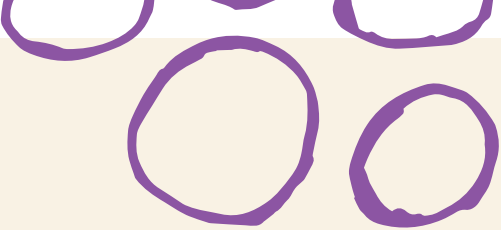


Looking ahead, together





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Notes about this guide

This guide is intended as an outline guide only. We strongly recommend seeking professional advice before writing your Will or deciding on your next steps. This guide is based on English law and practice in force at the date it was prepared. It is important to note that the laws of Northern Ireland and Wales may differ from those of England. If you are based in Scotland, please contact Enable Scotland on 0300 0200 101 or email: trustee@enable.co.uk. You can also visit their website at: www.enable.org.uk.

Introduction by Emma Cadey, Wills and Trusts Manager

If you're reading this guide, you may be caring for someone with a learning disability and wondering how best to support their rights and choices. The Mental Capacity Act is about respecting and empowering your loved one by helping them make decisions wherever possible, and ensuring their voice is heard

As families and carers, you play a vital role in safeguarding the wellbeing and dignity of those you care for. The Mental Capacity Act is designed to protect people who may struggle to make certain decisions, and to make sure that any choices made on their behalf are truly in their best interests.

This guide aims to make the principles and practicalities of the Act clear and accessible. We know every person and family is unique, and we hope you'll find reassurance and confidence in these pages. Whether you're facing everyday choices or more complex decisions, you're not alone, there is support and guidance available.



Emma Cadey



Wills and Trusts Manager, Mencap



Mental Capacity Act 2005

The Mental Capacity Act (MCA) is the statutory framework for people who may not be able to make their own decisions because of illness, a learning disability or mental health problems. It places a strong emphasis on supporting and enabling the individual to make their own decisions.

The 5 principles of the Act are:

- 1.** All adults have the right to make decisions for themselves unless it is shown that they are unable to do so.
- 2.** People should be supported as much as possible to make their own decision before anyone concludes that they cannot make their own decision.
- 3.** People are allowed to make a decision that may seem to others to be an unwise or strange decision.
- 4.** If a person lacks capacity, any decisions or actions taken on their behalf must be taken in their best interests.
- 5.** People who lack capacity should not be restricted unnecessarily (in relation to their freedom and rights as a person).

The definition of mental capacity

The first question is: is there an impairment of, or disturbance in, the functioning of the person's mind or brain? If so, the second question is: does the impairment or disturbance make the person unable to make the particular decision?

A person will be deemed to be unable to make a particular decision if they cannot do one or more of the following things:

- understand information given to them
- retain that information long enough to be able to make a decision
- weigh up the information available to make a decision
- communicate their decision by any possible means.

Every effort should be made to find ways to communicate with someone before deciding whether or not they have capacity.

What types of decisions are covered by the Act?

The types of decisions range from day-to-day decisions about things such as what to eat or wear, to serious decisions about where to live, finances and deciding to have an operation. It does not cover personal decisions such as marriage/civil partnership, divorce, sexual relationships, adoption and voting.

If a person has the capacity for one decision, does it mean they have capacity for all decisions?

No – the test is whether a person has the capacity to make a particular decision at a particular time. **A person with a learning disability may lack the capacity to make complex decisions but this does not mean that they cannot decide what to do each day.** People are allowed to make a decision that may seem to other people to be an unwise or strange decision.

Who decides if a person is deemed to lack capacity to make a decision?

The starting point for everyone is that they are assumed to have the capacity to make decisions for themselves. **A family member/carer/health or care professional or other professional might need to then decide if a person has the capacity to make a particular decision.** That person must have a “reasonable” belief that the person lacks capacity. The word reasonable is important, as capacity can change and a person can have capacity to make one decision and not another. It is for the person who is making the decision to decide what is a reasonable way to take account of this.

For more information, please see the Mental Capacity Act Code of Practice, available via:

gov.uk/government/publications/mental-capacity-act-code-of-practice

What happens if a person is deemed to lack capacity to make a decision?

If a person lacks capacity, actions can be taken or decisions can be made in the person's best interests on their behalf by a decision-maker (usually the carer responsible for the day-to-day care, or a professional such as a doctor, nurse or social worker).

The following must be taken into consideration when deciding on this:

- Can the decision be delayed in case the person can regain the ability to make the decision in the future?
- A person's appearance, age, medical condition or behaviour cannot be an influencing factor
- All relevant information about the person needs to be considered, and this includes as much involvement with the person as possible
- A person's wishes, feelings, values and beliefs must be taken into consideration the views of the person's family members, carers and other relevant people who care for the person or are interested in the person should be taken into consideration
- Assumptions about the quality of a person's life must not be made.



When should family members/ carers be expected to be consulted?

Any person making a best-interests assessment will have to consult anyone who is caring for the person or interested in their welfare. For example, in an emergency situation it may not be possible to do so. If there is an Attorney or a Deputy appointed, they will have to be consulted. However, this will depend on what sort of decision needs to be made and the circumstances as the decision-maker assesses them.

What if a person has no-one to support them or act on their behalf?

Where there is no-one appropriate that can be consulted for decisions about serious medical treatment, changes in accommodation, care reviews or adult protection cases, the Independent Mental Capacity Advocate (IMCA) service will be applicable to protect the rights of the most vulnerable. The advocate is there to represent and support the person who lacks capacity – they are not the decision-maker. It is the decision-maker's duty to instruct the IMCA before making a decision (unless it is in an emergency, such as a doctor or a care worker). All councils with social services responsibilities operate an IMCA service. The following link provides further information about the role of an IMCA:

www.scie.org.uk/imca

What are the duties of an IMCA?

The duties of the IMCA are to:

- support the person who lacks capacity and represent their views and interests to the decision-maker
- obtain and evaluate information
- ascertain the person's wishes and feelings, beliefs and values
- ascertain alternative courses of action
- prepare a report for the person who instructed them
- challenge any decisions made by the decision maker

What if a person wants to challenge the result of a decision on capacity and/or best interests?



- The first port of call is to challenge the person who did the assessment, asking for a second opinion.
- Following this, involve an advocate who should be independent of all parties.
- After this, the route to follow will be local complaints procedures, mediation, a case conference and finally an application to the Court of Protection.

If it is decided a person lacks capacity, what actions can be taken on their behalf?

If a person has been assessed to lack capacity and it is deemed that certain actions would be in their best interests, **the Act allows people to legally carry out these actions to do with the person's care or treatment.**

The Court of Protection can **appoint a Deputy to make decisions on a person's behalf on a long-term basis.** This can be a relative, friend, carer or a professional such as a solicitor or Director of Social Services. An application will need to be made to the Court of Protection. If no one is able to be a Deputy, the Court can appoint one from an approved panel. A Deputy will be accountable to the Court for any decisions they make.

Can a person appoint someone to make their decisions for them in the future, when they lose capacity?

A Lasting Power of Attorney (LPA) is a legal form which allows a person to choose someone else (known as an “Attorney” and can be a friend/relative or a professional) to manage their affairs on their behalf. A person with capacity over the age of 18 can make a LPA.

There are two types of LPA:

- 1.** A Property and Financial Affairs LPA which will allow the Attorney to make decisions about financial and property matters
- 2.** A health and Welfare LPA, which will allow the Attorney to make decisions about health and personal welfare (but this can only take effect when a person lacks capacity to make decisions).

LPA forms are available from the OPG website:

www.gov.uk/government/publications/make-a-lasting-power-of-attorney

or you can make the LPA online:

www.gov.uk/power-of-attorney/make-lasting-power

The LPA must be registered with the Office of the Public Guardian before it can be used, and a registration fee of £92 will be payable for each LPA. Registration fee exemptions or reductions are available for people receiving certain benefits or on low incomes.

Please visit the following to complete the LPA120 form which can be used to claim help with fees:

www.gov.uk/government/publications/power-of-attorney-fees

What if a person has already made an Enduring Power of Attorney (EPA)?

Financial LPAs replaced EPAs, but if a person already has an EPA (registered or not), nothing needs to change. They may wish to sign a new LPA if they still have capacity – this can be a health and welfare LPA, a property and financial affairs LPA, or both.

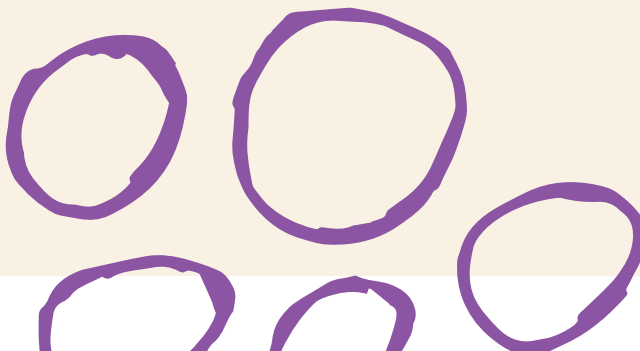
What if a person wants to make advance decisions about treatment?

An advance decision to refuse treatment allows a person to set out particular types of treatment they do not want should they lack the capacity to decide this for themselves in the future. An advance decision about life-sustaining treatment (to keep a person alive) may also now be made. This does not allow a person to ask for their life to be ended.

A person can also write down or tell people about their wishes and preferences about future treatment or care. These must be taken into consideration when determining what is in that person's best interests.

What is the Code of Practice?

The Act is supported by guidance in a Code of Practice. Certain people must have regard to it when they act in relation to a person who lacks capacity to make a decision – such as Attorneys, Deputies, the Court, IMCAs, doctors, social workers, solicitors and paid carers.



The Court of Protection

The Court of Protection was established under the MCA and is a specialist court which deals with all issues relating to the Act.

- The Court can make final decisions on capacity if there is uncertainty whether a person is able to make the decision in question.
- The Court can make decisions about finances, property and health and welfare decisions and the Court can make one-off orders to deal with one-off decisions on behalf of people who do not have capacity to do so themselves.
- The Court is able to appoint Deputies with ongoing authority to make decisions for a person who lacks capacity.
- The Court is able to remove the powers of an Attorney or Deputy who has not been acting in the person's best interests and put alternative arrangements in place.

Who is the Public Guardian?

The role of the Public Guardian is to protect people who lack capacity from abuse. Its role is to:

- register LPAs and EPAs
- support Attorneys and Deputies to do their jobs
- supervise the Deputies appointed by the Court
- provide information to the Court
- give information and guidance to the public.

I am an appointee for a person who lacks capacity – what do I need to know?

If you are an appointee with the Department of Work and Pensions for someone who lacks capacity to make financial decisions, the appointeeship should be carried out in accordance with the Act. For example, decisions on how the person's money should be spent should be done according to the "best interests" principle.



Mencap's Wills and Trusts resources



Mencap's Wills and Trusts service offer free resources to families and carers who are planning for the financial future for a loved one with a learning disability.

We provide:

- Free Wills and Trusts guides
- Free online Planning for the Future webinars
- A list of STEP qualified legal professionals in your area who can help write your Will and set up a Trust
- A dedicated team who can offer guidance and support on Wills and Trusts

By attending one of Mencap's free online you will have the opportunity to:

- Get valuable advice and information about Wills and Trusts
- Hear from a legal professional with experience in Trust and Estate law
- Get answers to your questions
- Hear questions and views from other families in similar situations

“Clear and concise presentation with an empathic approach to disability issues. It is great to feel I can protect my son's assets and support his sibling to manage this process in the future. Thank you.”

A parent who attended a Wills and Trusts webinar

Further information

If you need any further help or guidance on Wills and Trusts, or you would like to attend one of our free online Wills and Trusts webinars:

Call: 020 7696 6925 | **Email:** willsandtrusts@mencap.org.uk

Visit: [mencap.org.uk/willsandtrusts](https://www.mencap.org.uk/willsandtrusts)