Assessment of Capacity
Accompanying Notes

These notes should be used in conjuction with the Mental Capacity Act, Mental Capacity Act Code of Practice and organisation policy. In case of doubt, you should always consult the Code of Practice itself.

The Mental Capacity Act (MCA) 2005 applies in England and Wales, providing a legal framework to protect adults (aged 16 or over) who lack capacity to make particular decisions, and those acting and taking decisions on their behalf. Everyone working with a person who lacks capacity must comply with the MCA (including the 5 statutory principles below) and "have regard" to the Code of Practice. Anyone departing from the Code of Practice must be able to demonstrate good reasons for this.

Five Statutory Principles

A person is assumed to have capacity. A lack of capacity has to be clearly demonstrated

No one should be treated as unable to make a decision unless all practicable steps to help them have been exhausted.

A person can make an unwise decision. This does not necessarily mean they lack capacity.

If it is decided a person lacks capacity then any decisions taken on their behalf must be in their best interests.

Any decision taken on behalf of a person who lacks capacity must take into account their rights and freedom of action. The decision should achieve the person's best interests in the least restrictive manner possible.

When should an MC1 form be filled in?

The MC1 should be used where there is a reasonable belief or suspicion that the person may not have the mental capacity to make a particular decision at the time it needs to be made. This is particularly important in the circumstances of:

adult or public protection issues
an accommodation change e.g. to long term care, hospital admission
any case conference convened around an issue that has/will have significant consequences for the person
an acute hospital setting where physical interventions are proposed for a patient who is not detained under the Mental Health Act or where there are restriction of liberty issues e.g. high level observations to prevent from the risk of falls/wandering. (Note: unless there are major changes in capacity or proposed interventions only one form should be completed per admission. Minor changes being recorded in routine clinical notes)
Where there may be conflicting views about capacity eg with family

ASSESSING CAPACITY

Who should undertake assessments of capacity?

Capacity assessments should be undertaken by the person who is i) most able to assess the person's capacity based on their own knowledge and experience of the person, the factors surrounding the decision and the consequences of acting/not acting and ii) directly concerned with the person at the time the act/decision needs to be taken. This means assessments of a person's capacity may be undertaken by different people at different times. Examples include:

- For minor decisions relating to day to day care, the person providing that care. A care assistant can assess the capacity of someone with a profound learning disability in relation to what they should wear for the day based on their knowledge of the prevailing weather conditions, the clothes the person has available to them, the clothes the person appears to like wearing and any previous choices they may have made for themselves.
- For acts/decisions relating to medical treatment, the healthcare professional involved. A district nurse can assess capacity in relation to dressing a pressure wound for someone suffering from dementia based on their clinical knowledge of wound management, their understanding of the likely consequences if they did not dress the wound, the likelihood of the person tampering with the dressing, any previous preferences, wishes and feelings expressed by the person about their treatment etc
- For legal decisions, the solicitor/legal practitioner involved, although in cases of doubt, the MCA Code suggests gaining a second opinion from a Doctor or other professional expert. It is also at the discretion of the Court whether they will accept capacity assessment from someone other than a medic.
- For welfare issues such as minor changes to care plans, planned respite accommodation and routine financial decisions – the Care Manager/Care Coordinator involved.
- In more complex situations, a social work or multi-disciplinary assessment of capacity may be required. For social care workers, it may be advisable for two people to conduct the interview, with one asking questions while the other records responses verbatim.

Preparing to assess capacity

It may be helpful to prepare some preliminary statements to help enable the person to understand the purpose of the interview; also, to prepare questions or materials to help structure the course of the interview, taking verbatim answers from the person, as objective evidence of their capacity or lack of capacity. See also examples at Appendices A & B

Assessing Capacity - Practice checklist

Preparation	✓
Are you clear about the decision that has to be made?	
Identify information that is relevant to the decision	
Can the decision be postponed until a time when the person is better able to participate?	
Consider the most effective way of communicating information to the person so that they are more likely to understand. (consult others involved, to ascertain best communication methods).	

Consider whether the person might need support from a friend or family member or professional that they trust.	
If involving other people, have you considered how much information should be shared in the person's best interests?	
Consider the impact of physical health on communication eg: sensory impairment, pain, effects of medication.	
Be aware of cultural, ethnic or religious factors that may shape the way the person behaves, thinks or communicates.	
Consider whether more specialist advice regarding communication needs is needed.	
Would the use of an advocate improve communication?	
Interview/discussion with person	
Does the person feel at ease?	
Is the time of day and environment right?	
Have you tried all possible and appropriate means of communication? Use simple language and (if appropriate, other methods) eg visual aids/images, written information , interpreter, sign language, electronic media or makaton.	
Is there a long-standing problem affecting the person's ability to understand the issue. If so, do you need to consider accessing psychological intervention if the decision can be delayed?	
Consider the length of interview time. Does the issue or person's needs necessitate more than one visit/discussion?	
Break down important information into smaller, easier to understand points and allow them time to understand each point before continuing.	
Have you explained the risks and benefits of the decision in a balanced way?	
Have you explained the consequences of making no decision at all?	
If there are choices, has the person been informed of alternatives (including risks/benefits of each choice)?	
Does the person have all the relevant information to help them make an informed decision?	

Evidence required for "lack of capacity"

(a) Balance of probabilities

When assessing capacity, the conclusion as to whether a person lacks capacity should be based on the "balance of probabilities" test. This dictates that on the evidence available – it is more likely than not that the person lacks capacity to make this decision at this time.

(b) Reasonable Belief

Having conducted the two stage test, and started with the presumption of capacity – a practitioner should be able to demonstrate that they "reasonably believe" that the person lacks capacity.

You should be able to:

- Give reasons for the conclusion that a person lacked capacity to make a specific decision at a specific time; and
- Provide objective evidence to support that belief

Situations where capacity fluctuates

In some circumstances, a person can have fluctuating capacity to make some decisions. (See MCA Code paras 4.26 – 4.27 for examples of situations and further guidance). Case

law suggests that where a person is assessed has having fluctuating capacity for decision making in any area, a list of indicators relating to loss of capacity should be included in their relapse management plan or advance statement to help carers/professionals identify when it is likely that the person has lost/will lose capacity and manage any associated risks. The best client centred practice will clearly be to agree the response with the client and family in advance whilst the client still has capacity.

The Role of the person's "Belief" in the Capacity Test

The factor of "belief", present in the earlier "common law" test, is notably absent in the MCA test. However courts have since confirmed that the specific requirement of belief has been "subsumed in the more general requirements of understanding and of ability to use and weigh information". If an individual does not *believe* a vital piece of information necessary to make a decision then such an omission may so distort the process of judgment as to render a decision invalid.

Issues relating to Advance Decisions:

Does the person currently have capacity to consent to or refuse treatment? If the person has capacity, they can make a decision to refuse treatment, or they can change a previous advanced decision to refuse a particular treatment and accept it. In these situations an Advance Decision **does not apply.**

Does an Advance Decision Exist; is it valid & applicable? Advance Decisions only concern treatment *refusals* and relate only to medical treatment. It is the responsibility of the person making the Advance Decision to ensure it will be drawn to the attention of healthcare professionals when needed. Section 25 of the MCA outlines factors to consider in deciding whether an Advance Decision is valid and applicable and further guidance is given in the MCA Code paras 9.38 – 9.44. In practice, professionals should consider how long ago the Advance Decision was made, have there been changes in the person's personal life that may affect validity of the Advance Decision, and whether there have been changes in medical treatments the person did not foresee. Examples might include a Johovah's Witness who has previously had an advanced decision to refuse blood transfusion but who has recently very publically converted to another faith suggesting a change in their views.

Disagreements about Advance Decisions may arise between professionals or between family and professionals. The senior clinician must consider all of the available evidence; they may consult with relevant colleagues and others who are close to the person. The point of such discussions should be to seek evidence regarding whether the Advance Decision is Valid and Applicable, rather than to overrule it. See MCA Code 9.64 – 9.66 for further guidance.

Healthcare professionals must follow an Advance Decision if it is valid and applies to the particular circumstances. If they do not, they could face criminal prosecution or civil liability. See MCA Code 9.57 – 9.60 for further guidance regarding Advance Decisions and professional liability.

"SPECIAL" CAPACITY TESTS

It has been established that the capacity test within the MCA is the appropriate test for decisions in relation to medical treatment, finance and welfare. However, some *specific*

areas of people's lives require decisions to be made that have their own capacity assessment and remain valid despite the introduction of the Act. These assessments should be used alongside the more general test within the MCA.

Note: Practitioners are advised to access resources such as Community Care Inform for up to date case law. In any event, if you are faced with any of the situations below senior management and legal advice should be considered.

Below are some examples of cases and relevant commentary which consider the kind of issues likely to be faced:

Capacity to Consent to Marriage

Case law has previously taken the definition of marriage from *Re the estate of Park, deceased, Park v Park* [1954] i.e. "The duties and responsibilities that normally attach to marriage can be summarised as follows: marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, the essence of the contract being an agreement between a man and a woman to live together, and to love one another as husband and wife, to the exclusion of all others. It creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance". The relevant question is whether the person has capacity to marry, not whether they are wise to marry. The Court of Protection has no jurisdiction over whether it is in the person's best interests to marry a particular partner or indeed to marry at all. However, practitioners should note there is useful commentary on more recent cases in Community Care Inform which consider this issue

Practice points

There are in essence, two aspects to consider in assessing a person's capacity to marry:

- Does he or she understand the nature of the marriage contract?
- Does he or she understand the duties and responsibilities that normally attach to marriage?

Capacity to Consent to Sexual Relations:

Case law to date suggests that the test of capacity to enter into sexual relations must be the same as that required in criminal law: Does the person have sufficient knowledge and understanding of the nature and character - the sexual nature and character - of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it and communicate their choice.

In (Re C [2009] UKHL 42) Baroness Hale held that capacity to consent to sexual relations is situation and person specific adding that "it is difficult to think of any activity which is more person and situation specific than sexual relations". She also set a more rigorous test than prior rulings stating that the threshold to consent to sexual relations was not merely the ability to understand the nature of the act itself giving the example of a client being commanded by God to have sex. Such a client may understand all the required information but be unable to weigh up the issues.

Practice points

Can the person demonstrate that

- they understand and have sufficient knowledge of the sexual nature of the act of sexual intercourse
- they appreciate the reasonably foreseeable consequences of sexual intercourse they have the capacity to choose whether or not to engage in sexual intercourse
- they can communicate their choice as to whether or not to engage in it
- consider any of the factors relating to sexual relations with that particular partner, the situation and any external influences which may interfere with capacity

Capacity to Litigate

The issue of capacity to litigate was considered in *Masterman -Lister v. Brutton and Co (No1)* [2003] 1 WLR 1511.

Practice points

- Capacity to litigate is issue-specific; some issues are much simpler to understand than others.
- Any assessment of capacity to litigate should be not be made on the person's capacity to understand litigation generally, but on the specific litigation in question.
- The test to be applied is whether the person is capable of understanding, with the assistance of proper explanation from legal advisers and experts, the issues on which his consent or decision is likely to be necessary in the course of those proceedings.

Testamentary Capacity (the capacity to make a will)

The test for the capacity to make a will dates from as far back as 1870! (Banks v Goodfellow) and is normally undertaken by a solicitor often with the assistance of a view from a medical practitioner.

In order to have testamentary capacity the testator must be able:

1.To understand the nature of the his act ie making a will and its effects.
2. To understand the extent of the property of which he is disposing.
3. To comprehend and appreciate the claims to which he ought to give effect. He must not be subject to any disorder of mind as shall "poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties".

Capacity to decide whether to take Contraception

This test was initially established in 2010. Mr Justice Bodey held that the test for capacity should be so applied as to ascertain the woman`s ability to understand and weigh up the immediate medical issues surrounding contraceptive treatment (the "proximate medical issues") including:

1. The reason for contraception and what it does (which includes the likelihood of pregnancy if it is not in use during sexual intercourse);
2. The types available and how each is used;
3. The advantages and disadvantages of each type;
4. The possible side-effects of each and how they can be dealt with;
5. How easily each type can be changed; and
6. The generally accepted effectiveness of each

The Judge continued to say that although the “reasonably foreseeable consequences” of not taking contraception involve possible conception, a birth and the parenting of a child the Judge accepted the submission that it is unrealistic to require consideration of a woman`s ability to forsee realities of parenthood, or to expect her to envisage the fact-specific unpredictable demands of caring for a particular child not yet conceived (let along born) with unpredictable levels of third-party support. To apply such a test would in his words “set the bar too high” and such would be matters more pertinent to best interest determinations rather than capacity

Coercion and Capacity

Case law to date suggests that the inherent jurisdiction of the Court of Protection can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either:

(i) Under constraint i.e. confined, controlled or under restraint (not necessarily incarcerated), resulting in some significant curtailment of the freedom to do those things others are entitled to do.

(ii) Under Coercion or undue influence: i.e. where a vulnerable adult's capacity or will to decide has been sapped and overborne by the improper influence of another. Where the influence is from a parent or close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, be subtle, insidious, pervasive and powerful. In such cases, very little pressure may influence the person’s capacity.

(iii) Under other disabling circumstances: i.e. other circumstances that may reduce a vulnerable adult's understanding and reasoning powers, preventing him/her from forming or expressing a real and genuine consent, eg: deception, misinformation, physical disability, illness, weakness (physical, mental or moral), tiredness, shock, fatigue, depression, pain or drugs.

The inherent jurisdiction can thus be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not limited to, mental disorder or mental illness. A vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he or she is reasonably believed to be incapacitated as a result of constraint, coercion, undue influence or other vitiating factors.

It is important to note here that the court is not suggesting over ruling the decision of a capable adult in such circumstances but merely suggesting that such scenarios can lead to incapacity whilst not being diagnosable as medically impaired in the meaning of the MCA

Many vulnerable adults may be seen to be a similar situation and it is worth staff bearing the possibility of such factors “sapping the will” of the client and their consequent capacity to make their own decision.

Who is a relevant advocate?

As far as possible you must consult other people if it is appropriate to do so and take into

account their views as to what would be in the best interests of the person lacking capacity, especially:

anyone previously named by the person lacking capacity as someone to be consulted e.g. in an advance statement

carers, close relatives or close friends or anyone else interested in the person's welfare

any person involved from an independent advocacy organisation

any attorney appointed under a Lasting Power of Attorney

someone with the person's Enduring Power of Attorney (financial matters)

any deputy appointed by the Court of Protection to make decisions for the person.

For decisions about serious medical treatment, significant financial decisions or certain changes of accommodation, and where there is no one who fits into any of the above categories, you may need to instruct an Independent Mental Capacity Advocate (IMCA)

Independent Mental Capacity Advocate (IMCA)

The IMCA service provides independent safeguards for particularly vulnerable people who lack capacity to make important decisions and have no-one else to support or represent them. IMCAs work with those individuals, representing their views to those working out what is in the person's best interests. The IMCA's legal powers include the right to interview the person in private, examine and take copies of any records that the person holding the records thinks are relevant to the investigation (see MCA Code paras 10.26-10.27). The IMCA can also request a second medical opinion and challenge the assessment of capacity and best interests decision.

Who meets the requirements for an IMCA?

- People who lack capacity to make a specific decision at a specific time, relating to serious medical treatment or long term accommodation, and
- Have no family/friends who are available and appropriate to support them, and
- Have not previously named someone who could help with a decision, and
- Have not made a Lasting Power of Attorney or Enduring Power of Attorney

Nor can an IMCA be instructed if a Court appointed Deputy continues to act on the person's behalf.

What decisions require an IMCA?

An IMCA must be instructed and consulted for someone who meets the above requirements, whenever important decisions need to be made, about:

- Serious medical treatment (See MCA Code 10.42- 10.50 for guidance)
- A change in accommodation (hospital for more than 28 days, a care home for more than 8 weeks) (See MCA Code 10.51- 10.58 for guidance)

An IMCA may be instructed to support someone who lacks capacity for decisions regarding:

- Care reviews (where family/friends/informal carers to consult)
- Adult protection cases (whether or not family/friends/ informal carers can be consulted)

General Advocacy

Situations may arise which do not fulfil the criteria for an IMCA, but in which the person lacking capacity may still benefit from the involvement of an Advocate eg: ensuring they have access to information to make choices; by attending meetings to support service users and to ensure they are listened to; discovering what service user's choices are. They can also be requested to provide independent views of "best interests" for people who lack capacity if there are differences of views and would be expected to provide a written brief report of their recommendations. A referral to general advocacy may be made where there is conflict between family/friends/carers and professionals.

Lasting Power of Attorneys (LPAs)

In October 2007 the MCA introduced Lasting Power of Attorney (LPA) which allow people over the age of 18 to formally appoint someone to look after their health, welfare and/or financial decisions, if at some time in the future they lack the capacity to make these decisions for themselves. The person appointed is known as an attorney. The LPA gives the attorney authority to make decisions on behalf of the donor and the attorney has a duty to act or make decisions in the best interests of the person

A personal welfare LPA is for decisions about both health and personal welfare

A property and affairs LPA is for decision about financial matters

The attorney will be the decision-maker on all matters relating to the person's care and treatment. Unless the LPA specifies limits to the attorney's authority the attorney will have the authority to make personal welfare decisions and refuse treatment (except life-sustaining treatment unless the LPA specifies this) on the donor's behalf. If there is a dispute that cannot be resolved e.g. evidence that the attorney is not acting in the client's best interests or not following the Code of Practice then a discussion should take place with a line manager or the wider care team to decide whether the Public Guardian should be requested to investigate.

It is important to read (and keep copies of) the LPA in order to clarify the extent of the attorney's power.

Deputy appointed by Court of Protection

A deputy appointed by the Court of Protection makes ongoing decisions about a person who lacks capacity. The Court of Protection will have defined the remit of their powers

Court of Protection & the Office of the Public Guardian

- *The Court of Protection*
  The Court of Protection deals with decision making for adults (and some children) who may lack capacity to make specific decisions for themselves. It now deals with not only property and affairs issues, but also serious decisions affecting healthcare a personal welfare matters. It is a superior court of record and can set precedent and build up expertise in all issues relating to lack of capacity. It has the same powers, rights, privileges and authority as the High Court it has replaced. In certain cases the Court can appoint a deputy to make decisions on behalf of the person lacking capacity (See MCA Code 8.31 onward)

- *The Public Guardian*
  The Office of the Public Guardian (OPG) has a supervisory, educational and

signposting role and acts as the gatekeeper to the Court of Protection to avoid, where ever possible, the costly and time consuming process of court proceedings. See below for the OPG website link

Practice Points:

- Applications to the court are at significant cost– details of fees are available from the Office of the Public Guardian (see below). They also involve a considerable degree of staff time over what is often a prolonged period.

- In Northumberland, applications to the Court of Protection on behalf of the department must considered at Head of Service level before proceeding.

Full guidance regarding applications to the Court of Protection and Court Appointed Deputies is available in the MCA Code (8.3 – 8.71) or via https://www.gov.uk/government/organisations/office-of-the-public-guardian

The Deputyship Team

The Deputyship Team at Northumberland County Council (part of the Financial Services Team) can act as last resort where there is no one else suitable to manage the finances of service users who lack the capacity to do so themselves. In some circumstances they may be able to assist clients who do have capacity with their consent if there is a genuine need for assistance.

Making a Referral to The Deputyship Team for assistance for a service user.

If you come across someone who may need assistance with their finances and there is no one else willing or suitable to do so on their behalf, you will need to ring the officer responsible in Financial Services for Triaging referrals (currently Claire McDougle 01670 623210). Before ringing to make the referral you will need details of Service User Capacity, Family members and involved parties including actions that have already been taken to resolve any issues. The officer will take you through a REC1 form which they will complete, you may be asked for additional information during the call. When the REC1 is completed it forms a report which is then passed to the Financial Services Team Manager for final approval. If the referral is approved it will be passed to the Deputyship Team who will be the ones actually managing the finances of the client. The Officer will be checking with you that we really are the last resort and that there is not a less restrictive option to aid the situation without the need for us to take over the person's finances fully. Part of the process before the REC1 is sent for approval will be to assess the client's capacity for their finances and provide an MC1 if they do not have capacity to confirm it is in their best interests for us to take over their finances. If the client does not have capacity and the case is approved a COP3 (Court of Protection assessment of capacity) will also need to be completed (based on capacity assessment for the MC1) to allow us to apply to the Court to become the Deputy (Property and Affairs)

The Difference between Appointeeship and Deputyship (Property and Affairs

An appointeeship from the Department of Works and Pensions (DWP) only gives the appointee the right to receive the client's benefit income and nothing else. A Deputy (Property and Affairs) acting under a full deputyship order from the Court of Protection will have full powers to manage the clients finances as if they were the client and will for example be able to do the following (in the best interests of the client if they lack the capacity to make the decision themselves):-
(1). Receive all of the client's income including occupational pensions etc.
(2). Close bank accounts and buy and sell investments on behalf of the client.
(3). Sell the client's house.
(4). Negotiate with Creditors.
(5). Restrict the client's ability to get credit.

We will usually apply to become the Deputy in all cases where the client does not have capacity unless there is a good reason not to.

Applying for Appointeeship with the Department of Works and Pensions

The process and paperwork for applying for appointeeship with the DWP will be completed by the Officer within the Financial Services team responsible for the case. The actual process involves sending a BF56 (application for appointment to act on behalf of someone else) to the DWP. The DWP should then send out a visiting officer to visit the client. The visiting officer should then carry out their own assessment of the client's ability to manage their finances and the need for an appointee.
Please note - The decision on whether an appointee is required is solely the decision of the DWP, although they may consider any supporting evidence we could provide.

Applying to the Court of Protection to become the Deputy (Property and Affairs)

In order to apply to the Court of Protection, a COP3 assessment of capacity form is required (see appendix 12 for blank COP3). The COP3 can be completed by a Medical Practitioner, Psychiatrist, Approved Mental Health Professional, Social Worker, Psychologist, Nurse or OT (see Making a Referral to the Deputyship Team for assistance for a service user.)The Deputyship Team will complete all other forms and make the actual application.

Once the Court receives the application to become Deputy, they will issue the application and send a copy of the issued application back to the Deputyship Team. At this point, all known family and close friends of the client will be notified of the application to become Deputy by the Deputyship Team in writing. The client will also need to be served in person with regards to the application. This will normally be done by a Financial Assessments and Benefits Officer or Care Manager or both.

The Current service standards of the Court of Protection are that if no oral hearing is required, the actual Deputyship Order will be received within 16 weeks of the court

receiving the application. At present we usually receive the order after 8 weeks. Once the order is received the client needs to be served in person again with regards to the final order. Again this will normally be done by a Financial Assessments and Benefits Officer or Care Manager of both.

Costs associated with Deputyship.

The Court of Protection (COP) charge a fee for making an application to them for the appointment of a Deputy and the Office of the Public Guardian (OPG) then charge on going fees when a Deputyship is granted. Local authorities are also allowed to charge for carrying out the role of Deputy in accordance with a fee structure set by the Court of Protection.

Court of Protection and Office of the Public Guardian fees (correct as at 01/04/2017)

Each application to the Court attracts an application fee of £400.00. A further one off Appointment of Deputy fee of £100.00 is due to the OPG after the Order is made. Depending on the Supervision Type given to the case (Supervision Type is usually set by the level of assets a client has) there will also be annual supervision fees due to the OPG which is £320.00 for General Supervision cases and £35.00 for Minimal Supervision cases.

All these costs will be borne by the client however both the Court and the OPG have exemption and remission policies but the policies are not the same. For example someone on a means tested benefit would be exempt from all OPG fees regardless of their capital but would have to have less than £3,000 in capital if aged under 61 or less than £16,000 in capital if aged over 61 to be exempt from the COP application fee.

Remuneration of Public Authority Deputies (correct as at 01/04/2017)

Local authorities are allowed to charge clients set fees for acting as their Deputy. These fees are laid down by the Court each year and will be charged to clients where sufficient assets exist. The current levels are as follows:-

Work done until an Order is made £745.00

Annual Management Fee where assets exceed £16,000

(a) First year £775.00
(b) Second and subsequent years £650.00
(If assets are less than £16,000 3.5% of the actual assets will be charged)

Annual Property Management Fee £300.00

Preparation of an Annual Report £216.00

BEST INTERESTS DECISIONS

A Best Interests decision-maker is the person who is deciding whether to take action in connection with the care or treatment of an adult who lacks capacity or who is contemplating making a decision on their behalf.

As with any assessment of capacity, the decision maker should be the person most directly involved with the proposed act/decision. Section 4 of the MCA sets out a Statutory checklist of factors that **must** be taken into account by decision makers. These factors have been included in the MC 2 form. See MCA Code 5.13 for further details.

The decision maker is required to weigh up all the information in order to determine what decision is in the person's best interests.

General Comments from the Courts in Relation to a "best Interest" Decision

In making best interests decisions the practitioner must have regard to the client`s welfare as the paramount consideration

The evaluation of a clients best interests involves a welfare appraisal "in the widest sense", taking into account, where appropriate, a wide range of ethical, social, social, moral, emotional and welfare considerations but it would be "undesirable and probably impossible to set bounds to what is relevant to a welfare determination" (Re S [2001] Fam 15.

The Relative Importance to be Attached to the Factors in the Statutory best Interest Checklist

Case law has confirmed that there is no hierarchy between the various factors to be considered but that the weight to be attached to any one factor will inevitably differ depending upon the individual circumstances of the particular case but that there may be one or more which are of "magnetic importance" in influencing or even determining the outcome

Weight to be Attached to the Present and Past Wishes and Feelings of the Client

In 2009 (ITW v Z EWHC 2525) Mr Justice Munby said the following in relation to this issue:

1. Firstly that an individual's wishes and feelings will always be a significant factor which must one pay close regard to
2. Secondly, the weight attached will always be case specific and fact specific. In some cases they will carry predominant weight in others little weight. One cannot he stated attribute a priori weight as it all depends and must depend upon the individual circumstances of the particular case and in the particular context.
3. Thirdly that in coming to a determination the following matters should be considered:

    The degree of the individuals incapacity, for the nearer to the borderline the more weight must in principle be attached to the clients wishes and feelings given the greater distress, humiliation and anger they are likely to otherwise feel.

    The strength and consistency of the views expressed by the client

    The possible impact on the client of the knowledge that his/her wishes and feelings are not being given effect to

The extent to which the clients wishes and feelings are, or are not, rational, sensible, responsible, and pragmatically capable of sensible implementation in the particular circumstances

In so ruling Justice Munby agreed with the views of Judge Lewison, who in a previous case (P[2009] EWHC 163), stated that Parliament had endorsed a "balance sheet" approach and as such the client's previous views as far as they may be ascertained will be only one part of a best interest balance. The Judge added that he could not see that it would be a proper exercise for a third party decision maker consciously to make an unwise decision merely because the client would have done so.

Subsequent case law has given considerably more weight to wishes and feelings and practitioners would need to take advice where these may be at odds particularly with family or other professional opinions.

Decisions to remove vulnerable adults from family care

Where the decision involves the removal of a vulnerable person from the care of their family or private carers, case law suggests that there would normally be an assumption that mentally incapacitated adults are better off in the care of their families rather than placed in the care of an institution. If the state is to justify removing people from their families, relatives, carers or friends, it can only be on the basis that the State is going to provide a better quality of care than that which they have hitherto been receiving.

We should not lightly interfere with family life. If the State (eg Local Authority) deems that they are the more appropriately placed to look after a mentally incapacitated adult than his/her own partner or family, the practical and evidential burden of establishing this lies with the State. Common sense indicates that the longer a vulnerable adult's partner, family or carer have looked after a person without the State having perceived the need for its intervention, the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the partner, family or carer.

The law will intervene to protect a vulnerable adult from the risk of future harm - the risk of future abuse or future exploitation - so long as there is a real possibility, rather than a merely fanciful risk, of such harm. But a pragmatic, common sense and robust approach to the identification, evaluation and management of perceived risk must be employed.

It is important to note however that the Local Authority only has "limited" duties & powers in relation to protecting vulnerable "incapable" adults from harm. These were clarified by Judge Munby in a case in 2010 (In the Matter of A EWHC 978 (fam)) as the duty to assessment/investigation and the duty to consider provision of services to the client or carer and appropriate support. It does not he stated have the power to "regulate, control, compel, restrain, confine or coerce". In the event of opposition of any proposed action from either the vulnerable adult or their family or significant others a third duty kicks in to refer the matter to the court for resolutions. **In any such circumstances senior management should be consulted immediately.**

Practice Point

- Have you undertaken, evidenced and documented a thorough evaluation of the risk of current and future harm? Is there a balance sheet completed?

The Importance of Article 8 Rights

Article 8 of the Human Rights Act is a "qualified" right to a personal and family life. Courts have held that public authorities (ie health and social care managers and practitioners) should recognise when Article 8 rights are engaged in their decision making in relation to vulnerable adults and to be able to justify that any such interference with such rights are both "proportionate" and "necessary". Closely following the Article 4 best interest checklist in MCA Act (as incorporated into the MC1 form) whilst acknowledging the limits of local authority of Trust powers in relation to vulnerable adults should ensure compliance with Article 8.

How to work out Best Interests: Balance Sheet Model

The balance sheet approach is the preferred method of the courts to assist in the evaluation of the various factors of a case and come to a decision as to what might be considered to be in a person's best interests. This model can be used by a Decision Maker to demonstrate the factors s/he has considered in the decision making process.

The first entry should be of any factor or factors of actual benefit followed by any counter-balancing dis-benefits to the applicant. At the end of that exercise the decision maker should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the decision maker conclude that the decision is in the best interests of the claimant. The assessor should conclude by explaining the relative weights attached to the factors that led to the decision. The balance sheet model is incorporated into the MC2.

FINAL DECISION

Practitioners must clearly record their final decision, supported by objective evidence. Also record here any further action required, who will take responsibility for that action and a timescale it will be taken within.

OTHER ISSUES:

Confidentiality and sharing information:

Information may need to be shared with other people when assessing capacity and coming to best interests decisions. Where possible, obtain the person's permission to share relevant information with others. If the person is unable to give permission, relevant information may still be shared if this is in the best interests of the person. Where an assessment of capacity has involved discussions with third parties, practitioners should record the facts of the discussion, thus demonstrating the extent of inquiry.

Disputes

In the event of disputes staff should seek local resolution if at all possible. The following ideas may assist the decision maker:

Involve an advocate who is independent of all parties involved

Get a second opinion

Hold a strategy meeting of all involved

Consider mediation

Consider with line management whether a legal perspective should be attained. Physical attendance of a lawyer at strategy meetings should be at a last resort and only after agreement of senior managers.

See MCA Code Chapter 15 for further guidance about settling disagreements.

Sample questions – assessing capacity to decide on who should manage finances:

Preliminary Statements

We need to talk about your money. There is nothing to worry about.
Your savings are building up in the bank account.
It is possible that you might need more help to manage your money.
To help us decide what to do, I need to know what your wishes are.
I also need to work out how well you understand money matters.

Interview questions

Does anyone help to sort out your pension and money now?

Do you remember the council have 'Appointeeship' to help you?

What does this mean?

Do you know how much money you get each week?

Do you know where it comes from?

How do you get access to your money?

Do you have any savings?

Do you think you need someone to help organise your finances?

Why do you/don't you think you need this help?

Is there anyone you would want to help you with your money?

Another option would be for the County Council to apply to the Court of Protection, so they can manage your finances. (explanation of the role of the CoP)

What would be good about leaving things the way they are?

What would be bad/what would the risks be of leaving things the way they are?

What would be good about having someone else managing your finances?

What would be bad/what would the risks be of someone else managing your finances?

Sample questions – assessing someone's capacity to decide on change of residence (change of care homes)

Preliminary statements

I have come to talk about where you want to live.
Thelma (daughter) thinks you should live somewhere else.
We need to decide where you should live.
We need to know where you would like to live.

Interview questions

How long have you lived here?

What is the name of this place? Where is it?

What sort of place is it?

Do you need any help day to day?

What would you think about moving to live somewhere else?

What would be good about moving?

Would there be anything bad about moving?

How do you think you would feel if you moved?

How do you think you would you feel if you stayed here?

What would be good about staying here?

Is there anything bad about staying here?

If you moved, you would have different people helping you day to day.

If you moved, you would not see the people who are here.

If you moved, you could make some new friends.

If you moved, you might see more of your family.

Would your health be affected if you stayed here?

Would your mood/spirits be affected if you stayed here?

Is there anything else to think about if you were to move?