

A photograph of two women sitting at a desk, looking at a laptop. The woman in the foreground is wearing large grey headphones and has a joyful expression, smiling broadly. The woman behind her is also smiling and looking at the screen. The background is dark and out of focus.

The **Mental** **Capacity Act** 2005

The Mental Capacity Act 2005 (MCA) covers how to make decisions for people aged 16 and over who may lack the mental capacity to make their own decisions.

If there's a serious dispute about what's in a person's best interests, the Court of Protection (CoP) can be asked to make a decision under the MCA.

Decisions must be made in a person's best interests if they don't have the capacity to decide themselves. This includes decisions about:

- Where a person should live
- Who they should have contact with
- What care or medical treatment they should receive.

Capacity

Before a decision can be made for someone else, a capacity assessment is needed to establish whether they have capacity to make the decision themselves.

Sometimes it isn't clear if a person has the mental capacity to make a particular decision. The MCA states that you must consider whether a person has the relevant capacity to make a certain decision at a particular time. The starting point is always a presumption of capacity.

This means that someone could have the capacity to make simple decisions such as what to have for lunch, but they may not have the capacity to make more complex decisions such as where to live or whether to have medical treatment.

It also means that someone whose condition changes over time might have the capacity to make a decision one day but not the next. Ultimately, a judge in the CoP can make a decision if a person does or doesn't have capacity if it's not clear, or if it's disputed.

Disputes can arise over a person's capacity to make a decision. For example:

- Where the person should live (whether they should live at home or in residential care, or in one particular residential care placement or another)
- What care the person should receive
- The person's contact with others (whether contact should be restricted, supervised, or stopped altogether)
- Whether the person can consent to sexual relations or marriage
- The person's access to the internet and social media platforms (whether access should be supervised or restricted)
- Serious medical treatment (including disputes about stopping or continuing life support, and disputes about sterilisation).

Best interests

The MCA says that decisions made in relation to someone who lacks capacity must be made in their best interests. The MCA sets out how to make the decision and says that the views of the person, their friends and family must be taken into account. It's also important to support a person making their own decisions where possible, for example, with the support of a speech and language therapist or other communication aids.

Other factors that must be considered:

- Their past and present wishes and feelings (including any written statement they made when they had capacity).
- The beliefs and values they would be likely to have if they had capacity.
- Any factors they would consider if they were able to do so: If appropriate, the views of others including anyone caring for the person or interested in their welfare and any attorney or deputy.

It's usually the responsibility of social services or the NHS to apply to the CoP where there's a dispute about someone's best interests. Family members and other individuals (including Independent Mental Capacity Advocates) can also apply to the CoP for a judge to make a decision.

Deputies

A judge in the CoP can make a decision in someone's best interests, or they can appoint a deputy to make decisions on that person's behalf.

The MCA says that a decision by the judge is to be preferred to the appointment of a deputy to make decisions and the powers given to a deputy should be as limited in scope and for as short a duration as possible in the circumstances. Deputies must act in accordance with the MCA.

Usually, a deputy will be appointed when decisions are likely to arise regularly over an extended period of time. This is one reason why it's more common for deputies to be appointed in relation to a person's finances rather than their welfare.

Why choose us?

Experienced solicitors count when dealing with CoP matters. We're one of the UK's most successful and well-respected national law firms, and our CoP team is the largest in the country with extensive experience, currently managing over £1.2 billion in funds.

We're a top tier legal team for CoP law according to Chambers and Partners and The Legal 500, and can support you in a range of areas including:

- CoP health and welfare disputes
- Deprivation of Liberty Safeguards
- Appointing a Deputy or acting as a Deputy
- Powers of Attorney
- Statutory Wills and trusts
- Personal injury trusts, including those for children.

Mental Capacity Act in action

Our Public Law & Human Rights (PLHR) solicitors helped Stuart (not our client's real name), who was placed in local authority care and wanted to move back to his own flat.

Stuart was in his early 50s and lacked the mental capacity to make some decisions for himself. Despite this, he'd lived independently in his community for most of his life.

Social services started looking at Stuart's care needs and raised concerns that he was having trouble caring for himself. Stuart was struggling with alcohol consumption, which caused him to develop a form of dementia. Social workers decided it was in his best interests to move into care.

Social services placed Stuart in a residential care home. An advocate was appointed to support Stuart and voice his opinions on his new placement. Stuart told his advocate that he wanted to return home to his flat.

Stuart's advocate contacted our PLHR team to see if we could help. Our expert gathered evidence to assess whether Stuart could live independently and applied to the CoP to challenge social services' decision to put Stuart in a care home.

Shortly after court proceedings began, the social services department accepted our evidence. They decided that it was in Stuart's best interests to return home and they put a transition plan in place to give him the support he needed.

Over the following months, and with the help of his carers, social worker and advocate, Stuart stopped drinking alcohol and improved his independent living skills. He focused on eating a healthier diet and managing his medicine. Stuart also worked to renovate his flat, including decorating and buying furniture. He now lives in his flat full-time with the help of a support worker.

