# **Mental capacity in England and Wales**

(Information taken from Carers UK website for more information see www.carersuk.org)

**The Mental Capacity Act 2005 provides the legal framework for making decisions on behalf of people who lack the mental capacity to make decisions themselves.**

The Mental Capacity Act 2005 sets out five ‘statutory principles’:

* *a person must be assumed to have capacity unless it is established that they lack capacity*
* *a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success*
* *a person is not to be treated as unable to make a decision merely because they make an unwise decision*
* *an act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests*
* *before the act is done, or the decisions 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*

There is a [Mental Capacity Act Code of Practice](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf) which explains the Mental Capacity Act 2005 in detail.

## **What is mental capacity?**

Mental capacity is the ability to make a decision, whether it is an everyday decision such as what to wear, or a more important decision such as where to live.

## **How is mental capacity assessed?**

There is a two stage test to work out if someone lacks mental capacity.

**Stage one: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?**

This could include dementia, learning disabilities, mental illness, brain damage etc.

**Stage two: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?**

A person is unable to make a decision if they cannot:

* understand information about the decision to be made
* retain that information in their mind
* use or weigh that information as part of the decision making process
* communicate their decision

**Who assesses mental capacity?**

Normally, the person who is most involved with the particular decision is the one who would assess mental capacity, for example a carer providing day to day care and who knows the person well can assess whether they have the capacity to decide on what to wear for the day. If the decision is a complex one then a professional opinion might be necessary, for example the opinion of a psychiatrist, psychologist, social worker etc.

**What can I do if I disagree with a mental capacity assessment decision?**

If you disagree with a mental capacity assessment decision, for example if the person you look after is assessed as lacking mental capacity when you think they have mental capacity, there are various ways you can try and resolve this.

You can raise the matter with the person who carried out the assessment and ask them to give reasons why they believe the person lacks mental capacity to make the decision, and ask them to provide objective evidence to support that belief.

You could try and get a second opinion from an independent professional.

If you cannot resolve the disagreement then you may be able to apply to the Court of Protection, who can make a decision as to whether a person has mental capacity.

## **What happens if the person I look after is assessed as lacking mental capacity?**

If the person you look after is assessed as lacking mental capacity to make a particular decision, then any decision made on their behalf should be done in their ‘**best interests**’. This is the case whether the person making the decision on behalf of the person lacking capacity is a carer, a lasting power of attorney, a court appointed deputy, or a professional.

Who should actually make the best interest decision will depend on the decision in question and on whether there is anyone with the legal right to make the decision.

If the decision is an everyday decision then the person most directly involved with the person should be the decision maker. In the example above, if you help the person you look after get dressed and they lack the capacity to decide what to wear, you will make the decision as to what they wear.

If the decision is about property or financial affairs and you or another family member or friend has [lasting power of attorney](http://www.carersuk.org/help-and-advice/practical-support/managing-someone-s-affairs/different-ways-of-managing-someone-s-affairs-in-england-and-wales#sec1) for property and financial affairs or is [court appointed deputy](http://www.carersuk.org/help-and-advice/practical-support/managing-someone-s-affairs/different-ways-of-managing-someone-s-affairs-in-england-and-wales#sec2) for property and financial affairs, then you or the family member or friend should be the decision maker.

If the decision is about health or welfare and you or another family member or friend has [lasting power of attorney](http://www.carersuk.org/help-and-advice/practical-support/managing-someone-s-affairs/different-ways-of-managing-someone-s-affairs-in-england-and-wales#sec1) for health and welfare or is [court appointed deputy](http://www.carersuk.org/help-and-advice/practical-support/managing-someone-s-affairs/different-ways-of-managing-someone-s-affairs-in-england-and-wales#sec2) for health and welfare, then you or the family member or friend should be the decision maker.

If there is not a lasting power of attorney or court appointed deputy then the most suitably informed professional involved should be the decision maker.

When making the best interest decision, if it is practical and appropriate to do so, the decision maker should consult any lasting power or attorney or court appointed deputy (if the power of attorney or court appointed deputy does not have the relevant authority to be the decision maker themselves – ie a power of attorney for property and financial affairs should still be consulted about a decision relating to health and welfare), anyone who is caring for the person, any close relatives and friends, and anyone else who is interested in the welfare of the person you look after.

When making the best interest decision, the decision maker should also take into account the past and present wishes and feelings of the person you look after.