



Mental Capacity Act 2005 and the Court of Protection

Public Law

Concerns are often raised by the parents of children who lack the capacity to make certain decisions about what will happen when they become young adults. The Mental Capacity Act (the MCA) is the law which applies to decision making for people aged 16 and over who do not have the mental capacity to make decisions for themselves.

Cases where there is a serious dispute about what is in the person's best interests can be referred to the Court of Protection (the CoP), which exists to settle disputes under the MCA. This includes disputes about where a person should live, who they should have contact with and what care or medical treatment they should receive.

Capacity

Sometimes it is not clear if a person has the mental capacity to make decisions. The MCA says that you have to consider whether the person has the mental capacity to make a particular decision at a particular time.

This means that a person could have the mental capacity to make simple decisions (e.g. what to have for lunch today) but not more complex decisions (e.g. where to live or whether to have medical treatment). It also means that someone whose condition changes over time might have the mental capacity to make a decision one day but not the next.

Ultimately a judge in the CoP can decide if a person does or does not have capacity when this is not clear or is disputed.

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 a decision in a person's best interests. Importantly, the MCA says that the views of the person's friends and family must be taken into account when deciding what is in the person's best interests. Other factors which must be taken into account when deciding what is in a person's best interests include:

- The person's 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
- Factors they would consider if they were able to do so
- The views of others, including, if appropriate, anyone caring for the person or interested in their welfare and any Attorney or Deputy.

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



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Deputies

A Judge in the CoP may either make the decision in relation to someone's best interests, or 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 a decision, and the powers given to a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

The most likely scenario in which a deputy will be appointed, as opposed to the court making a one-off order, is when decisions are likely to arise again and again over an extended period of time. This is one reason why deputies are appointed in relation to someone's finances much more frequently than in relation to their welfare.

MCA in Action: Case Study

Mathieu Culverhouse of Irwin Mitchell's Public Law Department represented a disabled teenager in the fight to prevent the Council from removing him from his home, where he lived with his foster mother.

The 19-year-old, has a mental age of two and severe physical disabilities. He had lived with his foster mother since 1995 but was removed from her care by Manchester City Council.

He was moved to a residential home for several months with no arrangements in place to allow the teenager and his mother to have contact. During his stay, his behaviour deteriorated and he showed signs of missing his foster mother.

The Council said that they were investigating claims against the foster mother and believed they were doing the right thing in removing him from her care. The allegations against the foster mother were later decided to be unfounded.

Mathieu Culverhouse helped prove that the Council's decision not only failed to consider the relationship between the teenager and his foster mother, and how the decision would affect him, but also that it was unlawful.

The case also uncovered a series of managerial failings and poor decisions by Manchester City Council which the High Court judge in the case, Mr Justice Baker, labelled "deplorable". In his judgment, Mr Justice Baker ruled that the Council had breached the teenager's human rights and also failed to abide by safeguards required by The Mental Capacity Act 2005.

The teenager has since been returned home and shown significant improvement in his behaviour and mood. Manchester City Council has also put new procedures in place to prevent this happening to other vulnerable people.

If you would like any further information or have any questions regarding the Mental Capacity Act, please contact:

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