



## A: Introduction

1. This purpose of this document is to provide for social workers and those working in front-line clinical settings an overview of the law and principles relating to the assessment of capacity. Its focus is on (a) how to apply the MCA 2005 principles when assessing capacity; and (b) how to record your assessment, primarily in the context of health and welfare decisions.
2. This document cannot take the place of legal advice. In any case of doubt as to the principles or procedures to apply, it is always necessary to consult your legal department. In particular, if it appears that the person in question is subject to undue influence or coercion, it is always vital to consult your legal department as soon as possible to consider whether and how their interests are to be secured.
3. The courts have now considered questions of capacity on many occasions, sometimes giving guidance as to how the Act should be applied in general terms, and sometimes applying the Act to particular factual scenarios.

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**Disclaimer:** This document is based upon the law as it stands as at June 2020; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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

4. However, we give these references in footnotes for those who want to read further: the key information is contained in the body of the Guide, in language which is hopefully not as legalistic as that sometimes adopted by the courts.
5. A note on language. The word 'assessment' is in our experience all too often used to cover two completely different things: (1) the process of assessing whether or not a person has capacity to make a decision; and (2) the recording of the conclusion reached as to whether or not the person had capacity. It is important to keep the two concepts separate, in particular in circumstances where (too) many forms are labelled 'capacity assessment' when they are, in fact, forms to record the fact that the person does not have capacity to make a relevant decision. Forms to record the outcome of capacity assessments should enable the person completing them to set out that the person **has** capacity if that is the outcome of the assessment.

## B: Key principles

6. The core principles of the MCA 2005 are set out in s.1. They are:
  - s.1(2): a person (P<sup>3</sup>) must be assumed to have capacity unless it is established that he lacks capacity;
  - s.1(3): P 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;
  - s.1(4): P is not to be treated as unable to make a decision merely because he makes an unwise decision;
  - s.1(5): 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; and
  - s.1(6): 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.
7. The presumption that P has capacity is fundamental to the Act. It is important to remember that P has to 'prove' nothing. The burden of proving a lack of capacity to take a specific decision (or decisions) always lies upon the person who considers that it may be necessary to take a decision on their behalf (or will invite a court to take such a decision). The standard of proof which must be achieved is on the balance of probabilities (s.2(4)). Accordingly, it will always be for the decision-maker to prove that it is more likely than not that P lacks capacity. Precisely how the presumption

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<sup>3</sup> Strictly, of course, P is not 'P' unless they are the subject of proceedings before the Court of Protection who is alleged to lack capacity to take one or more decisions (Court of Protection Rules 2017, r 2.1), but it is a convenient shorthand.

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plays out in situations where there is objective reason to believe that P lacks capacity is addressed further at paragraphs 12 and 13 below.

8. Common phrases which suggest that the presumption is not being adopted include:

*"One needs to be certain of her capacity."*

*"[P] is unable to fully understand, retain and weigh information."*<sup>4</sup>

9. It is also important that it is the decision-maker who needs to have a reasonable belief that P lacks capacity. In a court setting, the decision-maker is the judge; outside the court setting, it is the person who is proposing to take the step in question on the basis that it is said to be in P's best interests.<sup>5</sup> That does not mean that expert assistance cannot be sought (for instance as to whether the person has an impairment or disturbance of the mind or brain). But it does mean that the decision-maker cannot delegate the decision as to capacity to that expert. To give an example which occurs frequently in the clinical setting, if you are a doctor proposing to carry out a particular operation, you cannot delegate to a psychiatrist colleague the decision whether or not the person has capacity. You may – and in some complex cases may need – to get expert input from that psychiatric colleague, but it is ultimately you, as the treating doctor, to decide whether or not P lacks capacity. If you did not reasonably believe P lacked capacity, and went ahead with the operation in what you thought was P's best interests, you will have no defence under s.5 MCA 2005 to a claim for damages and/or criminal prosecution.
10. It is important to understand that it is not only medical professionals – and in particular psychiatrists – who can carry out a capacity assessment. There will be some circumstances under which the particular expertise of a medical professional will be required, but that is because of their expertise, not because of the position that they hold. A capacity assessment is, in many ways, an attempt to have a real conversation with the person on their own terms, and applying their own value system.<sup>6</sup> It is frequently the case that professionals or others who know the person better, and in particular who have seen the person over time, will be able to do a more robust capacity assessment than a person (of whatever discipline) 'parachuted' in for a snapshot assessment.<sup>7</sup> But before having the capacity conversation with P it is most important to do your

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<sup>4</sup> These are both taken from the judgment of Peter Jackson J in *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP), with the key words emphasised.

<sup>5</sup> For more on this, see our [Brief Guide to Carrying out Best Interests Assessments](#).

<sup>6</sup> See *Kings College NHS Foundation Trust v C* [2015] EWCOP 18, in particular at paragraph 38.

<sup>7</sup> See in this regard both *A Local Authority v SY* [2013] EWHC 3485 (COP) at paragraph 22 (emphasising that "appropriately qualified social worker is eminently suited to undertake [...] capacity assessments" for completing a COP3 form) and *PH v A Local Authority v Z Limited* [2011] EWHC 1704 (COP) at paragraph 56. By "appropriately qualified" social worker is meant a social worker who can properly claim to have the necessary expertise (and be able to explain why they do).

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homework and consider what we might call the circumstantial evidence. In other words, ensure you are familiar with P's circumstances, incidents where risks have materialised etc.

11. The Court of Protection can make interim decisions and declarations about P's best interests where it has evidence before it "*to justify a reasonable belief that [the individual] may lack capacity in the relevant regard.*"<sup>8</sup> This means that it is possible to make an application where those concerned with P's circumstances have been unable (perhaps because they have been prevented by a third party) to complete a COP3 form to the level of detail usually required. In such circumstances, it will always be necessary to make clear in a supporting witness statement why the person or body bringing the application has reasonable grounds to believe that P may lack the relevant capacity and must, in particular, show what they have done to secure P's participation in the assessment.<sup>9</sup> One of the first steps that the court will then take is to bring about a proper capacity assessment; that capacity assessment will then determine whether or not it has jurisdiction to take further steps in relation to P.
12. Finally, the very act of deciding to carry out a capacity assessment is not, itself, neutral, and the assessment process can, itself, often be (and be seen to be) intrusive. So you must always have grounds to consider that one is necessary.
13. Conversely, you must also be prepared to justify a decision not to carry out an assessment where, on its face, there appeared to be a reason to consider that the person could not take the relevant decision:
  - Whilst the presumption of capacity is a foundational principle, you should not hide behind it to avoid responsibility for a vulnerable individual.<sup>10</sup> In our experience, this can happen most often in the context of self-neglect where it is unclear whether or not the person has capacity to make decisions.<sup>11</sup>
  - If you have proper reason to think that the person may lack capacity to take a relevant decision, especially if the consequence of what they are wanting to do is likely to lead to serious consequences for them, it would be simply inadequate for you simply to record (for instance)

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<sup>8</sup> *Re F* [2010] 2 FLR 28.

<sup>9</sup> In *LB Wandsworth v M* [2017] EWHC 2435 (Fam), Hayden J suggested (at para 66) the bar in *Re F* had been set too low, and that the statement that "*reason to believe*" *P lacks capacity must be predicated on solid and well reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves.*"

<sup>10</sup> As the House of Lords Select Committee looking at the MCA 2005 reported, this unfortunately happens all too frequently – in our experience, most often in the context of self-neglect. House of Lords Select Committee on the MCA 2005 (2014) *Mental Capacity Act 2005: Post-legislative scrutiny*, HL Paper 139, at paragraph 105.

<sup>11</sup> See, for instance, the cases discussed in *Learning from SARS: A report for the London Safeguarding Adults Board* (July 2017)

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“as there is a presumption of capacity, [X] decision was the person’s choice.”<sup>12</sup> Indeed, the more serious the issue, the more one should document the risks that have been discussed with P and the reasons why it is considered that P is able and willing to take those risks.

14. Useful guidance on how to think about the presumption can be found in this passage from the judgment in *Royal Bank of Scotland Plc v AB*:<sup>13</sup>

*The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way*

15. It is also important to remember that some people can ‘talk the talk, but not walk the walk’, especially if they have had numerous prior capacity assessments. See further Section E below.

### C: What does it mean to lack capacity to make a decision?

16. The law gives a very specific definition of what it means to lack capacity for purposes of the MCA 2005. It is a legal test, and not a medical test, and is set down s.2(1) MCA 2005,<sup>14</sup> which provides that:

*‘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’*

17. To apply the test, it can best be broken down into three questions:

- (1) Is the person unable to make a decision? If so:
- (2) Is there an impairment or disturbance in the functioning of the person’s mind or brain? If so:

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<sup>12</sup> Framed in human rights terms, a public body may well not be able to show that it has discharged its operational duty under Article 2 ECHR to take practicable steps to secure the life of a vulnerable individual if it relies unthinkingly upon the presumption of capacity where there are proper reasons to consider that they may lack it. In *Arskaya v Ukraine* [2013] ECHR 1235, the European Court of Human Rights found a breach of the Article 2 ECHR operational duty where the doctors took refusal of life-saving treatment where “despite S. showing symptoms of a mental disorder, the doctors took those refusals at face value without putting in question S.’s capacity to take rational decisions concerning his treatment. Notably, if S. had agreed to undergo the treatment, the outcome might have been different.” (para 87).

<sup>13</sup> [2020] UKEAT 0266\_18\_2702. The judgment relates to capacity to conduct proceedings before the Employment Tribunal, but the principles are of broader application.

<sup>14</sup> Referred to as the “core determinative provision” in *PC and NC v City of York Council* [2013] EWCA Civ 478 at paragraph 56.

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

18. The ordering of the first and second questions set out above is the opposite to that set out in the Code of Practice as it stands at present.<sup>15</sup> However, we consider that the case-law is now clear that the ordering set out in the Act itself must be followed.<sup>16</sup> There are also three sound 'policy' reasons why this order should be followed:

(a) There is a danger that you will mentally 'tick off' the presence of an impairment or disturbance and then will not sufficiently question whether that impairment or disturbance is actually **causing** the inability to make the decision;<sup>17</sup>

(b) Linked to this, there is also a risk that the structuring perpetuates the discriminatory approach to those with mental disorders, as it essentially loading the capacity assessment against them by 'pre-filling' the first element of the test. In other words, it makes it – subconsciously – easier to move for you to move from thinking 'this person has schizophrenia' to concluding 'this person lacks capacity to make [X] decision.'

(c) Focusing on what it is thought that the person is functionally unable to do means that support can be targeted appropriately, for instance to help them understand the information relevant to the decision, or to use and weigh it. If, with that support, the person is able to make the decision, there is then no need to go further: they have capacity to make it.

19. That having been said, depending upon the circumstances, it may be that more focus needs to be placed upon either the causal impairment or the functional test – for instance – if P is in a psychiatric ward with a clear diagnosis of a mental disorder, then it may be that more attention is required to considering whether that disorder means that they are unable to take the specific decision in question.

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

21. We now look at these elements in turn.

### (1): Is the person unable to make a decision?

22. 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

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<sup>15</sup> The Code of Practice is under revision as at March 2020.

<sup>16</sup> See *PC and NC v City of York Council* [2013] EWCA Civ 478 at paragraph 58 and *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80 at paragraph 35.

<sup>17</sup> This risk was identified by the Court of Appeal in *PC* at paragraph 58.



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

23. Before looking at each of these elements in turn, we should emphasise a number of cardinal principles that apply to all of them.

24. First, capacity is decision-specific. The statement 'P lacks capacity' is, in law, meaningless. You must ask yourself "what is the actual decision in hand"<sup>18</sup>? If you do not define this question with specific precision before you start undertaking the assessment, the exercise will be pointless. By way of example, where a person needs medical treatment to address gangrene in their leg, the decision in respect of which you need to assess capacity is whether they have the capacity to consent to treatment. It is not whether they have capacity to consent to one of a number of potential operations that could be carried out to provide that treatment (assuming that each of the operations carries materially similar risks to the patient).<sup>19</sup>

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

26. Third, before you can determine whether P is able or unable to decide, you must identify what the information relevant is to the particular decision. This includes the reasonably foreseeable consequences of deciding one way or another, or failing to make the decision. You should record this information and explain which aspect(s) of it P is unable to understand, or retain, or use and weigh.

27. Fourth, to comply with s.1(3) MCA 2005, you must take all practicable steps to help P before concluding that they are nevertheless unable to make a decision.<sup>20</sup> And, importantly, consider why is it that you were unsuccessful in enabling P to decide despite those steps having been taken? This will include asking yourself – and being in a position to record – the answers to questions such as:

- What is the method of communication with which P is most familiar (is it, for instance, a pointing board, Makaton or visual aids)?

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<sup>18</sup> See *PC* at paragraph 40.

<sup>19</sup> This was the position that was addressed in *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP).

<sup>20</sup> See also here Chapter 2 of the [Code of Practice](#) to the MCA 2005.

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- What is the best time of day to discuss the decision in question with P?
  - What is the best location to discuss the decision in question with P?
  - If you do not know P, would it assist to have another person present who does (and, if they do, what role should they play)?
  - Has P made clear (in whatever fashion) that there is someone that they would like to be present, or someone they would really like not to be present?
  - What help does P require to learn about and understand the information relevant to the decision? For instance, does P need to be taken to see different residential options? Have you explained to P all the pieces of information that you have identified as being relevant to the decision?
  - Is it possible to complete the assessment in one go, or is it necessary to come back and see P on more than one occasion, even if only to put P at their ease and help them engage with the process?<sup>21</sup>
  - And, perhaps above all, is there something that you can do which might mean that P would be able to make the decision? Depending upon the circumstances, this could range from simply waiting to undergo work with P to assist them: see for a good example, *Re DE* [2013] EWHC 2562 (Fam), in which (whilst Court of Protection proceedings were ongoing), an intensive programme of education was provided to a learning disabled man, in consequence of which he gained the capacity to consent to sexual relations.

### Is P unable to understand the relevant information?

28. It is not necessary that P understands every element of what is being explained to them. What is important is that P can understand the 'salient factors'<sup>22</sup>: the information relevant to the decision. This means that the onus is on you not just to identify the specific decision (as discussed above) but also what the information is that is relevant to that decision, and what the options are that P is to choose between. We give examples of the kind of information that has been held by the courts to be relevant (and irrelevant) to decisions in the annex to this Guide.
29. The level of understanding required must not be set too high.<sup>23</sup>
30. Further, you must not start with a 'blank canvas.' In other words, you must present the person you are assessing with detailed options so that their capacity to weigh up those options can be fairly

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<sup>21</sup> For an example of the difference that this can make, see the contrasting assessments of P's capacity to make decisions as to residence and care in *Re FX* [2017] EWCOP 36.

<sup>22</sup> *LBJ v RYJ* [2010] EWHC 2664 (Fam).

<sup>23</sup> *PH and A Local Authority v Z Limited & R* [2011] EWHC 1704 (Fam).



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assessed.<sup>24</sup> This is particularly important where a person's particular impairment may make it more difficult for them to envisage abstract concepts. But it is also important to give the person sufficient information about the options that they are being asked to choose between that they are given the opportunity to understand (if they are capable of doing so) the reality of those options. In other words, and to take a common example, you should not simply seek to assess a person's ability to decide between living at home and living in a care home in the abstract, but rather by reference to what continuing to live at home would be like (for instance, what care package would the relevant local authority provide) and what living in an actual care home would be like.<sup>25</sup>

31. The ability to understand also extends to understanding the reasonably foreseeable consequences of reaching a decision or failing to do so (s.3(4)).
32. When you are making an assessment of capacity it is vital that you ask yourself the questions set out at paragraph 64. Consider the responses, and record them in the assessment form or the COP3. Be in a position to explain to the court how questions have been put to P, where they have been put, what efforts have been made to ensure that P understands the information before him or her.

#### Is P unable to retain the relevant information?

33. We repeat the need to be precise about the information in question.
34. P needs to be able to retain enough information for a sufficient amount of time in order to make a decision. The Act specifies at s.3(3), however, that 'the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.'
35. This is an important consideration, particularly when dealing with the elderly or those with deteriorating memories. Capacity is the assessment of the ability to make a decision 'at the material time.' If information can be retained long enough for P to be able to make the relevant decision at the material time, that is sufficient, even if P cannot then retain that information for any longer period.

#### Is P unable to use or weigh the relevant information?<sup>26</sup>

36. Again, it is necessary to be clear what the information is (and how it is said to be relevant to the decision). This aspect of the test has been described as '*the capacity actually to engage in the*

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<sup>24</sup> [CC v KK & STCC](#) [2012] EWHC 2136 (COP).

<sup>25</sup> [CC v KK & STCC](#) [2012] EWHC 2136 (COP).

<sup>26</sup> Note that the statutory requirement is that P must be unable to use or weigh the relevant information. In practice, the two terms are usually used together, so we also refer here to "use and weigh." However, we think that it is clear that P should be considered to lack capacity if they are able to use the information, but not able to weigh it.

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*decision-making process itself and to be able to see the various parts of the argument and to relate the one to another.*<sup>27</sup> As with understanding, it is not necessary for a person to use and weigh every detail of the respective options available to them, merely the salient factors. Therefore, even though a person may be unable to use and weigh some information relevant to the decision in question, they may nonetheless be able to use and weigh other elements sufficiently to be able to make a capacitous decision.<sup>28</sup>

37. It is particularly important here to be aware of the dangers of equating an irrational decision with the inability to make one – P may not agree with the advice of professionals, but that does not mean that P lacks capacity to make a decision.<sup>29</sup>
38. Further, if a person is able to use and weigh the relevant information, the weight to be attached to that information in the decision making process is a matter for that person.<sup>30</sup> This means you need to be very careful when assessing a person's capacity to make sure – as far as possible – that you are not conflating the way in which they apply their own values and outlook (which may be very different to yours) with a functional inability to use and weigh information. This means that, as much as possible, you need as part of your assessment – your conversation – with P, to glean an idea of their values and their life story as it relates to the decision in question.
39. In some cases, it may be difficult to identify whether P is using a piece of relevant information but according it no weight, or failing to use the piece of information at all. Psychiatric expertise may be of assistance in such cases, as it may explain whether P's ability to process information is impaired and if so, to what extent.

#### Is P unable to communicate their decision?

40. It is very important to understand how this limb of the test works. It presupposes that the person has been able to make a decision: in other words, that they have been able to understand, retain, use and weigh the relevant information – the problem is that they cannot communicate the decision that they have made. It is therefore a limb of the test which only applies to a very limited group of people, for instance those with locked-in syndrome who may, despite all practicable steps, be unable to communicate.
41. If, therefore, you consider that the person is unable to understand, retain, use or weigh relevant information, but it is clear that they are communicating something, then:

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<sup>27</sup> *The PCT v P, AH & the Local Authority* [2009] EW Misc 10 (COP).

<sup>28</sup> *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80 at paragraph 37.

<sup>29</sup> "there is a space between an unwise decision and one which an individual does not have the mental capacity to take and ... it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates": PC at paragraph 54.

<sup>30</sup> *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80 at paragraph 38.

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- The record of your assessment should **not** say that they are unable to communicate their decision – it should say that they are unable to make a decision, and what they are communicating are wishes and feelings;
  - You should take into account what they are communicating for purposes of constructing the best interests decision: see further our guide to this process [here](#).

42. Any residual ability to communicate the decision is enough, so long as P can make themselves understood. This will be an area where it is particularly important to identify (and to demonstrate you have identified) what steps you should be taking to facilitate communication: for instance, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of any relevant carers or friends who may assist with communication.

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

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

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

- The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent (s.2(2)): if temporary, be careful to explain why it is that the decision cannot wait until the circumstances have changed before the decision is taken.
- It is important to remember that it is not necessary for the impairment or disturbance to fit into one of the diagnoses in the ICD-11 or DSM-5.<sup>31</sup> It can include medical conditions causing confusion, drowsiness, concussion, and the symptoms of drug or alcohol abuse. To this extent, therefore, the term “diagnostic” test which is often used here is misleading – the important thing is that there is a proper basis upon which to consider that there is an impairment or disturbance.
- Finally, particular care needs to be exercised if you are considering a person who appears to have a very mild learning disability – this may well not be enough to constitute an impairment or disturbance of the mind or brain for these purposes.<sup>32</sup>

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<sup>31</sup> The COP3 form recognises this in section 7, where it requires the identification of the material impairment of or disturbance in the functioning of the mind or brain, and the identification of the specific diagnosis (or diagnoses) “[w]here this impairment or disturbance arises out of a specific diagnosis.”

<sup>32</sup> See *WBC v Z* [2016] EWCOP 4.

### (3): Is the person's inability to make the decision because of the impairment or disturbance in the functioning of their mind or brain?

45. In all cases, it is important to be able to answer this third question – sometimes called identifying the 'causative nexus.'<sup>33</sup> In other words, are you satisfied that the inability to make a decision is because of the impairment of the mind or brain? Any pro forma form for the assessment of capacity that does not include a final box asking precisely this question is likely to lead you astray. In *PC and NC v City of York Council* this issue made all the difference. The Court of Appeal found that a conclusion that PC's inability to decide whether to resume married life with her husband upon release from prison "*significantly relate[d]*" to her mild learning disability was insufficient: the MCA requires the inability to be "because of" of the impairment, which is evidentially more stringent.
46. To reiterate, there has to be, and you have to show that you are satisfied why and how there is, a causal link between the disturbance or impairment and the inability to make the decision(s) in question. *JB's* case, again, shows how easy it is to assume that merely because a person has schizophrenia, they are then unable to take decisions regarding surgical procedures – this is entirely incorrect. The disturbance or impairment in the functioning of the mind or brain must also not merely impair the person's ability to make the decision, but render them unable to make the decision.<sup>34</sup>
47. There will be situations in which it is not entirely easy to identify whether a person is unable to make what professionals consider to be their own decisions because of:
- An impairment or disturbance in the functioning of their mind or brain (for instance the effect of dementia);
  - The influence of a third party (for instance an over-bearing family member); or
  - A combination of the two.
48. Examples of such cases include:
- The elderly patient on the hospital ward who looks to their child for affirmation of the 'correctness' of the answers that they give to hospital staff;
  - A person with mild learning disability in a relationship with an individual who (even when that individual is next door) is clearly still cautious about expressing any opinions that may go against what they think may be the wishes of that individual.

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<sup>33</sup> *PC and NC v City of York Council* [2013] EWCA Civ 478 at paragraph 52.

<sup>34</sup> *Kings College NHS Foundation Trust v C and V* [2015] EWCOP 80 at paragraph 31.

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

#### D: Flashpoints: (1) Fluctuating capacity

50. Some people's ability to make decisions fluctuates because of the nature of a condition that they have. This fluctuation can take place either over a matter of days or weeks (for instance where a person has bipolar disorder) or over the course of the day (for instance a person with dementia whose cognitive abilities are significantly less impaired at the start of the day than they are towards the end).

##### *One-off decisions*

51. If it is a one-off decision, it may be possible to put it off until the impact of the person's condition upon their decision-making abilities has diminished. At that point, you should record the person's decision, and, at least in any case where there may be a challenge later to the decision on the basis that they lacked capacity, record why you consider that the person had capacity to make it.<sup>35</sup> Depending upon the context, you should also record what the person would want in the event that they lose capacity in future to make similar decisions. This means that, if further decisions then need to be taken in their best interests, they can be taken in knowledge of what they would want.

52. If it is not possible to put the decision off, then you should take the minimum action necessary to 'hold the ring' pending the person regaining decision-making capacity.

##### *Repeated decisions*

53. Some decisions are not one-off and need to be repeated over a period of time. Examples include the management of property and affairs,<sup>36</sup> or the management of a physical health condition which requires a multitude of 'micro-decisions' over the course of each day. Although capacity is time-specific, in such a case, it will usually be appropriate to take a broad view as to the 'material time' during which the person must be able to take the decisions in question. If the reality is that there are only limited periods during the course of each day or week that the person is able to take

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<sup>35</sup> *A, B and C v X and Z* [2012] EWHC 2400 (COP) (grant of a will and grant of a power of attorney).

<sup>36</sup> *A, B and C v X and Z* [2012] EWHC 2400 (COP) at paragraph 37.

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their own decisions, then it will usually be appropriate to proceed on the basis that, in fact, they lack capacity to do so. This is particularly so where the consequences for the person are very serious if they are taken to have capacity when, in reality, this is only true for a very small part of the time. The courts have shown themselves increasingly willing to take this approach,<sup>37</sup> or, closely-linked, the approach of ‘zooming out’ to ask themselves a macro-question if appropriate.<sup>38</sup>

54. If the approach taken here is adopted, you should keep the person’s decision-making ability under review, and reassess if it appears that the balance has tipped such that they have, rather than lack, capacity to take the relevant decision(s) more often than not.

#### *Deprivation of liberty*

55. Precisely how to characterise the ‘material time’ in relation to the capacity assessment under DoLS is legally complicated at the level of principle.<sup>39</sup> However, the Deprivation of Liberty Safeguards Code of Practice, in essence, suggests that the same approach as set out above in relation to repeated decisions should be taken in the context of deprivation of liberty.<sup>40</sup>

### E: Flashpoints (2): Executive functioning

56. Another common area of difficulty is where a person – often a person with an acquired brain injury – gives superficially coherent answers to questions, but it is clear from their actions that they are unable to carry into effect the intentions expressed in those answers. It may also be that there is evidence that they cannot bring to mind relevant information at the point when they might need to implement a decision that they have considered in the abstract. Both of these situations are frequently referred to under the heading of ‘executive dysfunction.’ Executive function has also been described by Cobb J as *“the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we’ve learned in the past, and use this information to solve problems of everyday life.”*<sup>41</sup>
57. It can be very difficult in such cases to identify whether the person in fact lacks capacity within the meaning of the MCA 2005, but a key question can be whether they are aware of their own deficits – in other words, whether they are able to use and weigh (or understand) the fact that there is a

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<sup>37</sup> See Cheshire West And Chester Council v PwK [2019] EWCOP 57.

<sup>38</sup> See Royal Borough of Greenwich v CDM [2019] EWCOP 32 (‘macro’ decision about the management of diabetes in the context of rapidly fluctuating capacity to take all the many ‘micro’ decisions that might be required to bring about effective management of the condition).

<sup>39</sup> For discussion, see the Law Commission’s report on Mental Capacity and Deprivation of Liberty at paragraphs 9.38 and onwards.

<sup>40</sup> See paragraphs 8.22-8.24.

<sup>41</sup> A Local Authority v AW [2020] EWCOP 24.

mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations. Failing to carry out a sufficiently detailed capacity assessment in such situations can expose the person to substantial risks.

58. Although there is a (strange) lack of determinative case-law on this point,<sup>42</sup> our view is that:

- You can legitimately conclude that a person lacks capacity to make a decision if they cannot understand or use/weigh the information, that they cannot implement what they will say that they do in the abstract, or (if relevant) that when needed, they are unable to bring to mind the information needed to implement a decision;

**BUT**

- You can only reach such a finding where there is clearly documented evidence of repeated mismatch.<sup>43</sup> This means, in consequence, it is very unlikely ever to be right to reach a conclusion that the person lacked capacity for this reason on the basis of one assessment alone.

**AND**

- If you conclude that the person lacks capacity to make the decision, you must explain how the deficits that you have identified – and documented – relate to the functional tests in the MCA. You need to be able to explain how the deficit you have identified means (even with all practicable support) that the person cannot understand, retain, use and weigh relevant information, or communicate their decision.

## F: Flashpoints (3): Refusal to participate in capacity assessment

59. A problem that can be encountered in practice is where the person declines to take part in a capacity assessment.

60. It is important to distinguish between the situation where the person is **unwilling** to take part in the assessment, and the one where they are **unable** to take part. As Hayden J emphasised in *Re QJ*: “[i]t is important to emphasise that lack of capacity cannot be established merely by reference to a

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<sup>42</sup> In *TB v KB and LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14, the court found that P was unable to conduct the proceedings because the deficits in his executive function meant that he was unable to retain information (as he had short-term memory issues) or to use and weigh the information as part of making the decision; the court also found that while there were some compensatory strategies that could be deployed to assist P, they could not compensate for the deficits in his executive functioning. In *A Local Authority v AW* [2020] EWCOP 24, Cobb J found that AW’s problems with executive functioning were such as to make him unable to understand the information relevant to residence and care).

<sup>43</sup> In *TB & KH*, noted above the court had before it evidence of “glaringly obvious occasions when [P] has not been able to bring to mind information that it is important to know in the moment to make the relevant decision.”



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*person's condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). [In this case, a]n aspect of [the person's] behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice."*<sup>44</sup>

61. It is also important to think of ways in which to seek to persuade the person to take part, for instance on the basis that helping the assessor will help them. Solutions in reported cases have included identifying whether the reason for non-engagement is embarrassment about particular issues and finding ways which allow the assessing of capacity with requiring confronting the person with the issue,<sup>45</sup> and giving the person an element of choice as to who will carry out the assessment.<sup>46</sup>
62. If there is reason to think that the person's non-engagement is down to the actions of another person, it may be necessary to think about the use of inherent jurisdiction, although the Court of Protection could make orders requiring that person to allow access where it has reason to believe that the individual in question may lack capacity.<sup>47</sup>
63. Ultimately, however, it is not possible to force a person to undergo a capacity assessment. It will therefore be necessary to consider whether there is enough surrounding evidence to come to a reasonable belief that the person lacks capacity, if steps are going to be taken on the basis of s.5 MCA 2005. If the stakes are high, for the person or others, then it will be necessary to make an application to court to decide whether the person has or lacks the capacity to make the relevant decision.

## G: Flashpoints (4): Remote assessment

64. The COVID-19 pandemic has led to a dramatic change in the way that the majority of capacity assessments are carried out, the Department of Health and Social Care making clear in its guidance<sup>48</sup> on the MCA and DoLS during the COVID-19 pandemic, for instance, that:

*[t]o carry out DoLS assessments and reviews, remote techniques should be used **as far as possible**, such as telephone or video calls where appropriate to do so, and the person's communication needs should be taken into consideration (emphasis added).*

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<sup>44</sup> *QJ v A Local Authority & Anor* [2020] EWCOP 7.

<sup>45</sup> See *Re FX* [2017] EWCOP 36.

<sup>46</sup> *Wandsworth Clinical Commissioning Group v IA* [2014] EWCOP 990.

<sup>47</sup> See, for instance, *Re SA* [2011] EWCA Civ 128.

<sup>48</sup> April 2020, updated 15 June 2020.

65. The Court of Protection has also endorsed the lawfulness of remote assessment, the Vice-President setting out in *BP v Surrey*<sup>49</sup> the guidance that he had issued on 19 March 2020 to the effect that:

*'Can capacity assessments be undertaken by video when it is established that P is happy to do so and can be "seen" alone?*

*Suggested solution: In principle, yes. The assessor will need to make clear exactly what the basis of the assessment is (i.e. video access, review of records, interviews with others, etc.) Whether such evidence is sufficient will then be determined on a case by case basis. It is noted that GPs are rapidly gaining expertise in conducting consultations by video and may readily adopt similar practices for assessments. Careful consideration will need to be given to P being adequately supported, for example by being accompanied by a "trusted person." These considerations could and should be addressed when the video arrangements are settled. It should always be borne in mind that the arrangements made should be those which, having regard to the circumstances, are most likely to assist P in achieving capacity.<sup>50</sup>*

66. Remote assessment undoubtedly poses particular challenges, and requires considerable creativity. Some of those challenges, and ways in which it is proving possible to overcome those challenges, are discussed in this [webinar](#) led by Alex for the National Mental Capacity Forum. However, the following key points are crucial:

- None of the fundamentals set out above, or below, are altered by the need to conduct assessments remotely. However, preparation – including identification of the decision in question and the information relevant to the decision – becomes all the more important. Indeed, some DoLS assessors have identified that this process means that they are ultimately **more** confident that the assessment that they have reached is robust than might have been the case when they carried out such assessments previously;
- The requirement is always on the assessor to explain why, on the balance of probabilities, they have reached the conclusion that they have as to the person's capacity. Where assessments are taking place remotely, it may well be that the evidence that they take into account includes a considerable amount of 'triangulation' of the evidence that they have gained by way of the (remote) assessment of P themselves. In a limited number of cases,

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<sup>49</sup> [2020] EWCOP 17.

<sup>50</sup> The independent psychiatrist in fact declined to carry out the assessment remotely but Hayden J "remain[ed] of the view that creative use of the limited options available can deliver the information required to determine questions of capacity. It may be that experienced carers well known to P and with whom P is comfortable can play a part in facilitating the assessment. Family members may also play a significant role in the process. I am aware that in many areas of the country innovative and productive approaches of this kind are proving to be extremely effective" (*BP v Surrey (No 2)* [2020] EWCOP 22).

this surrounding evidence may have to do all the work because it is simply not possible to interact even in a limited way with P remotely;

- In some cases, assessors have identified that, in fact, providing P with technology and enabling a remote assessment constitutes a practicable step to supporting them to make their own decision – for instance, a person with autism who is more comfortable talking by video than face to face.

## H: Good capacity assessment and recording

67. A judge has helpfully summed up what makes a good capacity assessment in this way (although this relates to medical treatment, the principles are equally applicable to other contexts):

*The fundamental principles of self-determination, freedom from non-consensual medical treatment and personal inviolability, and the equally fundamental principles behind the right to health, are most respected by **capacity assessments that are criteria-focussed, evidence-based, person-centred and non-judgmental**. Such assessments engage with the demand (or plea) of the person to be understood for who they are, free of pre-judgment and stereotype, in the context of a decision about their own body and private life. (emphasis added)<sup>51</sup>*

68. A good record of a capacity assessment will show that you have:

- Been clear about the capacity decision that is being assessed;
- Ensured P (and you) have the concrete details of the choices available (e.g. between living in a care home and living at home with a realistic package of care);
- Identified the salient and relevant details P needs to understand/comprehend (ignoring the peripheral and minor details);
- Avoided the protection imperative;
- Demonstrated the efforts taken to promote P's ability to decide and, if unsuccessful, explained why;
- Recognised that assessment is not necessarily a one-off matter, and that you have taken the time to undertake to gather as much evidence as is required to reach your conclusion – including, for instance, returning to have a further conversation with P or obtaining corroborative evidence (particularly important in the case of deficits in executive functioning);

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<sup>51</sup> *PBU & NJE v Mental Health Tribunal* [2018] VSC 564. The judge in question is an Australian one, the case coming from Victoria, but applying a framework that looks very much like the MCA, and drawing on English case-law.

- Evidenced each element of your assessment:
  - (i) Why could P not understand, or retain, or use/weigh, or communicate in spite of the assistance given?
  - (ii) What is the impairment/disturbance? Is it temporary or permanent?
  - (iii) How is the inability to decide caused by the impairment/disturbance (as opposed to something else)?
- Answered the question: why is this an incapacitated decision as opposed to an unwise one?

69. Verbatim notes of questions and answers can be particularly valuable in the record of the assessment, because they can allow the reader then to get a picture of the nature of the interaction and judge for themselves both the nature of the questions asked and of the responses received.

70. If you are assessing a person's capacity to make a number of different decisions, it is important to take a step back and ask before reaching a conclusion as to the person's decision-making capacity in relation to each decision whether they all make sense logically together. This point was reinforced by the Court of Appeal in *B v A Local Authority*,<sup>52</sup> in which it emphasised the danger of approaching decisions in 'silos' and reaching mutually incompatible conclusions.

71. In addition to the specific points mentioned above, as with all documentation, the key general points to remember are:

- Contemporaneous documentation is infinitely preferable to retrospective recollection;
- Do not assert an opinion unless it is supported by a fact;
- "Yes/No" answers in any record are, in most cases, unlikely to be of assistance unless they are supported by a reason for the answer;
- What is reasonable to expect by way of documentation will depend upon the circumstances under which the assessment is conducted. An emergency assessment in an A&E setting of whether an apparently brain-injured patient has the capacity to run out of the ward into a busy road will not demand the same level of detail in the assessment or the recording as an assessment of whether a 90 year old woman has the capacity to decide to continue living in her home of 50 years where the concerns relate to her declining abilities to self-care.

## I: Conclusion

72. As the court memorably put it in *JB*, "*do not allow the tail of welfare to wag the dog of capacity*". An extremely foolish or irrational decision is still a decision and one that P is entitled to make. A

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<sup>52</sup> [2019] EWCA Civ 913.

decision can only be taken either in reliance on the general defence in s.5 MCA 2005 or by the court if and when it is proved on the balance of probabilities that (1) P is in fact unable to take the decision in question and (2) this inability is because of an impairment or disturbance in the functioning of the mind or brain.

73. And finally: it is possible to overcomplicate capacity assessments. Especially in the context of those with learning disability and dementia, the key to a successful assessment is patience and empathy. Those are not skills that are the province of particular professionals, but they are ones that can be taught, and need to be nurtured in settings in which it is understood that assessment of capacity to take complex decisions necessarily takes time.

## J: Useful resources

74. Useful free websites include:

- [www.39essex.com/resources-and-training/mental-capacity-law](http://www.39essex.com/resources-and-training/mental-capacity-law) – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing [marketing@39essex.com](mailto:marketing@39essex.com).
- [www.mclap.org.uk](http://www.mclap.org.uk) – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to ‘do’ the MCA 2005 better.
- [www.mentalhealthlawonline.co.uk](http://www.mentalhealthlawonline.co.uk) – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- [www.scie.org.uk/mca-directory/](http://www.scie.org.uk/mca-directory/) - the Social Care Institute of Excellence database of materials relating to the MCA.
- [www.nice.org.uk/NG108](http://www.nice.org.uk/NG108): - the NICE guideline on decision-making and mental capacity
- [www.gmc-uk.org/learningdisabilities/](http://www.gmc-uk.org/learningdisabilities/) - extremely useful resource designed in the first instance for doctors, but of much wider application, with particularly useful practical guidance upon communication techniques.
- [www.assessright.co.uk/](http://www.assessright.co.uk/) - a website developed in conjunction between NHS Aylesbury CCG and NHS Chiltern CCG to help health and social care professionals assess capacity for purposes of the MCA 2005.

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## Annex: relevant (and irrelevant information)

### Introduction

1. As noted in the body of this Guidance Note, the courts have now applied the MCA 2005 in respect of very many types of decision. In the course of doing so, they have given indications as to what they consider to be relevant (and sometimes irrelevant) information for purposes of those decisions. This Annex<sup>53</sup> pulls together the guidance given in relation to some of the most common decisions that are encountered in practice in the context of health and welfare matters. It is important to understand that each decision is specific, so that the information outlined here must always be tailored to the individual situation.<sup>54</sup>

### Medical treatment

2. The information that is relevant to the assessment of whether a person has the capacity to consent to a medical procedure is the information going to the nature, purpose and effects of the proposed treatment, the last of these entailing information as to the benefits and risks of deciding to have or not to have the operation, or of not making a decision at all.<sup>55</sup> It is important that the information as to risks is tailored to the risks particular to that particular individual.<sup>56</sup>
3. The courts have emphasised that is required is “a broad, general understanding of the kind that is expected from the population at large,” and that the person “is not required to understand every last piece of information about her situation and her options: even her doctors would not make that claim. It must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.”<sup>57</sup>

### Sex

4. In *A Local Authority v JB*,<sup>58</sup> the Court of Appeal held that, normally, the question in relation to sexual relations is not whether the person has capacity to consent (as had been previously understood) but whether the person has capacity to decide to engage in sexual relations. When considering that question, the information relevant to that decision may include:

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<sup>53</sup> Primarily prepared by Shereen Akhtar.

<sup>54</sup> See *B v A Local Authority* [2019] EWCA Civ 913.

<sup>55</sup> *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 25.

<sup>56</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at para 87.

<sup>57</sup> *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 26.

<sup>58</sup> [2020] EWCA Civ 735.

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- (a) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
  - (b) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
  - (c) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent. The courts have held previously that person must understand that they can change their mind in relation to consent to sex at any time leading up to and during the sexual act.<sup>59</sup>
  - (d) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
  - (e) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom. The courts have held previously that the knowledge required is fairly rudimentary. "In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom."<sup>60</sup> Nothing more than this is required. There is thus no need to be able to name and describe each, or indeed any, potential infection, nor must a person specifically be able to understand condom use (this is an example of a precaution);<sup>61</sup>
5. The Court of Appeal in *JB* expressly declined to decide whether **all** the information set out above will be relevant in each case, it is suggested that as a matter of logic there will be some situations where all the information cannot be relevant. As Baker J had noted in *Re TZ*,<sup>62</sup> the relevant information included the risks of pregnancy only "if the relations are heterosexual".
6. Notwithstanding the reframing of the test in *JB*, it is suggested that the assessment must not however entail consideration of the following elements, should they be present in any particular case:
- (a) **The identity of the sexual or marriage partner.** In other words, capacity to consent to sexual relations is act-specific, rather than person-specific.<sup>63</sup>

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<sup>59</sup> *A Local Authority v H* [2012] EWHC 49 (COP) at para 25; *LB Tower Hamlets v TB & Ors* [2014] EWCOP 53 at para 41; *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 54.

<sup>60</sup> *A Local Authority v H* [2012] EWHC 49 COP at para 23.

<sup>61</sup> *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 72.

<sup>62</sup> *Re TZ* [2013] EWHC 2322 (COP) at paras 31-3.

<sup>63</sup> *IM* at para 77.



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- (b) **An understanding of what is involved in caring for a child (should a protected person become pregnant).** This comes close to crossing the line into a paternalist approach that would find incapacity on the basis that a decision is simply unwise.<sup>64</sup>
  - (c) **The risk that may be caused to herself through pregnancy, or the risk to future children.** The social, emotional and psychiatric consequences of falling pregnant or those attaching to the children arising from such a pregnancy cannot be part of the relevant information informing the decision of whether a protected party has the capacity to consent to sex or marriage.
  - (d) **The fact that the opportunity for sexual relations with a specific partner will be limited for some time to come into the future.**<sup>65</sup>
  - (e) **The ability to understand or evaluate the characteristics of some particular partner or intended partner.**<sup>66</sup>

## Marriage

- 7. The test for capacity to marry is a simple one, and the issue is act- (or status-), rather than person-specific. The wisdom of the marriage is irrelevant,<sup>67</sup> and the courts have emphasised that the bar must not be set high so as to avoid discrimination.<sup>68</sup> The information relevant to the test is:<sup>69</sup>
  - (a) **The broad nature of the marriage contract;**
  - (b) **The duties and responsibilities that normally attach to marriage,** including that there may be financial consequences and that spouses have a particular status and connection with regard to each other;
  - (c) **That the essence of marriage is for two people to live together and to love one another.**
  - (d) **That marriage will make any existing will invalid.**
- 8. It has also been held that the person must not lack capacity to enter into sexual relations.<sup>70</sup>
- 9. Information that has been held to be irrelevant includes:<sup>71</sup>

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<sup>64</sup> Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549, (Fam) [2011] Fam 61 at [61]

<sup>65</sup> *IM*.

<sup>66</sup> Munby J in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at para 86.

<sup>67</sup> Hedley J in *A, B and C v X and Z* [2012] EWHC 2400 (COP) at para 32.

<sup>68</sup> *Sheffield City Council v E* [2004] EWHC 2808 (Fam) at para 144.

<sup>69</sup> The first three come originally from the judgment of Munby J in *Sheffield City Council v E* [2004] EWHC 2808 (Fam), as applied subsequently by Court of Protection judges, most recently by Parker J in *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20. The last comes from the judgment of HHJ Marston QC in *Re DMM* [2017] EWCOP 32.

<sup>70</sup> See most recently *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 76.

<sup>71</sup> All of these come from *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at paras 78-79.

- (a) That in a family which facilitates arranged marriage the person is much more likely to find a spouse than if they were unaided;
- (b) How financial remedy law and procedure works and the principles are applied. A person who lacks capacity to conduct proceedings in relation to any financial aspects of divorce proceedings does not necessarily lack capacity to marry.
- (c) That (at least in the context of entry clearance) a spouse may require entry clearance.

## Contraception

10. In deciding whether a person has capacity to make decisions about their own contraceptive regime, the information that will be seen as relevant is as follows:<sup>72</sup>

- (a) **A rudimentary understanding of the reproductive process.** This would involve an understanding that pregnancy is a result of sexual intercourse and not other (non-sexual) activity such as eating or ingesting unfamiliar substances.<sup>73</sup>
- (b) **A basic understanding of the purpose of contraception.** This understanding would encompass both the reason for contraception and what it does. This would primarily include understanding that there is a likelihood of pregnancy if it is not in use during sexual intercourse;
- (c) **The types of contraception available and how each is used;**
- (d) **The advantages and disadvantages of each type;**
- (e) **The possible side-effects of each and how they can be dealt with;**
- (f) **How easily each type can be changed;**
- (g) **The generally accepted effectiveness of each;**
- (h) **If medically necessary, the important medical information associated with a pregnancy, delivery or future pregnancy.** This is highly specific to the person involved but could include

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<sup>72</sup> Save where otherwise indicated, these come from the decision of Bodey J in *A Local Authority v A* [2010] EWHC 1549 (Fam).

<sup>73</sup> Cobb J in *The Mental Health Trust, The Acute Trust & The Council v DD & Ors* [2015] EWCOP 4 at para 67.

the risk of development of specific medical conditions or complications due to pregnancy or childbirth. For those who suggest a preference for a home birth, the additional risk of a person of home birth must also be understood. The risk of premature birth, where it exists, must be understood, as well as the effects it may have on the child. This is all contingent on there being present one party for whom a further pregnancy could lead to serious health risks, whether physical or mental.<sup>74</sup>

11. The following factors are not relevant to this assessment:<sup>75</sup>

- (a) **The woman's understanding of what bringing up a child would be like in practice;**
- (b) **Any opinion of the woman or other expert or authority as to how she would be likely to get on with child rearing;**
- (c) **Whether any child would be likely to be removed from her care.**

## Residence

12. The information relevant to an assessment as to person's capacity to make a decision as to their place of residence is:<sup>76</sup>

- (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

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<sup>74</sup> *The Mental Health Trust, The Acute Trust & The Council v DD (By her litigation friend, the Official Solicitor)*, BC [2015] EWCOP 4 (Fam)

<sup>75</sup> Again, all of these come from *A Local Authority v A* [2010] EWHC 1549 (Fam).

<sup>76</sup> This comes from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam); most recently endorsed in *Re B* [2019] EWCOP 3 per Cobb J.

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.

13. The following information will not be relevant to a decision as to capacity concerning residence arrangements of the person being assessed:<sup>77</sup>

- (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;**

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<sup>77</sup> These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

- (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).

## Contact

14. In the delicate task of assessing whether a protected person has the capacity to decide whether to maintain, reduce or eliminate entirely their contact with another person, the factors which constitute relevant information are:<sup>78</sup>

- (a) **Whom the contact will be with.** Unlike in sex and marriage cases, the identity of the person in regards to whom the decision would be made is crucial. The decision must always be specific to a particular person.<sup>79</sup> We are aware that this view is not shared by the Official Solicitor, but in our view the case-law is clear upon the matter;
- (b) **In broad terms, the nature of the relationship between the person under assessment and the contact in question;**
- (c) **What sort of contact the person under assessment could have with each of the individuals with whom they may have contact.** This must include an exploration of different locations in which contact could occur, including within a private home or in a community setting such as a cafe. It must also include an exploration of the duration of contact available to the person under assessment, from an hour to overnight stays. There should also be discussion and understanding of the arrangements regarding the presence of a support worker;
- (d) **The positive or negative aspects of having contact with each person.** This will require a broad discussion which must be kept structured in the assessor’s mind. Evaluations must only be disregarded as irrelevant if they are based on “demonstrably false beliefs”.<sup>80</sup> Furthermore, the discussion should include not only current experiences but also a discussion of past pleasant experiences with the contact, of which, in appropriate circumstances, the person under assessment should be reminded.

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<sup>78</sup> Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam); endorsed most recently in *Re B* [2019] EWCOP 3 per Cobb J.

<sup>79</sup> MacFarlane LJ in *PC (by her litigation friend the Official Solicitor), NC v City of York Council* [2013] EWCA Civ 478 at [38]

<sup>80</sup> Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam) at para 45

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- (e) **What a family relationship is and that it is in a different category to other categories of contact.** However the assessor must take care not to impose their own values in this assessment;
- (f) **Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party.** If so, there must be a discussion of the potential risk that the person poses to the protected party, and if such a risk exists, whether the risk should be run. This may entail looking closely at the reasons for conviction and the protected party's ability to understand the danger posed to themselves or others around them.<sup>81</sup>

15. The following are not relevant to the assessment:<sup>82</sup>

- (a) **The nature of friendship and the importance of family ties.** Beyond the idea of a separate category for family relationships, any further exploration of this idea is irrelevant, especially where it may tend to become value laden or parochial;
- (b) **The long term possible effects of contact decisions.** As with residence decisions above, consideration of these would fall into assessment of consequences that are not "reasonably foreseeable" against the instruction of the Mental Capacity Act 2005;
- (c) **Risks which are not clearly in issue in the case.** Therefore a consideration of financial abuse or assault when there is no indication of its likelihood would be irrelevant.

16. It is important to recognise that a person may have capacity to consent to sex or marriage, but simultaneously lack capacity to maintain contact with a particular person.<sup>83</sup> The former involves an understanding of "*matters of status, obligation and rights*" whilst the latter "*may well be grounded in a specific factual context.*" The process of evaluating these capacities must be the same but the factors to be taken in to account will differ. Indeed, it is not uncommon for the court to be asked (for example in dementia cases) to regulate the contact that one spouse may have with the other.<sup>84</sup>

## Social media

17. The issue of whether someone has capacity to engage in social media for the purposes of online 'contact' is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact. It has been held that "*[t]here are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; [...]*"

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<sup>81</sup> Hedley J, approved in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 13.

<sup>82</sup> These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

<sup>83</sup> *A Local Authority v TZ (No. 2)* [2014] EWCOP 973.

<sup>84</sup> McFarlane LJ in in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 38.

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*in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.”<sup>85</sup>*

18. The relevant information is (described in the terms that would be applicable in assessing a person with learning disability:<sup>86</sup>

- (a) That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;
- (b) That It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites. The precise details or mechanisms of the privacy settings do not need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;
- (c) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended. 'Sharing' in this context has the same meaning as in 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribution. 'Rude or offensive' is used here as "these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;"<sup>87</sup>
- (d) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
- (e) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;

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<sup>85</sup> *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at paras 25 and 26 per Cobb J.

<sup>86</sup> Taken from *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 28 per Cobb J.

<sup>87</sup> *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 29(iii) per Cobb J.



- (f) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime. 'Sharing' has the same meaning as above; see above also in relation to 'rude or offensive.' This statement "*is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' [...] Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information [...] is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*"<sup>88</sup>

19. Not relevant is the information that internet use may have a psychologically harmful impact on the user:

*It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005.*<sup>89</sup>

## Care

20. In the context of decisions relating to care, each decision will be specific instead of general, and will have to be revisited should circumstances or the question posed to the person under assessment change. The following constitute relevant information to an assessment of whether a person has capacity to decide their own care:<sup>90</sup>

- (a) With what areas the person under assessment needs support;
- (b) What sort of support they need;
- (c) Who will provide such support;
- (d) What would happen without support, or if support was refused.

<sup>88</sup> *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 29(iv) per Cobb J.

<sup>89</sup> *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 30 per Cobb J.

<sup>90</sup> Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam). Endorsed most recently in *Re B* [2019] EWCOP 3 per Cobb J.

- (e) That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

21. The following are not relevant to any assessment of capacity as to care:<sup>91</sup>

- (a) How care is funded;
- (b) How overarching arrangements for monitoring and appointing care staff work.<sup>92</sup>

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<sup>91</sup> Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

<sup>92</sup> *LBX v K, L and M* [2013] EWHC 3230 (Fam)

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