



MCA Guidance Contact

Grab sheet guidance and links to support practitioners
when undertaking capacity assessments relating to
contact decisions



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CONTACT DECISIONS MCA GUIDANCE NOTES

**GRAB SHEET MENTAL CAPACITY ACT GUIDANCE
DOCUMENTS: CONTACT**

Version 2

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1	LSAB MCADOLS Subgroup	N/A	N/A
2	LSAB MCADOLS Subgroup		<ul style="list-style-type: none">• Disclaimer strengthened - not legal advice• The order of the MCA assessment• Source acknowledgment added re relevant information• Live links updated
3			
4			
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GRAB SHEET MENTAL CAPACITY ACT GUIDANCE DOCUMENTS: CONTACT

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

(Please also read grab sheet Guidance on Sexual Relations in conjunction with this guidance where necessary)

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

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

Section1: The five statutory principles are

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

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

Section 2 MCA 2005 states that

(1) a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or the brain

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

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

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

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

Section 3 provides that:

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

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

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

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

The Functional Test

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

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

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

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

Impairment

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

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

Causation

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

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

Assessing Capacity for Contact: Contact – COP Indicated

Any situation where a restriction on contact is being considered is a potential infringement of Article 8 Human Rights (right to personal and family life) and as such needs to be very carefully considered.

When assessing capacity in this area workers need to be mindful of the potential intrusion and impact on Human Rights. There will always be a fine balance between protection and risk, rights, and responsibilities. Whilst the Principle 1 of the MCA is Presumption of Capacity, we should not hide behind or rely on Presumption of Capacity, where there are reasonable doubts over decision making ability. The below Essex Chambers Guidance again provides salient information relevant to this decision.

Any restrictions on contact could suggest the **Court of Protection** is indicated. Workers will need to demonstrate that they have applied the principles of the Act carefully before restrictions on contact are in place and that these restrictions are **necessary and proportionate** for the welfare of the person. This is important both now and when **the Liberty Protection Safeguards** are in place.

General information

The salient information needs to be relevant to the personal situation in each circumstance. For example, when assessing capacity around sexual relations where it is a same sex relationship or regarding a woman over childbearing age, the risk of pregnancy may not be required to be understood. The same person centred considerations need to be applied in other circumstances e.g.: things of particular relevance around residency may differ from one person to the next for example being able to have a pet in a care home may be pivotal for person or of no relevance to the next. The salient information is a guide for workers to apply and to consider they have provided suitable information considered by case law to be relevant in order to assess capacity. They should be able to represent how they have done so in the body of their assessment.

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

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

Salient Information

The content in this section has been borrowed from Essex Chambers' Guidance Note: Relevant Information For Different Categories Of Decisions, November 2021. To check for any updates please see [Essex Chambers MCA Guidance Note](#)

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:

(a) Whom the contact will be with. The identity of the person in regard to whom the decision would be made is crucial. The decision must always be specific to a particular person or (where relevant) category of persons.

(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”. 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.

(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.

The following are not relevant to the assessment:

(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.

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. 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 into 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.'

Particularly relevant case law in this area can be found at: [39 Essex Chambers | COP Cases – 39 Essex Chambers](#). In key word search select 'Mental capacity – Contact'

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

Key helpful documents

Please see the **MCA Code of Practice**

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

Essex Chambers Assessing Mental Capacity Guidance notes:

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

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

Other links which may be of use

Lancashire Safeguarding Adults Board. Lots of resources on here, well worth a look.

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/resources/mca-dols.aspx>

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

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

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

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

Lancashire Self Neglect Framework link:

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

Office of the Public Guardian (OPG)

Find out if someone has a registered attorney or deputy

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

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

Assessing Capacity for Residence:

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

References

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

Mental Capacity Act Code of Practice <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice> (Date accessed 25.10.22)