

# MAKING FINANCIAL DECISIONS

*Guidance for Assessing, Supporting and  
Empowering Specific Decision Making*



EMPOWERMENT MATTERS





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## Acknowledgements

An online survey was set up to find out the views from anyone who has an interest in the assessment of a person's capacity to make decisions about their finances. Responses were received from people who came from a wide range of backgrounds. Their contributions were extremely valuable and highlighted many issues experienced when attempting to assess a person's capacity for financial decision-making. Many people offered their experiences in resolving issues and we are grateful to them for sharing these. Many are included in this guide.

The draft guide was circulated for comment to a reference group made up of a wide range of people and organisations. We would like to thank those people for their time and efforts.

**Jakki Cowley & Sue Lee**  
**Empowerment Matters CIC**

## Scope of the guidance

The guidance focuses primarily on how to assess an individual's capacity in relation to financial decision-making and makes practical suggestions about supporting an individual to make specific financial decisions. Most issues taken to the Court of Protection are financial ones. There is an impression that decision specific capacity assessment in relation to financial decision-making is not well understood or practiced. Therefore there is a need, in particular, for better understanding of capacity assessment for financial decision making, through a practitioner guide. It should be noted that assessments undertaken prior to a court decision are not covered in this guidance.

## Guide Reference Group

Joseph Yow	MCA & DoLS Lead	Cambridgeshire County Council
Lucy Bonnerjea	MCA & DoLS	Department of Health
Alex Ruck Keene	Barrister	39 Essex Street Chambers
Meike Beckford	Financial Advocate	DOSH
Ian Gunn	Consultant	Personal Financial Planning Ltd
Tim Farmer	Managing Director	TSF Consultants Ltd
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## Introduction

This guide was written by Empowerment Matters a Community Interest Company that is a resource agency for the Mental Capacity Act and Advocacy. Much of our work focuses on Mental Capacity Act training for staff supporting individuals who may lack capacity to make some decisions. It is our experience of hearing about the issues they face in their everyday work that has helped us to understand the need for this guide and what should be included. The guide was funded by the Department of Health

The House of Lords enquiry into the Mental Capacity Act 2005 acknowledged ‘the wide-spread support which the Act enjoys among stakeholders’.<sup>1</sup> The evidence submitted during the enquiry also highlighted that there is a need for better understanding in relation to empowering individuals, capacity assessments and supported decision-making. These concepts are very important when supporting individuals to make financial decisions. There is a need for a practical guide that will assist those concerned with assessing an individual's capacity to manage their finances.

Financial decisions can range from deciding whether or not to buy a pint of milk to making complex decisions about a portfolio of shares. It is an area that demands a number of skills from the individual. People who support individuals may be concerned about the need to protect an individual so that their vulnerability to financial abuse is minimised and this can sometimes result in a person not being supported to make their own financial decisions. It has the potential to disempower the individual. There is a need to balance safeguarding the person from financial abuse with the need to preserve the individual's independence.

Our **survey** highlighted the concern that sometimes a ‘blanket’ decision that an individual lacks capacity to manage all their finances is applied without any regard to whether the

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<sup>1</sup> Mental Capacity Act 2005 – post-legislative scrutiny. House of Lords Select Committee on the Mental Capacity Act 2005 (2014) <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>

individual has capacity to manage a particular aspect of their finances. Family members, deputies and attorneys may take on the responsibility of managing a person's finances with the assumption that an individual is incapable of making ANY financial decisions. This is contrary to the Mental Capacity Act that places emphasis on enablement and empowerment.

Capacity is the ability to make a particular decision, having understood the information relating to the decision at hand and appreciating the consequence of making or not making that decision. In order to provide the right support and to respect the rights of the individual it is essential that the person's capacity to make particular decisions about their finances is properly assessed. It is possible, for example, for someone to lack capacity to make decisions about paying rent and bills but to have capacity to make decisions about buying everyday items making it necessary to assess capacity in relation to specific financial decisions.

## Who is this guide for?

This guide is primarily for anyone who is in a position of assessing and/or supporting an individual to manage their own finances including:

- Support and care staff involved in supporting and empowering individuals in their own homes or in a care setting.
- Deputies and their staff appointed by the court to manage a person's property and affairs such as those employed by a solicitors firm or a local authority.
- Deputies appointed by the court to manage a person's property and affairs who are a family member or a friend.
- Appointees who are appointed by the Department for Work and Pensions to claim and collect benefits or pensions on behalf of a person who lacks capacity to manage their own benefits.
- Attorneys who are appointed to make decisions about property and affairs under a Lasting Power of Attorney (LPA).
- Staff working in the banking sector.
- Family carers and friends who support an individual with their finances.
- Advocates who are involved in supporting a person to understand their options in relation to their finances or involved in a non-instructed capacity when decisions about finances are being made by others.
- Social workers and Care Managers who have a responsibility to assess capacity and to put in place appropriate support when a person is found to lack capacity to manage some or all aspects of their financial affairs
- GPs who may be asked to assess someone's capacity to manage their finances, for example, in support of a person's application to appoint a Property and Affairs Attorney for a Lasting Power of Attorney.

Trainers who deliver training on the Mental Capacity Act may also find this guidance useful.

## Purpose of the guide

The guide provides practical assistance to anyone who supports an individual to make decisions about their finances. It is necessary to include the legislation that governs financial decision-making and a small part of the guide is devoted to that important aspect, however, this is above all a guide that makes practical suggestions about how to:

- empower and support an individual with making decisions about their finances
- assess an individual's capacity in relation to financial decision-making in a way which is *decision-specific*
- apply the Mental Capacity Act to an individual's situation
- enable decision making by individuals wherever possible

It sets out to promote best practice in this area.

This is a complex area and the guide cannot cover every conceivable situation or decision that individuals may face. What it aims to do is set out an assessment process that complies with the Mental Capacity Act and respects the rights of individuals to be as involved in the decision-making as possible. It can be used with a range of individuals who may be experiencing difficulties in making decisions about aspects of their finances.

## Case scenarios

We have included case scenarios throughout the guide to demonstrate situations individuals may be facing in relation to financial decision-making and how these may be resolved. Some of the situations described are from our own experiences as advocates, some are from people who have attended our Mental Capacity Act training and others have been offered either by the reference group or taken from the survey described above. Names have been changed to ensure anonymity.

## What's covered in this guide?

We start with the Mental Capacity Act and the importance of the presumption of capacity. This important legislation sets out the framework for working with people who lack capacity to make specific decisions and tells us how capacity should be assessed.

A section is devoted to supporting individuals with financial decision-making including case scenarios and practical suggestions to help maximise a person's capacity, to empower individuals and promote independence.

One section covers the capacity assessment and includes suggestions about what should be included and how to carry out an assessment of the person's capacity to manage their finances. It introduces the idea of 'the ladder of assessing capacity' that sets out various areas that would form part of the assessment.

The legal framework that allows decisions to be made by others is covered briefly and related to that is best interests and how this applies to financial decisions.

Finally, a section covers top tips in order that we may share the many excellent suggestions offered by the respondents to the survey.

## Mental Capacity Act 2005

The Mental Capacity Act (MCA) provides a legal framework in England and Wales for people who lack capacity to make some decisions for themselves or who have capacity and want to prepare for a time when they may lack capacity in the future. The Code of Practice<sup>2</sup> offers guidance on the practical application of the MCA for anyone working with individuals aged 16 and over<sup>3</sup> who may lack capacity to make particular decisions. In relation to appointing attorneys under a Lasting Power of Attorney (LPA) the person making the LPA must be aged 18 or over and a person may be a deputy if they are over 18 years.

The MCA applies to a wide range of decisions, including personal welfare, healthcare and financial matters. It sets out how to act and make decisions on behalf of an individual who lacks capacity to make a specific decision. Anyone who has responsibility for assessing capacity or supports individuals who lack capacity to make particular decisions, must know how the MCA applies to the individual's situation.

Mental Capacity is the ability to make a decision at the time it needs to be made.

### Why may people lack capacity?

People may have a condition or illness that affects their ability to make decisions. A lack of capacity may be temporary such as that caused by some illnesses or the influence of drugs or alcohol. Examples of conditions that may cause the person to experience difficulties with decision-making include:

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<sup>2</sup> Mental Capacity Act 2005 Code of Practice. Ministry of Justice (2007) <http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act>

<sup>3</sup> this guidance does not cover the position of those under 16. Decisions relating to property and affairs can be taken in respect of those below the age of 16 if the relevant lack of capacity will last beyond the age of 18.

- dementia
- mental health problems
- acquired brain injury
- learning disability

A person's capacity may vary over time depending on the condition or illness that the person experiences.

## MCA principles

The MCA has 5 principles and these are just as relevant to financial decision-making as decisions relating to a person's health and welfare.

### **Mental Capacity Act statutory principles:**

- 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 him to do so have been taken without success.
- 3 A person is not to be treated as unable to make a decision merely because he makes 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 his best interests.
- 5 Before the act is done, or the decision 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 the person's rights and freedom of action.

Understanding and applying the Act's 5 statutory principles are fundamental to ensuring that people who have conditions affecting their decision-making ability are given the best opportunity to make decisions for themselves. The emphasis must be on supporting people to make their own decisions or where they are assessed to lack capacity to make a particular decision, that they are supported to take part.



## Principle 1 – the presumption of capacity

The MCA is clear that we must presume that a person has the capacity to make a decision until we have a reason to suspect that capacity is in some way compromised. The responsibility for proving that a person lacks capacity falls to the person who is challenging it.

### **Case Scenario – applying the MCA principles**

Mr Richards was involved in a road traffic accident resulting in an acquired brain injury. He has problems with his memory, communication and organising everyday tasks that he needs to do. Mr Richards is currently residing in a rehabilitation unit.

A deputy who works at a local legal firm has been appointed by the court to manage Mr Richards property and affairs. Mr Richards contacts the deputy to say he needs money to pay for a holiday. The deputy knows that she must follow the MCA and initially assume that Mr Richards has capacity to make this decision unless there is proof that he lacks capacity to make this decision. She discusses it with him but is concerned that he doesn't seem to know how much money he needs or where he will go on the holiday.

The deputy meets with Mr Richards and assesses his capacity to make a decision to spend money on a holiday. She thinks that he currently lacks capacity but that with support he will probably have capacity to decide to spend money on the holiday. She asks Mr Richards if he is OK with getting some help on finding out his holiday options, support he will need whilst there and the holiday costs and then asks the staff at the unit to provide support with this.

(see page 87 for further information about the role of deputies)

## Principle 2 – helping someone to make a decision

Many people, regardless of whether or not they have capacity, need help to make decisions. It may be very hard for a person to decide whether or not to choose a particular option without having all the information in a format that is right for them. In relation to assessing capacity to make a financial decision, a person should be supported to understand the decision in hand rather than assuming that they do not have the skill or knowledge to make the decision. The need for additional support does not necessarily mean that the person cannot make a particular decision. In accordance with principle 2, every effort must be made to assist the person, to enable them to make the decision for themselves. Independence must be supported wherever possible.

Our survey<sup>4</sup> highlighted that principle 2 of the MCA is often misunderstood or overlooked by those providing support and this results in the person being found to lack capacity and excluded from further opportunities to make decisions as others then make a decision on their behalf, in the individual's best interests. There should be an emphasis on finding ways to help a person to understand the decision to be made and to provide support that enables him/her to make the decision for himself/herself.

There are a range of options that may be used to give someone practical support during a capacity assessment such as making the information accessible or being aware of an individual's communication needs. There is more about this in the section on [supported decision-making](#).

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<sup>4</sup> 50 people from a wide range of professions responded to our survey asking what should be included and addressed within this guidance. The questions we asked are included on page 130.

### **Case scenario – Principle 2 helping someone (Attorney)**

Mrs Polkowski had a stroke 6 months ago and since then has required assistance with various aspects of her life including managing her financial affairs. Her son is her attorney, appointed under a Lasting Power of Attorney before Mrs Polkowski's stroke.

Mrs Polkowski has recently inherited £50,000 and her son is responsible for making decisions about investing the money and making gifts and purchases. He understands that he has a responsibility to consider taking professional advice and to invest the money in his mother's best interests in a company regulated by the Financial Conduct Authority<sup>5</sup> if she lacks capacity to make the decision for herself.

He talks to his mother about the inheritance and she shows that she has some awareness of where the money came from, however, when he discusses what to do with the money, Mrs Polkowski does not seem able to understand the options available. To help her he decides to make some sheets of paper with various options written/drawn on each and works through each one with his mother.

He chooses a time when she will be most alert. He knows that in the past his mother has chosen to give financial gifts of £100 each year to her 4 grandchildren and has regularly invested her savings in ISAs and he needs to take this into consideration. He concludes that she does not have capacity to make decisions about investments but does have capacity to decide on smaller amounts such as giving birthday money to each of her grandchildren.

### Principle 3 – the right to make an unwise decision

Whether a decision is considered unwise or not by others very much depends on a person's perspective, their values and their experience. This principle protects individuals who have capacity to make a decision that to others may appear unwise. The making of an unwise decision does not in itself indicate a lack of capacity. However, if a person makes a decision that is completely out of character and seems irrational in the context of decisions that the person has made in the past, this may raise questions about the person's capacity and lead to an assessment of their capacity to make that particular decision.

#### **Case Scenario – making an unwise decision**

A solicitor is a Deputy for Property and Affairs for Ms Peters a 28 year old woman who has an acquired brain injury due to an illness. Ms Peters has made good progress in her recovery. She calls the Deputy to say she has an opportunity to buy a car and wants £6000 to make the purchase. As this is a large purchase, the Deputy makes arrangements to meet with Ms Peters.

During the meeting Ms Peters explains that the car belongs to a friend and is for sale as the friend is moving to Australia. Ms Peters feels this is a good opportunity as she may be able to drive in the future and the car is a bargain.

The Deputy assesses Ms Peters capacity to make this decision, carefully exploring whether she understands the consequences of making the purchase. Ms Peters expresses that she wants to buy the car in anticipation of being able to drive again and although she does not know if she definitely will be able to but feels that having the car will provide her with the motivation for progressing her recovery further.

The Deputy considers that Ms Peters does understand the consequences of buying a car and then not being able to drive it. She feels this is unwise but believes that Ms Peters does have capacity to make this decision.

## Principle 4 – decisions made on the person’s behalf must be in their best interests

Once a lack of capacity to make a particular decision has been established, the decision made on another’s behalf must be in their best interests. The MCA sets out a list of factors<sup>5</sup> that should be considered when making best interests decisions. The person should be supported and encouraged to take as full a part in the decision-making as they are able.

### **Case Scenario – making a best interests decision**

Mrs Olney is a Property and Affairs attorney for her father, Mr Neal, who is 85 and lives in his own home. Mr Neal has dementia and is supported by his family and care workers.

During a recent storm, the roof of Mr Neal’s garage roof was damaged resulting in rain coming in through the roof. When she talks to her father about it, Mr Neal says ‘it won’t do any harm to leave it’ but she feels that her father does not understand the extent of the problem. She consults family members and takes into account that her father always carried out house repairs promptly in the past and the effect on the house value if it is not repaired. She decides it is in her father’s best interests to have the roof repaired and gets 3 quotes for the work.

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5 Mental Capacity Act 2005 Code of Practice (2007), Chapter 5.

## Principle 5 – the least restrictive option

When a decision is made on behalf of a person who lacks capacity to make that decision the MCA says that the option that is the least restrictive of the person's basic rights and freedoms must be explored and considered, even if eventually discounted as the right option for the final decision.

For more detailed information about the MCA principles, consult the Code of Practice.<sup>6</sup>

### **Case Scenario – considering the least restrictive option**

Mr Smith has Korsakoff's Syndrome and requires support with managing his finances. After problems with unpaid debts and a potential eviction, the court has appointed the Local Authority (LA) to provide a deputy service for Mr Smith.

The LA are aware that in order to comply with the MCA, they need to consider the least restrictive option for Mr Smith and how he could be supported with his money. They make arrangements to ensure that his essential bills are paid and arrange for him to have a restricted bank card that enables him to access a pre-determined amount of cash. This supports Mr Smith's independence within safe limits. They consider that the risk of losing small amounts of money are worth the benefit of having the freedom to go out and spend money and be part of the community.

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<sup>6</sup> Mental Capacity Act 2005 Code of Practice. Ministry of Justice (2007) <http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act>

## Assessing capacity

39 Essex Street Chambers state in their helpful legal guidance<sup>7</sup> on assessing capacity, that ‘The statement ‘P lacks capacity’ is, in law, meaningless. You must ask yourself “what is the actual decision in hand”? If you do not define this question with specific precision before you start undertaking the assessment, the exercise will be pointless.’

### Assessing Capacity

A person’s capacity is time specific and decision specific. This is fundamentally important in relation to assessing capacity to make a financial decision.

It is not compliant with the MCA, and therefore not legal, to state that a person lacks capacity to make financial decisions unless their capacity has been properly assessed to ascertain which specific decisions they are able or not able to make at the time the decision needs to be made.

Intelligence Quotients, Cognitive Impairment and Mini Mental Tests or the person’s diagnosis are not indicators of whether or not a person has capacity to make a specific decision.

A ‘lack of insight’ must not be conflated with a lack of capacity.

Stating that a person ‘lacks capacity to manage their finances’ will only be the case if an individual has no awareness of money, or the relative value of coins and notes at all and despite all attempts to support them or provide training to develop their skills, they cannot learn the skills needed to make decisions about using money to make purchases. Or through

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<sup>7</sup> A brief guide to carrying out capacity assessments (2014) 39 Essex Street Chambers. <http://www.39essex.com/docs/newsletters/capacityassessmentsguide31mar14.pdf>

illness or injury they have lost all their skills to manage money to the extent that these cannot be re-learnt.

It is more helpful and empowering for the individual if they are described as 'lacking capacity to make decisions about some aspects of their finances'. An outline of aspects where the person lacks capacity and aspects where they have capacity should support the statement. This would be in line with the MCA and would be useful information in terms of care and support planning.

Whether a person has or lacks capacity depends entirely on the decision to be made at the time it needs to be made. An individual can have capacity to manage their everyday spending but lack capacity to manage paying their rent, for example. Capacity can change from decision to decision.

#### **Example statement after assessing a person's capacity**

Mrs Johnstone's capacity was assessed specifically to find out if she has capacity

- to pay her bills, including rent
- to buy items to meet her everyday needs
- to buy gifts for her family and friends

It was ascertained that Mrs Johnstone:

- Lacks capacity to understand the consequences of not paying her bills on time, including the possible consequences of utilities being cut off and eviction if the rent is not paid.

It was also recorded that Mrs Johnstone:

- Has capacity to decide what to buy on a day-to-day basis when supported with budgeting.
- Has capacity to buy gifts for her family and friends when supported with shopping.



## The capacity test

The MCA sets out the test for determining capacity.

- Does the person have a 'disorder of the mind or brain'? (diagnostic test) If so,
- Is that impacting on the person's ability to make the particular decision at the time it needs to be made? (functional test).

To determine this find out if the person can:

- understand the information relevant to the decision;
- retain that information (long enough to make the decision) ;
- use or weigh up the information as part of the process of making the decision;
- communicate their decision (by whatever means, for example using sign language)

The MCA is clear that we must presume that a person has the capacity to make a decision and can only regard a person as lacking capacity once it is clear that, having been given all the necessary information and support, they cannot do any one of the four criteria given above.

In addition there is a need to establish that the impairment of the mind or brain is directly causing the person to have difficulties with making the particular decision in question. This was discussed in *PC and NC v City of York Council* [2013] EWCA Civ 478<sup>8</sup>. Assessors must evaluate the person's ability to decide and consider whether this is because of the individual's impairment.

Assessors shouldn't set the threshold too high. Judgments from cases heard in the Court of Protection have made it very clear that capacity assessments should not be made so difficult that it creates an unrealistic 'test' for a person that someone who has capacity would have difficulty with.

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<sup>8</sup> PC and NC v City of York Council <http://www.bailii.org/ew/cases/EWCA/Civ/2013/478.html>

### **Case scenario – assessing capacity**

Marie has a learning disability and is supported daily by paid care workers. Marie's father acts as a deputy, appointed by the Court of Protection. He was appointed as a deputy after an assessment of capacity showed that Marie lacks capacity to make financial decisions about some aspects of her finances, particularly those where larger sums of money are involved. Marie's father works closely with the care staff to understand Marie's financial needs. Marie is supported to access her own bank account and makes everyday decisions with the support of care workers.

Marie wants to attend a college course that will cost £1000 for the year. The care workers understand that capacity to make the decision about spending the money is specific to the time it needs to be made. They presume capacity but when they discuss the decision with Marie they have concerns that she may not have capacity to understand the amount of money that the course will cost and how that will affect her budget and money available for other things.

A meeting is held with Marie, her father and her support staff. They ask questions to probe her understanding of spending that amount of money and to assess whether she understands the consequences of deciding to pay for the course. Marie explains that she knows the course costs a lot of money, more than buying a week's shopping or a new pair of boots and a coat and that she may not have enough money for a holiday but the course is important to her because it may help her to get a job.

Her father and the care workers believe that Marie understands the decision and how it will impact on her future spending, can weigh up the main factors involved in making the decision and can explain her decision. They believe she has capacity to make this particular financial decision.

## Assessing capacity to make financial decisions

There are 3 different types of situations that require an assessment of the person's capacity.

- Decisions that require an informal assessment of the person's capacity to make a particular financial decision. This applies to everyday decisions such as buying a new coat or a pint of milk. If the person has capacity, they can make the decision. Carers and support workers must have a **'reasonable belief'** that the person lacks capacity to make the particular decision before they can act in the person's best interests.
- Specific financial decisions that require a more formal capacity assessment that the assessor will want to be recorded. For example, a professional deputy who is responding to a request from their client for money to purchase an expensive item. A family member acting as deputy may also want to do this and keep a record.
- Somebody may want to know which specific areas a person is finding difficult in managing their finances overall, so that they can suggest support or they may need to consider if the person requires an appointee, deputy or if they have capacity to appoint an attorney. For example, a person with dementia who is losing the ability to manage their finances.

There is more detail on specifically *how* to **assess capacity** in relation to finances in the following sections. **Templates** for assessing are at the end of the guidance.

### **Case scenario – assessment of capacity not carried out**

Betty is an older woman with dementia who had been living at home on her own. Over a period of months a best interests decision was taken for her to move into a residential care home. Up until this point she maintained control of her finances and there was no evidence or concerns raised to date that she was unable to manage her finances. She had 4 x paid carer visits a day and they supported her with shopping for food and toiletries by asking Betty what she needed as well as their observation of what she had in the house. Betty's social worker decides that an appointee is now required to enable the care home to buy toiletries and clothes for her.

This case study demonstrates that what appears as the most practical solution to the situation given Betty's income is minimal and her outgoings are spent on quite basic items but it is not in line with supporting Betty to retain an element of independence. It may be easier for the home to make decisions on behalf of Betty, however, time should be spent with Betty and her previous carers to look at how she can be supported to make some decisions about using her finances in her new accommodation.

### **Case scenario – best practice**

Using the principles of the Act and supported decision making, time could have been spent with Betty at any point from the change of accommodation proposal to the point of her moving to the care home and settling in considering how decisions about money were made. Given it was for basic food and personal toiletry items and that there was an existing framework in place (although an informal arrangement) Betty was already used to someone supporting her to make and then carry out decisions. Betty could be supported to look at what at her income and what her outgoings would be.

A capacity assessment could be carried out to determine which aspects of her finances Betty lacks capacity to manage. If Betty had capacity then safe and secure arrangements could be put in place for where she keeps her money and a care plan completed that outlined how she wished to spend her money. Support she requires either to make decisions or to carry them out i.e. someone taking her out or going out on her behalf/accessing the internet to purchase items should be recorded. If Betty lacks capacity to manage her benefits, an appointee could still be progressed and a plan put in place that documented exactly what decisions Betty can or cannot make. Also, how decisions could be made on her behalf having considered what she usually used her money for, what her past preferences had been as well as her changing needs given the different environment she is now in.

## Considerations before assessing capacity

An important place to start, to ensure that assessments are not carried out unnecessarily, is to ask whether a formal assessment is actually required. In line with the principles of the Act, the person should be at the heart of all decision making and supported as much as possible to make their own decisions. The following questions serve as a model to begin with before starting any assessment and should be recorded to support the rationale for carrying out (or not) an assessment.

### Checklist before beginning the assessment

<i>Checklist Question</i>	<i>Points for consideration</i>
Do you have a right to assess capacity?	<ul style="list-style-type: none"><li>• What is it that has led you to believe the person may lack capacity?</li><li>• Is there an impairment or disturbance in the functioning of the brain or mind and if so do you believe it is this that is impacting on their decision-making?</li><li>• Are you the decision maker in this instance i.e. responsible for making the decision about the person's finances?</li></ul> <p>If you are not the decision maker this does not make an assessment inappropriate. Your evidence may be vital for the decision maker. The decision maker may have asked you, as someone that works closely with the person e.g. as the care home manager or named nurse, to assess capacity.</p>

<p>Is there a framework already in place for decisions about finances?</p> <p>Is there someone who has authority to make financial decisions on the person's behalf?</p>	<ul style="list-style-type: none"> <li>• Does the person have a court appointed property and affairs deputy or a Lasting Power of Attorney in place relating to decisions about finances?</li> <li>• Is there is an appointee from the local authority who is responsible for receiving the person's benefits and ensuring the money is spent in their best interests?</li> </ul> <p>This does not make it inappropriate to carry out an assessment but a discussion with the relevant person that holds responsibility should take place. It may be that a deputy holds a substantial amount of money on behalf of the person but that the individual could still make decisions about day to day spending. Similarly, if someone in the local authority is the appointee, they may need information that informs them the person can make some decisions therefore enabling the individual to have a greater degree of control over their finances.</p>
<p>What kind of problems is the person experiencing?</p>	<ul style="list-style-type: none"> <li>• Have you determined exactly what the issue is?</li> <li>• Is there an underlying issue that is affecting the persons ability to make decisions about how they use their money?</li> <li>• Are there concerns that others may be taking advantage of the person?</li> </ul> <p>The person may still have the capacity to make decisions about their money but lack the confidence or ability to address the way others have a degree of control over them.</p>

<p>What can you do to provide support?</p>	<ul style="list-style-type: none"> <li>• Are there practical steps that you can take to enable the person to manage some aspects of their finances?</li> <li>• Has consideration been given to the first steps to be taken before even starting an assessment?</li> </ul> <p>The ability to make a decision should not be confused with the ability to carry out the decision. Someone may have cognitively based difficulties with initiation that makes it hard to carry out decisions that may or may not respond to support (commonly as a result of damage to the frontal lobes). This may result in them lacking the capacity to make a decision as they cannot then carry it out.</p>
<p>Is the person making an unwise decision?</p>	<ul style="list-style-type: none"> <li>• Is the decision in breach of a policy or values of an organisation? (which may be unwise if the person is risking a tenancy or service but a capacitous decision).</li> <li>• Is the decision a lifestyle choice?</li> <li>• Are your own values in conflict with the decision or choice a person wishes to make?</li> </ul> <p>A decision may be viewed as unwise because the person is in debt and can't realistically afford to spend their money.</p> <p>The person may choose to spend their money on something that is illegal such as drugs or something that is viewed by some people as immoral such as sex workers.</p>



	<p>Consideration must be given to whether the person is making a choice that some would view as unwise but is an extension of their lifestyle, or something that goes against the values or policies of a decision maker, environment they're living in or service they're in receipt of but <i>is</i> a capacitated choice. It is essential to consider the person's historical attitude towards financial risk and the sorts of financial decisions they have made in the past.</p>
<p>Do you need to take action in an emergency?</p>	<ul style="list-style-type: none"> <li>• Is there a professional duty of care or a safeguarding concern that takes priority?</li> </ul> <p>This is not to say that best interests or the person's capacity is ignored but rather to highlight there will be some circumstances that warrant immediate action to safeguard the person.</p>

### **Case scenario – making an unwise decision**

Henry has a learning disability and receives support from paid care workers. The care workers are aware that Henry regularly buys scratch cards from the local shop. He seems to be buying them more frequently than he was before and the care workers are concerned about the impact it is having on Henry's savings and his ability to pay for essential items.

They discuss their concerns with Henry and are aware that they must presume capacity. Henry explains that he really likes buying scratch cards and can't see why he needs to stop. The staff say they are worried he won't have enough money for going out or paying for a holiday. Henry says that he's not worried about having a holiday and that he goes out as much as he needs to. The staff do not agree with Henry and think his decision is not wise but agree to support him by helping him to understand how much he is spending on scratch cards and the impact of this on his money situation.

## Supported decision making

The House of Lords in their enquiry into the Mental Capacity Act<sup>9</sup> raised concerns that ‘the empowering ethos of the Act has not been widely implemented.’ Supported decision-making is a vital element in ensuring that empowerment is achieved.

Before assessing capacity it is important to consider Principle 2 of the Mental Capacity Act:

*‘A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.’*

Research ‘Making Best Interests Decisions: People and Processes’<sup>10</sup> carried out by the Mental Health Foundation, Norah Fry Research Centre and the University of Bradford highlighted something called the ‘concertina effect’ which noted how many best interests decisions were either made at the time of assessing capacity or an assessment of lack of capacity was carried out after a decision had been made. Although it did highlight that in the majority of decisions the person themselves was involved in the decision, the fact that best interests decisions are made with such speed would suggest that principle 2 of the Act is potentially being overlooked. It is vital for the ethos of the Act to flow through a culture of practice and for supported decision making and maximising capacity to be at the heart of best interests decisions to ensure not only that the Act is interpreted as intended but also that those with support needs are not potentially discriminated against because they may have difficulties in decision making.

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9 <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>

10 [http://www.mentalhealth.org.uk/content/assets/PDF/publications/BIDS\\_report\\_24-02-12\\_FINAL1.pdf?view=Standard](http://www.mentalhealth.org.uk/content/assets/PDF/publications/BIDS_report_24-02-12_FINAL1.pdf?view=Standard)

## Financial Capacity and Financial Capability

Financial capacity is the ability to make a decision about how to use your money, whether this is about spending weekly state benefits on basic life necessities or more complex decisions such as investing money in property, stocks or shares. However a person may be deemed as lacking financial capacity because they don't have the financial capability to carry out the decision at hand. One reason might be because they've never had the opportunity to learn or be educated on the relevant decision. For example, it may be easy to assume that someone with a brain injury who lacks a particular skill is lacking that skill due to the injury but perhaps they never had responsibility for making financial decisions within their household.

Consideration must be given as to whether the person may be able to learn relevant information applicable to the decision as well as ensuring that there is an exploration as to why the person is unable to make certain decisions.

- How much is known about the person's understanding and experience of managing finances?
- What support do they require, is it about the provision of information; will they benefit from specific education or training?
- Are there opportunities from them to practice spending money or work out how to use it?
- Is there an opportunity to access a local training course?

### **Case scenario – promoting financial capability**

Stephen is a young man with a learning disability and is in receipt of income support. He wants to get a job and is being supported by staff from the learning disability team. At the moment Stephen has an appointee but he's keen to be able to start managing his own finances. Stephen has previously been assessed as lacking capacity to make decisions about how he spends his money. However it has recently been recognised, through the work staff have been doing with him, that he's never learnt about the value of money i.e. that certain things cost more than others or that notes and coins have differing values. Time is spent with Stephen educating him on how to recognise different coins and what the difference is between the price of a loaf of bread and the price of clothes. In time Stephen is able to make small decisions about how to spend his money and budget and as a result no longer needs an appointee. Stephen's capacity may need to be revisited when he gets a job and his income increases, as he will likely have a wider range of decisions to make.

This scenario highlights the importance of time spent on a capacity assessment and principle 2 of the Act. The individual's ability to make a decision could be improved if the reasons that they cannot understand, retain or weigh up the information are fully explored.

It is important to remember that whatever the reason the answer is 'no' to one or more of the 4 questions in stage 2 of the capacity assessment, that the reason for this is carefully considered. Where possible the person must be continually supported to enable them to make a decision. Appropriate support in enabling decision-making should be viewed as an on-going process.

## Provide all relevant information along with what rights the person has

Make sure that all relevant information about the decision(s) is available to the individual. Nobody should be expected to make a decision about something unless they know all the facts. This may include explaining a court decision, for example, if the person has been appointed a deputy responsible for large amounts of money, which may be the result of a personal injury claim or the person had existing finances and a previous decision was taken with regards their capacity and deputyship.

## Explain what support can be offered

The person may be unaware that someone can assist them with working out their finances or budget. They may need to be reminded about previous agreements they had with regards their finances, for example, that staff will put a certain amount of money away each week to help them save. Or they may need someone to help go out with them on a regular basis to get groceries or work out what they need to buy. It is important not to leave someone feeling isolated within the decision-making.

## Understand the person's situation

It is important to recognise the impact a change in a person's capacity or their ability to make a decision has. For some individuals their capacity may have changed slowly over a period of time, others may experience a sudden event that changes their ability to make their own decisions, for example after a brain injury. Some people may be in the process of learning new information, which they may be struggling with.

Empathy and recognising the difficulties someone is experiencing is crucial within supported decision-making. Generalised statements such as:

'They lack insight'; 'they just don't see that they can't live the life they previously did'

do not demonstrate an attempt to understand the person's situation but rather come from the perspective of others knowing best. Recognising that it takes time to be able to adjust to a life-changing event or for a person to learn new things is vital in gaining trust and enabling someone to state or understand what is difficult for them.

### Consider if practical help may be needed

Consider if a person needs practical support. For example, for a person who has capacity, information about how to organise a third party mandate form that would allow another person to operate their finances on a temporary basis. This would give them authority to deal with everyday transactions and can be useful, for example, if a person is recovering from a period of ill-health which makes it difficult for them to go to the bank. Or would an individual's capacity be enhanced if they had practical help with budgeting or banking.

### Allow sufficient time for the person to make the decision

Consider the use of decisional supports. These are other people or tools that support decision-making. None of us make decisions in isolation or immediately unless the situation requires this. We speak to family, friends, colleagues, use the internet for research, social media and so on. Therefore it would be unrealistic to expect someone who may be struggling to make some decisions not to need the same type of time and support. Consider who may be able to work with the person over a period of time on the relevant decision. This may be a paid professional or someone the person knows well and feels comfortable with.

### Re-visit the decision on a regular basis

The Mental Capacity Act focuses throughout on enabling the person to make their own decisions even when they have been deemed to lack capacity. Once it is established

in what area the person lacks capacity i.e. understanding, weighing up, retaining the information or communicating their decision, then on-going support should be provided in enhancing the particular area of need. For some people, where it is clear they are unlikely to have capacity to make the decision, it is still important to enable them to continue to engage with whoever supports them with their decision-making. These are likely to be the main people that will notice subtle changes in a person's ability or behaviour. They are also likely to be engaged in on-going best interests decisions which may result either in new information being presented or may provide a platform on which to discuss the person's needs and how to adapt to necessary changes in their circumstances.

### Capacity to choose who supports you with your finances

Whilst a person may be unable to make a decision that is directly about managing their finances, for example, where a substantial sum of money is involved, but they may still have the capacity to choose who supports them. The best interests decision will be made by the appointed person (a deputy, attorney or appointee) but must include the person as far as possible and practicable. A decisional supporter, such as a family member or advocate, can spend time with the person exploring their wishes and preferences and support the person to decide who they want to support them with their money.

### Location and environment

Consideration of the person's usual living arrangement or environment needs to be given to ensure their capacity is maximised as much as possible if an assessment is to take place.

- Is the person in an unfamiliar environment such as respite care or hospital?
- Does the environment impact on their ability to express a choice or make a decision, for example, is it busy, confusing or noisy?
- Are there other factors at play that may mean the person feels pressured into



agreeing to something they may otherwise not? For example if the person is detained under the Mental Health Act and already in an environment where they may not experience or feel they have a real choice, their ability to express their true views may be hampered.

- Does the person view the assessor as a person in authority and if so is this likely to impact on whether they engage in the process or what they say?
- Is the assessor dressed appropriately in the context of the environment? For example, a person being visited by a professional in a suit. This may feel overwhelming, out of context or too serious a situation for them to feel relaxed enough to express themselves or engage in a relationship with the assessor.

## Timing

The timing of a capacity assessment links very closely with the above and similar questions will need to be considered.

- Does the person understand beforehand why they are meeting the assessor?
- Has there been an informal 'getting to know' conversation with the person and the assessor?
- Is it the right time of the day for the person to actively engage in discussion? Does their medication, disability or health condition impact on when they are at their most responsive?
- Is the person experiencing a range of decisions that mean it's not appropriate to begin an assessment e.g. treatment decisions, accommodation or safeguarding. Can the commencement of a capacity assessment be delayed?
- Would the timing of the assessment benefit from others' involvement e.g. an advocate, family member, friend, colleague, even if this means an assessment needs to take place outside of an assessor's usual working hours?

## Communication

The person being able to communicate, or being offered support to enable communication, is clearly an important one.

- What are the communication needs of the person?
- Do they use any aids to enable them to communicate? For example a hearing aid, sign language (and if so what sign language do they best understand – it is important not to assume that it's British Sign Language). Other aids may include pictures, a letter board or 'talking mat'.
- Has the person been assessed by a Speech and Language Therapist?
- Can the person write down their wishes, thoughts or preferences if they are unable to verbalise them?
- Is there a record of the person's non verbal communication and what this means? (which may enable the assessor to understand when the person may be getting distressed or trying to explain a particular issue or view).
- Is the person's communication enhanced (or not) when someone they know is present and supporting them?
- Is English the person's first language; is an interpreter required?

## Props/scenarios

The use of props or scenarios, such as bank statements and utility bills, are likely to be more beneficial when there is some knowledge of the person and how the person understands information, communicates it or expresses a choice. Consideration should be given to offering a scenario the person is most likely to be familiar with; asking questions about past choice and decisions; what was important about those, including the relevant factors. These will need to be as person-centred as possible.

## Culture, Spirituality & Values

Consideration of a person's values, traditions, and beliefs where known must be considered.

- If a person's religion or faith is known, does their religion stipulate any views on the decision (this may highlight what would have been important to the person)?
- Does the person have lifestyle-related beliefs and attitudes that have been an integral aspect of their identity? Have these been investigated (and, where appropriate, input been sought from significant parties) in order to determine their relevance to the decision and ways in which they may be promoted or upheld?
- Has consideration been given to the person seeing their priest, reverend, rabbi or imam with respect to the decision or circumstances relating to the decision?
- Did their beliefs impact on how they invested their money? For example, perhaps the person would only invest in ethical companies in the past or perhaps they were a member of a particular political party and regularly contributed to party funds.

## Independence and autonomy

How do the proposed options impact on the person's independence and/or autonomy? Is the notion of autonomy (whilst important in British law) an important factor for the person being assessed? The focus here should be on what these factors mean to the person themselves.

- How can the person be supported to retain their independence when the decision may be taken out of their hands?
- Is it important for the person for them to have a close network that enables or supports them to make their own decisions?
- Would the person benefit from having an independent advocate as part of the assessment process?

## Benefits of a money plan/financial passport

A money plan or financial passport can be helpful in informing others in the person's life, including professionals that may only come into contact occasionally with the person, as well as those supporting an individual on a day to day basis. This isn't legally binding but is something to which particular weight should then be given by s.4(6) MCA 2005 if the person lacks capacity and others are taking best interests decisions on their behalf. Sometimes it is beneficial for a person to have a financial profile which is a more formal document that has more detail about a person's income and assets.

It can cover the following:

- Information about the person's capacity and where it is appropriate to make best interests decisions.
- Decisions where the person needs support e.g. at the bank
- Information about income, benefits etc.
- What the person likes to spend their money on.
- Where they may need support in making a decision (for example if the person is on a minimal budget).
- How their money is kept safe – any potential safeguarding issues.
- Who has responsibility for their finances (for example if others need to be consulted about some decisions or permission sought to access their finances such as a deputy or appointee).
- Any training needs to support the person to learn money/budgeting skills etc.
- Information to provide assistance in creating a care plan that can support the person to make decisions or carry out those decisions, for example, supporting the person to make a list of items they need.
- Accompanying the person to places where they will spend their money and offering appropriate support (such as counting out their coins).
- Identifying daily activities that the person would normally carry out in the community (getting a hair cut, going for afternoon tea or a café) and supporting them to budget

their money to carry this out.

- Consider also whether the individual may want to make a film. This can be a very effective way of ensuring that a person's wishes and feelings are accurately recorded and to give a picture of them as an individual.

## Empowerment and Protection in relation to finances

The MCA aims to strike a balance between empowerment and protection but decisions can often be led by the level of risk the person may face rather than the focus being on empowering an individual. This is particularly relevant when it comes to financial decisions because empowering a person to have a level of responsibility for their finances may also put them at risk from abuse from others either within the wider community or their own living environment.

The Oxford English Dictionary describes the process of empowerment as:

*Make (someone) stronger and more confident, especially in controlling their life and claiming their rights:*

People become more confident and empowered the more they carry out a particular action but they also need to be provided with information on their options, the pros and cons of these options, including how feasible they are, as well as what rights they have.

## Advocacy

Advocacy is a way of supporting an individual to say what they want, ensure their rights are upheld, or access services or other resources that they are entitled to. Paid professional advocates are independent of other service providers such as the NHS or local authority to ensure that they represent the person only and to ensure there is no conflict of interest.

### Support from an advocate

Advocates can spend time with the person in order to gather their views, wishes and preferences including talking to others in the person's life to ensure they build up a full picture of the person. This may include outlining what decisions they would have made when they had capacity (if applicable) as well as ensuring the person remains at the heart of all decision-making.

Advocates can support a person if there are concerns that family members are not acting in the best interests of the individual and the involvement of an independent person would be beneficial.

Some people will be eligible for support from an Independent Mental Capacity Advocate (IMCA) for a care review, safeguarding, change of accommodation or treatment decisions. Where there is a statutory responsibility to instruct an IMCA<sup>11</sup> this must occur. Where there is a discretionary power to instruct an IMCA, consideration must be given to this.

It is important to note that to be eligible for an IMCA there must be a reasonable belief that the person lacks capacity to make the decision and that they do not have family or friends that are 'appropriate to consult' with. It is for the decision maker to determine what is meant by 'appropriate' rather than the IMCA provider. If family or friends disagree with a decision-

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11 Making Decisions – the Independent Mental Capacity Advocate Service (IMCA). Office of the Public Guardian (2007) <https://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/making-decisions-opg606-1207.pdf>

maker's proposed action, this is not grounds for concluding there is nobody 'appropriate to consult'. In this situation it may be appropriate to appoint an advocate who is not an IMCA.

Instructing an advocate where it is felt the person may benefit from the involvement of an independent person within the decision-making process must be considered to ensure that the person has been afforded as much opportunity to be involved as possible.

The Care Act 2015 introduces new duties to appoint advocates when an individual has substantial difficulty in engaging with the processes involved in care/support assessment, planning and reviews or in the safeguarding process when a safeguarding enquiry is carried out following concerns that a person may have experienced or be at risk of experiencing abuse or neglect.

Advocates can be instrumental in promoting supported decision-making and can bring a unique perspective to the decision making process. The nature of their role means they do not bring with them other responsibilities in the same way a doctor or social worker has to. They are also not personally connected to the person in the same way family members or friends are and therefore can advocate on behalf of the person solely, without any conflict of interest. Their role is to ensure that the person's views are listened to and considered.

Where the person has a property and affairs deputy or attorney it may also be possible to privately fund the advocacy where it is believed to be in their best interests. There must be a framework in place that ensures the advocate's role is not compromised, for example, if they are advocating for something that others object to (who are also responsible for ensuring the funding is in place to pay for an advocate). The crucial point to remember is that advocates do not make decisions on behalf of clients; their role is to ensure the person has a voice in the process even where this may be different to what others are stating.

Funding an advocate or advocacy provider specifically for the person will only need to be considered where there is no existing provider that can provide the service free of charge for that person.

### **Case scenario – funded advocacy**

Vikram has profound and multiple learning disabilities, which occurred as a result of trauma at birth. He has very limited communication, mostly sounds and gestures and is unable to make most decisions for himself. He has a court-appointed deputy to manage a personal injury settlement. It is recognised that there are ongoing decisions relating to his care and needs, including where he lives, ongoing medical treatment and day to day care. He has family involved with all decisions about him but they believe it is important for Vikram to have someone involved that is just for him. They also wish to make preparations for the future, for example, if anything happens to them and they are unable to be involved as much as they are. They believe it is important that someone knows Vikram the way they do and can advocate on his behalf.

Vikram's deputy approaches a local advocacy provider that works with people who have learning disabilities but they state their funding means they can only get involved with specific decisions on a short-term basis. The deputy states that advocacy can be funded out of Vikram's personal injury settlement and seeks permission for this to occur. This means that Vikram can access long-term advocacy, which he would otherwise not have had.



## Financial advocacy

Financial advocacy is a specific service that supports individuals who are experiencing difficulties with managing their money.

Financial advocacy may be of a benefit to the person in the following ways:

- To meet with the person & talk to them and their circle of support.
- Involve the person in every decision about their money.
- Check the person is getting the right benefits.
- Support the person to make a budget.
- Check with the person regularly to make sure it is up-to-date.
- Open a separate bank account for the person's money.
- Support the person in getting a Motability vehicle.

*(taken from [www.dosh.org](http://www.dosh.org))*

## Who should carry out a capacity assessment?

The MCA code of practice states that ‘the person who assesses an individual’s capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made’.<sup>12</sup> In the context of financial decision-making there will be a range of people who have responsibility for assessing capacity. It is not always necessary to engage an expert assessor. The following list is not exhaustive.

Who?	Examples of assessment area
<p><b>Support Worker</b> A person who is supporting an individual in a paid capacity either in the individual’s own home, supported living arrangement or a care home.</p>	<p>Informal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity for everyday purchases.</p> <p>Must have taken reasonable steps to find out if the person lacks capacity at the time the decision needs to be made.</p>
<p><b>Social worker</b> <b>Nurse</b> Social workers and nurses (for example a nurse who specialises in supporting people who have a learning disability) have a role in assessing a person’s capacity to make a range of different financial decisions.</p>	<p>Formal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity.</p> <p>Assessment to ascertain if the person has capacity to decide who will support them with their finances.</p>

12 MCA 2005 Code of Practice 4.38.

<p><b>Property and Affairs Attorney</b> Appointed under a Lasting Power of Attorney when a person has capacity to decide who they want as their attorney.</p>	<p>Informal capacity assessment regarding any specific financial decision to be taken by the person at the time it needs to be made.</p> <p>Must have taken reasonable steps to find out if the person lacks capacity at the time the decision needs to be made.</p>
<p><b>General Practitioner</b> GPs may be asked by a patient to assess whether a person has capacity to manage their finances.</p>	<p>Formal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity, for example, where an application to the court is being made.</p>
<p><b>Family Carer</b> When supporting an individual a family carer may find themselves in a position of buying necessary purchases and goods when the person does not have capacity to make the financial decision.</p>	<p>Informal capacity assessment to ascertain when a person does not have capacity to buy necessary goods and services.</p> <p>Must have taken reasonable steps to find out if the person lacks capacity at the time the decision needs to be made.</p>
<p><b>Deputy appointed by the court for Property and Affairs</b> after the person has lost capacity. Able to make decisions when a person lacks capacity to make a specific decision as long as it is within the scope of the order issued by the court.</p>	<p>Informal capacity assessment to ascertain specific financial aspects for which the person does and does not have capacity.</p> <p>Must have taken reasonable steps to find out if the person lacks capacity at the time the decision needs to be made.</p>

<p><b>Financial Advocate/Money Support Service</b></p> <p>A financial advocate can support an individual with budgeting and making payments. They sometimes act as an appointee for a person and provide support with managing benefits. They make sure that the person is involved in financial decisions.</p>	<p>Informal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity.</p>
<p><b>Clinical psychologist/ Neuropsychologist/psychiatrist</b></p> <p>A professional with experience and expertise in assessing capacity on a range of issues may be involved in assessing capacity where decisions life-changing or have far-reaching consequences.</p>	<p>Formal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity.</p> <p>Assessment to ascertain if the person has capacity to decide who will support them with their finances.</p>
<p><b>Bank Staff</b></p>	<p>Informal capacity assessment to ascertain specific financial aspects for which the person does or does not have capacity.</p>

Anyone who is in a position of supporting another person with their finances should remember that they have no authority to make decisions on that person's behalf if the person **has capacity** to make a particular decision for themselves. For example, a court-appointed deputy who is appointed to manage a person's property and affairs will have a responsibility to ensure that their own actions are in line with the MCA. This includes maximising the person's capacity, providing support to enable the person to participate in decision-making and encouraging independence whenever possible.

It is therefore very important that anyone who has a role in supporting individuals to manage their financial affairs knows how to:

- provide the right support specifically tailored to the individual to enable decision-making.
- assess capacity using the MCA to the standard required (informal / formal).
- use assessment templates that will reliably provide accurate information about the person's capacity to make particular financial decisions.

Suggested templates are provided from page 108 onwards in this guide.

## Professional involvement

In particularly complex situations, for example, if there are potentially serious consequences attached to a particular decision, an assessment by a specialist such as a psychologist or neuropsychologist may be required. The MCA code of practice says that 'more complex decisions are likely to need more formal assessments' (4.42). It also describes the situations where professional involvement might be needed:

- the decision that needs to be made is complicated or has serious consequences
- an assessor concludes a person lacks capacity, and the person challenges the finding
- family members, carers and/or professionals disagree about a person's capacity
- there is a conflict of interest between the assessor and the person being assessed
- the person being assessed is expressing different views to different people – they may be trying to please everyone or telling people what they think they want to hear
- somebody might challenge the person's capacity to make the decision – either at the time of the decision or later
- somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them
- a person repeatedly makes decisions that put them at risk or could result in suffering or damage.

### **Case scenario – Professional assessment needed**

Doreen is 79 and had a stroke 3 years ago. She has some difficulties with her speech and uses a wheelchair. She has been diagnosed with vascular dementia. She is supported in her own home by paid care workers 3 times a day. She owns her own home and has lived there for 40 years. Doreen's son and daughter-in-law and their 3 children moved in with Doreen 2 years ago when they got into mortgage arrears and their house was re-possessed.

During a care review, Doreen expressed to her social worker that she wants to move to a flat in the complex where her sister lives. This would involve selling her house to fund the move. The social worker ascertains through discussion that Doreen understands that selling her home would mean that her family would be homeless. Doreen says that she wants to give her son some money to help with their move. The social worker presumes capacity and believes that Doreen has capacity to make decisions about selling her house, buying another property and giving money to her son. However, she receives a call from Doreen's son saying that his mother does not understand what she's doing and would never want to sell the family home. When she talks with Doreen again, Doreen says she has changed her mind and seems confused about what she wants to do.

The social worker conducts a capacity assessment. The decision(s) for Doreen to make are whether or not to sell her house and whether or not to buy a flat. The social worker concludes that Doreen does have capacity for these decisions. After further discussion with Doreen's family who are adamant that Doreen does not have capacity to make the decisions, given that there are significant consequences for Doreen in making/not making the decision and the family disagree with the capacity assessment, the social worker talks to Doreen about getting a psychologist to assess her capacity for this decision.

When deciding who is best placed to assess capacity, consideration should always be given to whether it is possible for someone who knows the person well to do it. In the scenario above, Doreen already had a relationship with her social worker and so she is more likely to be relaxed, the social worker will know how Doreen communicates and how to provide the right support.

There is an argument for ensuring that someone who is independent of the local authority assesses a person's capacity when that same local authority will possibly be managing that person's finances.

## Reasonable Belief

Family carers and paid care workers do not have to be experts at assessing capacity. There is no expectation that they will need to carry out formal capacity assessments in relation to financial decision-making. They can have a 'reasonable belief' that the person lacks capacity to make a particular decision having made an informal assessment about the person's capacity. That reasonable belief must be based on the family carer or paid care worker having taken steps to establish that the person lacks capacity at the time the decision needs to be made. Those steps include:

- supporting a person through providing all relevant information about a particular decision
- giving a person time to consider a decision
- supporting independence and choice whenever possible
- awareness of the 4 criteria in the capacity test and which of these the person cannot do (understand, retain, weigh up, communicate) in relation to a particular financial decision
- Considering whether the person may be able to make the decision with support

An attorney or deputy would not need to assess capacity every time they pay a bill on an individual's behalf, for example, as long as they reasonably believed that the individual lacks capacity to pay it.

## Preparing for a Capacity Assessment

### The person's support network

Family, friends and paid care workers often provide a network of support for an individual and may have a role in helping a person to manage their finances. Consideration should be given to whether anybody in the support network could provide help to the person before and during the assessment process. The person being assessed should be asked if there is anybody they would want present during the capacity assessment and if they agree to it, the person providing support should be contacted prior to the assessment to discuss their role. The person providing the support, may need time to prepare for the assessment themselves to work out how best to support the individual.

### Undue influence/coercion

It is important for assessors to consider if there is anybody in the person's life who may be attempting to influence the financial decision being made by an individual through exerting pressure to take certain actions. This may be against the wishes of the individual, for example, pressurising someone to sign over assets or change their will. Assessors may consider asking the individual if they would like the support of an advocate in this situation.

### Capacity and Executive functioning

When preparing to assess capacity in relation to an activity, such as managing finances, it is important to consider if there may be an issue with the person's executive functioning. This is an umbrella term, which is often used to cover a wide variety of skills. It includes being able to plan, organise, prioritise, and weigh up information, including assessing the relative risks of various decisions - all essential tasks in decision making. It also covers the ability to initiate action, allowing the person to carry out the decision they have made. Finally it also



encompasses inhibition, allowing the person to not respond to immediate impulses and to follow through on the capacious decision they have made.

A person's executive functioning may be affected by a mental disorder, dementia, an acquired brain injury or a learning disability and can be impaired to various degrees depending on the severity of the person's condition.<sup>13</sup> When executive functioning is impaired the person may not have the ability to understand the consequences of their actions and the impact that their actions may have on others or the full consequences of an action for themselves. A person with impaired executive function:

- may not transfer learning from one area to another
- may not be able to understand the consequences of taking/not taking actions in relation to their finances
- may not be able to manage changes in financial arrangements or the ways that bills are paid
- may have difficulty with understanding the details of a contract
- may have difficulty with carrying out money transactions
- may spend more money than can be afforded
- may have problems with their memory making it difficult to remember financial activities that need to be carried out
- may say they are going to do one thing but then do the opposite
- may not understand the implications of making financial gifts

The person may, for example, pay a bill more than once, neglect to pay an additional bill that is not routine or pay something that does not need paying such as notification of a direct debit. Their verbal communication may be good and the person can therefore explain what a bill is, for example, but they may have difficulty in making arrangements to pay the

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13 *Using Functional Assessments to Determine Mental Capacity in the Person with Dementia* at <http://www.crisisprevention.com/Resources/Article-Library/Dementia-Care-Specialists-Articles/Assessment/Using-Functional-Assessments-to-Determine-Mental-Capacity>

bill and remembering to pay it.

**Strategies that may help the person:**

- presenting information in a visual form
- talking through the consequences of an action with a person
- assisting them in understanding changes to usual arrangements
- checklists and reminders
- backing up verbal instructions with written directions

Part of the assessor's preparations will need to include how to find out if the person may have problems with executive functioning and what kind of support might be appropriate for the person to assist them in managing their financial tasks, enabling independence. Difficulties with executive functioning can also affect the person's ability to use other cognitive skills such as their attention and memory. This can mean that someone with executive functioning impairments can also have impaired abilities to concentrate and remember.

### **Case scenario – ABI & executive functioning issues**

Ralf had a serious illness that resulted in him being in intensive care for some months. He is recovering slowly but has problems with his memory and completing tasks.

During an assessment to find out which aspects of his finances he has capacity for and which he doesn't, it is clear that he can understand, retain, weigh and balance information and communicate his decisions. However, the assessor knows that there are decisions and actions that Ralf is not making which is leading to him getting into debt. On further discussion with Ralf, it is evident that he is having problems with organising financial tasks so that essential jobs get done on time. They discuss the support that Ralf would find helpful.

After a few weeks the assessor returns and finds out that most of Ralf's previous issues have been resolved as he is getting the right support with his finances. The assessor records the decisions that Ralf has capacity to make and notes the support that Ralf currently needs to maximise his capacity and preserve his independence.

### **Defining the decision(s)**

As stated earlier, a blanket statement that a person 'lacks capacity' has no basis in law. It is important to be clear on the decisions/activities that are the reason for carrying out the assessment. The overall management of finances should be broken down into the component parts.

The following are examples for particular financial activities. Does the person have/lack capacity to:

- decide to spend £2000 on a holiday to America
- decide how to spend a personal budget/direct payment
- decide what money to spend on everyday items
- manage bill organising and paying
- manage household finances
- manage a portfolio of shares

It is helpful to the assessor if the specific reason for the assessment is clear as this will inform the questions to prepare that are specific to the individual's situation and will enable the assessor to work out what information is relevant to the particular decision so that all relevant information is provided for the individual. Preparation is key to gathering the evidence needed to evaluate capacity properly.

# Assessing Capacity

Assessing capacity flow chart



## The ladder of assessing capacity

In order to break the assessment process down, below is a guide to be used as a supportive tool. A blank copy is in the back of the guide and users can adapt it to suit the individual person or client group, for example, if used in a specialised setting. **It is not expected that the assessor goes through each step on the ladder if some aspects are not relevant to the individual at that time.** It can be used to record:

- the person's financial decision-making capacity for all areas of financial decision-making
- the support a person needs with financial decision-making
- a specific area that needs to be assessed, for example, understanding banking or the value of money.

### Case scenario – using some aspects of the ladder

Joe is a 37-year-old man with profound neurological and physical impairments that were the result of a catastrophic brain injury 1 year ago. Since his accident he has been diagnosed as being in a minimally conscious state, which means he has some wakeful awareness. He is able to track people that come into his room and point to certain items to indicate his need, for example when he points at the remote control next to his bed he is asking for the TV to be either turned on or off. He has very limited verbal communication. Others make decisions relating to his care and treatment due to his complete dependency on them physically and neurologically.

In this example it would be feasible to go through steps 1 and 2 by asking questions of others in Joe's life including paid care staff in order to create a financial plan of expenditure, care needs and costs. However, due to Joe's limited communication and awareness it is unlikely that visiting him several times would achieve a different outcome. This doesn't mean that the decision cannot be re-visited as Joe's rehab continues but that this would be part

of a long-term plan and dependent on any progress he makes. It would seem inappropriate to visit Joe a number of times over a short period of time when there is clear evidence that highlights the difficulties he experiences in making any type of decision.

The assessment questions are framed to enable the person carrying out the assessment to ask the question of the person themselves, where possible. Sometimes this will not be feasible in which case the same questions should be asked of others that may be able to give this information i.e. instead of 'do you', ask 'does the person?' to ensure that the person being assessed has the same opportunities for all elements to be considered. People that may be asked could include:

- friends
- family
- neighbours
- professionals involved in the person's care

Confidentiality must still be maintained however and consideration must be given as to how to ensure questions are asked, particularly when there is limited information about the person's relationship with those considered appropriate to be consulted.

### Preparation of questions and using open questions

Assessment should begin with simple relevant information that informs the person why the conversation is taking place. Rather than simply asking the person whether they understand what the decision is, ask the person to paraphrase or share what their understanding is for example:

- 'Can you explain in your own words what I've said'
- 'Can you tell me why you think (option 1) is right for you?'

- 'Can you tell me more about why you believe this'
- 'What are some of the ways (option 2) has an impact or influence on what you do?'
- 'Do you think (option 1) is better for you? Can you tell me why?'

Not only can this ensure that assessment fully explores the person's capacity but means that the person is able to explain what is important to them as well as opening up the discussion in order to reflect back what some of the concerns might be with regards the person's decision making ability.

### Considerations for what assessment may be like for the person

It is important to remember that for any one of us, having someone come into our lives and make decisions on our behalf can feel disempowering and daunting. Even for those that put in place plans to ensure their wishes are considered, it is difficult to know in advance how it actually feels should that time come.

- Ensure you explain exactly why you're there and why.
- Consider that the person may feel scared or not understand why this is occurring.
- Remember the person may feel confused, not recall conversations or become frightened.
- It is important to reassure the person.
- Consider the language you use when recording information, statements such as 'the person is challenging in their behaviour' or 'the person displays challenging behaviour' and how this then impacts on how they may be viewed by others. Recording that the person is frightened or confused instead ensures that others approach with compassion rather than being combative in their approach.
- Consider that whilst the person may be deemed to lack capacity, they may disagree with this and as a result feel others are not listening to them or taking their views on board.
- Explain (where applicable) why it is you believe they can no longer make the specific decision at hand.



## Capacity Assessment for financial decision-making

### Steps of assessing

#### 1. Developing a financial profile for the person – needs and responsibilities

##### ***Considerations/Questions to ask***

This is essentially a breakdown of the person's budget, not just what their incomings are but also necessary outgoings. This may include:

- Any private care needs, for example, if care is being provided out of a personal injury payout
- Essential bills, debts, investments, daily activities, personal care items
- Activities such as holidays
- Regular purchases

By categorising the different responsibilities it is then possible to identify the person's needs in each area. For example there is a difference in the provision of support that will enable a person to budget and save for a holiday as opposed to selling a property. The complexities of each decision and whether the person can make a decision on their own, with support, or a decision to be made on their behalf, must all be considered.

Many people will have had capacity to manage their financial affairs prior to either lacking capacity to deal with all or certain elements of this. Consideration must also be given to the person's previous role in money management in the household:

- Does the person have any support (informal or formal) arrangements in place to help them to manage their money?
- To what extent does/did the person manage their financial responsibilities?
- Are there any elements of this that were a joint arrangement e.g. joint accounts/ investments with a partner/relative?

- Where applicable, is a joint account holder currently involved in this process and is there clarity as to what they will be doing?

Example questions:

Q: Who manages the money in your household?

Q: What do you need to pay for/what are your outgoings?

Q: Do you have any difficulties in taking your money out of the bank?

Q: Do you have any savings?

Q: Is there anyone you owe money to?

Q: Do you need any help with your money?

Q: Does anyone help you with your money?

Q: How do your bills get paid?

Q: Can you tell me where you keep copies of bills/statements?

## 2. Areas of unmet financial need – what are they?

### ***Considerations/Questions to ask***

This step not only considers areas of entitled unmet need i.e. benefits/funded care, but also is geared to enable the assessor to consider what else the person may benefit from and a) whether this needs to be funded b) where funding can be sought from if required and c) whether specific welfare advice or support including access to specialised appeal agencies (advice or appeal agencies, solicitors etc) or advocacy is needed.

- Does the person need support in opening/managing a bank account?
- Does the person need to be considered for the input of an appointee, deputy or can they take out an LPA?
- Does the person need a financial advocate?

Example questions:

Q: Are you in full receipt of your benefits? Q: Do you know what you are entitled to?

Q: How is your care funded? Is it sufficient to cover your needs? Does it need reviewing?

Q: Have you had any help to get the benefits you may be entitled to?

Q: Do you need any help to get the benefits you are entitled to?

Q: Does anyone owe you money?

Q: Can you always pay for essential items?

Q: Do you sometimes run out of money? What happens?

It is important to consider a best interests decision, where the person lacks capacity to consent/make a decision, with regards using the person's own money to pay for extra support that they may benefit from but are not necessarily entitled to.

### **3. Recognition and awareness of money**

#### ***Considerations/Questions to ask***

Questions should be focused on finding out whether the person understands the relative value of notes and coins and that money is required to pay for items. It is important to be mindful if the person has never had the experience of buying things on their own or visits to the shops were largely led by another person. Their inability to answer some questions may not indicate a lack of capacity but rather a lack of experience and a skill that could be learnt.

Where the person cannot carry out this action, consideration needs to be given as to whether they can learn this and what the options are for enabling this.

The person may still recognise that when given a certain amount of coins (even if they don't know what the value is) means they can buy a certain product from the local shop. But another person carries out the counting of money and has the knowledge of the cost of an item. The important element in this scenario is the person can still maintain an element of independence and therefore reduce the need for another person carrying out an aspect of the task.

Actual coins and notes should be used to explore money recognition.

Example questions:

- Q: How much money do you have in your purse/pocket?
- Q: What are you planning on spending it on?
- Q: What are these coins/notes?
- Q: Point to a coin/note and ask 'how much is this worth?'
- Q: Can you give me 27p from the coins?
- Q: How do you go about getting things from the shops?

Q: Why can't you just take what you want from the shops?

Q: What do you spend your money on?

Q: How much does (items person has named) cost?

Q: Show £10 note, ask 'how much is this and what could you buy?'

Q: If you had a £34.50 bill to pay but you wanted to buy new jeans that cost £29 what would you do?

#### **4. Relative values of things e.g. pint of milk and new coat**

##### ***Considerations/Questions to ask***

This step focuses on the person's understanding of the relative value of items. Questions should be focused on what the person's experience is and what they are likely to know/understand. So again if the person is unlikely to know the cost of something due to their personal experience this should be noted and questions adapted to ensure that the relative value is matched to their ability/knowledge:

Example questions:

Q: What is more expensive – a pint of milk or a packet of cigarettes?

Q: What costs less – breakfast at the local café or a computer?

Q: If you wanted to buy a new iPad and a new shirt, which would cost more?

Use real objects or photographs whenever possible.

## **5. Management/control of money at the current time.**

### ***Considerations/Questions to ask***

This step looks at enabling the person carrying out the assessment to look at areas where the person does have control and areas where they could be supported to be independent.

- How does the person currently use or spend their money?
- Does the person have any control over their finances currently? (if yes, what areas are they in control of and how are they managing this. If no, what is the evidence that means control is fully maintained by others).
- What would the person spend their money on if they had full control?
- What (if any) elements of their financial expenditure can be self managed?

Example questions:

Q: What do you spend your money on?

Q: If you need extra money how do you get that?

Q: Does anyone provide you with help to manage your money?

Q: Are you happy with the help you get with this?

Q: Is there anyone in your family or a good friend that you trust who could help you with your money?

Q: Are you happy with (name) helping you?

Q: Is there anything (name) does that you would like to be able to do yourself?

Q: Is there anything you want to buy that you can't buy? Why can't you buy (whatever person says)?

Q: Is there anything else to do with your money that you need help with?

## **6. Does the person know their approximate income/value of benefits?**

### ***Considerations/Questions to ask***

This step considers how much information the person either knows or can comprehend about what their available funds are. The use of the individual's bank statements can be useful in this area of assessment.

### ***Example questions:***

Q: Can you tell me how much money or income you have coming in every week/month? Roughly how much?

Q: Where does that money come from? (eg benefits, interest, pensions etc).

Q: What do you need to use this money for?

Q: Can you show me on your bank statement what is money coming in and money going out of your account?

Q: Are you overdrawn at the bank or in credit?

Clearly the more income a person has (whether this is from savings, investments, shares, if they hold a mortgage and so on), the more complex this area will be in terms of the volume of income or outgoings to be considered. But the process remains the same with regards identifying all avenues of income.

## 7. Balancing responsibilities

### ***Considerations/Questions to ask***

This step looks at not only a person's understanding of their responsibilities but also considers their personal values and how the person makes decisions. Questions here should reflect what the person currently spends their money on as well as what is a priority for them. It is important to recognise that we all have different values with respect to money. For some people it will be more important, for example, to spend money on going out, socialising, carrying out hobbies than paying household bills. A person's personal preferences, values and their own views about what are considered responsibilities should be weighed up carefully so that a person is not considered to lack capacity merely because their decision is viewed by some as an unwise decision. Consideration must be given to whether there is a change in the person's thought processes *because* of their impairment rather than simply them expressing a preference for a long-held lifestyle:

Example questions:

Q: You have an electricity bill to pay, how do you do that?

Q: What happens if you don't pay the electricity bill?

Q: Which of these has priority, paying the bill or going out with friends/to the local pub?

Q: What is important to you about your chosen option?

Q: If you saw a new (item person may want to buy) for £30 but had to spend £30 on food. What would you do?

Q: What would happen if you didn't have enough money to pay a bill?

Q: What would happen if you got into debt?

Further specific questions relative to the person's situation could be added.



## **8. Budgeting and planning**

### ***Considerations/Questions to ask***

This step looks at supporting someone to make financial decisions and explore any support they may need in ensuring the decision is their preferred outcome. For example, the person may struggle to budget for something such as a holiday or new purchase. Here it is important to look at planning and agreements that can be made with the person. This does not mean that the decision can't be re-visited but rather places emphasis on supporting the person to purchase desired things.

Example questions:

- Q: How do you budget your money?
- Q: What are the essential things you need to pay for every week/month?
- Q: How do you make sure those things are paid for?
- Q: How do you decide what to spend your money on?
- Q: Do you ever run out of money? What happens then?
- Q: What would you do in a crisis i.e. if you had no money?
- Q: Would you like/do you have help with budgeting?

Getting someone to focus on how they plan or whether they do plan, as well as asking questions in a supportive manner so they understand this does not come from a perspective of judgement but rather enable the person to fully consider the methods of support.

Example areas of consideration:

- Reminding someone of their desired goal e.g. to buy an iPad or go on holiday.
- Reminding someone of a budget planning meeting and what was agreed

- Reminding someone that they're about to spend their last £20 and looking at what the plan is for their budget.

This area can be difficult as it is important that the person's difficulties are not simply dismissed and the decision taken out of their hands because they struggle to stick with a plan. Alternatively that it's viewed as 'their choice' when the reality is that they need support in order to make a choice.

## **9. Security and a PIN**

### ***Considerations/Questions to ask***

This step looks at asking and considering questions about safety. The key is to ascertain if there are any issues that the person struggles with and to explore ways of addressing that. For example, someone may have difficulties in retaining a PIN number but have no issues with day-to-day management of their finances. It is important not to confuse lacking capacity with a difficulty the person has.

Example questions:

Q: Can you remember your PIN for your debit/credit cards (not that you're asking them to tell you what it is)

Q: What do you do to help you remember your pin?

Q: If not how do you carry out banking, what safety measures are in place?

Q: Does anyone take money out of your account for you? Do they know your PIN?

Q: How do you know how much they've taken?

Q: Do you do online banking? If so, do you have any problems remembering your passwords?

Q: Does anyone else know the passwords? Q: Do you trust (name) to use the passwords to get access to your account?

This is also an opportunity to discuss problem areas, for example if someone has given their PIN to someone before, asking what happened, maybe reminding them the importance of not divulging their PIN to keep their money safe. It could be that the person needs a signature account rather than a PIN number and this option may need to be explored.

## **10. Banking**

### ***Considerations/Questions to ask***

This step looks at the skills & knowledge needed to use a bank account. Consideration should be given to the benefits & drawbacks of having an account. Reflecting back to step 9, if the person can't ever recall their PIN then looking at supportive measures and discussions with the bank about alternative options for retaining the safety of their money.

Consider whether the person would be able to identify if money has gone missing from their account.

It looks at whether someone can recall they have a bank account and if not how their money is kept.

### ***Example questions:***

Q: Do you keep your money in a bank or building society? Which one is it?

Q: Do you have any direct debits or standing orders? What are they?

Q: Do you have a cheque book? How do you write a cheque? (use actual cheque or copy)

Q: How do you get your money?

Q: How do you keep your money safe?

Q: Do you get bank statements? What do you do with them? What are you checking on them?

Q: What does it mean if you are overdrawn?

Q: What would you do if you thought money was missing from your bank account?

Q: Is there anyone you would trust to help you with your banking?

Considering the administration of a bank account:

- Identifying if someone needs support to manage an account.
- Can they comprehend forms or do they need support in completing them?
- Would someone recall signing or completing a form?
- What support mechanisms can be put in place in all of these instances and can it be done safely, for example, completing a form with a member of staff and then arranging to re-look at the form to determine retention of all relevant information.
- Whether a basic bank account where the person cannot go overdrawn is an appropriate option.

## **11. Does the person have capacity to make a Lasting Power of Attorney for Property and Affairs?**

### ***Considerations/Questions to ask***

A person may lack capacity to manage various aspects of their finances but have capacity to decide to appoint an attorney under a Lasting Power of Attorney.

Information should be given on the role of a Property and Affairs attorney prior to exploring an individual's understanding.

### **Example questions**

- Would you like someone else to make decisions about money on your behalf when you can't make those decisions yourself?
- How do you feel about another person making decisions about your money?
- Who are you choosing (named people) to make decisions about your money?
- Why are you choosing (named people)?
- Do you trust (named people) to make decision about your money?
- What decisions about your money do you want your attorney(s) to make?
- What decisions about your money would you not want them to make?

## **12. Investments, savings, ISAs and shares**

### ***Considerations/Questions to ask***

This step looks at a high level of financial decision-making. It could be that a person does not have capacity to make financial decisions in this area but can in other areas.

### ***Suggested questions***

- Q: Do you have any savings?
- Q: Where are your savings held?
- Q: How do you know your savings are held securely?
- Q: Do you have any investments?
- Q: How are your investments managed?
- Q: Do you have any ISAs? How do you check how they are performing?
- Q: Do you hold shares in any companies? How do you know how well they are performing? Where are they held?
- Q: If you wanted to sell some of your shares, what would you do?
- Q: Does anyone advise you on your investments/shares/ISAs?

## Recording Assessments

To ensure there is a clear record of the steps taken throughout the process it is vital to record this. The flowchart on page 61 can be a useful tool in ensuring it is documented in a way that is clear to anyone that may be assessing, supporting, reviewing or generally wishing to access the person's notes. Later on in this guide we have included a capacity assessing form that reflects the ladder of assessing.

## Deputies/attorneys recording

Deputies and attorneys may also wish to use the assessing capacity template/form as a way to evidence the way in which they have made best interests decisions. Not only can this demonstrate to external agencies (for example a Court of Protection visitor) the way decisions have been made and what the deputy/attorney has done with/on behalf of the person, but can also be useful as a prompt for the relevant decision maker when carrying out decisions.

## Best Interests

A short section on making best interests decisions is included here to give a full picture of decision-making under the Mental Capacity Act. Making best interests decisions is a position of last resort when **all attempts to support a person** to make their own decision have not been successful.

When a person has been assessed to lack capacity, despite all supported efforts to enable them to make a particular decision, the MCA says that another person can make the decision on their behalf. Principle 4 states that ‘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 his best interests.’ (Section 1(5)). It can be challenging to work out what the best interests of an individual are and the MCA requires people to follow certain steps (the best interests ‘checklist’) to ensure that proper consideration is given to a person’s best interests. It is not about what the person making the best interests decision would do if they were the person lacking capacity; rather it is what is currently in the best interests of that person.

The requirement to make a decision in the best interests of the person does not negate the need to involve the person in the decision. Everything possible must be done to include the person in the process of coming to a decision.

The key question is:

**“How can this person be helped to have as much control over their financial decisions as possible?”**

## Best interests ‘checklist’

Checklist	How it applies to financial decision-making - examples
<p><b>Encourage participation</b></p> <p>Do whatever is possible to permit and encourage the person to take part, or to improve their ability to take part, in making the decision.</p>	<p>Discuss the financial decision with the person, adapt information to their needs, break down decisions into smaller decisions, adapt communication.</p>
<p><b>Identify all relevant circumstances</b></p> <p>Try to identify all the things that the person who lacks capacity would take into account if they were making the decision for themselves</p>	<p>How did the person make financial decisions previously? Did/do they enjoy buying specific items? Did they previously regularly give money to relatives or to charity?</p>
<p><b>Find out the person’s views</b></p> <p>Try to find out the views of the person who lacks capacity, including:</p> <ul style="list-style-type: none"> <li>• the person’s past and present wishes (expressed verbally, in writing or through behaviour or habits) A past wish expressed in writing must be given particular weight.</li> <li>• any beliefs<sup>15</sup> or values (e.g. religious, cultural, moral or political) that would be likely to influence the decision</li> </ul>	<p>Can the person express a view about the decision e.g. buying an item /giving money to a third party?</p> <p>Try to find out what the person spent their money on in the past, what took priority, how they saved, how they invested their money.</p> <p>It is worth noting the following taken from <i>Aintree v James</i><sup>16</sup></p> <p>‘The purpose of the best interests test is to consider matters from the patient’s point of view. That is not to say that his wishes</p>

14 A County Council v MS and RS [2014] EWHC B14 (COP). A case about tithing to the Mormon Church.

15 Aintree University Hospitals NHS Foundation Trust (Respondent) v James (Appellant) [2013] EWCA Civ 65



<ul style="list-style-type: none"> <li>any other factors the person themselves would be likely to consider if they were making the decision or acting for themselves.</li> </ul> <p>The person's views, wishes and feelings are very important.</p>	<p>must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament.... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'</p>
<p><b>Avoid discrimination</b></p> <p>Do not make assumptions about best interests simply on the basis of the person's age, appearance, condition or behaviour.</p>	<p>Do not make assumptions about the person's financial circumstances based on their current diagnosis.</p>
<p><b>Assess whether the person might regain capacity</b></p> <p>Consider whether the person is likely to regain capacity (e.g. after receiving medical treatment) If so, can the decision wait until then?</p>	<p>A person may be appointed to manage the person's financial affairs but the person's condition means that they may in the future regain capacity to make some or all financial decisions.</p>

**Consult others**

If it is practical and appropriate to do so, consult other people for their views about the person's best interests and to see if they have any information about the person's wishes and feelings, beliefs and values. In particular try to consult:

- anyone previously named by the person as someone to be consulted on either the decision in question or similar issues
- anyone engaged in caring for the person
- close relatives, friends or others who take an interest in the person's welfare
- any attorney appointed under a Lasting Power of Attorney or Enduring Power of Attorney made by the person.
- any deputy appointed by the Court of Protection to make decisions for the person.

When consulting, remember that the person who lacks capacity to make the decision or act for themselves still has a right to keep their affairs private.

There may be people already supporting the person who could provide information to assist in making a best interests decision.

It should be noted that if there are safeguarding issues relating to finances, it may be considered appropriate to instruct and consult an Independent Mental Capacity Advocate (IMCA).

<p><b>Avoid restricting the person's rights</b></p> <p>Seek other options that may be less restrictive of the person's rights.</p>	<p>Always consider if there is an option that is less restrictive for the person who lacks capacity to make the financial decision. For example, rather than another person taking complete control of the individual's finances, is there a way of giving some control to them?</p>
<p><b>Take all of this into account</b></p> <p>Weigh up all these factors in order to work out what is in the person's best interests.</p>	<p>The Court of Protection has made it clear that the final decision is not necessarily one that the person would take if they had capacity, rather it is what is in their best interests at the time the decision is to be taken.</p>

The factors not relevant to financial decision-making have been omitted from the list. For the full checklist see the MCA Code of Practice chapter 5.

### Who can make best interests decisions in relation to finances?

Some people may be in the position of having the authority to make a best interests decision about aspects of a person's finances.

There are only 3 scenarios in line with the MCA that allow best interests decisions about another individual's finances.

### Attorneys (donee) appointed by a person (donor)

A person must be 18 or over and have capacity to decide who they want as an attorney(s)

- Lasting Power of Attorney for Property and (financial) Affairs (LPA)

- Enduring Power of Attorney (EPA) (Existed before MCA)

Information about the role and scope of an attorney and how to create an LPA can be found in the Code of Practice in chapter 7 and on the Office of the Public Guardian website.

Attorneys acting under an LPA have a legal duty to pay regard to the Code of Practice, EPA attorneys do not although they do have a responsibility to comply with the duties set out in the Code at 7.58 – 7.68.

A property and financial affairs LPA can be used to appoint attorneys to make a range of decisions, including:

- the buying and selling of property
- operating a bank account
- dealing with tax affairs
- claiming benefits and pensions
- investing the donor's savings
- paying for private medical care

Unlike Health and Welfare LPAs, once a Property and Affairs LPA is registered with the Office of the Public Guardian, it is possible for the attorney to make decisions even if the donor has capacity to make those decisions for themselves **but only if**:

- the donor has asked the attorney to take specific actions or make specific decisions
- the donor has given the attorney full responsibility for all financial decisions through the creation of the LPA

Other than those situations described above, the attorney can only make decisions that the donor lacks capacity to make and they must be made in the best interests of the donor.

**The attorney has responsibility for assessing if the person has or lacks capacity to make a particular decision.** This guidance can help an attorney to make that assessment.

A donor may specify any particular action(s) he or she would or would not want their attorney to take on their behalf, including whether there are specified situations where they would want their attorney to appoint a specialist advisor.

Attorneys must:

- act in accordance with the MCA and the 5 statutory principles
- assess whether the donor has capacity to make the decision in question at the time it needs to be made
- consider whether the donor may regain capacity at some point in the future and if so whether the decision can be delayed
- make decisions where the donor lacks capacity in their best interests following the guidance in the Code of Practice and the best interests 'checklist'.
- Only make the decisions covered by the LPA
- Apply to the court if decisions need to be made that fall outside the scope of their authority
- keep financial records
- keep the donor's finances in an account separate to their own

### **Case scenario – attorney making a best interests decision**

Mrs Jackson was involved in a road traffic accident that resulted in her having a brain injury, mobility problems and requiring a long stay in hospital. Mrs Jackson registered a property and affairs LPA some time ago which specifies that should she lose capacity to make some decisions about her finances, her daughter can take any decisions where she is deemed to lack capacity.

The hospital staff explore the options for Mrs Jackson's discharge. It is thought possible for her to return to her home if certain adaptations are in place. She explores the options with her mother but finds she is unable to weigh up the relative options in order to make a decision. Her daughter has to consider making financial decisions in relation to spending her mother's money on the adaptations, in her mother's best interests.

The daughter:

- Considers whether her mother might regain capacity, within a timescale that would not compromise her discharge, that means she may be able to make the relevant financial decisions.
- Thinks about how she will involve her mother in decisions, perhaps through bringing photos of equipment to show her and discussing what is needed.
- Will continue to try to get her mother's views on what needs to be purchased.
- Remembers that her mother had talked before about getting a stair lift if she should need one in the future and had spent a considerable amount of money on making her home comfortable.
- Consults with other members in the family about what their views are on spending money on adaptations.
- Knows that the amount spent must be proportionate in relation to her mother's available money and other likely costs.

## Deputies appointed by the court to manage a person's property and (financial) affairs

These may be a

- Lay deputy – family members or friends
- Professional deputy (mainly legal firms specialising in this area of law)
- Local Authority acting as deputy (usually as a 'last resort' where nobody else can act)
- A joint arrangement of a family member & professional acting as deputies

The MCA code of practice (8.35) states that an application to the court for a deputy appointment to manage a person's financial matters is necessary:

- for dealing with cash assets over a specified amount that remain after debts have been paid
- for selling a person's property, or
- where the person has a level of income or capital that the court thinks a deputy needs to manage.

The order of appointment will set out the scope of the deputy's authority and powers. Any deputy appointed by the court has a responsibility to act in accordance with the MCA, including paying regard to the 5 statutory principles and how they apply to the person they support, and the best interests checklist. While carrying out their duties as a deputy, it is important that the deputy considers whether or not the person has capacity to make a particular financial decision each time a decision is required. More formal decisions will require a more formal assessment of capacity that the deputy may decide needs input from a professional who specialises in assessing capacity. **The deputy does not have authority to make a best interests decision if the person can make the decision for themselves.**

For a full description of a deputy's duties see the MCA code of practice chapter 8. The

Office of the Public Guardian produces guidance for deputies.<sup>16</sup>

The decision in the *Re Buckley*<sup>17</sup> [2013] case has clarified the responsibilities of deputies and attorneys to spend or invest a donor's money in the individual's best interests at the time a decision needs to be made. The donee cannot do whatever they like with the donor's money or whatever the donee thinks the donor would or could have done if he/she had capacity to make the decision. The case highlighted that there is sometimes a lack of awareness about the duties and obligations of attorneys and deputies. Senior Judge Lush (paragraph 43) states:

*The final point is one that has been made in the past, but needs to be repeated. Attorneys should be aware of the law regarding their role and responsibilities. Ignorance is no excuse. I am not suggesting that attorneys should be able to pass an examination on the provisions of the Mental Capacity Act 2005, but they should at least be familiar with the "information you must read" on the LPA itself and the provisions of the Mental Capacity Act 2005 Code of Practice.*

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16 [www.justice.gov.uk](http://www.justice.gov.uk)

17 *Re Buckley: The Public Guardian v C* (2013) EWHC 2965 (COP)



### **Case scenario – deputy considering a best interests decision**

Ms Singh had suffered a traumatic brain injury and is in a minimally conscious state. A property and affairs deputy from a legal firm is appointed by the Court of Protection to make both long and short-term financial decisions. Ms Singh has an extensive family network but they did not feel able to take on the role of a court-appointed deputy.

It has been suggested by the care team that an independent advocate is appointed to represent Ms Singh at care review meetings. It has been difficult to find an independent advocate with the appropriate experience and expertise, however, it is possible to instruct an advocate on Ms Singh's behalf and for the costs of this to be met from Ms Singh's capital.

In making the best interests decision, the deputy considers:

- whether Ms Singh may regain capacity to make the decision
- the views of her family
- the costs of an advocate & the impact of this on her capital
- likely benefits to Ms Singh
- disadvantages to Ms Singh of not having an independent advocate
- the views of the care team
- any relevant views Ms Singh may have indicated in the past

The Deputy concludes that it would be in Ms Singh's best interests to have the representation of an independent advocate for care reviews and records how the decision was made in the case file.

## Family carers, care workers and support workers.

- A family member providing support in a person's own home.
- A paid care or support worker providing support in a person's own home, a care home or supported living situation.

Paid care workers and support workers should know if a person already has someone with formal powers to make decisions about their finances. If there is such a person in place, they will need to liaise with them regarding financial decisions. The attorney or deputy may make arrangements so that an individual is supported by care or support workers to make some financial decisions. This should be recorded in the care/support plan.

The MCA permits using a person's money to buy goods and pay for services as long as

- the person lacks capacity to do this themselves
- the purchase of goods and services is necessary
- it is in the person's best interests to make the purchase

The family carer, paid care worker or support worker must 'reasonably believe' that the person they are supporting lacks capacity to make the particular financial decision. There is no requirement to formally assess the person's capacity but they must have objective reasons for believing the action is in the person's best interests.

Section 7 of the MCA states that necessary goods and services can be paid for (and reimbursed) but does not allow access to a person's funds held by a third party such as a building society or bank. For example, a carer may need to pay for shopping delivered to the person's home or pay a mobile hairdresser who visits the person in his or her own home. They can use the person's money to pay for the service. The carer must first take reasonable steps (see page 55) to ascertain if the person has capacity to arrange to make the payment themselves or to consent to the carer making the payment on their behalf. If the person lacks capacity to do this, the carer can make a decision in the best interests of

the person.

It should be noted that some agencies who employ care workers do not allow those workers to access any of the clients' monies or to use their own funds to buy necessary good or services.

## Appointees

Appointees who manage a person's benefits where the person lacks capacity to do so, do not fall within the remit of the MCA but they will be expected to act in the person's best interests (MCA code of practice 8.36) and cannot make decisions about anything other than benefits.

The Department for Work and Pensions will carry out an assessment to ascertain whether or not a person has capacity to manage their benefits and, where a person lacks capacity, will appoint an appointee. The Care Quality Commission suggests that this should not be someone who is supporting the person in a paid capacity such as a support worker. Most usually an appointee will be a member of the person's family but it can be someone from an organisation who provides an appointee service.

## Mediation

Where there are disputes about the best interests decision at hand it may be useful to access mediation. This may negate the need to go to court for a resolution.

## Independent report/view

There may be circumstances when a second opinion from someone that specialises in capacity assessments and best interests decision-making is felt to be beneficial for the person, for example, in circumstances where:

- there is a dispute between family and the relevant responsible body or between family members. An independent capacity assessment may negate the need to seek resolution in court.
- the relevant decision maker may wish to ensure that the decision is as robust as possible and seek a second independent opinion.
- there may be varying degrees of complexity with regards the decision(s).

## Safeguarding

### Who is at risk from financial abuse?

At the time of writing, draft guidance relating to safeguarding to accompany the Care Act<sup>18</sup> is out for consultation. The guidance says that ‘Local Authorities must make enquiries, or require another agency to do so, whenever abuse or neglect is suspected in relation to an adult with care and support needs.’

In the context of the Mental Capacity Act it is therefore appropriate to state that adults coming within this framework (one of many frameworks of course) are people who may lack capacity who *may* be at risk from financial abuse.

Financial abuse is generally accepted as:

- theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits

However the impact of financial abuse can have wider consequences.

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18 <http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted>

### **Case scenario – where financial abuse has a wider impact**

Linda is a 62-year-old woman with a diagnosis of Parkinson's. She lives in sheltered accommodation and over the last few months a group of people living in the community that are known to the police for petty crimes have befriended her and often come round to visit her. Over a period of several visits Linda's social worker notices that she has little food in and she does not have all her medication. On further investigation it transpires that Linda is giving her money to various members of this group, which means she is unable to pay for all of her medication or buy sufficient food. Linda states these are her friends and she does not want to get them into trouble.

Linda's social worker has worked with her for several years and although communication is difficult, her capacity has not been affected by her illness. However, as a result of the financial abuse, the changes in her taking her medication and self neglect resulting from the lack of food and general ability to care for herself has led to the social worker querying whether she still has capacity. Without further steps to tackle the financial abuse there is a risk that Linda's physical health will increasingly deteriorate. There is also a risk to her independence and presence in the community. Given the fact Linda lives in sheltered accommodation there are also concerns that a Linda may lose her tenancy and other residents may also be at risk of exploitation.

In this scenario the abuse is impacting on Linda's capacity as well as many other factors identified above.

## Support options to minimise risks

The wide ranging situations and factors within safeguarding mean that it is not possible to cover all aspects of safeguarding in this guide. SCIE has published guidance<sup>19</sup> on this subject matter which although aimed specifically at the instruction of IMCAs in safeguarding cases, it offers valuable points for consideration. It also outlines the responsibilities of all involved within these decisions. There are support options that can be put in place, which should be considered:

- Discussing with the person how to safely manage their finances.
- Asking the person if they would benefit from support such as accompanying to the shops or to collect their benefits.
- Supporting the person to approach relevant agencies that hold their money to ensure they are aware of particular risks the person may experience.
- Identifying those that are deemed at risk of exploiting the person due to known circumstances and alerting relevant agencies, professionals, others interested in the person's welfare including the police.
- Discussing with the person and the police what options are available to minimise risk of abuse such as the use of a harassment order.
- Where the person has capacity and wishes to make a LPA, consider with them whether they wish to identify people who will make specific decisions on their behalf. These decisions and actions can then be carried out even if the person still has capacity but has given permission to others to act on their behalf.
- Ensure that the person is not left isolated or dependent on one person, which may increase both their risk of abuse but crucially that they have no-one to alert this to.
- Consider with the person what could decrease their isolation or support them to raise issues where they may be abused.
- Consider the role of an advocate, whilst this does not mean abuse will not happen nor that an advocates role is that of a 'policing watchdog' for abuse but the person may feel

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19 <http://www.scie.org.uk/publications/guides/guide32/files/guide32.pdf>

more able to raise issues of concern with a person that is independent of the direct care they receive.

Action on Elder Abuse<sup>20</sup> identify that abusers are usually known to the person, and highlight that many of their helpline calls relate to family members carrying out abuse. Whilst it is important not to make assumptions about others involved in the persons life, it is still important to consider this fact and how this might be occurring. It is also important to consider that abuse may not be intentional: family members may believe they're doing the right thing, for example taking money from the person as they fear they'll be at risk from others but where there are concerns these should be highlighted and appropriate steps taken to support the individual to address the issues.

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20 <http://www.elderabuse.org.uk>



### **Case scenario – considering a safeguarding alert due to concerns**

Gordon has recently been diagnosed with a brain tumour and has been offered only palliative treatment. He recognised that he was having difficulties looking after himself and approached a local care home which he was familiar with as his mum used to work there. He had over the years become friendly with the care home manager and asked whether he could pay privately for his care which was agreed. He retains control of his own finances and owns 3 properties. His dad and sister are still around but he has asked that they not be consulted with or informed about where he is or how he's doing.

Gordon has a neighbour, Jenny, who visits him regularly and she reports that they've been friends for a long time, Gordon is able to tell the care home staff who she is but is unable to say how long they've known each other and it is believed his brain tumour is beginning to impact on his memory. Jenny states that Gordon had asked her to help him look after his finances and ensure that everyone knows this. The care home manager had never heard him mention the neighbour before Jenny visited the home and although she has nothing to substantiate any concerns she has, she has begun questioning whether Jenny is trying to take control of Gordon's money. She's aware that Gordon has signed several cheques for her to cash and both Gordon and Jenny say it is to cover household bills and personal items needed to live at the home.

Jenny approaches a local charity to ask advice as to whether Gordon can appoint her as his attorney and states that they have been discussing this. No capacity assessment has been carried out but Gordon's hospital social worker as well as the care home manager are concerned that he no longer has the capacity to do this and feel unclear how much of Jenny's story is accurate and how much Gordon is either being influenced by Jenny or merely repeating what she tells him is fact. When others discuss with Gordon about him making an LPA he says he's not ready to do that and doesn't wish to discuss it further.

In this scenario there are clear concerns about Gordon's capacity as well as how he will manage his money once the time comes when he is unable to do this himself. There are also several people involved who have varying degrees of interest in his welfare but are speaking independently of each other. Whilst abuse may be occurring, given that concerns have been expressed, it would be appropriate for the Local Authority to commence safeguarding procedures to ascertain firstly whether financial abuse is occurring and if so what protective measures may be appropriate. If abuse is not occurring then processes can still begin with regards to supporting Gordon to protect his finances given it is recognised that at some point a framework will need to be put in place for a time that he lacks capacity to manage some or all aspects of his finances

### Concerns when coercion may be occurring

Sometimes a local authority when investigating potential financial abuse may have concerns when a person has been deemed to have capacity to manage their finances that they may have been subject to coercion, for example, by a family member. Whilst police may choose not to proceed with a criminal investigation if they believe that the person had voluntarily given their money away, it may be still appropriate to support the individual. Assessing that they have capacity should not necessarily mean that no further action is to be taken.

If there are matters connected with pressure in relation to wills, property, inheritance or possessions, for example, and a solicitor has been involved, involving the Legal Ombudsman<sup>21</sup> may be an option.

### Deputies and attorneys misusing money

Deputies and attorneys are ultimately accountable to the Office of Public Guardian and must

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21 The Legal Ombudsman can be contacted on 0300 555 0333 or [enquiries@legalombudsman.org.uk](mailto:enquiries@legalombudsman.org.uk).

make decisions in accordance with the person's best interests. Concerns must be reported to the OPG about an attorney who will then follow this up. The following issues may give rise to concern:

- Unpaid bills
- Extravagant spending of the person's money
- Using the person's money on things that are not related to the person's needs
- Transferring assets
- Opening a credit card account on behalf of the donor

Court Appointed visitors <sup>22</sup> will also carry out visits to ensure that the relevant responsible person is adhering to their duties. Safeguarding alerts can occur along with raising concerns with the OPG.

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22 <http://www.justice.gov.uk/downloads/forms/opg/fs08-visitors.pdf>

## Top tips/recommendations

- Many people may still have the capacity to manage some aspects of financial decision-making.
- When an individual needs to be assessed as to which areas they can and can't manage, the assessment should be a positive experience with the person in control.
- Assessments should never be experienced as negative or disempowering experiences.
- Assessments should always seek to find out a person's wishes and feelings.
- Appointee/deputy may delegate certain aspects of supporting a person with their finances to paid support workers.
- Keep records, particularly of larger decisions and how they were made.
- Ensure there is clarity on the attempts that have been made to enable the person to manage their financial affairs themselves.
- Always carefully consider, before meeting with the client, how you will present all relevant information.
- Ensure that people who lack capacity to make some or all decisions about their finances have as much control and independence over their money as possible.
- It is hard for some people to talk about things that they cannot see. Always consider using actual coins, notes, utility bills, cheque books, bank statements, photographs and other props.
- Managing money is a skill that we all need to acquire. Always consider whether the person needs training or support to develop these skills.
- Make sure before you carry out an assessment that you know as much as possible about the person's individual financial circumstances, their role in managing money and

their past and present ability to manage their finances. Not starting from a blank sheet – having an understanding of the particular issues that the individual is facing.

- There is a principle that no matter what capacity a person has or doesn't have, they should be supported to be involved in the decision-making process and it should be recognised that a person who may lack capacity today, may have it tomorrow.
- It is not suitable to use the mini mental score as a way of assessing capacity.
- Capacity assessments showing that a deputy is needed must be clear and must indicate the specific areas where the person lacks capacity.
- Consider whether the person will benefit from having an independent advocate or a financial advocate.
- The person can be empowered through putting in place the means for the person to be involved and as independent as possible – leaving the person to make unwise decisions within safe limits.
- The emphasis is on the person being assisted to make a decision, not testing the person's ability to decide.
- Keep financial profiles up to date by reviewing regularly and ensuring that they record capacity, capability and support needs.
- Take time with clients. Check out their abilities to do rather than just their understanding – deconstruct the barriers as to why someone may not be managing their finances e.g. sight problems.
- Ensure that the person being supported is central to the decision-making. Use a circle of support so that not just one person is making the decision.
- Look at risks that are relatively OK. The risk of losing small amounts of money might be worth the benefit of having the freedom to go out and spend at shops and be included in society.

- Make sure that the actual financial decisions are identified. A broad approach is not acceptable.
- See the person in their own home and frame the assessment as a general chat.
- Where possible, assessments should be carried out by someone who knows the person and their circumstances.
- Consider using scenarios and role-plays with the person.
- Always ask the person who they would want to support them with their finances. Respect the wishes of the person.
- Break the financial decisions into component parts. Does the person have capacity to manage small amounts of money, simple purchases, a bank account, to sell a house, or shares or other investments.
- It is important to understand the difference between capacity and capability.
- Identify the various sub issues – rent is different from bills, to food, holidays, gifts etc.
- A person may lack capacity to manage various aspects of their finances but have capacity to decide who they want to support them or to appoint as their attorney for Property and Affairs.
- Financial assessments should be well planned. The assessor should know the paperwork beforehand, plan questions, prepare information and record thoroughly.
- Before meeting the person being assessed, make sure you know about the financial decisions they need to make and any issues the person is experiencing.
- Try to have information that has been independently verified about the person's finances so that a genuine check can be made against what the person being assessed tells you.
- It's important for the assessor to have some detachment and to be objective.
- Assessing capacity to make financial decisions cannot be done without very good knowledge of the Mental Capacity Act.

## Templates

### Assessing Capacity Checklist

Activity	✓
Presume Capacity.	
Identify the actual decision(s) to be made.	
Provide all relevant information.	
If the person is finding it difficult to make a particular financial decision, consider what will help them.	
Adapt information/materials to suit the individual's needs.	
Consider what decisional supports would help the person, including whether there is someone the person would want to be present during the capacity assessment/ talking about their money.	
Assess capacity if despite all support given there is reason to believe that the individual lacks capacity to make the particular decision.	
Consider how to address areas highlighted in the assessment that the individual is finding difficult.	
Give further support to enable the individual to make the decision for themselves if at all possible.	
<p><b>Authorised third party decision-maker in place</b></p> <p>If the conclusion is that the individual lacks capacity to make the decision, make a best interests decision using the best interests checklist. This only applies if there is:</p> <ul style="list-style-type: none"> <li>• An Attorney appointed under a Lasting Power of Attorney.</li> <li>• A Deputy for Property and Affairs appointed by the Court.</li> <li>• An Appointee appointed to manage a person's benefits.</li> <li>• A family member or care worker buying necessary goods &amp; services on the individual's behalf.</li> </ul>	
<p><b>No third party decision-maker in place</b></p> <p>If the conclusion is that they lack capacity to make the particular decision(s)</p> <ul style="list-style-type: none"> <li>• Consider if there is someone they would want to help them with their finances.</li> <li>• Explore if the person has capacity to appoint an Attorney under a Lasting Power of Attorney and whether they would want this.</li> <li>• Explore if a financial advocate would be of benefit.</li> <li>• Consider if a Deputy for Property and Affairs is needed.</li> <li>• Consider if this is a decision that needs to be made by the Court of Protection.</li> </ul>	

## Capacity Assessment Template for assessing a person's capacity to manage aspects of their finances

It is not the intention that the assessment should be used in full with every individual who may lack capacity to manage aspects of their finances. Assessing is not meant to be a 'test' where the individual is subject to intense questioning that may make them feel anxious and disempowered.

The questions are given **as a guide as to what questions may be asked, depending on the person's circumstances**. A list of **suggested questions** for each assessment area is given in this guidance.

Assessments work well if they take the form of a discussion where there is ample opportunity for the assessor to find out what the person's views, wishes and feelings are.

The emphasis should be on what support the person needs to maintain independence. Carrying out an assessment enables the assessor to find this out.



## Assessment of capacity for aspects of financial decision-making

This form can be adapted/filled in to insert questions relevant to the person's particular circumstances. It should be used in conjunction with the information on the various assessment steps given on (page 65- 77)

Within **each step** the assessor should be assessing which are the areas that the person does or does not have capacity. This is judged on whether the person:

- Understands the information relevant to the decision;
- Retains the information for long enough to make the decision;
- Weighs up the consequences of making or not making a particular decision; and
- Can communicate their decision

**Not all of the steps will be relevant for every person.** It may be relevant to look at the area of money awareness but to get an overview of the person's capacity to manage aspects of their finances other assessment areas will need to be considered.

The assessment process is also a very useful way of finding out areas where the **person needs support or skills development to maximise capacity.**

It is important to consider if the person may regain capacity at some point in the future and to note what steps need to be taken to support the individual to regain capacity.

**There is a different template for assessing a specific financial decision such as purchasing an item or service, or selling a car, for example.**

<b>Name:</b>	<b>Date of Birth:</b>
<b>Date:</b>	
<b>Name of person assessing capacity:</b>	
<b>Job Title:</b>	
<b>What areas of financial decision-making are to be assessed?</b>	
<b>Does the person have an 'impairment of, or disturbance in the functioning of the mind or brain'? e.g. an acquired brain injury or dementia</b>	
<b>Reasons for believing the person may lack capacity to manage some aspects of their finances? (due to the impairment/disturbance)</b>	
<b>What support has been provided to enable the person to understand the information being presented? Eg communication support, information about the decision has been simplified, pictorial information etc</b>	

**1 Person's financial profile:**

If the person already has a financial support plan/financial profile, please attach.

**What are the person's views/wishes/feelings?**

**Additional support needs identified?**

**2 Have any areas of unmet financial need been identified?**

**What are the person's views/wishes/feelings?**

**Additional support needs identified?**

## ASSESSMENT ZONES

### 3 Recognition and awareness of money

Real money should be used to assess money recognition.

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?** (the person may have capacity to manage smaller amount of money and not larger amounts – be specific)

**Reasons:**

**4 Relative values of things e.g. pint of milk and new coat**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

**5 Management/control of money at the current time.**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

**6 Does the person know their approximate income/value of benefits?**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

## **7 Balancing responsibilities**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**



## **8 Budgeting and planning**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

## **9 Security and a PIN**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

**10 Banking**

**What are the person's views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

**11 Does the person have capacity to make a Lasting Power of Attorney for Property and Affairs?**

**Note: assessor must provide information on LPAs in most appropriate format for the individual.**

**What are the persons views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional Support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

## **12 Investments, savings, ISAs and shares**

**This step looks at a high level of financial decision-making. It could be that a person does not have capacity to make financial decisions in this area but can in other areas.**

**What are the persons views/wishes/feelings?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**Additional Support needs identified?**

**Does the person have capacity in this area?**

**Reasons:**

## **SUMMARY**

**Decisions/actions where the person does have capacity**

**Decisions/actions where the person does not have capacity**

**Decisions where the person may gain capacity with the right support**

**Details of further support/skills development needed and who will provide that support**

**This assessment should be reviewed within ..... (time period)**

**Signed.....**

**Date.....**

**Position.....**

**Contact Details .....**

## Capacity Assessment Template for assessing a person's capacity for a specific financial decision

### Assessment of capacity for a specific financial decision.

Somebody has capacity to make a particular financial decision if they are able to do the following:

- Understand the information relevant to the decision;
- Retain the information for long enough to make the decision;
- Weigh up the consequences of making or not making a particular decision; and
- Communicate their decision

The assessment process is also a very useful way of finding our areas where the person needs support or skills development to **maximise capacity**.

**Name:**

**Date of Birth:**

**Date:**

**Name of person assessing capacity:**

**Job Title:**

**What is the specific financial decision to be made?**



**Does the person have an 'impairment of, or disturbance in the functioning of the mind or brain' that is affecting their ability to make this decision? e.g. an acquired brain injury or dementia**

**(If NO, assessment cannot continue)**

**Reasons for believing the person may lack capacity to make the specific financial decision?**

**What support has been provided to enable the person to make the decision? Eg communication support, information about the decision has been simplified, pictorial information etc**

## Questions to ask the person being assessed:

### Understanding and retaining information about the specific decision

#### (Provide all relevant information)

Q: Can you tell me what the decision is?

Q: What do you know about (decision/action)?

Q: What are your choices?

#### Assessor's summary:

(include person's response to questions)

#### Further support needs identified?

### Understanding consequences/weighing and balancing

Q: What is good about (choice A) What is bad about (choice A)?

Q: What is good about (choice B) What is bad about (choice B)?

Q: What will happen if you (go through choices)?

Q: How will that affect you?

Q: How will that affect (family member/friends etc)

Q: What will happen if you don't make this decision?

#### Assessor's summary:

(include person's response to questions)

#### Further support needs identified?

**Communicating the decision**

Is the person able to communicate their decision?

Do they need further communication support?

Are they trying to tell you but you cannot understand?

Do they need more time?

**Assessor's summary:**

**Further support needs identified?**

**Does the person have capacity to make this decision?**

**YES**

**NO**

**Reasons for this judgment?**

**Might the person regain capacity in the future? If so, what support is required to assist the person to regain capacity?**

**If NO, can further support be given to enable the person to make the decision for themselves?**

**How will this support be provided and by whom?**

**If NO, is this a decision that must be made (in the best interests of the person)?**

**Is there anyone with authority to make the best interests decision?**

**YES**

**NO**

**Name of person: .....**

**Relationship to the person .....**

**Reason they are able to make this decision (attorney/deputy etc)**

**This assessment should be reviewed within ..... (time period)**

**Signed.....**

**Date.....**

**Position.....**

**Contact Details .....**

### Form for making best interests decisions

Using a 'balance sheet' approach to best interests decision-making can be useful when evaluating what is in a person's best interests. The possible benefits, disbenefits, losses and gains and the likelihood of them occurring may be considered. In other words, weighing up the advantages and disadvantages of a particular course of action.

<b>Best Interests decision form</b> This form should only be used once the person has been assessed to lack capacity for a particular decision)	
<b>Name:</b>	<b>Date of Birth:</b>
<b>Date:</b>	
<b>Name of person completing form:</b>	
<b>Job Title:</b>	
<b>What is the best interests decision to be made?</b>	
<b>What is the 'impairment of, or disturbance in the functioning of the mind or brain' that is affecting their ability to make this decision? e.g. an acquired brain injury or dementia</b>	

**Why does the person lack capacity to make this decision?** (Attach copy of capacity assessment)

**What has been done to enable the person's participation?**

Discussing the financial decision with the person, adapting information to their needs, breaking down decisions into smaller decisions, adapting communication etc.

**Identify all the relevant circumstances**

What is happening now? How did the person make financial decisions previously? Did/do they enjoy buying specific items? Did they previously regularly give money to relatives or to charity?

**Find out the person's views, wishes and feelings about the decision.**

Can the person express a view about the decision eg buying an item/giving money to a third party? Try to find out what the person spent their money on in the past, what took priority, how they saved, how they invested their money.

**Is it possible that the person might regain capacity? If so, could the decision wait?**

A person may be appointed to manage the person's financial affairs but the person's condition means that they may in the future regain capacity to make some or all financial decisions.

**Who has been consulted to find out their views on the decision?**

There may be people already supporting the person who could provide information to assist in making a best interests decision. It should be noted that if there are safeguarding issues relating to finances, it may be considered appropriate to instruct and consult an Independent Mental Capacity Advocate (IMCA).

Name:

Date:

Views:

Name:

Date:

Views:

**What has been considered to avoid restricting the person's rights?**

Always consider if there is an option that is **less restrictive** for the person who lacks capacity to make the financial decision. For example, rather than another person taking complete control of the individual's finances, is there a way of giving some control to the individual?

**If the least restrictive option is not the final best interests decision, explain why?**

**Taking all of these factors into account – what is the best interests decision?**

It has been made clear through judgements made in the Court of Protection that the final decision is not necessarily one that the person would take if they had capacity; rather it is what is in their financial best interests at the time the decision is to be taken.

**Why is this decision in the best interests of the person?**

**If it is possible that the person may regain capacity to make this decision, what arrangements have been made to review the person's capacity for this decision?**



**Who made this best interests decision?**

**Name** .....

**Role** .....

**Contact details** .....

## Empowerment Matters survey

The following questions were asked in the survey:

What experience have you had in carrying out capacity assessments for financial decision-making, observing such assessments or being assessed?

What issues/challenges have you encountered?

What works well?

What helps to ensure that financial capacity assessments are carried out well? e.g. knowledge, skills, resources etc.

What would you like to see included in guidance on assessing capacity for financial decision-making?

## Useful Resources

Organisation	Resource
39 Essex Street	Mental Health and Mental Capacity Law blog  <a href="http://mentalhealthandcapacitylaw.wordpress.com">http://mentalhealthandcapacitylaw.wordpress.com</a>
Arc	Guidance on money management for people who may lack capacity to make some decisions about how their money is used.  <a href="http://arcuk.org.uk/publications/files/2011/09/Guidance-on-Money-Management.pdf">http://arcuk.org.uk/publications/files/2011/09/Guidance-on-Money-Management.pdf</a>
British Medical Association and the Law Society	Assessment of Capacity A practical guide for doctors and lawyers, 3 <sup>rd</sup> edition (2009)
Brain Injury Rehabilitation Trust (BIRT)	Your money matters – a guide for people with brain injury.  <a href="http://www.thedtgroup.org/media/315905/Your%20money%20matters%20-%20a%20guide%20for%20people%20with%20brain%20injury.pdf">http://www.thedtgroup.org/media/315905/Your%20money%20matters%20-%20a%20guide%20for%20people%20with%20brain%20injury.pdf</a>
British Institute for Learning Disabilities (Bild)	Financial Decision-Making. Guidance for supporting financial decision-making by people with learning disabilities.  Available from bild <a href="http://www.bild.org.uk">www.bild.org.uk</a>
British Banking Association	Leaflet: Guidance for people wanting to manage a bank account for someone else.  <a href="https://www.bba.org.uk/publication/leaflets/4162-2/">https://www.bba.org.uk/publication/leaflets/4162-2/</a>

Care Quality Commission	<p>Supporting note: Managing money belonging to people who use services</p> <p><a href="http://www.cqc.org.uk">www.cqc.org.uk</a></p>
DOSH Financial Advocacy	<p>Access to Banking for People with a Learning Disability.</p> <p><a href="http://www.dosh.org/data/Access_to_banking_for_people_with_a_learning_disability_2014.pdf">http://www.dosh.org/data/Access_to_banking_for_people_with_a_learning_disability_2014.pdf</a></p>
Housing Options	<p>My Home My Money</p> <p>Managing money and living independently.</p> <p>A guide for people supporting adults with a learning difficulty to manage their money.</p> <p><a href="http://www.housingandsupport.org.uk/site/hasa/templates/general.aspx?pageid=207&amp;cc=gb">http://www.housingandsupport.org.uk/site/hasa/templates/general.aspx?pageid=207&amp;cc=gb</a></p>
Mental Health Foundation and Foundation for People with Learning Disabilities	<p>Indirect Payments: Practitioners Guide</p> <p><a href="http://indirectpayments.org.uk/#introduction">http://indirectpayments.org.uk/#introduction</a></p> <p>Banking on Good Decisions – How can the Mental Capacity Act help you with your bank, building society or post office account?</p> <p><a href="http://www.mentalhealth.org.uk/content/assets/PDF/publications/banking_good_decisions_summary.pdf?view=Standard">http://www.mentalhealth.org.uk/content/assets/PDF/publications/banking_good_decisions_summary.pdf?view=Standard</a></p>
Ministry of Justice	<p>Mental Capacity Act 2005 Code of Practice</p> <p><a href="http://www.justice.gov.uk">www.justice.gov.uk</a></p>

Nicholas Hedley	<p>Living with an acquired brain injury: a practical life skills book (2011)</p> <p>Speechmark Publishing</p>
Office of Fair Trading	<p>Mental capacity – OFT guidance for creditors</p> <p>Quick reference guide</p> <p><a href="http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT24289QuickGuide.pdf">http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/shared_offt/business_leaflets/consumer_credit/OFT24289QuickGuide.pdf</a></p>
Office of the Public Guardian (OPG)	<p>Information on arrangements enabling others to take financial decisions on behalf of others.</p> <p><a href="http://www.justice.gov.uk/about/opg">http://www.justice.gov.uk/about/opg</a></p> <p>Information on becoming a deputy:</p> <p><a href="https://www.gov.uk/become-deputy/overview">https://www.gov.uk/become-deputy/overview</a></p> <p>Information on Lasting Power of Attorney</p> <p><a href="https://www.gov.uk/power-of-attorney">https://www.gov.uk/power-of-attorney</a></p>
Royal College of Physicians	<p>Prolonged disorders of unconsciousness. National Clinical Guidelines (2013)</p> <p><a href="https://www.rcplondon.ac.uk/sites/default/files/prolonged_disorders_of_consciousness_national_clinical_guidelines_0.pdf">https://www.rcplondon.ac.uk/sites/default/files/prolonged_disorders_of_consciousness_national_clinical_guidelines_0.pdf</a></p>
Trading Standards	<a href="http://www.tradingstandards.gov.uk">http://www.tradingstandards.gov.uk</a>



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