

# Mental Capacity Issue



Welcome to our latest newsletter! This issue will look at mental capacity – a subject that whilst often talked about, is frequently misunderstood. We are sure that many of you have heard phrases “she has lost capacity” or “he hasn’t got capacity”.

We will be looking at the law that defines what mental capacity is, how you should act if you are working with someone who does not have capacity and highlight how you and your clients can plan to ensure that their wishes are upheld should they lose mental capacity.

## Why do I need to know about mental capacity?

Simply put, if you work with vulnerable adults who may be affected by mental capacity issues then the law requires you to ‘have regard’ to both the Mental Capacity Act 2005 (MCA) and the supporting Code of Practice to protect the person you work with and yourself.

## Mental Capacity and Care Standards

The Care Quality Commission’s fundamental standards require care staff to understand and apply the principles of the Mental Capacity Act as part of achieving these standards, and look at practices as part of the inspection process. For example, Regulation 11, which emphasizes the need for consent states that: *“If the service user is 16 or over and is unable to give such consent because they lack capacity to do so, the registered person must act in accordance with the Mental Capacity Act 2005”*

## WESTGATE HOUSE MOVE

The Health and Community Care Team have now moved from their Brook Street offices to much larger premises in:

**Westgate House, Market Street, Warwick, CV34 4DE**

to accommodate the ever expanding multi-disciplinary team.

**T: 01926 491181**

## Book a free talk to residents/support groups

Areas covered include:

- Wills
- Lasting Powers of Attorney
- Mental Capacity and best interests
- Continuing healthcare funding

Please contact Esme Hill:

**esmeh@moore-tibbits.co.uk**

Talks can be tailored to your needs.

# WHAT IS THE LAW?

The **Mental Capacity Act 2005** came into force in 2007 and its aims are broadly three-fold:

- **To ensure that vulnerable adults are supported to have the right and opportunity to make their own decisions, wherever possible;**
- **To provide a framework for decision making on behalf of an incapacitated adult, when they are not able to take decisions themselves;**
- and
- **To enable adults to plan for their future.**

- The Act introduced Lasting Powers of Attorney to replace Enduring Powers of Attorney. These broadened the powers someone could give to their chosen attorney to include health and welfare decision making as well as property and financial affairs.
- It also introduced the Court of Protection as a specialist court with jurisdiction over health, welfare and financial matters of people who lack capacity.
- Independent Mental Capacity Advocates (IMCA's) were introduced to provide support and advocacy and for people (with no suitable family or friends) who lack capacity in relation to significant decisions regarding their health and welfare.

- Finally, and perhaps most controversially it contains the Deprivation of Liberty Safeguards (added in 2007), which are currently under intense scrutiny and review.

There is a Code of Practice that provides fuller information and guidance on using and applying the Mental Capacity Act, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/224660/Mental\\_Capacity\\_Act\\_code\\_of\\_practice.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf).

It is essential reading and we would recommend that every care provider and third sector service has a copy available for staff to refer to.



## Follow The Principles

The Act has, at its core, five "principles" which should guide everyone working in this area:

1. The starting point must be that an adult is presumed to have capacity unless it is established otherwise
2. Before an adult is treated as unable to make a decision, all practical steps must have been taken, without success, to help them make the decision themselves
3. An adult should not be treated as unable to make a decision just because they make an unwise one
4. Any decision or action on behalf of someone who lacks capacity under this Act must be done in their best interests, BUT
5. Before this, you must consider whether the proposed act or decision is the least restrictive of the incapacitated person's rights of freedom and action

Lasting Powers of Attorney are as important as having a will for ensuring your wishes are followed, **but:**

While an estimated **40%** of the adult UK population has a will

Less than **1%** has an LPA

Over **60%** of potential LPA customers shared these misconceptions

- The next of kin always gets the final say...if the patient is unable to make decisions for themselves
- If a couple has a joint bank account and their home is in joint names...the other can legally make decisions for them.

# How do I know if someone lacks mental capacity?

The starting point under the Act is that an individual has capacity, however, “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.”

The impairment or disturbance can be temporary OR permanent – if it is temporary, consider if the decision / act can be delayed. Don't pre-judge a person by their age, appearance, condition or behaviour.

## Think about:

1. What is the decision / act?
2. When does the decision need making / act doing?
3. Is the adult able to make a decision?

“Before deciding someone lacks capacity to make a particular decision, it is important to take all practical and appropriate steps to enable them to make the decision themselves.”  
(Statutory Principle)

## In practice this means:

- Providing relevant information
- Consider the use of an advocate
- Use different communication techniques
- Work with speech and language or interpreter if required
- Can the decision be delayed?
- Choose an appropriate location
- Take steps to put the individual at ease
- Choosing the best time of day for the individual
- Try more than once

**REMINDER!** – If someone wants to make or amend their Will, their mental capacity to do this is subject to a different test called testamentary capacity. Legal advice should be sought to support and protect the individual in these circumstances.

## CASE LAW UPDATE:

We are often approached by care providers who are considering whether a Do Not Resuscitate (DNR) is appropriate for a client who lacks capacity to make this very difficult decision themselves.

This recent case, **Winspear v City Hospitals Sunderland NHS Foundation Trust [2015] EWHC 3250 (QB) (13 November 2015)** highlights the importance of consulting family members prior to any decision taken on a best interest basis to implement a Do Not Resuscitate (DNR) instruction.

<http://www.bailii.org/ew/cases/EWHC/QB/2015/3250.html>

## Further Resources

In recognition that applying the Mental Capacity Act 2005 for frontline staff has been patchy at best, Skills for Care have developed a Level 3 Awareness in the Mental Capacity Act. Visit [www.skillsforcare.org.uk/standards-legislation/mental-capacity-Act/mental-capacity-Act.aspx](http://www.skillsforcare.org.uk/standards-legislation/mental-capacity-Act/mental-capacity-Act.aspx)

The British Psychological Society has produced an excellent guide to best interest decision making, available at:

<http://www.scie.org.uk/mca-directory/files/BPS-best-interests.pdf>

## National Mental Capacity Forum

How did you mark the recent National Mental Capacity Action Day? This day was initiated by the Forum to increase awareness of the Mental Capacity Act and to highlight good practice. For more info see. SCIE [www.scie.org.uk/MCA-directory/forum/events/20160315-action-day.asp](http://www.scie.org.uk/MCA-directory/forum/events/20160315-action-day.asp)

## Do you have difficulty knowing how to record decisions around mental capacity?

There is an online tool which provides a good starting point at [ehealthtracker.co.uk/blog.php](http://ehealthtracker.co.uk/blog.php). This is not a substitute for legal advice in appropriate circumstances. Please contact the team for more information if required.

Leading the fight against dementia  
**Alzheimer's Society** | **Dementia Awareness Week 15–21 May 2016**

Our team will be out and about providing talks to various support groups during this week. If you would like our team to come and talk at one of your meetings, please contact [esme@moore-tibbits.co.uk](mailto:esme@moore-tibbits.co.uk). Areas covered include Wills, Lasting Powers of Attorney and issues surrounding long term care but can be tailored to the group's needs.

For more information on Dementia Awareness Week please visit [www.alzheimers.org.uk](http://www.alzheimers.org.uk)

# Recording your capacity assessment

**A “good” capacity assessment would include the following:**

**A clear overview of the decision that is being taken**

**Concrete details of choices available**

**Identify the salient details that need to be understood**

**Avoids making assumptions**

**Demonstrate the efforts taken to promote the person’s ability to decide**

**Evidence**

## CASE SCENARIOS

### Providing relevant information:

Albert has Alzheimer’s disease and lives in a care home and enjoys taking part in the various activities provided at the home. On this particular day, there is a choice between going to a garden show, attending his usual painting class or watching a DVD. Although Albert has the capacity to choose, having to decide is making him anxious.

The care assistant carefully explains the different options, providing information about the DVD and a leaflet about the garden show. She explains where the show is being held and how long it will

take to get there in the mini-bus. She has to repeat this information several times as Albert keeps asking if they will be back in time for dinner. She also informs him that one of his friends is going on the trip to the garden show.

At first, Albert is reluctant to disturb his usual routine of attending the painting class but the care assistant reassures him that he will not lose his place at the painting class if he goes on the trip. Albert can therefore choose whether or not to go on the day trip.

### Recording the Assessment:

Flora has dementia and lives in a residential care home. Like many

people with dementia her mental capacity fluctuates. On most days she can make all the basic decisions about daily living such as washing, eating and drinking etc. However, sometimes she lacks capacity to make the most basic of decisions, such as what to eat.

On these occasions, a possible entry in the care records could be: “At lunch time today, Flora lacked capacity to decide what to eat, so a decision about this was made in her best interests. At each mealtime we will assess her capacity to decide what she wants to eat. If Flora has capacity to make this decision at any point she will decide what to eat”.

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