

The Mental Capacity Act

A guide to how the Mental Capacity Act works

Expert advice

The Mental Capacity Act was introduced to protect people who are unable to make decisions for themselves. This may arise, for example, if they've suffered a brain injury, a stroke or are unconscious due to an accident.

The Act provides guidance on who can make decisions in such situations and how they should go about this. It also enables people to plan ahead for a time in the future when they may lack capacity.

What are the principles of the Mental Capacity Act?

The principles of the Mental Capacity Act are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. 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.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done or made in their best interests.
5. 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 effectively achieved in a way that is less restrictive of their rights and freedom of action.

How do you know if someone lacks mental capacity?

For the purposes of this Act, a person is considered to lack capacity if at the material time they are unable to make a decision for themselves because of an impairment of, or a disturbance in, the functioning of the mind or brain.

A person is unable to make a decision for themselves if they are unable to:

- understand the information relevant to the decision;
- retain that information;
- use or weigh that information as part of the process of making the decision; or
- communicate their decision (whether by talking, using sign language or any other means).

When is someone's mental capacity assessed?

A person's capacity is assessed at the time when they would need to make the decisions in question.



Who assesses someone's mental capacity?

A family member or carer can assess a person's capacity to make certain decisions for most straightforward, everyday activities – such as washing and dressing. However, if the decision is of a more complex nature, such as selling a home, a formal assessment may be required involving a doctor or another professional.

What happens if someone is assessed and they don't have mental capacity?

If a person lacks the mental capacity to make decisions and they've not planned ahead, other people will be required to make the necessary decisions or take actions on their behalf.

Any decision or action must be taken in the person's best interests and the Act contains a checklist which must be consulted by the decision maker. Friends and family members or carers should be consulted and their views taken into account if appropriate.

An Independent Mental Capacity Advocate (IMCA) is an advocate who can provide extra help and support regarding serious decisions if the person has no family, friends or other appropriate person to consult. The IMCA will only become involved in specific situations.

What is the Court of Protection?

The Court of Protection makes final decisions on mental capacity where there is uncertainty. It deals with decisions regarding a person's finances and property as well as serious issues relating to health and welfare.

If a decision relates to property and financial affairs, then an application can be made to the Court of Protection to ensure that the person's best interests are protected.

Sometimes a Deputy will be appointed by the Court to make a series of ongoing, long-term decisions on a person's behalf regarding property, financial affairs and personal welfare. The Deputy must be aged 18 years or over and is often a relative, friend or professional.

How do you plan ahead in case you lack mental capacity in the future?

The Act enables you to appoint someone else to make decisions for you in the future in the event that you lack mental capacity. You can do this in a number of ways:

1. Lasting Power of Attorney

You can appoint a friend, relative or professional as an Attorney under a Lasting Power of Attorney (LPA) to manage your affairs on your behalf.

There are two types:

- Property and Affairs LPA – for decisions regarding financial and property matters
- Personal Welfare LPA – for decisions regarding health and personal welfare

2. Advance decision to refuse treatment

This allows you to specify particular types of treatment that you don't want should you lack mental capacity in the future. The advance decision is legally binding provided certain conditions are met.



3. Advance decision regarding life-sustaining treatment

You can choose to refuse life-sustaining treatment which may result in your life being shortened. Again, specific rules must be followed for this to be legally binding.

4. Recording wishes and feelings regarding treatment and care

You can specify your wishes and preferences regarding future treatment and/or care, and this must then be taken into account by a person who is determining your best interests.

How can Slater and Gordon help?

Slater and Gordon has a specialist Court of Protection team with experts who can provide the best available advice on the Mental Capacity Act and protecting your best interests.

If you would like advice or assistance from our experts, please contact us.

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I can't thank Slater and Gordon enough. I didn't know which way to turn but the advice and assistance they gave me was invaluable for me and my mum.

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