individual is therefore deemed to be deprived of their liberty under Article 5, and authorisation for the deprivation must be sought.

Continuous and complete supervision and control

When considering whether an individual is subject to 'continuous and complete supervision and control,' it can be helpful to ask whether there is a care plan in place that means that those looking after the individual will be aware at any time:

✓ Where the individual is,

✓ What the individual will be doing, and

- What steps they will take if they cannot establish the above.

Non-negligible period of time

Case law has also established that for the purposes of Article 5 any deprivation of liberty must be for a 'non-negligible' period of time. There is no definition of a 'non-negligible' period of time, but in general the more intense the measures of restraint and the greater the resistance or resentment of the individual, the shorter will be the period. The courts have regarded as little as forty minutes of in- tense restraint as amounting to a deprivation of liberty.

Free to leave

✓ Whether a person is 'free to leave' will depend on whether he or she is free to come and go, or to decide to live else- where, or whether he or she would require permission. If permission is required, it is likely that the

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✓ Identifying and authorising a deprivation of liberty should not substitute for or impede, the delivery of the highest standard of care.

Does the person have capacity to consent to that deprivation of liberty?

In addressing this question the attention has to be on the specific circumstances of the individual's care and treatment. The question must be: does the individual have the capacity to consent to the core elements of the confinement, to which the person is subject?

Factors not relevant to a deprivation of liberty

✓ The purposes for which care and treatment are being provided are not relevant to whether a person is being deprived of their liberty, nor are the nature of any dis- abilities they may have. Similarly, a person's compliance or lack of objection are not relevant, nor is the agreement of family or carers, the appropriateness or 'normality' of the treatment, or the lack of an alternative safe place for treatment.

Where it is identified that an individual may be deprived of liberty in a care home or hospital and lacks the capacity to consent, that deprivation of liberty must be authorised under the Deprivation of Liberty Safeguards (DoLS). To do this the 'managing authority' of the hospital or care home has to apply to a 'supervisory body'– usually the local authority where the person lives.

There are two types of DoLS authorisation, standard and urgent.

Standard authorisation

After receiving an application for a standard authorisation, the supervisory body has to decide within 21 days whether the person can be deprived of their liberty. If the conditions are met, the supervisory body must authorise the deprivation of liberty and inform the person and managing authority in writing. It can be authorised for up to one year. The person does not have to be deprived of liberty for the period of authorisation. The restrictions should stop as soon as they are no longer necessary.

Urgent authorisation

There will be times when a person may need to be deprived of their liberty before a standard authorisation can be provided. In these situations the managing authority can itself issue an urgent authorisation which can last up to seven days, with an option to extend it for a further seven days, if the supervisory body is in agreement. When issuing an urgent authorisation the managing authority must also request a standard authorisation.

person is not free and not free to leave

Source: 39 Essex Chambers

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Capacity to consent to care and support

In the context of decisions relating to care, each decision will be specific instead of general, and will have to be revisited should circumstances or the question posed to the person under assessment change. The following constitute relevant information to an assessment of whether a person has capacity to decide their own care: ✓ With what areas the person under assessment needs support ✓ What sort of support they need ✓ Who will provide such support ✓ What would happen without support, or if support was refused ✓ 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	**What's not relevant** X how care is funded X How overarching arrangements for monitoring and appointing care staff work; X why having a support worker is important to access the community; the importance of structure and routine in a person's day; X the importance of regular access to the local community to build and maintain confidence in daily life and independence and to avoid a deterioration in anxiety; X the importance of developing relationships with others outside of close family to build and maintain his confidence in daily life and independence and to avoid a deterioration in anxiety, to avoid a dependency upon close family members and to develop the person's own interests and opportunities for a social life with peers; X the opportunities that may be available to engage in training, education, volunteering or employment. 16	Care, Support and Education) [2020] EWCOP 56 LBX v K, L and M [2013] EWHC 3230 (Fam)

Source: 39 Essex Chambers

Contact dols@ Contact dols@northlincs.gov.uk for case discussion or further guidance. If legal advice is sought, contact legal services.

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MAKE A DECISION IN RELATION TO CONTACT WITH OTHERS

Authority when people lack capacity to consent

This is where the MCA comes in. As the MCA Code of Practice points out, 'every day, millions of acts are done to and for people who lack capacity either to take decisions about their own care or treatment, or consent to someone else caring for them.' (Code of practice, 6.1). Such acts range from helping with personal care or eating to life-changing events such as serious medical treatment, or moving into a care setting.

S.5 of the MCA provides 'protection from liability.' In other words, it protects people who carry out these actions. It stops them being prosecuted for acts that could otherwise be classed as civil wrongs or crimes. By protecting providers and families from liability, the MCA allows necessary care or treatment to take place, just as if the person who lacks capacity has consented to them.

What's relevant

In the delicate task of assessing whether a protected person has the capacity to decide whether to maintain, reduce or eliminate entirely their contact with another person, the factors which constitute relevant information are:

✓ Whom the contact will be with. The identity of the person in regards to whom the decision would be made is crucial. The decision must always be specific to a particular person or, where relevant, category of persons.

✓ In broad terms, the nature of the relationship between the person under assessment and the contact in question.

✓ What sort of contact the person under assessment could have with each of the individuals with whom they may have contact. This must include an exploration of different locations in which contact could occur, including within a private home or in a community setting, such as a cafe. It must also include an exploration of the duration of contact available to the person under assessment, from an hour to overnight stays. There should also be discussion and understanding of the arrangements regarding the presence of a support worker.

✓ The positive or negative aspects of having contact with each person. This will require a broad discussion which must be kept structured in the assessor's mind. Evaluations must only be disregarded as irrelevant if they are based on 'demonstrably false beliefs.' Furthermore, the discussion should include not only current experiences but also a discussion of past pleasant experiences with the contact, of which, in appropriate circumstances, the person under assessment should be reminded.

✓ What a family relationship is and that it is in a different category to other categories of contact. However, the assessor must take care not to impose their own values in this assessment.

✓ Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party. If so, there must be a discussion of the potential risk that the person poses to the protected party, and if such a risk exists, whether the risk should be run. This may entail looking closely at the reasons for conviction and the protected party's ability to under- stand the danger posed to themselves or others around them.

What's not relevant

The following are not relevant to the assessment:

× The nature of friendship and the importance of family ties. Beyond the idea of a separate category for family relationships, any further exploration of this idea is irrelevant, especially where it may tend to become value laden or parochial.

× The long term possible effects of contact decisions. As with residence decisions above, consideration of these would fall into assessment of consequences that are not 'reasonably foreseeable' against the instruction of the Mental Capacity Act 2005.

× Risks which are not clearly an issue in the case. Therefore, a consideration of financial abuse or assault when there is no indication of its likelihood would be irrelevant.

It is important to recognise that a person may have capacity to consent to sex or marriage, but simultaneously lack capacity to maintain contact with a particular person. The former involves an understanding of 'matters of status, obligation and rights' whilst the latter 'may well be grounded in a specific factual context.'

The process of evaluating these capacities must be the same but the factors to be taken into account will differ. Indeed, it is not uncommon for the court to be asked (for example in dementia cases) to regulate the contact that one spouse may have with the other.

Case law

LBX v K, L, M | 39 Essex Chambers

PC & NC v City of York Council | 39 Essex Chambers

Source: 39 Essex Chambers

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MAKE A DECISION IN RELATION TO EDUCATION

What's relevant

The following is relevant information to a person's ability to make decisions about their education:

✓ The type of provision.

✓ The type of qualifications, if any, on offer.

✓ The cohort of pupils and whether the person would match the profile of other pupils at the provision.

✓ The additional rights for those with special educational needs up to the age of 25.

It is not necessary for the person to be able to understand all the details within a Statement of Special Educational Needs or the nature of social and personal development opportunities that would be supported by educational provision.

The following is relevant information to the decision to request an EHC (Education, Health and Care) needs assessment under S.36(1) of the Children and Families Act 2014:

✓ An Education, Health and Care Plan (EHCP) states what support a child or young person should have.

✓ Other people will be consulted during the assessment process including parents, teachers and other professionals.

✓ The young person with an EHCP has enforceable right to the education set out within their plan.

✓ An EHCP is only available up to the age of 25 years.

What's not relevant

The following is not relevant:

× If assessed as requiring an EHC plan, social care and health needs may be included on the plan, and this may be advantageous to the person in having their needs.

× If an EHC plan is lapsed it may be difficult to seek one.

× The local authority would agree to 'lapse' GP's EHC plan this year, and he may reconsider next year but it may be difficult to seek an EHC plan after that: HHJ Dodd found that the possibility (of uncertain extent) that 'it may be difficult to seek an EHC plan' is too nebulous to amount to relevant information.

Case law

Heart of England NHS Foundation Trust v JB | 39 Essex Chambers

A Local Authority v GP (Capacity - Care, Support and Education) | 39 Essex Chambers

LBL v RYJ & VJ | 39 Essex Chambers

Source: 39 Essex Chambers

Contact dols@ Contact dols@northlincs.gov.uk for case discussion or further guidance. If legal advice is sought, contact legal services.

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MAKE A DECISION IN RELATION TO FINANCES

These questions will be useful when needing to assess whether a person has the mental capacity to make decisions around their own finances.

This can be made more specific under bills, day-to-day expenses, investment, and benefits. Reference must be made to the Mental Capacity Act 2005, S.1-4 relevant.

- ✓ Who manages the money in your household?
- ✓ What do you need to pay for and what are your out-goings?
- ✓ Do you have any difficulties in taking your money out of the bank?
- ✓ Do you have any savings?
- ✓ Where are your savings held?
- ✓ Do you need any help with your money?
- ✓ Does anyone help you with your money?
- ✓ How do your bills get paid?
- ✓ Can you tell me where you keep copies of bills/ statements?
- ✓ Are you in full receipt of your benefits?
- ✓ Does anyone owe you money?
- ✓ Can you always pay for essential items?
- ✓ Do you sometimes run out of money? What happens?
- ✓ Where do you keep your money?
- ✓ How much money do you have in your purse/pocket?
- ✓ What are you planning on spending it on?
- ✓ What are these coins/notes?
- ✓ Can you give me 35p from the coins?
- ✓ Can you give me a £10 note?
- ✓ How do go about getting things from the shops?
- ✓ If you had a £14.50 bill to pay but you wanted to go out with your friends, what would you do?
- ✓ What is more expensive, a pint of milk or a packet of cigarettes?
- ✓ Can you remember your PIN for your debit/credit cards?
- ✓ What do you do to help you remember your pin?
- ✓ Do you do online banking?
- ✓ Have you given your PIN or passwords to anyone?
- ✓ Do you receive any help with your money?
- ✓ Are you happy with the help you get with this?
- ✓ Is there anyone you would like to help you with your money?
- ✓ Is there anything else you would need help with around your finances?

What is a lasting power of attorney?

Sometimes one person will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so. Under a power of attorney, the chosen person (the attorney) can make decisions that are as valid as one made by the person (the donor).

An LPA must be registered with the Office of the Public Guardian (OPG) before it can be used. An unregistered LPA will not give the attorney any legal powers to make a decision for the donor. The donor can register the LPA while they are still capable, or the attorney can apply to register the LPA at any time.

When healthcare or social care staff are involved in preparing a care plan for someone who has appointed a personal welfare attorney, they must first assess whether the donor has capacity to agree to the care plan or to parts of it.

If the donor lacks capacity, professionals must then consult the attorney and get their agreement to the care plan. They will also need to consult the attorney when considering what action is in the person's best interests.

For further information and guidance consult the Mental Capacity Act 2005 Code of Practice chapter 7.

Scie Social Care Institute for excellence, making decisions about money a series of short videos.

Source: 39 Essex Chambers

Contact dols@ Contact dols@northlincs.gov.uk for case discussion or further guidance. If legal advice is sought, contact legal services.

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MAKE A DECISION IN RELATION TO WHERE TO RESIDE TO RECEIVE CARE AND SUPPORT

What's relevant

Questions of residence are often considered at the same time as questions of care (addressed below). They need to be considered separately, but not at the expense of artificially assigning them to pigeonholes, if the nature of the person's needs mean that the questions are on the facts of their case interrelated.

The information relevant to an assessment as to person's capacity to make a decision as to their place of residence is:

✓ The two (or more) options for living. This must include the type and nature of the living option, such as whether it amounts to supported living or not, and if so, in what way the protected person will be support- ed. The person being assessed must also understand what sort of property it is, and the facilities that would be available to them there.

✓ Broad information about the area. This would cover the notional 'sort' of area in which the property is located, and any known specific risks of living in that area beyond the usual risks faced by people living in any other given area.

✓ The difference between living somewhere and just visiting it. Pictorial methods of conducting this assessment may be useful. The courts have approved of a social worker's methodology of asking a person to de- scribe what they understood to be the meaning of living, the meaning of visiting, and to draw the difference between the two, which happened to be a picture of a bed and which held the meaning of overnight stays. This could also include a discussion of what it means to sleep somewhere, and an understanding of the days of the week.

✓ The activities that the person being assessed would be able to do if they lived in each place.

✓ Whether and how the person being assessed would be able to see friends and family if they lived in each place.

✓ The payment of rent and bills. This is not required to be understood in any detail beyond the fact that there will have to be a payment made on their behalf, as for most cases concerning protected persons, the payments will be made by an appointee.

✓ Any rules of compliance and/or the general obligations of a tenancy. Again, the rules are not required to be known in any great detail by the person under assessment, but a basic understanding of the fact that there are restrictions, and the areas in which they would operate, will be necessary.

✓ Who they would be living with at each placement.

✓ The sort of care they would receive in each placement.

✓ The risk that a family member or other contact may not wish to see the person being assessed, should they choose a particular placement against their family's wishes. This is subject to the caveat below that this should not be presented as a long term and permanent risk with severe consequences on the longer term relationship be- tween the person and the contact involved. To do so would veer towards both emotional manipulation and predicting the future. However, it is perfectly appropriate to warn the protected person of the risk that they may not get many, or any, visits from their contacts where this is born of impracticality, especially if there are long distances or restricted visiting hours involved with any particular residence.

What's not relevant

The following information will not be relevant to a decision as to capacity concerning residence arrangements of the person being assessed, however, it doesn't prevent asking the questions:

× The cost of the placement and/or the value of money. The details of the precise financial arrangements are not important to the question of capacity beyond a basic understanding of whether payment is required, as laid out above.

× The legal nature of the tenancy agreement or licence.

× The consequences on the nature of the relationship of the person under assessment with a contact or family member in the long-term (10 to 20 years), should the former choose to live independently. Any long lasting social rejection or breakdown in relations would not count as a 'reasonably foreseeable consequence' as required by the Mental Capacity Act 2005 in S.3(4).

Case law

Liverpool City Council v CMW | 39 Essex Chambers

On the facts of that case, Sir Mark Hedley observed (at paragraph 15) that 'it would be artificial, and indeed wrong, in the case of CMW not to consider residence and care together. It is her fundamental inability to grasp why she needs support and what would happen if she did not have it, that underpins my finding that she lacks capacity in both these areas. She could not choose between packages of care be- cause she seriously overestimates her ability to protect her- self and seriously underestimates her own vulnerability.'

LBX v K, L, M | 39 Essex Chambers

Source: 39 Essex Chambers

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MAKE A DECISION IN RELATION TO SOCIAL MEDIA USE

What's relevant

The issue of whether someone has capacity to engage in social media for the purposes of online 'contact' is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact.

It has been held that '[t]here are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care, […] in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person.

The use of the internet and the use of social media are inextricably linked. The internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.'

The relevant information is (described in the terms that would be applicable in assessing a person with learning disability):

✓ That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it.

✓ That it is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites. The precise details or mechanisms of the privacy settings do not need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them.

✓ If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended. 'Sharing' in this context has the same meaning as in 2018 Government Guidance: 'Indecent Images of Children.'

✓ 'Guidance for young people': that is to say, 'sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribution.' 'Rude or offensive' is used here as 'these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic.'

✓ Some people you meet or communicate with (talk to) online, who you don't otherwise know, may not be who they say they are (they may disguise, or lie about, themselves). Someone who calls themselves a 'friend' on social media may not be friendly.

✓ Some people you meet or communicate with (talk to) on the internet or through social media, who you don't otherwise know, may pose a risk to you. They may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically. They may want to cause you harm.

If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime. 'Sharing' has the same meaning as above; see above also in relation to 'rude or offensive.' This statement "is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacious person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material.

Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' […] Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending.

This piece of information […] is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.

What's not relevant

Not relevant is the information that internet use may have a psychologically harmful impact on the user.

It is widely known that internet use can be addictive. Accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive.

Such sites could cause the viewer distress. I take the view that many capacious internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under S.3 MCA 2005.

Case law

A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2 (21 February 2019) (bailii.org)

Source: 39 Essex Chambers

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MAKE A DECISION IN RELATION TO THEIR CONTRACEPTION

What's relevant

In deciding whether a person has capacity to make decisions about their own contraceptive regime, the in- formation that will be seen as relevant is as follows:

✓ A rudimentary understanding of the reproductive process. This would involve an understanding that pregnancy is a result of sexual intercourse and not other (non-sexual) activity, such as eating or ingesting unfamiliar substances.

✓ A basic understanding of the purpose of contraception. This understanding would encompass both the reason for contraception and what it does. This would primarily include understanding that there is a likelihood of pregnancy if it is not in use during sexual inter- course.

✓ The types of contraception available and how each is used.

✓ The advantages and disadvantages of each type.

✓ The possible side-effects of each and how they can be dealt with.

✓ How easily each type can be changed.

✓ The generally accepted effectiveness of each.

If medically necessary, the important medical information associated with a pregnancy, delivery or future pregnancy. This is highly specific to the person involved but could include the risk of development of specific medical conditions or complications due to pregnancy or childbirth.

For those who suggest a preference for a home birth, the additional risk of a person of home birth must also be understood. The risk of premature birth, where it exists, must be understood, as well as the effects it may have on the child. This is all contingent on there being present one party for whom a further pregnancy could lead to serious health risks, whether physical or mental.

What's not relevant

The following factors are not relevant to this assessment:

× The woman's understanding of what bringing up a child would be like in practice.

× Any opinion of the woman or other expert or authority as to how she would be likely to get on with child rearing.

× Whether any child would be likely to be removed from her care.

Case law

PC & NC v City of York Council | 39 Essex Chambers

A Local Authority v A & Anor [2010] EWHC 1549 (Fam) (24 June 2010) (bailii.org)

The Mental Health Trust et al v DD and BC | 39 Essex Cham- bers

Source: 39 Essex Chambers

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MAKE A DECISION TO ENGAGE IN SEXUAL RELATIONS

What's relevant/what's not relevant

In A Local Authority v JB, 49 the Supreme Court held that, normally, the question in relation to sexual relations is whether the person has capacity to decide to engage in sexual relations.

When considering that question, the information relevant to that decision may include:

✓ The sexual nature and character of the act of sexual intercourse, including the mechanics of the act.

✓ The fact that the other person must have the ability to consent to the sexual activity and must, in fact, consent before and throughout the sexual activity.

✓ The fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent. The courts have held previously that person must understand that they can change their mind in relation to consent to sex at any time leading up to, and during the sexual act

✓ That a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant.

✓ That there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom. The courts have held previously that the knowledge required is fairly rudimentary. 'In my view it should suffice if a person under- stands that sexual relations may lead to significant ill- health and that those risks can be reduced by precautions like a condom.' Nothing more than this is required. There is thus no need to be able to name and describe each, or indeed any, potential infection, nor must a person specifically be able to understand condom use (this is an example of a precaution).

The Supreme Court in JB made clear that assessment will usually be on a 'generalised forward looking basis' i.e., without reference to a specific (actual or prospective) sexual partner. However, it also made clear that there are situations where the question is person-specific, for instance:

✓ Sexual relations between a couple who have been in a long-standing relationship, where one of them develops dementia or sustains a significant traumatic brain injury.

✓ In the case of sexual relations between two individuals who are mutually attracted to one another, but who both have cognitive impairments.

✓ If the decision can properly be described as person-specific, then there are four consequences.

✓ The information relevant to the decision may be different, for instance, depending on the characteristics of the other person (i.e., in same sex relations, the risk of pregnancy resulting from sexual intercourse will not be relevant), or because of the risks posed by a specific person.

✓ The practicable steps may also differ, for instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where they will remain unable to understand the diverse responses of many hypothetical sexual partners.

✓ The reasonably foreseeable consequences of deciding one way or another may differ. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship, where one partner has developed dementia.

✓ The potential for 'serious grave consequences' may also differ.

✓ Notwithstanding the reframing of the test in JB, it is suggested that the assessment must not, however, entail consideration of the following elements, should they be present in any particular case.

✓ An understanding of what is involved in caring for a child (should a protected person become pregnant). This comes close to crossing the line into a paternalist approach that would find incapacity on the basis that a decision is simply unwise.

✓ The risk that may be caused to P themselves through pregnancy, or the risk to future children. The social, emotional and psychiatric consequences of falling pregnant or those attaching to the children arising from such a pregnancy cannot be part of the relevant information informing the decision of whether a protected party has the capacity to consent to sex or marriage.

✓ The fact that the opportunity for sexual relations with a specific partner will be limited for some time to come into the future.

✓ The ability to understand or evaluate the characteristics of some particular partner or intended partner.

Case law

A Local Authority v JB (Rev1) [2021] UKSC 52 (24 November 2021) (bailii.org)

A Local Authority v H | 39 Essex Chambers

LB Southwark v KA (Capacity to Marry) | 39 Essex Chambers

X City Council v MB & Ors [2006] EWHC 168 (Fam) (13 February 2006) (bailii.org)

Source: 39 Essex Chambers