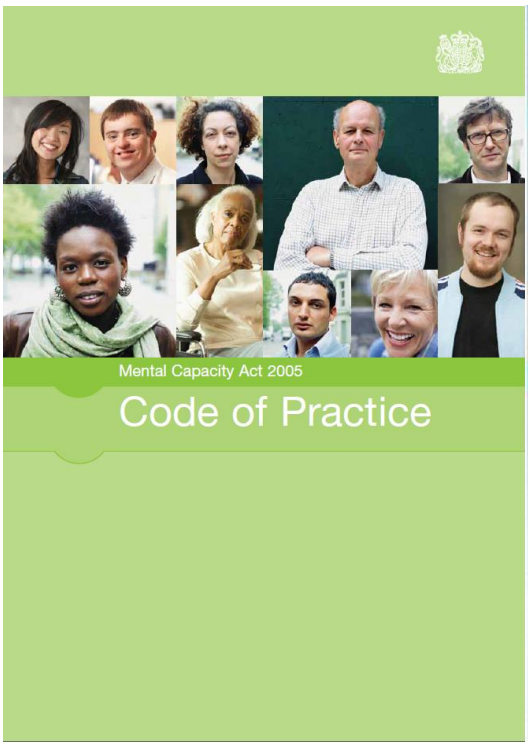
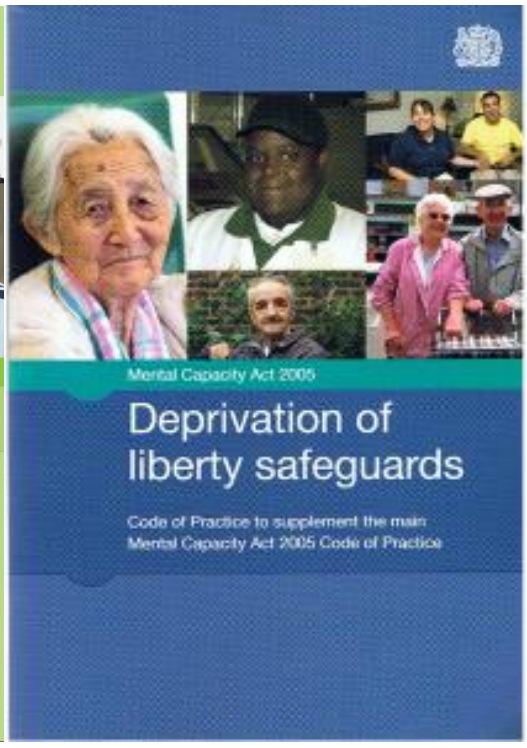
Cambridgeshire County Council

The Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) An Introduction





Mental Capacity Act and Deprivation of Liberty Safeguards Training

Welcome to the introduction to the Mental Capacity Act and the Deprivation of Liberty Safeguards

To gain the most from this training, pleasure ensure that we:

- Respect each other's point of view
- Any case experience discussed remain confidential to the training group
- Allow each person to contribute in group discussions

Further advice regarding MCA and/or DoLS – call or email:

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joseph.yow@cambridgeshire.gov.uk

Mental Capacity Act Operational Manager:
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james.codling@cambridgeshire.gov.uk

MCA & DoLS Training and Development Worker:
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phil.carter@cambridgeshire.gov.uk

For inquiries regarding Deprivation of Liberty Safeguards, you can call:

DoLS office
Tel: 01223 715581
Email: Mca.Dols@cambridgeshire.gov.uk

Introduction: The Importance of the Mental Capacity Act 2005

When we work in Adult Health and/or Social Care, the likelihood is that at some point we will work with someone who will not have capacity to make a decision and we may need to make the decision on their behalf in their Best Interests.

The Mental Capacity Act (MCA) is the law that covers this situation. The MCA will ask us two questions when we make a decision for someone:

How can you show that the person lacks capacity?

How can you show that what you are doing is in the person's best interests?

The MCA is the law and we must be able to answer these two questions.

This booklet will help you understand how to answer these questions so that your practice will be compliant with the MCA.

The booklet covers:

- Human rights
- Consent
- Capacity
- Decision making
- Restraint
- Deprivation of Liberty

By the end of the course you should be able to work with all of these!

Exercise

- **What Human Rights do we have?**

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Human Rights

Human Rights belong to everyone. They are basic rights that we all have simply because we are all human: it does not matter who we are, or where we live or what we do.

Exercise:

Look at the list below. Which two human rights are associated with your right to make your own choices/decisions and your right to liberty?

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_____

The Human Rights Act 1998 puts the **European Convention on Human Rights (ECHR) 1953** into practice in this country.

The ECHR protects your essential rights, including the rights to:

- Right to life (Article 2)
- Right to be protected from torture or inhuman or degrading treatment or punishment (Article 3)
- Right to liberty and security (Article 5)
- Right to privacy - respect for private and family life, home and correspondence (Article 8)
- Right to expression (Article 10)
- Right to marriage (Article 12)
- Right to be protected from discrimination (Article 14)

Your human rights are about your freedom to do things and about being free from intrusion. Your human rights are about many things in your daily life. They affect the choices you are able to make and how you are able to make them.

Consent

Even when we provide someone with the best care possible, we may have more control over the person than we would normally.

This means that we have to be careful that we don't go too far and exercise more control than is needed. Consent is fundamental to all of us! Consent allows the person to stay in control of what is happening. Consent can also make the difference from a lawful and an unlawful action. Generally speaking, you are acting lawfully if the person consents to what you are doing.

To give valid consent or permission the person needs to have:

- **Information** about the decision
- **Free choice** to make the decision without being pressured or forced
- The **Mental Capacity** to be able to consent or refuse

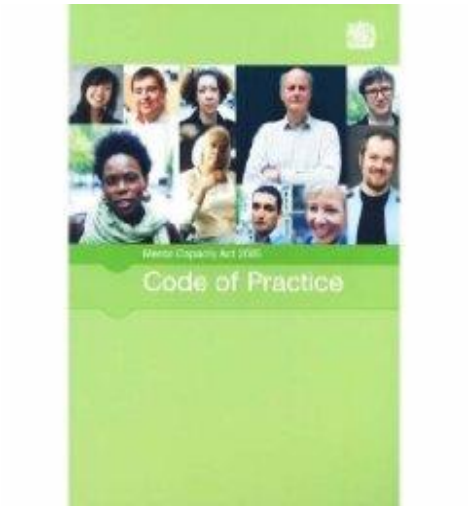
To help someone to decide whether or not to give consent, we need to:

- Explain **why** the care or treatment is needed
- Explain the **options** available and what they entail
- Explain **what** is likely to happen if the person **does consent**
- Explain **what** is likely to happen if the person **does not consent**

We need to support the person on every occasion where consent is required.

The Code of Practice

The Mental Capacity Act is accompanied by a Code of Practice.



You need to know where the Code of Practice is kept.

When you work with someone who may lack capacity to make some decisions you are expected to follow the guidance in the Code of Practice.

The Code covers all the aspects of the Mental Capacity Act and supports good practice.

Chapter 3 talks about how people can be supported to make their own decisions.
Chapter 4 talks about how to assess capacity.
Chapter 5 talks about how to make decisions in someone's best interests.
Chapter 6 talks about how you can be protected when you provide someone with care or treatment.

The Code of Practice is available from:

www.dca.gov.uk/menincap/legis.htm#codeofpractice

- **Do you have a copy of the Code of Practice?**
- **Do you and your colleagues know where it is?**
- **Is it part of your induction policy?**

Can you name the five principles of the Mental Capacity Act in the right order?

Five principles of the Mental Capacity Act

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5 _____

Five principles of the Mental Capacity Act

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 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/she 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/her 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.

Mental Capacity

What the MCA says about capacity?

The MCA is the legislation that governs how a specific decision can be taken on behalf of someone who lacks the capacity to make it.

Having mental capacity means that a person is able to make their own decisions.

In order to decide whether an individual has the capacity to make a particular decision you must answer these questions:

1. Is the person unable to make a specific decision? If so:

2. Is there an impairment of, or disturbance in the functioning of a person's mind or brain? This could be due to long-term conditions such as mental illness, dementia, or learning disability, or more temporary states such as confusion, unconsciousness, or the effects of drugs or alcohol. If so,

3. Is the impairment or disturbance sufficient that the person lacks the capacity to make a specific decision?

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

The ordering of the first and second questions set out above is the opposite to 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.

This is important, as it helps ensure that:

a) The presence of an impairment or disturbance of the mind or brain is causing the person's inability to make a specific decision, and

b) The approach to those with mental disorders is not inadvertently discriminatory, by assuming their incapacity is because of mental impairment or disorder – (e.g. concluding a person cannot make a decision because they have schizophrenia).

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

The MCA says that a person is unable to make their own decision if they cannot do <u>one</u> or more of the following four things:

- **Understand** the information about the decision, or
- **Retain** the information relevant to the decision, or
- **Use or weigh** the information relevant to the decision, or
- **Communicate** the decision.

If we assess that someone cannot understand, retain, use/weigh information or communicate, we must link this to an 'impairment or disturbance' in the mind or brain. A lack of capacity has to be caused by a problem in the way in which the person's mind or brain is working.

Understand

Understanding is the ability to comprehend basic information about a problem and the ability to recognise how a problem or solution applies to the person's situation.

The explanation of the problem or solution(s) should be given in a way that is appropriate to their circumstances – e.g using visual aids, simple language etc.

The person does not need to understand all the information, just the 'salient' or important details.

Retain

Retaining concerns the ability to recall information relevant to the decision & to recall information provided (in whatever format).

A person only needs to **retain information long enough to make a decision**.
Conditions such as some dementia syndromes, may mean that the person is unable to store new or abstract information. Their recall of some past events may be convincing and may hide a difficulty to handle information about the present or the future.

You need to be careful that you **don't assume the person lacks capacity simply because they have memory impairment**. Memory may be supported through memory aids and other assistance. There may be many creative ways to support someone to overcome gaps in their recall of information.

Under conditions of stress it is normal for people not to remember or recall information accurately. It is also normal for memories to be selective and to change over time. Although the person may not be able to recall information independently, they may be able to do so with memory aids (such as a diary or a calendar). Remember, **supporting someone to make a decision is not the same as a memory test** as such. It is about whether the person is able to make the decision in question.

In what ways can you make information easier to understand and retain?

Use or Weigh

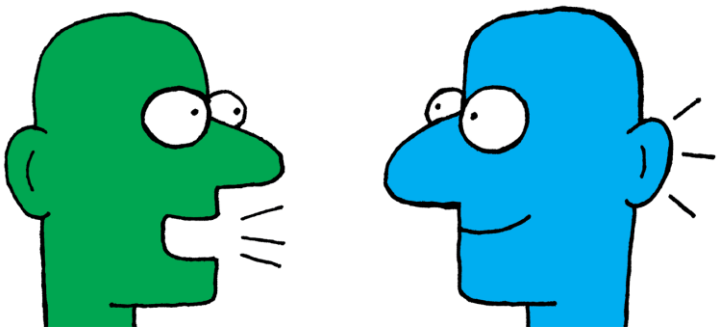
To **use or weigh** concerns the ability to consider potential solutions and describe how the solutions apply to person's situation. It concerns the ability to assess how one solution might be better than another.

This looks at whether the person can use or weigh the information to come to a decision. People have a right to make their own lawful decisions, even if others disagree (principle 3). Therefore, when supporting someone to make a decision, **you have to be able to tell the difference between an unwise decision and a lack of capacity to make the decision**.

Communicate

To **communicate** concerns purely the functional ability to communicate. It is about how the communication happens rather than the content of what is communicated. As such very few capacity assessments will fail on communication alone.

Exercise: Story telling



In your pairs decide who will be the **story teller** and who will be the **listener**.

Story-teller instruction:
Take a minute to think of a story about your childhood. You are going to tell this story to your partner. However, you cannot use any words. You may use gestures, mime, pictures and sounds. Think about how you are going to do this. What are the important events in your story? Who else does it involve? What emotions would you need to convey?

Listener instruction
You are going to be told a story about the story-teller's childhood. However the story-teller cannot use any words. The story can only be told in gestures, mimes, pictures and sounds. You can ask the story-teller for clarification, but the story teller cannot speak to you.

Top Tip: Do you have a communication section as part of your client's care plan?

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Supported Decision Making

Remember the 2nd principle:

A person is not to be treated as unable to make a decision unless all practicable steps to help to do so have been taken without success.

If we add this to the 'capacity test' it means that we have to take all practicable steps to help the person 'understand, retain, use or weigh and communicate'.

Exercise:

Mr Craven is a 23-year-old man who currently lives in a neurological rehabilitation home. In a road traffic accident 12 months earlier, he suffered a traumatic brain injury which left him with hemiplegia to the right-hand side. In addition, he has intermittent memory problems, slowed processing skills and fatigue. Additionally, Mr Craven is epileptic with dramatic mood swings and displays often inappropriate impulsivity.

The accident and its consequences means that he suffers bouts of depression and low self-esteem.

Mr Craven takes Epilim for the epilepsy he has suffered since his brain injury, which he takes in the morning and evening. Since being on this medication, Mr Craven has suffered no further seizures and his GP has emphasised the importance of this medication to prevent further damage to his brain through falls.

Since admission to the home, Mr Craven has been compliant and has consented to the taking of his medication on a daily basis.

Today, when you bring the medication to Mr Craven, he refuses to take it, stating: 'what's the point? I've lost everything since my brain injury. I don't want to take this anymore.'

- **What should you do?**
- **What information does Mr Craven need?**
- **What are the best ways to help him understand the information?**
- **What else could you consider doing?**

Notes:

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Recording Support and Capacity

Any record that someone lacks capacity in relation to a particular decision must include the evidence for:

- the support offered to the person to make the decision
- the reasons why you believe the person cannot make the decision (understand, retain, weigh or communicate)
- the reasons why you believe that the inability to make the decision is caused by the person's 'impairment of or disturbance in the mind or brain'

Examples of recording:

- Mrs Davies is unable to make decisions about receiving intimate washing. After speaking with Mrs Davies, on a couple of occasions, at different times of the day and with the support of her daughter, it is clear she is unable to understand the risks of not washing when doubly incontinent. Her verbal responses to our support were confused and bore no relevance to the questions being asked. We believe this is because of the advanced nature of her dementia.

- Since Mr Smith's stroke, there have been three occasions where he has fallen out of his bed during the night. This matter was discussed with Mr Smith, with the support of a district nurse and Mr Smith's key worker, who aided his communication. Even with this support it is evident that Mr Smith was unable to understand the information being provided (specifically he did not understand the risks of falling out of bed during the night, or recall incidents of previous falls), or communicate a decision on this matter, due to the severity of the stroke he had suffered. The use of bedrails was discussed with his wife and the district nurse on the 16th June 2017. It was agreed that it was in his best interests for these to be used because of the risk of him falling out of bed.

Concluding that someone lacks capacity…

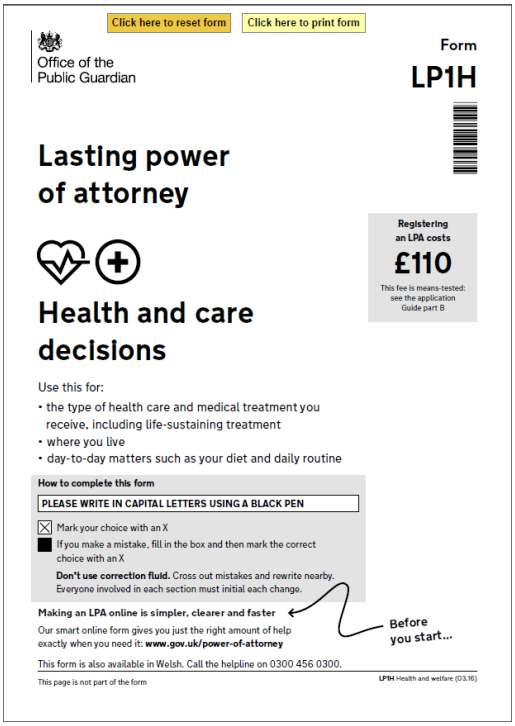
- is not about proving what the person cannot do
- it is about finding out what the person can do and how we could support them to do it
- is not an excuse for you to do what you and/or your service want to do
- it should be done carefully – remember, you are taking the person's right to consent or refuse away.

Planning for the Future (Legal Arrangements)

Lasting Powers of Attorney

There are two types of Lasting Powers of Attorney (LPA): Property and Affairs and Personal Welfare.

Property Affairs LPA are the equivalent to the Enduring Powers of Attorney. Personal Welfare LPA allow for decisions to be made concerning welfare, health care and consent to medical treatment.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Office of the Public Guardian

Form LP1H

Lasting power of attorney

Registering an LPA costs £110

This fee is means-tested: see the application Guide part B

Health and care decisions

Use this for:

- the type of health care and medical treatment you receive, including life-sustaining treatment
- where you live
- day-to-day matters such as your diet and daily routine

How to complete this form

PLEASE WRITE IN CAPITAL LETTERS USING A BLACK PEN

☒ Mark your choice with an X

■ If you make a mistake, fill in the box and then mark the correct choice with an X

Don't use correction fluid. Cross out mistakes and rewrite nearby. Everyone involved in each section must initial each change.

Making an LPA online is simpler, clearer and faster

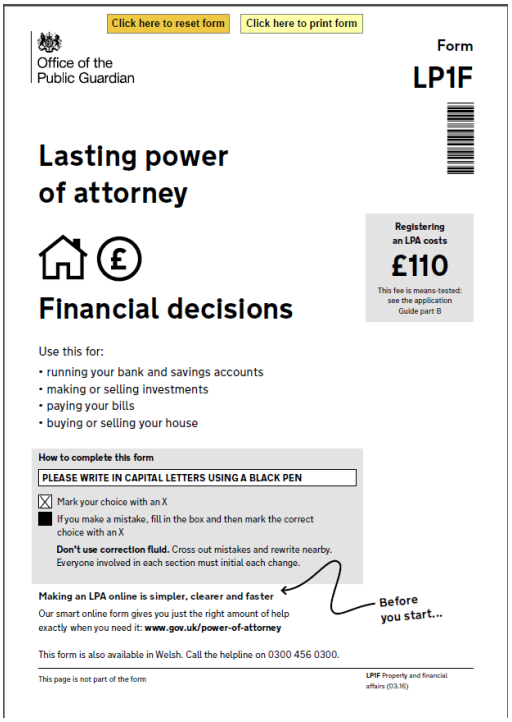
Our smart online form gives you just the right amount of help exactly when you need it: **www.gov.uk/power-of-attorney**

Before you start...

This form is also available in Welsh. Call the helpline on 0300 456 0300.

This page is not part of the form

LP1H Health and welfare (03.16)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Office of the Public Guardian

Form LP1F

Lasting power of attorney

Registering an LPA costs £110

This fee is means-tested: see the application Guide part B

Financial decisions

Use this for:

- running your bank and savings accounts
- making or selling investments
- paying your bills
- buying or selling your house

How to complete this form

PLEASE WRITE IN CAPITAL LETTERS USING A BLACK PEN

☒ Mark your choice with an X

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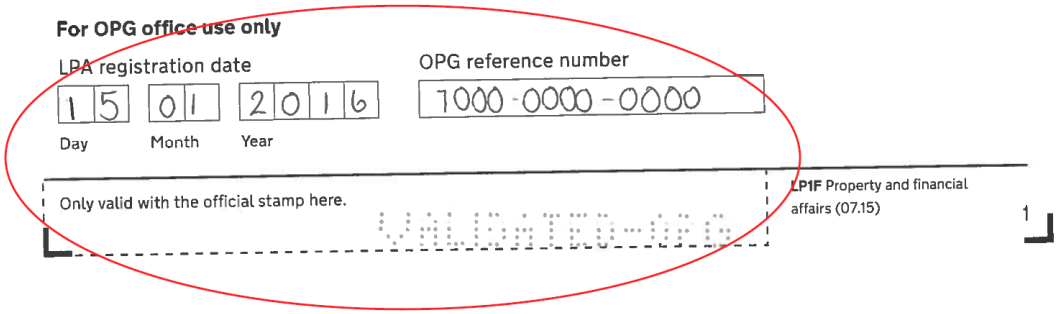
LP1F Property and financial affairs (03.16)

Once completed, form(s) must be sent to the OPG to be registered. It is not a legal arrangement until the OPG validates the form with a stamp (see below):


For OPG office use only

LPA registration date

15 (Day) 01 (Month) 2016 (Year)

OPG reference number

7000-0000-0000

Only valid with the official stamp here.

VALIDATED

LP1F Property and financial affairs (07.15)

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Office of the Public Guardian website:

www.gov.uk/power-of-attorney

Advance Decisions to Refuse Treatment (ADRT)

Advance Decisions are governed by the Mental Capacity Act 2005 also. They allow someone to refuse treatment in advance, should they lack capacity when the treatment is needed. They are on true when both 'valid' and 'applicable'.

Valid – In order to be valid, an advance decision must have been made at a time when you had capacity to make the decision.

Applicable – In order for the advance decision to be applicable, the wording has to be specific and relevant to the medical circumstances. This means you have to choose what you say carefully. If the advance decision is vague, or if it isn't clear that it refers to a particular medical condition, treatment or practice, the doctor may not have to (or be able to) follow it.

www.compassionindying.org.uk

Appointee

You can apply for the right to deal with the benefits of someone who can't manage their own affairs because they're mentally incapable or severely disabled.

Only 1 appointee can act on behalf of someone who is entitled to benefits (the claimant) from the Department for Work and Pensions (DWP).

An appointee can be:
•an individual, eg a friend or relative
•an organisation or representative of an organisation, eg a solicitor or local council

www.gov.uk/become-appointee-for-someone-claiming-benefits

Deputies

You can apply to become someone's deputy, if they lack mental capacity, via the Court of Protection. As a deputy, you'll be authorised to make decisions on their behalf.

There are 2 types of deputy: **Property and financial affairs deputy** - you'll do things like pay the person's bills or organise their pension: **Personal welfare deputy** - you'll make decisions about medical treatment and how someone is looked after.

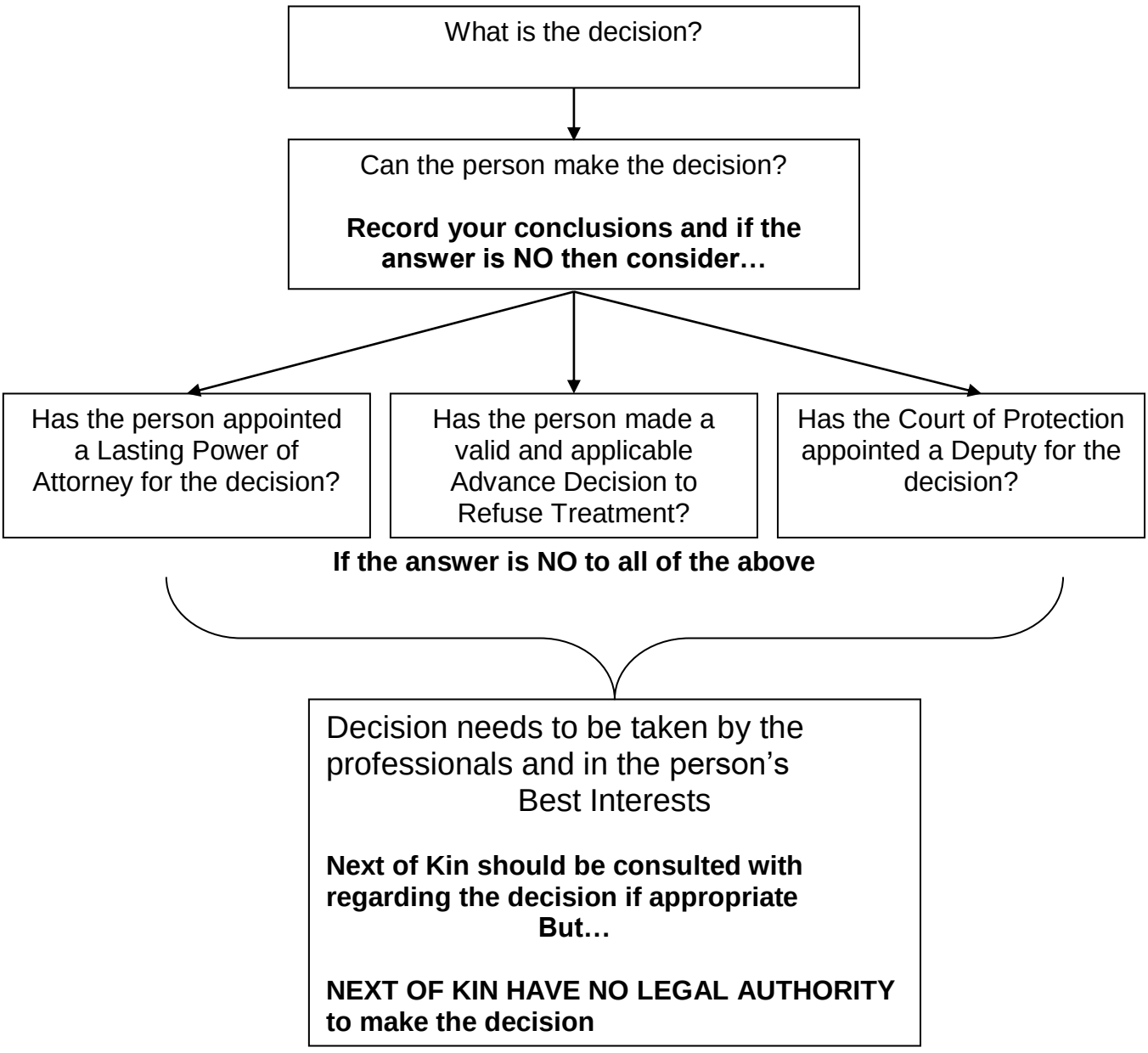
The court will usually only appoint a personal welfare deputy if:
•there's doubt whether decisions will be made in someone's best interests, for example because the family disagree about care
•someone needs to be appointed to make decisions about a specific issue over time, for example where someone will live

www.gov.uk/become-deputy

Best Interests decision making

When a person has been assessed as lacking capacity to make a decision, the decision may still need to be made.

This leaves us with the problem of who will make the decision and how the decision will be made.



To make a decision in someone's Best Interests we need to think about what is best for the person. This means that we need to go through a list of factors (checklist) and think how they apply to the person

The Best Interests check list:

- Don't make a decision just based on the person's age, condition, disability etc. We are making a decision about this person and not this *type* of person.
- If the decision is about whether or not to give treatment that will keep the person alive, we must not be motivated by the desire to bring about the death of the person.

- Consider if the person might regain capacity in the future to make this decision. Can the decision wait?
- Think about how the person could still be involved in the decision. Is it in their best interests to do what they want to do?
- Consider the person's past and present wishes about the decision. Has the person written anything down about it?
- Thin about the person's beliefs and values. What would the person have thought about if they were making the decision?
- Talk to other people caring or concerned for the person (where appropriate) about the person's wishes, feelings, beliefs and values.

When making a Best Interests decision…

- You don't have to do what the person wants to do
- You don't have to do what the person's family want to do
- It is not just about making the person safe
- It is not just about doing what you would want to do
- It is about thinking about the best 'fit' to the person's wishes and feelings, beliefs and values
- It is about thinking about the person's rights
- It is about thinking about the person's dignity
- It is about intruding as little as possible into the person's life

Best Interests and Care Planning

Model care plans should include:

- Record of either:
  - the person's consent to each aspect of the care plan **or**
  - the reason why it is believed that the person lacks capacity in relation to the aspect of the care plan
- Space for consent to be provided by Power of Attorney for Health and Welfare or Deputy for Health and Welfare
- Person's wishes and preferences in relation to each aspect of the care plan
- How to support and involve the person in decision making
- How the care plan has been decided to be in the person's Best Interests (include a balance sheet of care options)
- Information of the person's life history in relation to each aspect of the care plan
- Things the person enjoys doing and how they should be supported to do these (i.e. care plans going beyond meeting care needs)

Remember:

<u>You can only record that someone lacks capacity to make a decision when you can show that their inability to understand, retain, weigh or communicate is because of the impairment or disturbance in their mind or brain.</u>

Consider…
How is consent recorded in your care plans?
How is supported decision making recorded in your care plans?
How do your care plans record Best Interests?

The Mental Capacity Act – Section 5: States:

(FOR) AN ACTION CONNECTED TO A PERSON'S CARE OR TREATMENT

(WHERE) WE CAN SHOW THAT THE PERSON LACKS CAPACITY TO CONSENT TO THE ACTION

AND

(WHERE) WE CAN SHOW THAT THE ACT IS IN THE PERSON'S BEST INTERESTS

MEANS THAT

NO LIABILITY IS INCURRED
(The same as if the person had capacity to consent and consented)

In other words – we must show that we followed the Mental Capacity Act

Independent Mental Capacity Advocate (IMCA)

An IMCA is a role introduced by the Mental Capacity Act. IMCAs work in a slightly different way to other advocates. One difference is that in certain circumstances it is a **legal duty to appoint an IMCA**.

An IMCA must be appointed when:

The decision is about a long term change in accom-modation or about serious medical treatment **AND** The person lacks capacity to make the decision **AND** There isn't anyone else appropriate to consult, other than paid staff

An IMCA **can** be appointed when:

The decision relates to an adult safeguarding pro-cedure or a care review **AND** The person lacks capacity to make the decision **AND** There isn't anyone else appropriate to consult, other than paid staff

Although there is no hard rule, the following may help to suggest when an IMCA is needed:

- There are no family members or close friends willing to be consulted (even when the person wants them to be consulted)
- Family members or close friends are too ill or frail to be consulted
- It is too impractical to consult close friends or family (for example, they live too far away).
- There is so much conflict over best interests that a decision cannot be made
- There are allegations or proved incidents of abuse by the family or friend
- The family member or friend does not want to involve the person in the decision

In Cambridgeshire the IMCA service is provided by Total Voice:
Contact Person: Rachel Mason.

Address: Total Voice Advocacy, Mount Pleasant House, Cambridge,CB3 0RN.

Tel: 0300 2225704.

Email: tvcp@voiceability.org

Voiceability website

Restraint

Restraint is covered by the Mental Capacity Act.

It is illegal to restrain someone who lacks capacity without following the Mental Capacity Act.

Restraint is:

- The use or threat of force when someone resists
- Anything that restricts the person's liberty of movement, whether or not they resist

The following are examples of potentially liberty-restricting measures that apply in residential care settings:

- A keypad entry system;
- Assistive technology such as sensors or surveillance;
- Observation and monitoring;
- A care plan providing that the person will only access the community with an escort;
- Limited choice of meals and where to eat them (including restrictions on resident's diet).
- Use of restraint in the event of objections or resistance to personal care;
- Mechanical restraints such as lapstraps or bedrails;
- Use of medication to manage behaviour;

In addition to the above, the following are restricting measures which may be found in supported living settings:

- Decision on where to live being taken by others;
- Decision on contact with others not being taken by the individual;
- Doors of the property locked, and/or chained, to prevent residents leaving;
- A member or members of staff accompanying a resident to access the community to support and meet their care needs;
- Varying levels of staffing and frequency of observation by staff;
- Restricted access to finances, with money being controlled by staff or welfare benefits appointee;

In addition to the above the following are restricting measures which may be found in the home environment:

- The provision of physical support with the majority of aspects of daily living, especially where that support is provided according to a timetable set not by the individual but by others;
- The use of real-time monitoring within the home environment (for instance by use of CCTV or other assistive technology);13
- The regular use of restraint by family members or professional carers which should always be recorded.in the individual's care plan;
- The door being locked, and where the individual does not have the key (or the number to a key pad) and is unable to come and go as they please, strongly suggests that they are not free to leave;

- The individual regularly being locked in their room (or in an area of the house) or otherwise prevented from moving freely about the house;14
- Use of medication to sedate or manage behaviour, including PRN.

When is restraint justified?

Restraint is only **lawful** if:

- the person taking action must reasonably believe that restraint is necessary to prevent harm to the person who lacks capacity, and
- the amount or type of restraint used and the amount of time it takes must be a proportionate response to the likelihood and seriousness of harm.

(MCA Code of Practice, Paragraph 6.41)

Restraint is not a bad thing if you can show why you need to do it.

Restraint is abuse if you cannot show why you need to do it.

Restraint must NEVER be used to punish someone or to teach them a lesson!

Deprivation of Liberty

Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. The Deprivation of Liberty Safeguards is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

A Supreme Court judgement in March 2014 created what we now call the 'acid test' to see whether a person is being deprived of their liberty, which consisted of two questions:

- Is the person subject to continuous supervision and control? *and*
- Is the person free to leave? – with the focus, the Law Society advises, being not on whether a person seems to be wanting to leave, but on how those who support them would react if they did want to leave.

As such there are now 3 elements that will help us determine if a person is deprived of their liberty.

1. **Subjective element: Does the person lack the capacity to consent to their care and living arrangements?**
2. **Objective element: Is there a deprivation..? 'acid test'**
3. **Imputable to the state: Are the arrangements made by a 'public body'?**

Key Messages:

Deprivation of Liberty Safeguards (Care Homes and Hospitals)

- The Deprivation of Liberty Safeguards (2009) are an amendment to the Mental Capacity Act 2005. They apply in England and Wales only.
- Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty.
- The Deprivation of Liberty Safeguards can only be used if the person will be deprived of their liberty in a care home or hospital.
- Care homes or hospitals (known as a Managing Authority) must ask a local authority (known as a Supervisory Body) if they can deprive a person of their liberty. This is called requesting a Standard Authorisation.
- There are six assessments which have to take place before a Standard Authorisation can be given.
- If a Standard Authorisation is given, one key safeguard is that the person has someone appointed with legal powers to represent them. This is called the relevant person's representative and will usually be a family member or friend.
- Other safeguards include rights to challenge authorisations in the Court of Protection, and access to Independent Mental Capacity Advocates (IMCAs).

Deprivation of Liberty Safeguards (community settings)

- DoLS (2009) only applies to care homes and hospitals, but a Deprivation of Liberty can occur in other settings, for example; Supported Living, Extra Care, Shared Lives and within the person's own home.
- In these settings the Court of Protection can authorise a deprivation of liberty.
- Responsibility for making an application to the Court of Protection will depend on who is best placed to make the application. This will either be the Local Authority or the local Clinical Commissioning Group (CCG).
- The process for making these applications is known as the Re. X procedures.
- Care Providers should raise concerns regarding any potential Deprivation of Liberty with the most appropriate agency, be it the Local Authority or CCG.

To book training, please contact:

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