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Capacity in tribunals and the judiciary (2020)

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Capacity in tribunals and the judiciary (2020)

The law as stated during this webinar is up to date as of **8 December 2020**



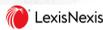
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Disclaimer

Mental capacity law proceedings are extremely complex. These slides are for information purposes only and should not be relied on in place of individual legal advice.

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Agenda

1. Guiding principles and key issues of mental capacity law
2. Capacity in the context of the SEND Tribunal
3. The Court of Protection
4. One off decision making
5. Deputyship
6. Lasting powers of attorney

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Sources of mental capacity law

- **The European Convention on Human Rights and Fundamental Freedoms**
- **Mental Capacity Act 2005**
- **Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007**
- Court of Protection Rules

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Principles of the Mental Capacity Act 2005

Section 1 Principles

- 2) A person must be assumed to have capacity unless it is established that he has capacity
- 3) A person is not to be treated as unable to make a decision unless all **practical** steps to help him to do so have been taken without success
- 4) A person is not to be treated as unable to make a decision merely as he makes an **unwise** decision
- 5) An act or decision made must be made in the persons **best interests**
- 6) 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 persons right and freedom of action.

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When does a person lack capacity?

Section 2 MCA 2005

- (1) The purposes of this act, 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 brain.**
- (2) It does not matter whether the impairment or disturbance is permanent or temporary
- (3) A lack of capacity cannot be established merely by reference to – (a) A persons 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.
- (4) 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.

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Inability to make decisions

Section 3 MCA 2005

- (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)

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Inability to make decisions cont.

- (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 **reasonable foreseeable consequences** of – (a) deciding one way or another, or (b) failing to make the decision.

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Decision making on behalf of an individual who lacks capacity

Section 4 MCA 2005 – Best Interests

When determining what is in a persons best interests

(4) He must, so far as reasonable practicable, permit and encourage the person to participate, or improve his ability to participate, as fully as possible in any act done for him and any decision affecting him...

(6) He must consider, so far as is reasonably ascertainable -

- (a) Person's past and present wishes and feelings (and in particular any relevant written statement made by him when he had capacity)
- (b) The beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) The other factors that he would be likely to consider if he would be able to do so.

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Chapter 5 Code of Practice – Best Interests

The MCA requires a decision maker to encourage the participation of P.

Chapter 5 of the Code of Practice sets out that a decision maker should **Do whatever is possible to permit and encourage the person to take part, or improve their ability to take part, in making the decision.**

When considering wishes and feelings, Chapter 5 states that a decision maker should

- Try to find out the views of the person who lacks capacity, including the persons past and present wishes and feelings – these may have been **expressed verbally, in writing or through behaviour or habits.**
- Any beliefs and values (e.g. **religious, cultural, moral or political**) that would be likely to influence the decision in question
- **Any other factors that the person themselves would be likely to consider if they were making the decision or acting for themselves.**

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In practice

Mental capacity is a difficult concept often involving highly emotive situations and conflicts.

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The relevance of age

- No power that is exercised in relation to a person who lacks mental capacity is exercisable in relation to a person under the age of 16.
- Under 16 – parental responsibility
- Gillick competence

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Young persons rights of appeal to the SEND Tribunal

On receiving a final decision from a local authority, a parent or young person can appeal on the following bases:

1. The authority decided not to carry out a needs assessment.
2. A authority declined to issue an EHC plan.
3. The content of the plan is inadequate.
4. The authority decided not to amend an EHC plan following an annual review.
5. The authority decided to cease to maintain the plan.

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Young persons rights of appeal to the SEND Tribunal

- The SEND Tribunal refers to a “young person” when that young person reaches the age of 16 years old.
- A “young person” is “over compulsory school age but under 25”:
Section 82(2) of the Children and Families Act 2014
- The young person is the Appellant and in line with the statutory presumption of capacity, is considered to have the capacity to conduct an appeal as an Appellant to the SEND Tribunal.
- Unless there is evidence that would displace the statutory presumption of capacity:

Section 51 of the Children and Families Act 2014 and LB of Hillingdon v WW (SEN): [2016] UKUT 253 (AAC) [2016] ELR 431

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Young persons rights of appeal to the SEND Tribunal

- Where a young person lacks capacity to conduct an appeal, An “alternative person” must bring the appeal. This can be:
 - **Deputy;**
 - **Donee of lasting power of attorney;**
 - **If there is neither in place, then the persons parent.**

(Regulations 63 – 66 of the SEND Regulations 2014)
- In these circumstances the deputy/donee/parent are the Appellants in respect of the young person:
- **Buckinghamshire County Council v SJ (SEN): [2016] UKUT 254 (AAC), [2016] ELR 350 [14]**

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Disputes over capacity of a young person

- When a young person has brought an appeal they are assumed to have capacity.
- In a case where there is dispute over a young persons capacity to conduct an appeal to the SEND Tribunal, in order to resolve the issue of the capacity the Tribunal itself will conduct the preliminary basis off the evidence as in front of it:

Buckinghamshire County Council v SJ (SEN): [2016] UKUT 254 (AAC), [2016] ELR 350 [14]

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The Court of Protection

- The court of protection is the forum at which to address a wide range of disputes that cannot be resolved otherwise, relating to individuals who lack capacity.
- The Court has no jurisdiction in relation to an individual who has capacity.

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Main orders of the Court of Protection

The court has the power to make **declarations**:

Section 15 MCA 2005

15 How to make declarations

- (1) The court may make declarations as to –
 - (a) whether a person has or lacks capacity to make a decision specified in the declaration;
 - (b) Whether a person has or lacks capacity to make decision on such matters as are described in the declaration;
 - (c) The lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
- (2) “At” includes an omission and a course of conduct.

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Main orders of the Court of Protection

The court has the power to make **decisions** and **appoint Deputies to make decisions**:

Section 16 MCA 2005

16 Powers to make decisions and appoint Deputies: general

- (1) This section applies if a person ('P') lacks capacity in relation to a matter or matters concerning –
 - (a) P's personal welfare
 - (b) P's property and affairs
- (2) The court may –
 - (a) By making an order make the decision or decisions on P's behalf in relation to the matter or matters, or
 - (b) appoint a person (a 'Deputy') to make decision on P's behalf in relation to matter or matters
- (3) The powers of the court under this section are subject to the provisions of this act and, in particular, to sections 1 (the principles) and 4 (best interests)

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Capacity to litigate generally

The test of capacity to conduct litigation is virtually the same as the test for any other transaction. The person must be capable of understanding information relevant to the litigation, retaining that information, evaluating the information and communicating a decision – **Masterman–Lister v Brutton and Co. (2003) [2002] EWCA Civ 1889**

NB – The threshold for having capacity to decide whether to make an application to the Court of Protection when specifically challenging a standard authorisation under section 21(A) is **lower than that required to conduct proceedings**.

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Private Client Law and Practice webinars in Q4 2020

- Procedural changes to the probate process (2020)
- The Guardianship (Missing Persons) Act 2017: case law update (2020)
- Digital assets update (2020)
- Issues and trends when making a will (2020)
- An update on elderly clients (2020)
- Capacity in tribunals and the judiciary (2020)
- Private client law and practice - end of year round-up (2020)



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- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
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