

Using the Mental Capacity Act

Guidance for homelessness services

Let's end homelessness together

Homeless Link, Minories House, 2-5 Minories, London EC3N 1BJ | 020 7840 4430

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Key messages for homelessness support staff

1. Always consider whether someone is able (has the capacity) to make the decision you are discussing with them, at the time the decision needs to be made.
2. If someone is struggling to make the decision, discuss what support might be available from your team and your manager to aid communication and information processing. Ask your client if they can think of anything that might help.
3. Use this guidance, along with the Mental Health Service Interventions for Rough Sleepers toolkit, to support you in assessing the client's capacity to make the decision if there are concerns that they cannot.
4. Ensure you follow the four-stage test to assess capacity and fully document your reasoning.
5. If you are struggling to establish whether someone has capacity to make the decision, discuss it with your manager to consider what action might be needed. It may be necessary to bring in help from other professionals, either to assess themselves, or support you to do so.
6. If you conclude that the client does not have capacity, you must then use the Best Interests Decision checklist to make the decision on their behalf.
7. Remember that, in the course of your assessment, you may discover other concerns, such as a person needing Mental Health team involvement or a Safeguarding referral. These other processes can run alongside your capacity and Best Interests assessments, and should not delay them.
8. Capacity and Best Interests assessments are fluid processes, and need to be reviewed on a regular basis, or if anything changes, to ensure that the person still needs you to make the decision, and that the decisions made are still right for that person.

Introduction

In simple terms, the Mental Capacity Act (MCA) was introduced to ensure that appropriate substitute decision making processes are used when someone is, temporarily or more permanently, unable to make a particular decision for themselves at a particular time. The central theme is for substitute decision-makers to make the decision that the person would have made themselves if they were able to do so, rather than making a decision that seems sensible to the assessor, or least risky.

The MCA came into force in October 2007 and, at the time, was heralded as a progressive piece of legislation, not least because it empowers *everybody* in society to be able to use its processes and powers to help someone to make a decision, rather than relying on professionals such as psychiatrists to do this. This means that people can often be helped by those who know them best, and who are better equipped to make a decision for them, rather than people who don't know them, but might be highly qualified.

Case examples – how the MCA could apply in your role

1. Kate has a brain injury and struggles to process information to inform her decision-making. She has lived for many years in a supported housing project and is supported by her long-term keyworker, Laura. Kate would benefit from going to a day centre to increase her social interaction and reduce isolation, but isn't able to make this decision for herself. Rather than relying on a social worker to make this decision, Laura is able to use the processes of the MCA to establish whether Kate can make the decision or not, and then make a Best Interests decision for her if she isn't able. Laura can use her in-depth knowledge of Kate's likes and dislikes to ensure that the decision made is what Laura would have decided if she was able to do so.
2. Jane is a hostel resident, and Brian works nights at the hostel. Brian knows Jane well, having worked with her closely for several months. He knows that she has a diagnosis of Borderline Personality Disorder, and that she sometimes binge drinks alcohol. He is also aware of her history of taking intentional overdoses. At the start of his shift Brian is told by his colleague coming off shift that Jane has had some difficult news earlier in the day and had then come to the office and left her medication with staff as she "felt unsafe". Several hours later Jane comes to the office, she appears heavily intoxicated with alcohol and is tearful – she demands the return of her medication, stating that she "can't go on any longer" and that "life isn't worth living".

Brian is extremely concerned for her safety if she has access to her medication, and he also feels that her ability to make decisions about staying safe is impaired by her intoxication and emotional state. Brian refuses to give Jane her medication and asks her to meet with his manager to discuss this further the next morning. He explains his decision to her and also justifies it by writing a progress note that explains his reasons referring to the relevant parts of the MCA: the four-step capacity assessment, and the Best Interests Decision checklist.

3. Harry is a rough sleeper who sleeps in a torn tent on a piece of waste ground. His outreach worker has been attempting to work with him for several months. Harry appears distracted and it is difficult to follow much of what he says. Alongside his rough sleeping there are increasing concerns that Harry is neglecting himself in terms of diet and physical health. Harry does not accept any assistance. The outreach team use the resources found here: www.pathway.org.uk/services/mental-health-guidance-advice/ – specifically the MCA screening tool – to consider and evidence their view that Harry's mental capacity to make decisions around declining shelter might be impaired. They then use this completed

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form to facilitate a discussion with local mental health services about coming to carry out an assessment at his sleep site.

Unfortunately, the legislation hasn't always been well utilised or understood, and this means that people who potentially are unable to make decisions for themselves are not being afforded the protections that the law provides. If we don't ensure that we are using the Mental Capacity Act properly, we are all failing in our duty to ensure the best outcomes for our clients.

We each make hundreds of decisions every day. Some might seem minor, but might cumulatively have a big impact on our quality of life, such as being able to choose what food we like to eat at each meal, or deciding what clothes to wear. Others are more obviously important, such as choosing where to work, or where to live. Imagine being in a position where you weren't able to make these decisions for yourself. Consider this for a moment – what if something was incredibly important to you, such as if you became very unwell, wanting to stay at home with carers, rather than go into a residential home. What if the people you had told about this ignored your wishes, and didn't ensure that your preferences were followed where possible? What if, once you had recovered, you realised that nobody had followed your wishes? These are situations where the MCA does apply, and it's essential that we know how, and when, to use it.

This guidance is intended to give you a basic overview of the main points of the MCA, so that you can ensure that you implement them into your practice, and are compliant with the law, as well as ensuring the best outcomes for your clients, and anybody else you might need to help make a decision when they are unable.

Statutory Principles of the MCA

Embedded in the very beginning of the MCA are its 'statutory principles', which are the values that underpin the law's requirements. Whenever we consider using the MCA, we must ensure that our practice complies with these legal principles:

- 1) A person must be **assumed to have capacity** unless it is established that they lack capacity.
- 2) A person is not to be treated as unable to make a decision unless all **practicable steps** to help him 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.

The reason that these are embedded in the law is to ensure that we integrate them into every part of our work done with people who may lack capacity. This law was designed to be "enabling and supportive", not "restricting or controlling" (MCA Code of Practice 2007, page 19), and ensuring we follow these principles assists us in ensuring that our practice reflects this ethos.

The assessment process

This is the basic process of the MCA, and each element will be explored in greater detail in subsequent headings.

- 1) Identify the decision to be made, and the time at which it needs to be made.
- 2) Have you any reason to believe that the person is struggling to make this decision?
- 3) If yes, carry out an assessment of their capacity to make this decision, using the four-step test of capacity.
- 4) If they lack capacity to make the decision, carry out an assessment to make a decision in their best interests, using the Best Interests decision checklist (section 4 of the MCA).

The decision

The key issue here is to be clear about what the decision is that the person needs to make. The MCA relates to a person's ability to make a particular decision at a particular time, and capacity should never be considered as an overall concept. If you see blanket statements in notes or reports with statements such as 'this person lacks capacity', and it doesn't relate to a specific decision at a specific time, then this is legally incorrect, as well as not respecting the person's right to autonomy. It is relatively rare for people not to be able to make *any* decisions, (although possible such as in the case of an unconscious person), so we should not be using sweeping statements to that effect.

In some circumstances, you might not have any concerns about a client's ability to make their own decision. Conversations with them might seem perfectly normal, and through general conversation, you are satisfied that they are able to make the decision in hand for themselves. However, in other circumstances, you might have reason to think that someone is struggling to make a decision for themselves, and this is more than the usual indecision that many of us will experience when faced with a difficult choice.

Case study part 1

Bec is a housing worker, and is meeting with her client, Andy, to discuss a possible move to supported accommodation. Andy seems very confused by the concept, and doesn't seem to understand the difference between having his own flat, and supported accommodation, saying it sounds the same to him, and asking if Bec is moving his flat somewhere else. The decision is becoming quite urgent as Andy isn't coping on his own and is neglecting himself and his environment.

In this example, Bec immediately identifies that there seems to be a problem with Andy making this decision. She asks him a few more questions than usual to confirm whether this is the case, and asks Andy to help her understand his thoughts on the matter. Having done this, Bec is clear that Andy is struggling, and decides that she needs to carry out an assessment of his capacity to make this decision at this time, as she doesn't feel that the decision can be delayed due to his self-neglect. She also doesn't feel that Andy's ability to make the decision himself is likely to improve because he has dementia, and his illness is rapidly progressing, although his illness doesn't appear to impact on his decision to make other, more day-to-day decisions. Bec is aware that a diagnosis of dementia in itself doesn't mean that people cannot make decisions, but it does give her reason to consider whether Andy does have difficulties in this regard.

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Bec tries to help Andy to make the decision for himself. Sometimes he seems to understand information better when it is written down, and he can read it a few times for himself, so she writes down the issues for him and explains them as well. Andy also seems to benefit from talking to his friend Rob about things that are worrying him, so Bec asks Rob to talk through the notes with him, and also to try to find out more about any concerns or worries that Andy has about a possible move. Bec knows that Andy tends to be more confused towards the end of the day when he is tired, so she makes sure she meets with him in the morning.

Here, Bec is taking steps to help Andy make the decision for himself, by finding ways for him to be best able to use the relevant information. This is an essential part of the process, and might take many forms, such as using written materials, involving friends or family, revisiting the decision on multiple occasions, or using an interpreter to ensure the information is being properly communicated and responses understood. It is essential to ensure that you keep a written record of steps you have taken to help the person make a decision for themselves.

The capacity assessment

The first stage of the capacity assessment is what is referred to as the two-stage test of capacity. This is:

- 1) Is the person unable to make the decision in question at the time it needs to be made?
- 2) Is this inability as a result of an impairment of, or disturbance in the functioning of the mind or brain?

(Note: in the original law and code of practice, the test is the other way round, and remains so in many documents now, with the impairment being first and the inability coming second, but the order was amended in case law as it was felt that the original order led assessors to consider the impairment primarily, which is not in the spirit of presuming capacity).

In our example, Bec is aware that Andy has a diagnosis of dementia, but a formal diagnosis isn't necessary for you to believe that a person meets the above criteria. They could just present in a way that strongly suggests there is an issue, and this would lead you to consider whether a capacity assessment is required. The test also covers people who may meet the criteria due to a temporary issue such as intoxication with substances, or being unconscious following an accident. It is important to remember that just because someone has a diagnosis, or isn't able to make some decisions, this doesn't mean that they are unable to make the decision that you are helping them with, and the law specifically states that you must not make assumptions about people based on their age, appearance, condition or diagnosis, or behaviour.

If you believe that the two-stage test criteria are met, you should then carry out a full assessment of the person's ability to make the decision at hand, using the four-step test of capacity. Through conversation and discussion around the issue, you should establish the following:

- 1) Does the person have an **understanding** of the key points of the decision that needs to be made, and why they need to make it? Do they understand the likely consequences of making the decision, or not making it?
- 2) Is the person able to **use and weigh** the information relevant to the decision?
- 3) Is the person able to **retain** the information relevant to the decision for long enough to make the decision?
- 4) Is the person able to **communicate** the decision by any means?

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Remember, a person needs only to be unable to do one of these things to be considered unable to make the decision.

There are lots of pointers that might be helpful in this process:

- Don't ask the person closed questions, as these are likely to elicit 'yes' or 'no' answers, and that doesn't really help you to establish whether they can, for example, understand the information.
- Don't ask the person whether they can or cannot do these things! Workers often ask "do you understand the information relevant to the decision" or "can you retain information"? The key thing is to be able to demonstrate how you could tell if they could or couldn't do something, which you will only learn from asking around the issue, and recording how you came to your understanding. Recording only that the person is able to 'understand, use and weigh, communicate, and retain' the information without explaining how you know this, is not legally correct.
- Remember that, just because someone is going along with everything suggested to them, this doesn't mean that they have capacity to consent to or refuse an intervention. Research has shown that workers have a tendency to assume capacity more readily if a person is compliant. Capacity assessments need to be carried out regardless of whether a person is going along with what is suggested to them or not.
- Ensure the ways that you explore the points are relevant to the decision. For example, testing whether someone can remember your name after a few minutes doesn't help you to establish their ability to retain information relevant to the decision, although it is often cited as being evidence of someone's memory difficulties. Try to tailor your questions to the situation and decision.
- Be clear about the specific points a person needs to understand to make the decision. You might need to break the decision down into much smaller bits to be able to help them understand the issue and to assess their understanding. Be careful not to set the bar too high – people only need to be able to understand the salient points, not absolutely everything about a situation and decision (as is the case for everyone).
- Some people might not be able to answer a question such as 'what would you like to eat' as the variety of possible responses make it too abstract for them, but if given a simple choice (such as whether they would like rice or pasta), they might well be able to make that decision.
- Is the person giving appropriate weight to different elements of the information? For example, are they giving more weight to the fact that being outside in the freezing cold may result in their death, than the fact that they don't really like the colour of the coat that you have found for them? If they seem to feel that the colour of the coat is the main issue, you might have cause to believe that they are attributing inappropriate weight to some information, and that they are unable to use and weigh.
- If someone is clearly unable to do one element of these four stages, you may not need to record your efforts to assess the other three, though it may be wise to do so if the issue isn't very clear'. For example, if someone is unable to communicate in any way at all (such as if they were unconscious), you would simply conclude that they lacked capacity to make the decision at hand because they were unable to communicate their decision, and you would not need to attempt to assess their ability to

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understand, use and weigh, or retain. You could just record that you did not explore these three points, because being unable to do just one of the four elements is sufficient to conclude that the person lacks capacity.

- Being able to communicate a decision is by any method. This might just be someone who blinks once for yes and twice for no, or someone who is able to squeeze your hand for yes. As long as you have established that there is a clear pattern to their communication, it is appropriate to use any information you can get from them in this way. You might consider getting specialist help involved if appropriate, such as from a speech and language therapist.
- Timing is key. You must ensure that you take all appropriate steps to help someone to make the decision for themselves. If you are aware that, for example, one of your clients tends to be sober in the morning, but heavily intoxicated by the mid-afternoon, you must carry out your assessment in the morning. Certain conditions may also be worse at certain times of the day, and you should always meet with people when they are at their best.
- It doesn't matter if the person forgets their decision five minutes after your assessment ends, and says something different to another worker. If, during your assessment, when you are presenting the information to them, they are able to retain it long enough to make the decision, this is sufficient. It would, however, be prudent to write down that you are aware that they gave a different decision a short time later.
- Try not to be fearful of coming to the wrong conclusion. It has been seen on many occasions that workers have not made a decision because they have said that they cannot be 100% sure of whether a client has capacity or not. This is not a reasonable position to take. If you have reason to doubt someone's capacity to make a decision, and you are the right person to carry out the assessment, then you must do it. The law states that your conclusions are 'on the balance of probabilities' – in other words, you only need to be more than 51% sure that you have reached the right conclusion, and have 'reasonable belief' that you have done so. If you follow the process thoroughly and are diligent in your recording, you are unlikely to be criticised for your opinion.
- If you think someone's inability to make a decision is temporary, and you could safely delay making the decision to enable them to recover sufficiently to make it, then you should do so. For example, if a client has been admitted to hospital and is unconscious but expected to recover within a few days, it would likely be appropriate to delay making a decision about accepting an offer of accommodation. You would take steps to ensure that there was no detriment to them in doing so, such as speaking to the housing provider to explain the circumstances and requesting they hold their offer for a few days.
- If you are the person most closely involved in providing care and support, and the decision at hand is within your sphere of knowledge, it is likely to be the case that you should carry out the assessment. It would be sensible to involve other professionals if the decision is very complicated or has potentially serious consequences for the client. Professionals in specialist fields such as Psychiatry may well not have greater skills than you in assessing capacity, but their expertise or professional background may make them better placed to carry out the assessment.
- Clients may sometimes refuse to engage in a formal capacity assessment, often because it can sound quite scary to them, or they do not accept that there is an issue with their capacity. They cannot be

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forced to have the assessment, but it may be that you conclude that it is in their best interests for you to carry out the assessment through several, less formal, conversations, if this is the only option.

- It is essential to follow these processes, not only because it is the best way of ensuring that your client's wishes and feelings are respected and considered, but also because doing so means that you are legally protected should decisions be challenged – something which is becoming more common. Section 5 of the MCA provides decision makers with protection for acts they have carried out, but only if it can be demonstrated that they had taken 'reasonable steps' to establish capacity, and had 'reasonable belief' that the client was unable to make the decision for themselves and the decision taken was in the client's best interests. By following what the law says, and ensuring that your recording is accurate and thorough, you should be able to meet these thresholds.

Best Interests decision making

If you carry out a capacity assessment, and find that your client does not have capacity to make a particular decision, you **MUST** then proceed to carry out a Best Interests assessment, unless it is clear that you would not be the appropriate person to do so, and have made arrangements for another professional to carry out their own assessments (for example, if the decision related to medical treatment, you should raise your concerns about lack of capacity with the responsible Doctor).

'Best Interests' is a term that has come into mainstream use in recent years, and you will often see it in notes and reports, and hearing people say that they consider a certain action to be in someone's best interests. However, when it comes to the Mental Capacity Act, the term has very specific meaning, and can only be used if particular processes are followed. Using the term without following the processes renders decisions made on behalf of a client unlawful. The term comes from the fourth statutory principle of the MCA:

'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' (MCA Section 1)

The MCA sets out the criteria which *must* be considered when you are trying to determine what might be in a client's best interests.

There are a few key things to remember here:

- Show your working out. Even if it seems obvious, you must still record it. If a decision was ever challenged, you need to be able to demonstrate that you have considered all the required points.
- Try not to be intimidated by the law – the MCA provides you with clear lists of what you must consider in your assessments (it may be helpful to print off Sections 2, 3, and 4 so you always have them to hand), and it is helpful to use the checklist provided as headings for your write-up.
- Even if a point in the Best Interests checklist does not apply to your client, you should still record this, and just briefly comment on why it is not relevant.
- Not every decision requires pages and pages of write-up. As a general rule, the more serious the decision, the more you need to write down. If you are helping someone make decisions around what to have for tea, you will likely need to write very little down, but if you are making a serious decision, such

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as where someone should live, you would need to ensure your records are far more detailed and comprehensive.

- Not every decision requires an assessment to be done each time. For example, if you are a care worker making a decision whether to provide a client with a daily wash, you might carry out your capacity and best interests decision on day one, and add this to your care plan for regular review (or if anything changes), rather than needing to repeat your assessment each day before you provide this care.
- Ensure you are clear and realistic about the options available. Even if a particular option would be desirable, or even perfect for a client, it cannot be considered if it isn't available (for example, you cannot suggest 24-hour care at home if the Local Authority isn't prepared to offer this).
- If a person has a Lasting Power of Attorney which covers the decision to be made, it is for that Attorney to make the decision (though they must also use the Best Interests checklist). Without this in place, family members have no legal right to dictate what decisions are made, although this is commonly misunderstood and happens frequently. There is a process for establishing if someone might have an Attorney which you can find by following this link www.gov.uk/find-someones-attorney-or-deputy
- Where there are serious decisions to be made, or disputes, it is usually best to bring all involved parties together for a best interests meeting to try to resolve these. If agreements cannot be reached and disputes remain, there should be a referral to the Court of Protection for a Judge to make the decision.

Let us consider Andy's case in looking at the Best Interests checklist (in black italics below), though remember that for each assessment, the headings remain the same, but the issues will be different. There is no set way of recording set out in the MCA, and as long as you show you have considered each heading, you should do your write-up in your usual way that you are comfortable with. The below is much briefer than an assessment regarding such as big decision would need to be, but is designed to give you some ideas of what you need to cover.

Case study part 2

Andy's decision relates to whether he should remain in his flat, or whether he should move to The Oaks supported living accommodation, in the next few weeks or so. Bec has printed off section 4 of the MCA to give her the headings she needs to consider in her assessment with Andy:

'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.'

Bec wants to ensure that Andy is fully engaged in the process of making this decision as far as he is able. She knows he becomes tired and confused later in the day, so ensures she speaks with him in the mornings. She takes him to visit The Oaks on two occasions, and asks the manager to speak with him about what help is available there. She also helps him to start a conversation with another resident who gives them their views on the accommodation. During the visits, when Andy mentions something he does or doesn't like, Bec writes this down for him so he has something to refer to when they are discussing it later, in case he forgets. Bec also invites Andy's sister to come on one of the visits, and she talks through things with him afterwards as well.

'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 or acting for themselves.'

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Bec works through all she knows and is able to find out about what is important to Andy. She knows he prefers to walk rather than catch the bus, and being near shops and pubs is important to him. The Oaks is on the outskirts of a small town but in easy walking distance to amenities. Andy has always been independent and likes his own space, and was happy when he saw that The Oaks had self-contained flats. Andy loves his flat and has said he would never want to leave, even if that meant he would come to harm living there. Andy is Catholic, and has attended the same church for thirty years, where he is well supported by clergy and congregation. The Oaks is twenty miles from his church and he would no longer be able to attend. Andy enjoys seeing his sister every Sunday and would like to see her more – the Oaks is much closer for her to drive to, and she has said she would visit more regularly. Andy's condition is likely to deteriorate quite quickly, and the Oaks is able to offer progressively more intensive care packages as required, without necessitating another move.

'Find out the person's views – the person's past and present wishes and feelings, beliefs and values (including religious, cultural, moral, or political beliefs), and any other factors the person would consider if they were making the decision for themselves.'

Bec has already identified many of Andy's views and recorded them in other sections, but she could re-record them in bullet form so they are easily identifiable. She also writes down that while she is aware that Andy has always said he wants to stay in his own home, he has also talked about feeling scared when he is alone recently, and wishing he had more people to talk to. His friend Rob is very important to him, but he has also said he wishes he had more friends to spend time with, and is finding it hard to meet people, which would be easier at The Oaks. Andy didn't really like The Oaks, and said it made him feel "old and sad".

Andy is Catholic, and attending church every week is non-negotiable. He enjoys the routine, the service, and the contact with others. He says it helps him feel less upset and alone, and gives him strength to 'keep going'. Andy goes to his local Indian restaurant every day without fail, and orders the same thing. He raves about this food and says it makes his day to go there.

'Avoid discrimination – do not make assumptions about someone's best interests simply on the basis of their age, appearance, condition, or behaviour.'

Bec knows that Andy has dementia, and his Psychiatrist has said he has quite an aggressive illness and is likely to deteriorate quickly. The Psychiatrist pointed out that Andy is nearly 80 and his health is poor, so thinks it would 'make sense' for him to move to supported accommodation now. However, Bec has spoken with other professionals, including his Occupational Therapist, who said that, because Andy is still quite fit, he could cope independently for some time, given the right support and tools. Despite the dementia, Bec has observed Andy coping well in many situations, and being well able to make many of his own decisions.

'Assess whether the person might regain capacity, and consider whether the decision could wait until then.'

Bec has known Andy for several months, and has been discussing his housing options with him throughout this time. She has never felt that he has capacity to make this decision during this time, and his condition is aggressive and degenerative, so she feels it is unlikely that he will regain capacity. There have been several recent incidents where Andy has had an accident at home, or got lost when he is out, and Bec feels that a decision needs to be made quickly now about what support Andy needs.

'If the decision relates to life-sustaining treatment, workers must not be motivated in any way by a desire to bring about the person's death, and should not make assumptions about the person's quality of life.'

Bec is clear that this point does not apply to Andy's situation or this decision, but she ensures she records this, to demonstrate she has considered all the required points.

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‘Consultation with others – anyone previously named by the person as someone to be consulted, 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 previous Enduring Power of Attorney, or any Deputy appointed by the Court of Protection to make decisions for the person’

Bec has spoken with Andy’s best friend Rob, and with his sister, who both feel that Andy isn’t safe to remain at home, and explained their reasons for this. Bec takes their views into account in her decision making, but remembers that just because a relative has a view, that does mean that view has to be followed (unless they have power of attorney). She also spoke with his Psychiatrist and his Occupational Therapist and recorded their views. Andy asked Bec to speak with his Priest, and she made several attempts to do so, but was unable to speak with him prior to completing the assessment, and she recorded all of these attempts. Andy told Bec he couldn’t remember whether he had a Lasting Power of Attorney, so she contacted the Office of the Public Guardian, who advised that no LPA had been registered with them.

‘Avoid restricting the persons rights and consider whether there are other options which may be less restrictive of their rights.’

Bec arranged for assessments to be carried out with Andy in his home, to see what support might be available to him there, as she didn’t want to rule out him staying at home with additional help, given he had talked about wanting to stay there. The assessments felt that a care package could be provided, and adaptations made to the flat, though it wouldn’t be possible to eliminate all risk in the home. Bec tried to look for supported accommodation closer to home, but for various reasons (which she recorded), The Oaks was the only available option.

‘Take all of the information into account, and weigh up the information to work out what is in the person’s best interests.’

Bec has read quite a bit about ways of assessing best interests, and knows that different people draw different conclusions. She decides to draw up a balance sheet to help her to summarise the pros and cons of a potential move and clarify her thinking. She writes down everything she can think of, even things which seem minor, which the intention of being then able to see which factors should be given more or less weight.

Pros of moving to the Oaks	Cons of moving to the Oaks
<ul style="list-style-type: none"> • Daily support is available, which can be increased as Andy’s needs increase. • Easy access to shops, pubs, and the local Church. • Closer to Andy’s sister so she could visit more. • Safe environment with no stairs. Call bells and alarms are available if Andy had an accident in his flat, and all residents are checked twice a day. So reduced risk of harm, especially as condition deteriorates. • Self-contained accommodation but with option to have prepared meals in the communal area. • 30 other flats, and communal activities, so potentially less isolation and more opportunity to make friends. • There is a Catholic Church within a five-minute walk. • Andy’s sister, best friend, and Psychiatrist all think The Oaks is the best option for him. • The area is very quiet with little traffic – safer now Andy’s road safety awareness is reduced. 	<ul style="list-style-type: none"> • Carers cannot provide nursing care, so if Andy’s needs became very serious and more medical, he might have to move again – more disruption for him. • Could no longer attend his local Church – reduction in support, which he finds very valuable. • Reduced contact with best friend Rob. • Always used to say he wanted to stay in his flat, there are care package options which might make things safer for him there and could be tried first. • No local Indian restaurant in the town so Andy couldn’t get his usual lunch. • Andy would have to change his care and medical teams, which he might find difficult. • Andy didn’t much like the feel of the Oaks and said it made him feel ‘old and sad’. • Unfamiliar environment and area might increase the risk of Andy getting lost and wandering.

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Bec needs to be clear that the decision she makes should not be based on what she, or other workers think is best, but what she feels Andy would want, if he were able to make the decision. This may mean that Bec needs to make a decision that she doesn't feel is particularly wise, or particularly safe.

This can be a very difficult position for any worker to find themselves in, and it is worth referring back to the key principles of the MCA, and remembering that you are a *substitute* decision-maker, and the aim is *not* to eliminate all risk and go with the 'safest option'. It is helpful to consider this statement from one of the leading Judges in this field, Lord Justice Munby:

"The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?"

On completing the assessment, you should ensure that your write up includes a clear conclusion covering the following:

- Key issues (issues of 'magnetic importance') which have pointed you in the direction of a particular decision/conclusion.
- If you conclude that certain risks are worth taking, you should clearly identify why the benefits outweigh the potential detriment, and explain what steps will be taken to reduce them.
- You should clearly state which is the option you consider to be in the client's best interests, and why. This is especially important where there is dispute about the best course of action.

Case study part 3

So, in Andy's case, Bec looks at all the available information, and comes up with the following conclusions:

- Andy would prefer to stay in his home. Some of the issues of safety and isolation could be addressed with a suitable package of care and some adaptations to his flat. Staying at home would mean Andy is in familiar surroundings, near his best friend, and the support of the church, as well as keeping his care team. He would be able to get his favourite lunch every day and keep his usual routines, which make him happy, and help him feel secure.
- The risks of Andy staying at home are still there (such as road safety and wandering), but could be minimised with a suitable care package, and although the risks are clearly not desirable, there is no evidence as yet that they would have very serious consequences for Andy.
- Although The Oaks provided a pleasant and safe environment, Andy felt sad at the idea of living there, and there were many negative aspects of him moving there.

On balance, Bec decides that if Andy was able to make this decision for himself, he would choose to remain at home, with some additional support, and this option seems most supportive of his rights and choices. Andy seems happy to try this, and doesn't object to any of the suggested input. If Andy deteriorates, and the risks of him staying at home increase significantly, Bec plans to urgently review the Best Interests assessment to see if the decision to stay at home is still the best one for Andy.

In our example, Andy remains at home, and is willing to accept the proposed help and support. It is important to remember that while the MCA allows for a limited amount of compulsion, should a person not want to do what it is decided in their best interests, there are many scenarios where the legal powers of the MCA would

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not be sufficient. For example, for workers hoping to reconnect a rough sleeper lacking capacity to make a decision to return to their country of origin, the powers of the MCA would not allow for conveying someone over the course of many hours, should they be refusing and physically resisting going on provided transport. Other legal options may well have to be considered.

Further information

Derbyshire CC v AC, EC and LC 2014

A helpful case which provides a list of 'salient details' which a person would need to understand if they were to be considered to have capacity to decide to a move to new accommodation. In AC's case, the decision was whether to move to residential care, but the points could be extrapolated and amended to other housing environments. The list of points demonstrates the thoroughness required in ensuring that a person has all the relevant information relating to the decision, which, amended from the judgement to be generic, and with some additions, would include:

- That the person will be living with other people.
- That they will no longer be living alone/with family members/with friends.
- That workers will be available to provide support.
- The location of the proposed accommodation.
- The ages and genders of people in the proposed accommodation.
- The demographic of the other residents (for example, is the placement for people with mental health problems, drug and alcohol problems etc).
- That there will be rules of the accommodation which need to be abided by.
- For how long the accommodation will be available to them.
- Whether the accommodation has a therapeutic component.

Tenancy and capacity is a complex area of law, and there are specific courses for those involved in this field.

Staying up to date

To stay up to date with the latest guidance and case law around mental capacity, consider signing up to the MCA newsletter published by Essex Street Chambers:

<http://www.39essex.com/resources-and-training/mental-capacity-law/>



What we do

Homeless Link is the national membership charity for organisations working directly with people who become homeless or live with multiple and complex support needs. We work to improve services and campaign for policy change that will help end homelessness.

Let's end homelessness together

Homeless Link
Minories House, 2-5 Minories
London EC3N 1BJ

020 7840 4430

www.homeless.org.uk

Twitter: @Homelesslink

Facebook: www.facebook.com/homelesslink

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