



MCA Guidance

Residency

Quick Guide and links to support practitioners when
undertaking capacity assessments relating to
residency decisions

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2	LSAB MCADOLS Subgroup		<ul style="list-style-type: none">• Disclaimer strengthened - not legal advice• The order of the MCA assessment• Source acknowledgment added re relevant information• Some minor change to content for clarity• Live links updated
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4			
5			

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INFORMATION SHEET MENTAL CAPACITY ACT 2005 GUIDANCE DOCUMENTS: RESIDENCE

This information sheet is intended to provide guidance to your Mental Capacity professional practice. Your scope of practice is the **limit of your knowledge, skills and experience** and as a health or social care professional, you must ensure that you work within this. Whilst your scope of practice is likely to change over time as your knowledge, skills and experience develop, any area of mental capacity assessment that falls outside of this, must be escalated via your line of authority to ensure adequate support and expertise is provided to both you as a practitioner and the assessment. **This guidance cannot take the place of legal advice, and please remember that case law can change and develop over time.** Workers should check for any significant changes to case law since this guidance has been written. In any case of doubt as to what to do, your legal department should be consulted.

Please see the below information and links which may help you when undertaking a capacity assessment around **residence** decisions. Please note and pay particular attention to the relevant case law and what has now been determined by the courts as being salient information to this decision. As with all MCA situations, the MCA Code of Practice is key guidance.

Those undertaking capacity assessments need to remember the importance of **applying Principle 2 of the Act**. Even if someone is assessed as lacking capacity to make a decision, their capacity could improve with additional support to understand the decision to be made. Whilst it is acknowledged that some decisions cannot wait and a determination on capacity and a best interests decision needs to be concluded, there may be some situations where, for example with time, additional information/education, the person could gain or regain capacity at a later date. This is particularly important when assessing capacity around life changing decisions such as changing residence.

Section1: The five statutory principles are

1. A person must be **assumed** to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless **all practicable steps** to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an **unwise** decision.
4. An act done or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his **best interests**.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is **less restrictive** of the person's rights and freedom of action.

Sections 2 and 3 define what is meant by lack of capacity

(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 the brain

It does not matter whether the impairment or disturbance is permanent or temporary.

A lack of capacity cannot be established merely by reference to—

- (a) a person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3 provides that:

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - (a) to understand the information relevant to the decision,
 - (b) to retain that information,
 - (c) to use or weigh that information as part of the process of making the decision, or
 - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) 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.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another, or
 - (b) failing to make the decision

The MCA Code of Practice refers to a two-stage capacity test, however, the Supreme Court's decision in *JB v A Local Authority* [2021] UKSC 52 confirms the appropriate 3 stage test which should now be applied;

- (1) Functional: Is the person able to make a decision? If they cannot:
- (2) Impairment: Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:
- (3) Causation: Is the person's inability to make the decision because of the identified impairment or disturbance?

In all cases all three elements of the above test must be satisfied in order for a person properly to be said to lack capacity for purposes of the MCA 2005

The Functional Test

(1) Is the person able to make a decision?

Broadly speaking, a person is able to make a decision if they have a general understanding of what decision they need to make, why they need to make it and the likely consequences of making, or not making, the decision.

As outlined above Section 3(1) states that P is unable to make a decision for himself if he is unable to:

- understand the information relevant to the decision; or
- retain that information; or
- use or weigh that information as part of the process of making the decision; or
- communicate his decision (whether by talking, using sign language or any other means).

Impairment

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

The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent, and the MCA Code gives some examples of what may amount to an impairment or disturbance in the functioning of the mind or brain. can include confusion, drowsiness, concussion, and the symptoms of drug or alcohol as well as formally diagnosed conditions. This is sometimes referred to as the 'diagnostic test' but this a little misleading, as a formal diagnosis is not always necessary, as long as there is clear evidence that there is an impairment or disturbance.

Causation

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

It is not sufficient to simply say that the person has a disturbance or impairment of mind, the assessor has to show why and how the disturbance or impairment of mind is causing the inability to make the decision(s) in question. This is sometimes referred to as the 'causal nexus'.

Assessing Capacity for Residence – COP Potentially Indicated

Residence decisions are a frequently tackled subject for health and social care teams and form a fundamental area for consideration. Where there are reasonable doubts around a persons' decision-making ability, an MCA must be completed for this decision. This ensures that the person remains central to the decision and that we are respectful and compliant in our processes. Once you have identified that an MCA, is required, you will need to carefully identify the matter requiring a decision i.e., what decision is the person being asked to make. Then you will need to identify the information relevant to that matter.

The starting point is to be clear about the available options. These options should be the same as the options available to a person in similar circumstances whose capacity is not in doubt. For example, in the context of hospital discharge planning where a move to 24 hour care in a care home is being considered, best practice would be to explore other options such as returning home with the maximum a care package that the local authority would be willing to fund, extra care, supported living, shared lives, live-in care etc. The rationale for concluding that any of these options are unavailable should be recorded. If a person has their own tenancy that tenancy should not be revoked prematurely (i.e. whilst it is still a potential option). Please note that a decision specific MCA is required to be undertaken in respect of any potential termination of tenancy.

The guidance below from Essex Chambers offers the relevant information when assessing capacity in respect of residence. The content in this section has been taken from Essex

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Chambers'

Guidance



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Note: Relevant Information For Different Categories Of Decisions (September 2022). To check for any updates please see [Essex Chambers MCA Guidance Note](#). Please remember that as each situation is unique, the information which is relevant to the specific decision must always be tailored to that situation, for example, being able to have a pet in residential care may be a consideration for one person but of no relevance to another.

'As practitioners and indeed as judges we must be vigilant to ensure that the applicable tests do not become a tyranny of sameness, in circumstances where they are capable of being applied in a manner that may properly be tailored to the individual's situation. To do otherwise would, for the reasons I have set out, lose sight of the key principles of the MCA 2005.'

HAYDEN J Para 66 <https://www.bailii.org/ew/cases/EWCOP/2019/27.html>

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

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

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

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

(d) **The activities that the person being assessed would be able to do if he lived in each place;**

(e) **Whether and how the person being assessed would be able to see friends and family if he lived in each place;**

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

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

(h) **Who they would be living with at each placement;**

(i) **The sort of care they would receive in each placement;**

(j) **The risk that a family member or other contact may not wish to see the person being**



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

The following information will not be relevant to a decision as to capacity concerning residence arrangements of the person being assessed:

- (a) The cost of the placement and/or the value of money. The details of the precise financial arrangements are not important to the question of capacity beyond a basic understanding of whether payment is required, as laid out above;
- (b) The legal nature of the tenancy agreement or licence;
- (c) The consequences on the nature of the relationship of the person under assessment with a contact or family member in the long term (10 to 20 years) should the former choose to live independently. Any long-lasting social rejection or breakdown in relations would not count as a "reasonably foreseeable consequence" as required by the Mental Capacity Act 2005 in s3(4).

Relevant case law examples can be found at: [39 Essex Chambers | COP Cases – 39 Essex Chambers](#). In the key word search select 'Mental capacity – Residence'

As with all capacity related decisions, the worker will need to identify whether the care arrangements in their totality amount to a **deprivation of the persons' liberty** and if so take the required steps to ensure this is **authorised appropriately**. They will need to demonstrate that the care arrangements are **necessary and proportionate** to support the person and use a balance table analysis to evidence how this decision has been reached. This is important both now and when the **Liberty Protection Safeguards** are in place

Please remember that interpretation of case law can change over time. Workers should check for any significant changes to case law since this guidance has been written. For additional advice please contact your own organisation's MCA lead and/or legal department.

Key helpful documents

Please see the **MCA Code of Practice**

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

Essex Chambers Assessing Mental Capacity Guidance notes:

<https://www.39essex.com/mental-capacity-guidance-note-assessment/>

Essex Chambers Best Interests Guidance notes: <https://www.39essex.com/mental-capacity-guidance-note-best-interests/>

Other links which may be of use

Lancashire Safeguarding Adults Board. Lots of resources on here, well worth a look.
<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/resources/mca-dols.aspx>

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/policies-and-procedures.aspx>

Essex Chambers (Case law updates) - brilliant for easy read summaries. Has a key word search which is useful [Mental Capacity Resource Centre | 39 Essex Chambers](#)

Advocacy Focus (Lots of easy read information you may find useful):

<https://www.advocacyfocus.org.uk/justiceforlb>

Lancashire Self Neglect Framework link:

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/what-is-safeguarding-and-abuse/self-neglect.aspx>

Office of the Public Guardian (OPG)

Find out if someone has a registered attorney or deputy

<https://www.gov.uk/government/publications/search-public-guardian-registers>

Lasting Power of Attorney <https://www.lastingpowerofattorney.service.gov.uk/home>

Assessing Capacity for Residence:

MCA Code of Practice - Chapters 6 (6.7, 6.8 & 6.52) and 10 Advocacy (10.51) discuss residence in more detail.

References

Allen N et al (2022), A Brief Guide to Carrying out Capacity Assessments, Accessed from , [\(Mental-Capacity-Guidance-Note-Capacity-Assessment-January-2022.pdf \(39essex.com\)\)](#)
Date accessed 15.11.22).

Mental Capacity Act Code of Practice <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice> (Date accessed 15.11.22)

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