**Dudley MBC Adult Social Care Staff Guidance**

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| **REMARKS** | This document sets out the procedure for undertaking and recording Mental Capacity Assessments in line with the Mental Capacity Act 2005. |

**AS A MANAGER YOU SHOULD ENSURE THAT:-**

* You read, understand and, where appropriate, act in accordance with the policy
* All people in your workplace who need to know see this procedure, are aware of its content and you ensure that all staff act in accordance with the policy
* This document is available in a place to which all staff members in your workplace have access

**AS AN OFFICER OR MEMBER OF STAFF YOU SHOULD ENSURE THAT:-**

* You read, understand and, where appropriate, act on this information
* Discuss any issues with your manager or supervisor

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# Introduction

1.1 This guidance sets out procedure for undertaking mental capacity assessments in line with the [Mental Capacity Act 2005.](http://www.legislation.gov.uk/ukpga/2005/9/contents) It covers the following five key issues:

Key principles of the Mental Capacity Act

Reasons for assessment of capacity

Functional and diagnostic test and causative nexus

Mental capacity assessment visits

Structure of the mental capacity assessment form

1.2 This staff guidance has been developed to support staff in their roles. It is not exhaustive and should be read alongside other policies and procedures[.](http://theloop:39064/ASSD/Shared%20Documents/Forms/By%20category.aspx)

1.3 Its focus is on (a) how to apply the MCA 2005 principles when assessing capacity; and (b) how to record your assessment, primarily in the context of health and welfare decisions.[[1]](#footnote-1)

1.4 In particular this guidance discusses mental capacity in relation to financial decisions. Financial decisions can range from deciding whether or not to buy a pint of milk to making complex decisions about a portfolio of shares. It is an area that demands a number of skills from the individual. People who support individuals may be concerned about the need to protect an individual so that their vulnerability to financial abuse is minimised and this can sometimes result in a person not being supported to make their own financial decisions. It has the potential to disempower the individual. There is a need to balance safeguarding the person from financial abuse with the need to preserve the individual’s independence.

# Key principles of the Mental Capacity Act

2.1 Mental capacity is the ability to make a decision and assessments of capacity are carried out when someone’s capacity is in doubt. The assessment is vitally important because someone who is assessed as lacking capacity may be denied the right to make a specific decision if others think that decision would not be in their best interest.

* 1. Mental capacity is decision-specific. The statement “P lacks capacity” is, in law, meaningless. You must ask yourself “what is the actual decision in hand”[[2]](#footnote-2)? If you do not define this question with specific precision before you start undertaking the assessment, the exercise will be pointless.

2.3 The person assessing a person’s capacity to make a decision will usually be the person who is directly concerned with the person at the time the decision needs to be made. For day-to-day decisions this can for example be a carer; for a decision about a dressing change it could be a district nurse.

2.4 It is also important to remember that it is the decision-maker who needs to be satisfied that P lacks capacity. In a court setting, the decision-maker is the judge; outside the court setting, it is the person who is proposing to take the step in question on the basis that it is said to be in P’s best interests. That does not mean that expert assistance cannot be sought (for instance as to whether the person has an impairment or disturbance of the mind or brain). But it does mean that the person relying on the defence cannot delegate the capacity issue to that expert. To give an example which occurs frequently in the clinical setting, if you are a doctor proposing to carry out a particular operation, you cannot delegate to a psychiatrist colleague the decision whether or not the person has capacity to consent to that operation. You may – and in some complex cases may need to - get expert input from that psychiatric colleague, but it is ultimately you, as the treating doctor, to determine capacity. If you do not reasonably believe that P lacks capacity to consent to the operation, but go ahead with the operation, you will have no defence under s.5 MCA 2005 even if you reasonably believed that you were acting in your patient’s best interests.

* 1. It is important to understand that it is not only medical professionals – and in particular psychiatrists – who can carry out a capacity assessment. Much depends upon (a) the nature of the decision, and (b) who knows the person best. There will be some circumstances under which the particular expertise of a medical professional will be required, but that is because of their expertise, not because of the position that they hold. A capacity assessment is, in many ways, an attempt to have a real conversation with the person on their own terms, and applying their own value system.[[3]](#footnote-3) This means that it is frequently the case that professionals or others who know the person better, and in particular who have seen the person over time, will be able to do a more robust capacity assessment than a person (of whatever discipline) “parachuted” in for a snapshot assessment.[[4]](#footnote-4)

* 1. The Court of Protection can make interim declarations and decisions about P’s best interests where it has evidence before it “*to justify a reasonable belief that* [the individual] *may lack capacity in the relevant regard*.”[[5]](#footnote-5) This means that it is possible to make an application where those concerned with P’s circumstances have been unable to complete a COP3 form to the level of detail usually required. This could, for example, be because they have been prevented by a third party or because P refuses to be assessed. In such circumstances, it will always be necessary to make clear in a supporting witness statement why the person or body bringing the application has reasonable grounds to believe that P may lack the relevant capacity. One of the first steps that the Court will then take is to bring about a proper capacity assessment; that capacity assessment will then determine whether or not it has jurisdiction to take further steps in relation to P.

* 1. Finally, the very act of deciding to carry out a capacity assessment is not, itself, neutral, and the assessment process can, itself, often be (and be seen to be) intrusive. After all, to assess someone’s mental capacity is to interfere with their right to respect for private life for Article 8 ECHR purposes. So you must always have grounds to consider that one is necessary. Conversely, you must also be prepared to justify a decision not to carry out an assessment where, on its face, there appeared to be a reason to consider that the person could not take the relevant decision. Whilst the presumption of capacity is a foundational principle, you should not hide behind it to avoid responsibility for a vulnerable individual.[[6]](#footnote-6) In our experience, this can happen most often in the context of self-neglect where it is unclear whether or not the person has capacity to make decisions.[[7]](#footnote-7)

2.8 Section 1 in the Mental Capacity Act sets out the statutory principles of the Act:

* Every adult must be assumed to have capacity unless they fail the capacity assessment.
* All practicable steps must be taken to help a person with the capacity assessment.
* An unwise decision does not mean a person lacks capacity (as long as they can pass the capacity assessment).
* Any decision or action taken on behalf of a person lacking capacity must be in their best interests.
* Any decision or action taken on behalf of a person lacking capacity should aim to be the less restrictive option available in terms of the person’s rights and freedoms of action.

# The reasons for assessment of capacity

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* 1. The spirit of the Mental Capacity Act is self-determination. It aims to protect and empower individuals who may lack the mental capacity to make a particular decision (or decisions), or to take a particular action for themselves. The law applies to individuals aged 16 and over.
  2. A mental capacity assessment determines if at a particular time, for a particular decision, the person has capacity or not, to make this decision. It is important to note what the particular decision is because mental capacity, in the sense of the Mental Capacity Act 2005, can never be a general determination. Hence, the observation that a person lacks capacity does not make sense under the Act without reference to a particular decision for which this was assessed.
  3. The presumption that a person has capacity is one of the core principles of the Act. If, for example, a social worker wants to make a decision on behalf of a person or ask the court to do so, it is this social worker’s responsibility to prove in the mental capacity assessment that it is more likely than not that the person assessed lacks capacity. This requires the assessment to contain evidence supporting the professional’s view.

3.4 Mental Capacity Assessments are everybody’s business in the sense that they should be completed by the professional who wants to act or make decisions on behalf of an individual who lacks the capacity to act or make these decisions for themselves.

**Main areas in which a Mental Capacity Assessment may be considered are:**

* A decision about medical treatment provided by the National Health Service (NHS).
  + This excludes treatment regulated under Part 4 of the Mental Health Act 1983.
* A decision about a long-term move (8 weeks or more) to different accommodation.
  + This may be proposed by an NHS body or Local Authority, i.e. to a different care home or hospital but it excludes situations where the move is a requirement of the Mental Health Act 1983.
* A Safeguarding Adults concern has been received and decisions with regards to proceeding with an enquiry and protection plan need to be made.
* A decision needs to be made in regards to deprivation of liberty and consent to care and treatment.
* A best interest decision is required on a number of important issues, e.g. financial management, support with care, etc.
  1. Promoting autonomy: to comply with s.1(3) MCA 2005, you must take all reasonable steps to help P to decide for themselves before concluding that they are nevertheless unable to make a decision. This will include asking yourself – and being in a position to record – the answers to questions such as:
* What is the method of communication with which P is most familiar (is it, for instance, a pointing board, Makaton or visual aids)?
  + - What is the best time of day to discuss the decision in question with P?
    - What is the best location to discuss the decision in question with P?
    - If you do not know P, would it assist to have another person present who does (and, if they do, what role should they play)? Or an independent advocate under the Care Act 2014?
    - What help does P require to learn about and understand the information relevant to the decision? For instance, does P need to be taken to see different residential options? Have you explained to P all the pieces of information that you have identified as being relevant to the decision?
* 3.5.6 And, perhaps above all, is there something that you can do which might mean that P would be able to make the decision? Depending upon the circumstances, this could range from simply waiting for the decision to be taken, to undergoing work with P to assist them: see for a good example, [*Re DE*,](http://www.39essex.com/cop_cases/re-de/)[[8]](#footnote-8) in which (whilst Court of Protection proceedings were ongoing), an intensive programme of education was provided to a learning disabled man, in consequence of which he gained the capacity to consent to sexual relations.

* 1. It may well be the case that taking practicable steps will be the end of the matter because the person has been enabled to decide for themselves.

# The diagnostic and functional tests

4.1 According to the Mental Capacity Act 2005 section 2(1), a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter **because of** an impairment of, or a disturbance in the functioning of, the mind or brain.

* 1. Section 2(1) is the key section.[[9]](#footnote-9) The rest of s.2 and the whole of s.3 flesh out what are traditionally called the two limbs of the capacity “test”, i.e. asking:
* whether P is “unable to make a decision for himself” (functional); and
* whether that inability is because of temporary or permanent “impairment of, or a disturbance in the functioning of, the mind or brain” (diagnostic).

It is very important to understand that the terms “functional” and “diagnostic” do not appear in the MCA 2005, although they are used in the Code of Practice. We use them here because they are very often used in everyday practice. However, we must caution that use of the term “diagnostic’ perpetuates a very medical model of capacity assessment and the “myth” that only medical professionals are capable of conducting capacity assessments. As set out above, this is not the case. Moreover, no formal diagnosis is in fact required, particularly in emergency situations.

It is also important to understand that there are actually three elements to the test for capacity:

* + - Is the person unable to make a decision? If so:
    - 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?

* 1. The ordering of the first and second questions set out above is the opposite of that set out in the Code of Practice to the MCA 2005. However, we consider that the case-law is now clear that the ordering set out in the Act itself must be followed.[[10]](#footnote-10) There are also two sound “policy” reasons why this order should be followed:

* + - * There is a danger that you will mentally “tick off” the presence of an impairment or disturbance and then will not sufficiently question whether that impairment or disturbance is actually causing the inability to make the decision;[[11]](#footnote-11)
      * Linked to this, there is also a risk that a different order would perpetuate the discriminatory approach to those with mental disorders, as it essentially loads the capacity assessment against them by “pre-filling” the first element of the test. In other words, it makes it – subconsciously – easier for you to move from thinking “this person has schizophrenia” to concluding “this person lacks capacity to make [X] decision.”

* 1. In all cases, though, all three elements of the single test must be satisfied in order for a person properly to be said to lack capacity for purposes of the MCA 2005.

* 1. We now look at these elements in turn.

# The functional test

* 1. The elements of the functional test are found in s.3(1) MCA 2005, which states that P is unable to make a decision for himself if he is unable:
     + to understand the information relevant to the decision; or
     + to retain that information; or
     + to use or weigh that information as part of the process of making the decision; or
     + to communicate his decision (whether by talking, using sign language or any other means).

* 1. As obvious as it may sound, it is vitally important to ensure that, having framed the question with sufficient precision to yourself, you actually then need to ask P the question (in whatever manner is appropriate) during the assessment (and record the answer). If, unusually, it is not appropriate to ask the precise question, the reasons why it was not asked should be spelled out carefully.

*Is P unable to understand the relevant information?*

* 1. It is not necessary that P understands every element of what is being explained to him. What is important is that P can understand the “salient factors”14: the information relevant to the decision. The level of understanding required must not be set too high.[[12]](#footnote-12) This means that the onus is on you not just to identify the specific decision (as discussed above) but also what the information is that is relevant to that decision, and what the options are that P is to choose between. We give examples of the kind of information that has been held by the courts to be relevant (and irrelevant) to some of the more common health and welfare decisions in the annex to this Guide.

* 1. Further, you must not start with a “blank canvas.”In other words, you must present the person you are assessing with detailed options so that their capacity to weigh up those options can be fairly assessed*.* [[13]](#footnote-13) This is particularly important where a person’s particular impairment may make it more difficult for them to envisage abstract concepts. But it is also important to give the person sufficient information about the options that they are being asked to choose between so that they are given the opportunity to understand (if they are capable of doing so) the reality of those options. In other words, and to take a common example, you should not simply seek to assess a person’s ability to decide between living at home and living in a care home in the abstract, but rather by reference to what continuing to live at home would be like (for instance, what care package would the relevant local authority provide) and what living in an actual care home would be like.[[14]](#footnote-14)
  2. The ability to understand also extends to understanding the reasonably foreseeable consequences of reaching a decision or failing to do so (s.3 (4)).

*Is P unable to retain the relevant information?*

* 1. We repeat the need to be precise about the information in question.

* 1. The issue is whether P is unable to retain enough information for a sufficient amount of time to make the decision. The Act specifies at s.3(3), however, that “the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.”

5.8 This is an important consideration, particularly when dealing with the elderly or those with deteriorating memories. Capacity is the assessment of the ability to make a decision “at the material time”: at the time of assessment. If information can be retained long enough for P to be able to make the relevant decision at the material time, that is sufficient, even if P cannot then retain that information for any longer period.

*Is P unable to use or weigh the relevant information?*[[15]](#footnote-15)

* 1. Again, it is necessary to be clear what the information is (and how it is said to be relevant to the decision). This aspect of the test has been described as *“the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate the one to another.”*[[16]](#footnote-16) As with understanding, it is not necessary for a person to use and weigh every detail of the respective options available to them in order to demonstrate capacity, merely the salient factors. Therefore, even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision.[[17]](#footnote-17)

* 1. It is particularly important here to be aware of the dangers of equating an unwise decision with the inability to make one – P may not agree with the advice of professionals, but that does not mean that P lacks capacity to make a decision.[[18]](#footnote-18)

* 1. Further, if a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for that person. [[19]](#footnote-19)

This means you need to be very careful when assessing a person’s capacity to make sure – as far as possible – that you are not conflating the way in which they apply their own values and outlook (which may be very different to yours) with a functional inability to use and weigh information. This means that, as much as possible, you need as part of your assessment – your conversation – with P, to glean an idea of their values and their life story as it relates to the decision in question.

* 1. In some cases, it may be difficult to identify whether P is using a piece of relevant information but according it no weight, or failing to use the piece of information at all. For example, agreeing or refusing to take medication for a condition that P does not think P has. Psychiatric expertise may be of assistance in such cases, as it may explain whether P’s ability to process information is impaired and if so, to what extent.

* 1. Another common area of difficulty is where a person with an acquired brain injury gives superficially coherent answers to questions, but it is clear from their actions that they are unable to carry into effect the intentions expressed in those answers (in other words, their so-called executive function is impaired). It can be very difficult in such cases to identify whether the person in fact lacks capacity within the meaning of the MCA 2005, but a key question can be whether they are aware of their own deficits – in other words, whether they are able to use and weigh (or understand) the fact that there is a mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations. Failing to carry out a sufficiently detailed capacity assessment in such situations can expose the person to substantial risks.

*Is P unable to communicate their decision?*

* 1. Any residual ability to communicate is enough, so long as P can make themselves understood. This will be an area where it is particularly important to identify (and to demonstrate you have identified) what steps you should be taking 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.

# The diagnostic test

6.1 In many cases, and especially if you are not medically qualified, you will be relying upon a clinician to provide an opinion as to whether P has an impairment or disturbance in the functioning of the mind or brain, and, if so, what precisely it is. As this is primarily a clinical question, we do not therefore address this aspect of the test in great detail here.

* 1. It is, though, important to make the following points:

* 1. The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent (s.2 (2)): if temporary, be careful to explain why it is that the decision cannot wait until the circumstances have changed before the decision is taken.

* 1. It is important to remember that it is not necessary for the impairment or disturbance to fit into one of the diagnoses in the ICD-10 or DSM-V.[[20]](#footnote-20) It can include medical conditions causing confusion, drowsiness, concussion, and the symptoms of drug or alcohol abuse. To this extent, therefore, the term “diagnostic” test is misleading – the important thing is that there is a proper basis upon which to consider that there is an impairment or disturbance.

* 1. Finally, particular care needs to be exercised if you are considering a person who appears to have a very mild learning disability – this may well not be enough to constitute an impairment or disturbance of the mind or brain for these purposes.[[21]](#footnote-21)

# The causative nexus

7.1 In all cases, it is vital to consider whether this third requirement – the “causative nexus” – is established. In other words, are you satisfied that the inability to make a decision is because of the impairment of the mind or brain? Any pro forma form for the assessment of capacity that does not include a final box asking precisely this question is likely to lead you astray. In *PC and NC v City of York Council* this issue made all the difference: that her inability “*significantly relate*[d] to” PC’s mild learning disability was insufficient: the MCA requires the inability to be “because of” of the impairment, which is evidentially more stringent.

7.2 To reiterate, there has to be (and you have to show that you are satisfied why and how there is) a causal link between the disturbance or impairment and the inability to make the decision(s) in question. *JB*’s case, again, shows how easy it is to assume that merely because a person has schizophrenia, they are then unable to take decisions regarding surgical procedures – this is entirely incorrect. The disturbance or impairment in the functioning of the mind or brain must also not merely impair the person’s ability to make the decision, but render them unable to make the decision.[[22]](#footnote-22)

7.3 There will be situations in which it is not entirely easy to identify whether a person is unable to make what professionals consider to be their own decisions because of:

* An impairment or disturbance in the functioning of their mind or brain (for instance the effect of dementia);
  + - The influence of a third party (for instance an over-bearing family member); or
    - A combination of the two.

7.4 Examples of such cases include:

7.5 The elderly patient on the hospital ward who looks to their child for affirmation of the “correctness” of the answers that they give to hospital staff;

7.6 A person with mild learning disability in a relationship with an individual who (even when that individual is next door) is clearly still cautious about expressing any opinions that may go against what they think may be the wishes of that individual.

In such cases, there will sometimes a difficult judgment call to make as to whether the involvement of the third party actually represents support for the person in question, or whether it represents the exercise of coercion or undue influence. We strongly suggest that in any case where you have grounds for concern that you seek legal advice as soon as possible as to what (if any) steps should be taken. In particular, there are some cases in which the right route is not to go to the Court of Protection but rather to make an application to the High Court for declarations and orders under its inherent jurisdiction.[[23]](#footnote-23)

7.7 If a person fails the test in any one of these areas, this represents a lack of capacity.

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# 8 Mental capacity assessments

8.1 Every effort must be made to communicate with the individual concerned, irrespective of the person’s disabilities. Several assessment discussions may need to be held, over a number of visits, to ensure that a decision about capacity is not rushed. Preparing a visit well can often avoid additional visits and usually, workers will not complete more than one or two visits for a mental capacity assessment. In exceptional circumstances, three visits or an independent view on the situation by an external assessor might be needed.

8.2 The following issues should be considered when arranging mental capacity assessment visits:

* Visits may need to be repeated at different times of day to ensure that the individual is given every opportunity to express their view without being adversely affected by medical interventions, medication, sundowning syndrome associated with dementias, meal times or other routines.
* The use of various communication techniques and involvement of communication experts should be thoroughly explored and implemented where appropriate.
* The presence of others during the assessment should be considered in the context of their ability to aid or hinder the individual express their own views. If another individual may influence or manipulate the individual’s views, efforts should be made to see them on their own.

**9 Mental capacity and financial decision-making**

The MCA has 5 principles and these are just as relevant to financial decision-making as

decisions relating to a person’s health and welfare. For example, in respect of principle 2 **helping someone to make a decision,** a person should be supported to understand the decision in hand rather than assuming that they do not have the skill or knowledge to make the decision. The need for additional support does not necessarily mean that the person cannot make a particular decision.

A person’s capacity is time specific and decision specific. This is fundamentally important in relation to assessing capacity to make a financial decision.

It is not compliant with the MCA, and therefore not legal, to state that a person lacks

capacity to make financial decisions unless their capacity has been properly assessed

to ascertain which specific decisions they are able or not able to make at the time the

decision needs to be made.

Stating that a person “lacks capacity to manage their finances” will only be the case if an individual has no awareness of money, or the relative value of coins and notes at all and despite all attempts to support them or provide training to develop their skills, they cannot learn the skills needed to make decisions about using money to make purchases. Or through illness or injury they have lost all their skills to manage money to the extent that these cannot be re-learnt.

It is more helpful and empowering for the individual if they are described as “lacking capacity to make decisions about some aspects of their finances”. An outline of aspects where the person lacks capacity and aspects where they have capacity should support the statement. This would be in line with the MCA and would be useful information in terms of care and support planning.

Whether a person has or lacks capacity depends entirely on the decision to be

made at the time it needs to be made. An individual can have capacity to manage

their everyday spending but lack capacity to manage paying their rent, for example.

Capacity can change from decision to decision.

**9.1 Assessing capacity to make financial decisions**

There are 3 different types of situations that require an assessment of the person’s capacity.

• Decisions that require an informal assessment of the person’s capacity to make a particular financial decision. This applies to everyday decisions such as buying a new coat or a pint of milk. If the person has capacity, they can make the decision. Carers and support workers must have a **“reasonable belief”** that the person lacks capacity to make the particular decision before they can act in the person’s best interests.

• Specific financial decisions that require a more formal capacity assessment that the assessor will want to be recorded. For example, a professional deputy who is responding to a request from their client for money to purchase an expensive item. A family member acting as deputy may also want to do this and keep a record.

• Somebody may want to know which specific areas a person is finding difficult in

managing their finances overall, so that they can suggest support or they may need to consider if the person requires an appointee, deputy or if they have capacity to appoint an attorney. For example, a person with dementia who is losing the ability to manage their finances.

**9.2 Checklist before assessing capacity in relation to financial decision-making**

***Checklist Question Points for consideration***

|  |  |
| --- | --- |
| Do you have a right to  assess capacity? | • What is it that has led you to believe the person may lack capacity?  • Is there an impairment or disturbance in the functioning of the brain or mind and if so do you believe it is this that is impacting on their decision-making?  • Are you the decision maker in this instance i.e. responsible for making the decision about the person’s finances? If you are not the decision maker this does not make an assessment inappropriate. Your evidence may be vital for the  decision maker |
| Is there a framework already in place for decisions about finances? Is there someone who  has authority to make financial decisions on  the person’s behalf? | • Does the person have a court appointed property and affairs deputy or a Lasting Power of Attorney in place relating to decisions about finances?  • Is there is an appointee from the local authority who is responsible for receiving the person’s benefits and ensuring the money is spent in their best interests? This does not make it inappropriate to carry out an assessment but a discussion with the relevant person that holds responsibility should take place. It may be that a deputy holds a substantial amount of money on behalf of the person but that the individual could still make decisions about day to day spending. Similarly, if someone in the local authority is  the appointee, they may need information that informs them the person can make some decisions therefore enabling the individual to have a greater degree of control over their  finances. |
| What kind of problems is the person experiencing? | • Have you determined exactly what the issue is?  • Is there an underlying issue that is affecting the person’s ability to make decisions about how they use their money?  • Are there concerns that others may be taking advantage of the person? The person may still have the capacity to make decisions about  their money but lack the confidence or ability to address the way others have a degree of control over them. |
| What can you do to provide support? | • Are there practical steps that you can take to enable the person to manage some aspects of their finances?  • Has consideration been given to the first steps to be taken before even starting an assessment?  The ability to make a decision should not be confused with the ability to carry out the decision. Someone may have cognitively based difficulties with initiation that makes it hard to carry out  decisions that may or may not respond to support (commonly as a result of damage to the frontal lobes). This may result in them lacking the capacity to make a decision as they cannot then carry it out. |
| Is the person making an unwise decision? | • Is the decision in breach of a policy or values of an organisation? (which may be unwise if the person is risking a tenancy or service but a capacitous decision).  • Is the decision a lifestyle choice?  • Are your own values in conflict with the decision or choice a person wishes to make? A decision may be viewed as unwise because the person is in debt and can’t realistically afford to spend their money. The person may choose to spend their money on something that is illegal such as drugs or something that is viewed by some people as immoral such as sex workers.  Consideration must be given to whether the person is making a choice that some would view as unwise but is an extension of their lifestyle, or something that goes against the values or  policies of a decision maker, environment they’re living in or service they’re in receipt of but ***is*** a capacitated choice. It is essential to consider the person’s historical attitude towards financial risk and the sorts of financial decisions they have  made in the past. |
| Do you need to take action in an emergency? | • Is there a professional duty of care or a safeguarding concern that takes priority?  This is not to say that best interests or the person’s capacity is ignored but rather to highlight there will be some circumstances that warrant immediate action to safeguard the person. |

**9.3 Financial Capacity and Financial Capability**

Financial capacity is the ability to make a decision about how to use your money, whether this is about spending weekly state benefits on basic life necessities or more complex decisions such as investing money in property, stocks or shares. However a person may be deemed as lacking financial capacity because they don’t have the financial capability to carry out the decision at hand. One reason might be because they’ve never had the opportunity to learn or be educated on the relevant decision. For example, it may be easy to assume that someone with a brain injury who lacks a particular skill is lacking that skill due to the injury but perhaps they never had responsibility for making financial decisions within their household.

Consideration must be given as to whether the person may be able to learn relevant

information applicable to the decision as well as ensuring that there is an exploration as to why the person is unable to make certain decisions.

• How much is known about the person’s understanding and experience of managing finances?

• What support do they require, is it about the provision of information; will they benefit from specific education or training?

• Are there opportunities from them to practice spending money or work out how to use it?

• Is there an opportunity to access a local training course?

Make sure that all relevant information about the decision(s) is available to the Individual. Nobody should be expected to make a decision about something unless they know all the facts. This may include explaining a court decision, for example, if the person has been appointed a deputy responsible for large amounts of money, which may be the result of a personal injury claim or the person had existing finances and a previous decision was taken with regards their capacity and deputyship.

**Explain what support can be offered**

The person may be unaware that someone can assist them with working out their finances or budget. They may need to be reminded about previous agreements they had regarding their finances, for example, that staff will put a certain amount of money away each week to help them save. Or they may need someone to help go out with them on a regular basis to get groceries or work out what they need to buy. It is important not to leave someone feeling isolated within the decision-making.

**Understand the person’s situation**

It is important to recognise the impact a change in a person’s capacity or their ability to make a decision has. For some individuals their capacity may have changed slowly over a period of time, others may experience a sudden event that changes their ability to make their own decisions, for example after a brain injury. Some people may be in the process of learning new information, which they may be struggling with.

Empathy and recognising the difficulties someone is experiencing is crucial within supported decision-making. Generalised statements such as: “they lack insight”; “they just don’t see that they can’t live the life they previously did” do not demonstrate an attempt to understand the person’s situation but rather come from the perspective of others knowing best. Recognising that it takes time to be able to adjust to a life-changing event or for a person to learn new things is vital in gaining trust and enabling someone to state or understand what is difficult for them.

**Consider if practical help may be needed**

Consider if a person needs practical support. For example, for a person who has capacity about how to organise a third party mandate form that would allow another person to operate their finances on a temporary basis. This would give them authority to deal with everyday transactions and can be useful, for example, if a person is recovering from a period of ill-health which makes it difficult for them to go to the bank. Or would an individual’s capacity be enhanced if they had practical help with budgeting or banking.

**Allow sufficient time for the person to make the decision**

Consider the use of decisional supports. These are other people or tools that support

decision-making. None of us make decisions in isolation or immediately unless the situation requires this. We speak to family, friends, colleagues, use the internet for research, social media and so on. Therefore it would be unrealistic to expect someone who may be struggling to make some decisions not to need the same type of time and support. Consider who may be able to work with the person over a period of time on the relevant decision. This may be a paid professional or someone the person knows well and feels comfortable with.

**Revisit the decision on a regular basis**

The Mental Capacity Act focuses throughout on enabling the person to make their own

decisions even when they have been deemed to lack capacity. Once it is established in what area the person lacks capacity i.e. understanding, weighing up, retaining the information or communicating their decision, then on-going support should be provided in enhancing the particular area of need. For some people, where it is clear they are unlikely to have capacity to make the decision, it is still important to enable them to continue to engage with whoever supports them with their decision-making. These are likely to be the main people that will notice subtle changes in a person’s ability or behaviour. They are also likely to be engaged in on-going best interests decisions which may result either in new information being presented or may provide a platform on which to discuss the person’s needs and how to adapt to necessary changes in their circumstances.

**Capacity to choose who supports you with your finances**

Whilst a person may be unable to make a decision that is directly about managing their finances, for example, where a substantial sum of money is involved, but they may still have the capacity to choose who supports them. The best interests decision will be made by the appointed person (a deputy, attorney or appointee) but must include the person as far as possible and practicable. A decisional supporter, such as a family member or advocate, can spend time with the person exploring their wishes and preferences and support the person to decide who they want to support them with their money.

**Props/scenarios**

The use of props or scenarios, such as bank statements and utility bills, are likely to be more beneficial when there is some knowledge of the person and how the person understands information, communicates it or expresses a choice. Consideration should be given to offering a scenario the person is most likely to be familiar with; asking questions about past choice and decisions; what was important about those, including the relevant factors. These will need to be as person-centred as possible.

**Benefits of a money plan/financial passport**

A money plan or financial passport can be helpful in informing others in the person’s life, including professionals that may only come into contact occasionally with the person, as well as those supporting an individual on a day to day basis. This isn’t legally binding but is something to which particular weight should then be given by s.4 (6) MCA 2005 if the person lacks capacity and others are taking best interests decisions on their behalf. Sometimes it is beneficial for a person to have a financial profile which is a more formal document that has more detail about a person’s income and assets.

It can cover the following:

• Information about the person’s capacity and where it is appropriate to make best

interests decisions

• Decisions where the person needs support e.g. at the bank

• Information about income, benefits etc

• What the person likes to spend their money on

• Where they may need support in making a decision (for example if the person is on a minimal budget)

• How their money is kept safe – any potential safeguarding issues

• Who has responsibility for their finances (for example if others need to be consulted about some decisions or permission sought to access their finances such as a deputy or appointee)

• Any training needs to support the person to learn money/budgeting skills etc

• Information to provide assistance in creating a care plan that can support the person to make decisions or carry out those decisions, for example, supporting the person to make a list of items they need

• Accompanying the person to places where they will spend their money and offering appropriate support (such as counting out their coins)

• Identifying daily activities that the person would normally carry out in the community (getting a haircut, going for afternoon tea or a café) and supporting them to budget their money to carry this out

• Consider also whether the individual may want to make a film. This can be a very

effective way of ensuring that a person’s wishes and feelings are accurately recorded and to give a picture of them as an individual

**Empowerment and protection in relation to finances**

The MCA aims to strike a balance between empowerment and protection but decisions can often be led by the level of risk the person may face rather than the focus being on empowering an individual. This is particularly relevant when it comes to financial decisions because empowering a person to have a level of responsibility for their finances may also put them at risk from abuse from others either within the wider community or their own living environment.

**Financial advocacy**

Financial advocacy is a specific service that supports individuals who are experiencing

difficulties with managing their money.

Financial advocacy may be of a benefit to the person in the following ways:

• To meet with the person & talk to them and their circle of support.

• Involve the person in every decision about their money.

• Check the person is getting the right benefits.

• Support the person to make a budget.

• Check with the person regularly to make sure it is up-to-date.

• Open a separate bank account for the person’s money.

• Support the person in getting a Motability vehicle.

*(taken from* [*www.dosh.org*](http://www.dosh.org)*)*

Anyone who is in a position of supporting another person with their finances should remember that they have no authority to make decisions on that person’s behalf if the person **has capacity** to make a particular decision for themselves. For example, a court appointed deputy who is appointed to manage a person’s property and affairs will have a responsibility to ensure that their own actions are in line with the MCA. This includes maximising the person’s capacity, providing support to enable the person to participate in decision-making and encouraging independence whenever possible.

It is therefore very important that anyone who has a role in supporting individuals to

manage their financial affairs knows how to:

• provide the right support specifically tailored to the individual to enable decision making.

• assess capacity using the MCA to the standard required (informal / formal).

• use assessment templates that will reliably provide accurate information about the

person’s capacity to make particular financial decisions.

There is an argument for ensuring that someone who is independent of the local authority assesses a person’s capacity when that same local authority will possibly be managing that person’s finances.

**Defining the decision(s)**

As stated earlier, a blanket statement that a person “lacks capacity” has no basis in law. It is important to be clear on the decisions/activities that are the reason for carrying out the assessment. The overall management of finances should be broken down into the component parts.

The following are examples for particular financial activities. Does the person have/lack

capacity to:

• decide to spend £2000 on a holiday to America

• decide how to spend a personal budget/direct payment

• decide what money to spend on everyday items

• manage bill organising and paying

• manage household finances

• manage a portfolio of shares

It is helpful to the assessor if the specific reason for the assessment is clear as this will inform the questions to prepare that are specific to the individual’s situation and will enable the assessor to work out what information is relevant to the particular decision so that all relevant information is provided for the individual. Preparation is key to gathering the evidence needed to evaluate capacity properly.

**9.4 Questions to consider when assessing capacity for financial decision-making**

|  |  |
| --- | --- |
| **Developing a financial profile for the person – needs and responsibilities** | ***Considerations/questions to ask***  This is essentially a breakdown of the person’s budget, not just what their incomings are but also necessary outgoings. This may include:  • Any private care needs, for example, if care is being provided out of a personal injury  payout  • Essential bills, debts, investments, daily activities, personal care items  • Activities such as holidays  • Regular purchases  By categorising the different responsibilities it is then possible to identify the person’s needs in each area. For example there is a difference in the provision of support that will enable a person to budget and save for a holiday as opposed to selling a property. The complexities of each decision and whether the person can make a decision on their own, with support, or a decision to be made on their behalf, must all be considered.  Many people will have had capacity to manage their financial affairs prior to either lacking capacity to deal with all or certain elements of this. Consideration must also be given to the person’s previous role in money management in the household:  • Does the person have any support (informal or formal) arrangements in place to help them to manage their money?  • To what extent does/did the person manage their financial responsibilities?  • Are there any elements of this that were a joint arrangement e.g. joint accounts/  investments with a partner/relative?  • Where applicable, is a joint account holder currently involved in this process and is  there clarity as to what they will be doing?  Example questions:  Q: Who manages the money in your household?  Q: What do you need to pay for/what are your outgoings?  Q: Do you have any difficulties in taking your money out of the bank?  Q: Do you have any savings?  Q: Is there anyone you owe money to?  Q: Do you need any help with your money?  Q: Does anyone help you with your money?  Q: How do your bills get paid?  Q: Can you tell me where you keep copies of bills/statements? |
| 2. **Areas of unmet financial need – what are they?** | ***Considerations/Questions to ask***  This step not only considers areas of entitled unmet need i.e. benefits/funded care, but also is geared to enable the assessor to consider what else the person may benefit from and  a) whether this needs to be funded  b) where funding can be sought from if required and  c) whether specific welfare advice or support including access to specialised appeal agencies (advice or appeal agencies, solicitors etc) or advocacy is needed.  • Does the person need support in opening/managing a bank account?  • Does the person need to be considered for the input of an appointee, deputy or can  they take out an LPA?  • Does the person need a financial advocate?  Example questions:  Q: Are you in full receipt of your benefits?  Q: Do you know what you are entitled to?  Q: How is your care funded? Is it sufficient to cover your needs? Does it need reviewing?  Q: Have you had any help to get the benefits you may be entitled to?  Q: Do you need any help to get the benefits you are entitled to?  Q: Does anyone owe you money?  Q: Can you always pay for essential items?  Q: Do you sometimes run out of money? What happens?  It is important to consider a best interests decision, where the person lacks capacity to  consent/make a decision, with regards using the person’s own money to pay for extra  support that they may benefit from but are not necessarily entitled to. |
| **3. Recognition and awareness of money** | ***Considerations/Questions to ask***  Questions should be focused on finding out whether the person understands the relative  value of notes and coins and that money is required to pay for items. It is important to be  mindful if the person has never had the experience of buying things on their own or visits to the shops were largely led by another person. Their inability to answer some questions may not indicate a lack of capacity but rather a lack of experience and a skill that could be learnt. Where the person cannot carry out this action, consideration needs to be given as to  whether they can learn this and what the options are for enabling this.  The person may still recognise that when given a certain amount of coins (even if they don’t know what the value is) means they can buy a certain product from the local shop. But another person carries out the counting of money and has the knowledge of the cost of an item. The important element in this scenario is the person can still maintain an element of independence and therefore reduce the need for another person carrying out an aspect of the task.  Actual coins and notes should be used to explore money recognition.  Example questions:  Q: How much money do you have in your purse/pocket?  Q: What are you planning on spending it on?  Q: What are these coins/notes?  Q: Point to a coin/note and ask ‘how much is this worth?’  Q: Can you give me 27p from the coins?  Q: How do go about getting things from the shops?  Q: Why can’t you just take what you want from the shops?  Q: What do you spend your money on?  Q: How much does (items person has named) cost?  Q: Show £10 note, ask “how much is this and what could you buy?”  Q: If you had a £34.50 bill to pay but you wanted to buy new jeans that cost £29 what  would you do? |
| **4. Relative values of things e.g. pint of milk and new coat** | ***Considerations/Questions to ask***  This step focuses on the person’s understanding of the relative value of items. Questions should be focused on what the person’s experience is and what they are likely to know/understand. So again if the person is unlikely to know the cost of something due to their personal experience this should be noted and questions adapted to ensure that the relative value is matched to their ability/knowledge  Example questions:  Q: What is more expensive – a pint of milk or a packet of cigarettes?  Q: What costs less – breakfast at the local café or a computer?  Q: If you wanted to buy a new iPad and a new shirt, which would cost more?  Use real objects or photographs whenever possible. |
| **5. Management/control of money at the current time.** | ***Considerations/Questions to ask***  This step looks at enabling the person carrying out the assessment to look at areas where the person does have control and areas where they could be supported to be independent.  • How does the person currently use or spend their money?  • Does the person have any control over their finances currently? (if yes, what areas  are they in control of and how are they managing this. If no, what is the evidence that means control is fully maintained by others).  • What would the person spend their money on if they had full control?  • What (if any) elements of their financial expenditure can be self managed?  Example questions:  Q: What do you spend your money on?  Q: If you need extra money how do you get that?  Q: Does anyone provide you with help to manage your money?  Q: Are you happy with the help you get with this?  Q: Is there anyone in your family or a good friend that you trust who could help you  with your money?  Q: Are you happy with (name) helping you?  Q: Is there anything (name) does that you would like to be able to do yourself?  Q: Is there anything you want to buy that you can’t buy? Why can’t you buy (whatever  person says)?  Q: Is there anything else to do with your money that you need help with? |
| **6. Does the person know their approximate income/value of benefits?** | ***Considerations/Questions to ask***  This step considers how much information the person either knows or can comprehend  about what their available funds are. The use of the individual’s bank statements can be  useful in this area of assessment.  *Example questions:*  Q: Can you tell me how much money or income you have coming in every week/  month? Roughly how much?  Q: Where does that money come from? (eg benefits, interest, pensions etc).  Q: What do you need to use this money for?  Q: Can you show me on your bank statement what is money coming in and money going out of your account?  Q: Are you overdrawn at the bank or in credit?  Clearly the more income a person has (whether this is from savings, investments, shares, if they hold a mortgage and so on), the more complex this area will be in terms of the volume of income or outgoings to be considered. But the process remains the same with regards identifying all avenues of income. |
| **7. Balancing responsibilities** | ***Considerations/Questions to ask***  This step looks at not only a person’s understanding of their responsibilities but also considers their personal values and how the person makes decisions. Questions here  should reflect what the person currently spends their money on as well as what is a priority for them. It is important to recognise that we all have different values with respect to money. For some people it will be more important, for example, to spend money on going out, socialising, carrying out hobbies than paying household bills. A person’s personal preferences, values and their own views about what are considered responsibilities should be weighed up carefully so that a person is not considered to lack capacity merely because their decision is viewed by some as an unwise decision. Consideration must be given to  whether there is a change in the person’s thought processes *because* of their impairment rather than simply them expressing a preference for a long-held lifestyle  Example questions:  Q: You have an electricity bill to pay, how do you do that?  Q: What happens if you don’t pay the electricity bill?  Q: Which of these has priority, paying the bill or going out with friends/to the local  pub?  Q: What is important to you about your chosen option?  Q: If you saw a new (item person may want to buy) for £30 but had to spend £30 on  food. What would you do?  Q: What would happen if you didn’t have enough money to pay a bill?  Q: What would happen if you got into debt?  Further specific questions relative to the person’s situation could be added. |
| **8. Budgeting and planning** | ***Considerations/Questions to ask***  This step looks at supporting someone to make financial decisions and explore any support they may need in ensuring the decision is their preferred outcome. For example, the person may struggle to budget for something such as a holiday or new purchase. Here it is important to look at planning and agreements that can be made with the person. This does not mean that the decision can’t be re-visited but rather places emphasis on supporting the person to purchase desired things.  Example questions:  Q: How do you budget your money?  Q: What are the essential things you need to pay for every week/month?  Q: How do you make sure those things are paid for?  Q: How do you decide what to spend your money on?  Q: Do you ever run out of money? What happens then?  Q: What would you do in a crisis i.e. if you had no money?  Q: Would you like/do you have help with budgeting?  Getting someone to focus on how they plan or whether they do plan, as well as asking  questions in a supportive manner so they understand this does not come from a perspective of judgement but rather enable the person to fully consider the methods of support.  Example areas of consideration:  • Reminding someone of their desired goal e.g. to buy an iPad or go on holiday.  • Reminding someone of a budget planning meeting and what was agreed  • Reminding someone that they’re about to spend their last £20 and looking at what the  plan is for their budget.  This area can be difficult as it is important that the person’s difficulties are not simply  dismissed and the decision taken out of their hands because they struggle to stick with a  plan. Alternatively that it’s viewed as ‘their choice’ when the reality is that they need support in order to make a choice. |
| **9. Security and a PIN** | ***Considerations/Questions to ask***  This step looks at asking and considering questions about safety. The key is to ascertain if there are any issues that the person struggles with and to explore ways of addressing that. For example, someone may have difficulties in retaining a PIN number but have no issues with day-to-day management of their finances. It is important not to confuse lacking capacity with a difficulty the person has.  Example questions:  Q: Can you remember your PIN for your debit/credit cards (not that you’re asking  them to tell you what it is)  Q: What do you do to help you remember your pin?  Q: If not how do you carry out banking, what safety measures are in place?  Q: Does anyone take money out of your account for you? Do they know your PIN?  Q: How do you know how much they’ve taken?  Q: Do you do online banking? If so, do you have any problems remembering your  passwords?  Q: Does anyone else know the passwords? Q: Do you trust (name) to use the  passwords to get access to your account?  This is also an opportunity to discuss problem areas, for example if someone has given their PIN to someone before, asking what happened, maybe reminding them the importance of not divulging their PIN to keep their money safe. It could be that the person needs a signature account rather than a PIN number and this option may need to be explored. |
| **10. Banking** | ***Considerations/Questions to ask***  This step looks at the skills & knowledge needed to use a bank account. Consideration should be given to the benefits & drawbacks of having an account. Reflecting back to step 9, if the person can’t ever recall their PIN then look at supportive measures and discussions with the bank about alternative options for retaining the safety of their money.  Consider whether the person would be able to identify if money has gone missing from their account. It looks at whether someone can recall they have a bank account and if not how their money is kept.  *Example questions:*  Q: Do you keep your money in a bank or building society? Which one is it?  Q: Do you have any direct debits or standing orders? What are they?  Q: Do you have a cheque book? How do you write a cheque? (use actual cheque or  copy)  Q: How do you get your money?  Q: How do you keep your money safe?  Q: Do you get bank statements? What do you do with them? What are you checking  on them?  Q: What does it mean if you are overdrawn?  Q: What would you do if you thought money was missing from your bank account?  Q: Is there anyone you would trust to help you with your banking?  Considering the administration of a bank account:  • Identifying if someone needs support to manage an account.  • Can they comprehend forms or do they need support in completing them?  • Would someone recall signing or completing a form?  • What support mechanisms can be put in place in all of these instances and can it be  done safely, for example, completing a form with a member of staff and then arranging  to re-look at the form to determine retention of all relevant information.  • Whether a basic bank account where the person cannot go overdrawn is an  appropriate option. |
| **11. Does the person have capacity to make a Lasting Power of Attorney for Property and Affairs?** | ***Considerations/Questions to ask***  A person may lack capacity to manage various aspects of their finances but have capacity to decide to appoint an attorney under a Lasting Power of Attorney.  Information should be given on the role of a Property and Affairs attorney prior to exploring an individual’s understanding.  Example questions  • Would you like someone else to make decisions about money on your behalf when  you can’t make those decisions yourself?  • How do you feel about another person making decisions about your money?  • Who are you choosing (named people) to make decisions about your money?  • Why are you choosing (named people)?  • Do you trust (named people) to make decision about your money?  • What decisions about your money do you want your attorney(s) to make?  • What decisions about your money would you not want them to make? |
| **12. Investments, savings, ISAs and shares** | ***Considerations/Questions to ask***  This step looks at a high level of financial decision-making. It could be that a person does not have capacity to make financial decisions in this area but can in other areas.  *Suggested questions*  Q: Do you have any savings?  Q: Where are your savings held?  Q: How do you know your savings are held securely?  Q: Do you have any investments?  Q: How are your investments managed?  Q: Do you have any ISAs? How do you check how they are performing?  Q: Do you hold shares in any companies? How do you know how well they are  performing? Where are they held?  Q: If you wanted to sell some of your shares, what would you do?  Q: Does anyone advise you on your investments/shares/ISAs? |

**Appendix 1**

# Best Interests Practice Guide

# Mental Capacity Act 2005 – Best Interests Practice Guide

# This practice guidance is to be used in conjunction with the Mental Capacity Act 2005, Code of Practice. Justification for yours and others’ views and the eventual decision needs to be recorded and evidenced.

# Ensure that you have completed a full Mental Capacity Act Assessment following the legislation as outlined in the Mental Capacity Act 2005, and the guidance in the Code of Practice. The mental capacity assessment should clearly demonstrate, with supporting evidence, that the person lacks the mental capacity for the specific decision you are looking at in this person’s best interest. If not STOP now as you will have no legal right to violate the individuals rights and freedom of action.

* Make sure you consider the provisions of Section 5 of the Mental Capacity Act 2005 and reference the statutory best interests checklist that follows.
* Everything should be recorded and supported by evidence.
* You must consider best interests from the incapacitated person’s point of view and evidence that you have done this.
* Ensure that you are clear what the specific decision is and who the decision maker is.
* All relevant people need to be consulted and their input needs to be recorded. If someone can not be consulted ensure you record why not.
* Could any care or treatment be provided in a way that is less restrictive to their rights and freedom of action? What options have been tried or considered? Make it clear what else has been explored and why these options have been ruled out. What is the justification and rationale for your decision making? Where is your evidence to support this?

**Statutory Checklist**

Remember that this is not exhaustive and is a minimum. Please bear in mind that you are looking at best interests in a holistic way from the person’s point of view. Consider all aspects including emotional, practical and psychological wellbeing as well as health related matters. Record all input from those consulted and ensure any disagreements are noted and evidence that you have considered all of this in the process.

**Encourage participation**

* Do whatever is possible to enable and encourage the individual to take part, or improve their ability to take part within the decision making process (including reasonable adjustments)

**Identify all relevant circumstances**

* Try to identify everything that the individual lacking capacity would take into account if they were making the decision, or acting for themselves

**Find out the person’s views**

* Try to find out about the individual’s past/current wishes or views surrounding the decision/topic. Can they express their views now? If not, is there anything in their past that can help? Their views might have been expressed verbally, in writing or through behaviour or habits.
* Has the individual any beliefs or values (e.g. religious, cultural, moral or political) that might influence the decision in question?
* Has the individual made an advanced statement?
* Has the individual talked to family or friends about this topic?
* Are there any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves?

**Avoid any form of discrimination**

* Do not make assumptions about someone’s best interests merely on the individual’s age, appearance, gender, sexual orientation, ethnicity, religion, condition or behaviour

**Assess whether the individual is likely to regain capacity**

* Consider whether the individual is likely to regain capacity – If **YES**, can the decision wait until then?

**Consult others**

**Try to consult**

* Anyone previously named by the person as someone to be consulted on either the decision in question or something similar.
* All close relatives or friends and anyone engaged in caring for the person.
* Anyone who knows the person e.g. family, carer, and friends and may have a viewpoint on what the individual would have wanted.
* Is there a Lasting Power of Attorney? – if **YES** they must be contacted and consulted.
* Is there a Deputy appointed by the Court of Protection? – if **YES** they must be contacted and consulted.
* If there is no one who can speak on behalf of the individual – consult an Independent Mental Capacity Advocate (IMCA)

Consider only the information relevant to the decision making. Be mindful of privacy, dignity and confidentiality and only share information on a need to know basis. Demonstrate that you have carefully assessed any conflicting evidence. Do not make assumptions about the person’s quality of life.

**Avoid restricting the individual’s rights**

* Consider whether there is a less restrictive option

**Making the best decision**

* Weigh up all of the factors listed above in order to determine what is in the individual’s best interests.
* If the decision relates to safeguarding, refer to Dudley’s Safeguarding procedures:

<http://safeguarding.dudley.gov.uk/adult/>

**Appendix 2**

**Best interests in relation to financial decision-making**

|  |  |
| --- | --- |
| **Checklist** | **How it applies to financial decision making** |
| **Encourage participation** | Do whatever is possible to permit and encourage the person to take part, or to improve their ability to take part, in making the decision.  Discuss the financial decision with the person, adapt information to their needs, break down decisions into smaller decisions, adapt communication |
| **Identify all relevant circumstances** | Try to identify all the things that the person who lacks capacity would take into account if they were making the decision for themselves  How did the person make financial decisions previously? Did/do they enjoy buying specific items? Did they previously regularly give money to relatives or to charity? |
| **Find out the person’s views** | Try to find out the views of the person who lacks capacity, including:  • the person’s past and present wishes (expressed verbally, in writing or through behaviour or habits). A past wish expressed in writing must be given particular weight.  • any beliefs or values (e.g. religious, cultural, moral or political) that would be likely to influence the decision  • can the person express a view about the  decision e.g. buying an item /giving money to a third party?  • try to find out what the person spent their  money on in the past, what took priority, how they saved, how they invested their money.  It is worth noting the following taken from  Aintree v James15:  ‘The purpose of the best interests test is to  consider matters from the patient’s point of  view. That is not to say that his wishes must prevail, any more than those of a fully  capable patient must prevail. We cannot  always have what we want. Nor will it always be possible to ascertain what an incapable patient’s wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament…. But insofar as it is possible to ascertain the patient’s wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.’  • any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.  • the person’s views, wishes and feelings  are very important. |
| **Avoid discrimination** | Do not make assumptions about best interests simply on the basis of the person’s age, appearance, condition or behaviour.  Do not make assumptions about the person’s financial circumstances based on their current diagnosis. |
| **Assess whether the person might regain capacity** | Consider whether the person is likely to regain capacity (e.g. after receiving medical treatment) If so, can the decision wait until then?  A person may be appointed to manage the  person’s financial affairs but the person’s  condition means that they may in the future  regain capacity to make some or all financial decisions. |
| **Consult others** | If it is practical and appropriate to do so, consult other people for their views about the person’s best interests and to see if they have any information about the person’s wishes and feelings, beliefs and values. In particular try to consult:  - anyone previously named by the person as someone to be consulted on either the decision in question or similar issues  - anyone engaged in caring for the person  - close relatives, friends or others who take an interest in the person’s welfare  - any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person.  - any deputy appointed by the Court of  Protection to make decisions for the person.  When consulting, remember that the person who lacks capacity to make the decision or act for themselves still has a right to keep their affairs private.  There may be people already supporting  the person who could provide information to  assist in making a best interests decision.  It should be noted that if there are  safeguarding issues relating to finances, it may be considered appropriate to instruct and consult an Independent Mental Capacity Advocate (IMCA). |
| **Avoid restricting the person’s rights** | Seek other options that may be less  restrictive of the person’s rights. Always consider if there is an option that is less restrictive for the person who lacks capacity to make the financial decision. For example, rather than another person taking complete control of the individual’s finances, is there a way of giving some control to them? |
| **Take all of this into account** | Weigh up all these factors in order to work out what is in the person’s best interests. The Court of Protection has made it clear that the final decision is not necessarily one that the person would take if they had capacity, rather it is what is in their best interests at the time the decision is to be taken |

14 A County Council v MS and RS [2014] EWHC B14 (COP). A case about tithing to the Mormon

Church.

15 Aintree University Hospitals NHS Foundation Trust (Respondent) v James (Appellant) [2013]

**Who can make best interests decisions in relation to finances?**

Some people may be in the position of having the authority to make a best interests

decision about aspects of a person’s finances. There are only 3 scenarios in line with the MCA that allow best interests decisions about another individual’s finances.

**Attorneys (donee) appointed by a person (donor)**

A person must be 18 or over and have capacity to decide who they want as an attorney(s):

• Lasting Power of Attorney for Property and (financial) Affairs (LPA)

• Enduring Power of Attorney (EPA) (Existed before MCA)

Information about the role and scope of an attorney and how to create an LPA can be found

on the Office of the Public Guardian website. Attorneys acting under an LPA have a legal duty to pay regard to the Code of Practice, EPA attorneys do not although they do have a responsibility to comply with the duties set out in the Code at 7.58 – 7.68.

A property and financial affairs LPA can be used to appoint attorneys to make a range of decisions, including:

• the buying and selling of property

• operating a bank account

• dealing with tax affairs

• claiming benefits and pensions

• investing the donor’s savings

• paying for private medical care

Unlike Health and Welfare LPAs, once a Property and Affairs LPA is registered with the

Office of the Public Guardian, it is possible for the attorney to make decisions even if the donor has capacity to make those decisions for themselves **but only if**:

• the donor has asked the attorney to take specific actions or make specific decisions

• the donor has given the attorney full responsibility for all financial decisions through the creation of the LPA

Other than those situations described above, the attorney can only make decisions that the donor lacks capacity to make and they must be made in the best interests of the donor.

**The attorney has responsibility for assessing if the person has or lacks capacity to make a particular decision.** This guidance can help an attorney to make that assessment.

A donor may specify any particular action(s) he or she would or would not want their attorney to take on their behalf, including whether there are specified situations where they would want their attorney to appoint a specialist advisor.

Attorneys must:

• act in accordance with the MCA and the 5 statutory principles

• assess whether the donor has capacity to make the decision in question at the time it needs to be made

• consider whether the donor may regain capacity at some point in the future and if so whether the decision can be delayed

• make decisions where the donor lacks capacity in their best interests following the

guidance in the Code of Practice and the best interests ‘checklist’.

• Only make the decisions covered by the LPA

• Apply to the court if decisions need to be made that fall outside the scope of their

Authority

• keep financial records

• keep the donor’s finances in an account separate to their own

**Appendix 3**

**Best Interests Tool**

|  |  |  |  |
| --- | --- | --- | --- |
| **BEST INTERESTS TOOL**  **Staff should always refer to the guidance in the Mental Capacity Act Code of Practice. A summary checklist is attached but should not be a substitute for the guidance** | | | |
|  | | | |
| **My Details** | | | |
| **PIN** |  | **NHS number** |  |
| **Name** |  | **Gender** |  |
| **Address** |  | **Date of Birth** |  |
| **Marital status** |  | **Lives alone** |  |
| **Ethnicity** |  | **Religion** |  |
| **Telephone number** |  | **Mobile number** |  |
| **GP** |  | **GP address** |  |
|  | | | |
| **Date of completion** |  | **Time of completion** |  |
|  | | | |
| **Describe the specific decision for which the person has been assessed as lacking capacity, and to which this best interests process relates. Please complete a new tool for each decision if more than one** | | | |
|  | | | |
| **Please indicate where this has been evidenced (for example Mental Capacity Act assessment, indexed document on ESCR)** | | | |
|  | | | |
|  | | | |
| **In order to record whether or not all relevant matters have been considered before making a best interests decision, it must be evidenced that the person has already been assessed as lacking capacity to make the relevant decision** | | | |
| **Describe how you have tried to encourage the person to take part in the decision and to improve their ability to take part, including any Advocate involvement and reasonable adjustments/ support. Please provide as much information as possible in your answer**  **NB given that mental capacity is both decision and time specific, reasonable adjustments should be in place to support the person as identified and defined in the MCA Code of Practice** | | | |
|  | | | |
| **What would the person take into account if they were making the decision? Please provide as much information as possible in your answer.** | | | |
|  | | | |
| **Does the person have a Lasting Power of Attorney in place? Have you seen a copy of this (including the specifics of the document)?** | | | |
|  | | | |
| **What are the person’s wishes and feelings, beliefs and values, both now and in the past? Please provide as much information as possible in your answer** | | | |
|  | | | |
| **Is the person likely to regain capacity? If yes can the decision wait until then? Please provide as much information as possible in your answer** | | | |
|  | | | |
| **Please list all of those consulted and detail contributions, any disagreements and identify significant outcomes. Was a best interests meeting held and decisions recorded? Please provide as much information as possible in your answer** | | | |
|  | | | |
| **Please detail all other options considered including any possible less restrictive options and why those options were not chosen. Please provide a full explanation of your reasoning behind this** | | | |
|  | | | |
| **How has information been shared with the person? If communication is an issue, how has this information been shared? Please state the date when information was shared and recorded** | | | |
|  | | | |
| **Best interests decision. Please provide as much information as possible in your answer** | | | |
|  | | | |
| **Decision maker name** | |  | |
| **Decision maker role** | |  | |
| **Decision maker signature** | |  | |
| **Line manager name** | |  | |
| **Line manager signature** | |  | |
| **Date authorised** | |  | |
| **Review date** | |  | |

**Appendix 4**

**Mental Capacity Assessment Tool**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **MENTAL CAPACITY ASSESSMENT TOOL**  **Staff should always refer to the guidance in the Mental Capacity Act Code of Practice** | | | | |
|  | | | | |
| **Subject of assessment** | | | | |
| **PIN** |  | **NHS number** |  | |
| **Name** |  | **Gender** |  | |
| **Address** |  | **Date of Birth** |  | |
| **Marital status** |  | **Lives alone** |  | |
| **Ethnicity** |  | **Religion** |  | |
| **Telephone number** |  | **Mobile number** |  | |
| **GP** |  | **GP address** |  | |
|  | | | | |
| **Date of assessment** |  | **Time of assessment** |  | |
|  | | | | |
| **Describe the specific decision for which capacity is being assessed (please complete a new assessment for each decision if more than one)** | | | | |
|  | | | | |
|  | | | | |
| **Stage one – diagnostic test** | | | | |
| **The Mental Capacity Act directs that capacity should be assumed. Why do you suspect that this person lacks the capacity to make this particular decision? Please explain your reasoning** | | | | |
|  | | | | |
| **Does the person have an impairment or disturbance of the brain? Is there a formal diagnosis and, if so, when and by whom was this made? Please include evidence to support this**  **NB if the person does not have an impairment or disturbance in the functioning of their mind or brain then they DO have capacity. You should always consult a doctor if there is any doubt** | | | | |
|  | | | | |
| **The MCA requires that a person receives all practical and appropriate support to help them make the decision themselves. Please describe the person centred support that person has received including communication strategies which were used, timing, location, who else was involved etc** | | | | |
|  | | | | |
|  |  |  |  | |
| **Stage two – functional test**  **Please tick as appropriate then record your reasoning below. If you tick any of the options, and the person has an impairment or disturbance of the brain, then they lack capacity** | | | | |
| **The person is unable to understand the information relevant to the decision**  Record what information is relevant to the decision and the salient factors the person needs to understand. Record how you have tested whether the person can understand the information, the questions used, how you presented the information and your findings | | |  | |
|  | | | | |
| **The person is unable to retain the information relevant to the decision**  Record how you tested whether the person could retain the information and your findings. Note that a person’s ability to retain the information for only a short period does not prevent them from being able to make the decision | | |  | |
|  | | | | |
| **The person is unable to use or weigh up that information as part of the process of making the decision**  Record how you tested whether the person could use and weigh up the information | | |  | |
|  | | | | |
| **The person is unable to communicate their decision (whether by talking, using sign language or any other means)**  Record the methods of communication which were attempted | | |  | |
|  | | | | |
|  | | | | |
| **Stage three – causative nexus** | | | | |
| **Explain why the person is unable to make the specific decision directly because of the impairment of, or disturbance in the functioning of, the mind or brain, and for no other reason** | | | | |
|  | | | | |
|  | | | | |
| **Outcome** | | | | |
| **In my opinion the person LACKS capacity to make the decision detailed in stage one**  Proceed to Best Interests Tool | | |  | |
| **In my opinion the person HAS capacity to make the decision detailed in stage one** | | |  | |
|  | | | | |
| **Other considerations** | | | **Yes** | **No** |
| **Has the person given a Lasting Power of Attorney for welfare decisions?** | | |  |  |
| **If yes, does the LPA for welfare give authority for this particular decision?**  The LPA can therefore make the decision and a best interests decision does not need to be made | | |  |  |
| **If so, does it affect the specific decision which needs to be made?** | | |  |  |
| **Name(s) of person(s) with authority and whether they have to act jointly or severally**  Take a copy of the document and index to ESCR, checking that it has been registered and covers the decision to be made | | |  | |
| **Has the person made an advance decision?** | | |  |  |
| **Is there a friend or family member who can be involved in the best interests decision making process?**  If the answer is yes and there is a conflict of interests regarding safeguarding, an IMCA will need to be appointed  If the answer is no and the decision is about a change of accommodation, an IMCA will need to be appointed | | |  |  |
|  | | | | |
| **Assessor name** | |  | | |
| **Assessor role** | |  | | |
| **Assessor signature** | |  | | |
| **Line manager name** | |  | | |
| **Line manager signature** | |  | | |
| **Date authorised** | |  | | |
| **Date of review** | |  | | |

1. Useful guidance in relation to the questions that arise in the context of the management of property and affairs (called *Making Financial Decisions - Guidance for assessing, supporting and empowering specific decision-makin*g) can be downloaded for free at [www.empowermentmatters.co.uk.](http://www.empowermentmatters.co.uk/)

   [↑](#footnote-ref-1)
2. See [*PC and NC v City of York Council* [](http://www.39essex.com/cop_cases/pc-and-nc-v-city-of-york-council/)2013] EWCA Civ 478 at paragraph 40. [↑](#footnote-ref-2)
3. See [*Kings College NHS Foundation Trust v C*](http://www.39essex.com/cop_cases/kings-college-nhs-foundation-trust-v-c-and-v/) [2015] EWCOP 18, in particular at paragraph 38. [↑](#footnote-ref-3)
4. See in this regard both [*A Local Authority v SY*](http://www.39essex.com/cop_cases/a-local-authority-v-sy/) [2013] EWHC 3485 (COP) at paragraph 22 (emphasising that “appropriately qualified social worker is eminently suited to undertake […] capacity assessments” for completing a COP3 form”) and [*PH v A Local Authority v Z Limited*](http://www.39essex.com/cop_cases/ph-v-a-local-authority-and-z-limited/) [2011] EWHC 1704 (COP) at paragraph 56. By “appropriately qualified” social worker is meant a social worker who can properly claim to have the necessary expertise (and be able to explain why they do). It does not imply a requirement for any specific medical expertise above and beyond the skills of a properly trained social worker. [↑](#footnote-ref-4)
5. *Re F* [2010] 2 FLR 28. [↑](#footnote-ref-5)
6. As the House of Lords Select Committee looking at the MCA 2005 reported, this unfortunately happens all too frequently. House of Lords Select Committee on the MCA 2005 (2014) *Mental Capacity Act 2005: Post-legislative scrutiny*, HL Paper 139, at paragraph 105. [↑](#footnote-ref-6)
7. See the joint report of the Parliamentary Health Service and Local Government Ombudsmen into the complaint against South Essex Partnership University Trust and Bedford Borough Council (JW 111510 and 11010604 (June 2014)), in which the Ombudsmen found a man with paranoid schizophrenia suffered from malnutrition and poor dental health because professionals did not properly assess whether he had the capacity to make decisions for himself. [↑](#footnote-ref-7)
8. [2013] EWHC 2562 (Fam) [↑](#footnote-ref-8)
9. Referred to as the “core determinative provision” in [*PC and NC v City of York Council*](http://www.39essex.com/cop_cases/pc-and-nc-v-city-of-york-council/) [2013] EWCA Civ 478at paragraph 56. [↑](#footnote-ref-9)
10. See [*PC and NC v City of York Council*](http://www.39essex.com/cop_cases/pc-and-nc-v-city-of-york-council/) [2013] EWCA Civ 478at paragraph 58 and [*Kings College NHS Foundation Trust v C and V* [](http://www.39essex.com/cop_cases/kings-college-nhs-foundation-trust-v-c-and-v/)2015] EWCOP 80 at paragraph 35. [↑](#footnote-ref-10)
11. This risk was identified by the Court of Appeal in *PC* at paragraph 58. 14 [*LBJ v RYJ* [](http://www.39essex.com/cop_cases/lbl-v-ryj-and-vj/)2010] EWHC 2664 (Fam). [↑](#footnote-ref-11)
12. [*PH and A Local Authority v Z Limited & R* [](http://www.39essex.com/cop_cases/ph-v-a-local-authority-and-z-limited/)2011] EWHC 1704 (Fam). [↑](#footnote-ref-12)
13. [*CC v KK & STCC* [](http://www.39essex.com/cop_cases/cc-v-kk-and-stcc/)2012] EWHC 2136 (COP). [↑](#footnote-ref-13)
14. [*CC v KK & STCC* [](http://www.39essex.com/cop_cases/cc-v-kk-and-stcc/)2012] EWHC 2136 (COP). [↑](#footnote-ref-14)
15. Note that the statutory requirement is that P must be unable to use or weigh the relevant information. In practice, the two terms are usually used together, so we also refer here to “use and weigh.” However, we think that it is clear that P should be considered to lack capacity if they are able to use the information, but not able to weigh it. [↑](#footnote-ref-15)
16. [*The PCT v P, AH & the Local Authority* [](http://www.39essex.com/court_of_protection/search.php?id=2809)2009] EW Misc 10 (COP). [↑](#footnote-ref-16)
17. [*Kings College NHS Foundation Trust v C and V* [](http://www.39essex.com/cop_cases/kings-college-nhs-foundation-trust-v-c-and-v/)2015] EWCOP 80 at paragraph 37. [↑](#footnote-ref-17)
18. “*there is a space between an unwise decision and one which an individual does not have the mental capacity to take and … it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual’s autonomy operates*”: *PC* at paragraph 54. [↑](#footnote-ref-18)
19. [*Kings College NHS Foundation Trust v C and V* [](http://www.39essex.com/cop_cases/kings-college-nhs-foundation-trust-v-c-and-v/)2015] EWCOP 80 at paragraph 38. [↑](#footnote-ref-19)
20. The revised COP3 form recognises this in section 7, where it requires the identification of the material impairment of or disturbance in the functioning of the mind or brain, and the identification of the specific diagnosis (or diagnoses) “[w]*here this impairment or disturbance arises out of a specific diagnosis*.” [↑](#footnote-ref-20)
21. See [*WBC v Z* [](http://www.39essex.com/cop_cases/wbc-v-z-and-others/)2016] EWCOP 4. [↑](#footnote-ref-21)
22. [*Kings College NHS Foundation Trust v C and V* [](http://www.39essex.com/cop_cases/kings-college-nhs-foundation-trust-v-c-and-v/)2015] EWCOP 80 at paragraph 31. [↑](#footnote-ref-22)
23. For an example of such case, see [*LB Redbridge v G, C and F*](http://www.39essex.com/cop_cases/lb-redbridge-v-g-c-and-f/) [2014] EWHC 485 (COP), in which the judge ultimately found that, in fact, G fell within the scope of the MCA 2005. [↑](#footnote-ref-23)