LEGAL MATTERS AND PLANNING AHEAD

Mental capacity and best interests: a guide for families

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IN BRIEF

Under the Mental Capacity Act 2005, everyone aged 16 or over is assumed able to make their own decisions unless it is shown that they cannot make a particular decision at a particular time, even with help. When someone lacks capacity for a decision, it must be made in their best interests, involving them and the people who know them, and choosing the option that restricts their freedom least.



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What the Mental Capacity Act does

The Mental Capacity Act 2005 applies in England and Wales to everyone aged 16 and over. It does two things at once. It protects people's right to make their own decisions, including decisions others disagree with. And it sets out how decisions should be made for people who genuinely cannot make them, so that those decisions respect who they are.

The Act applies to everyday decisions, such as what to wear or eat, as well as big ones, such as medical treatment or where to live. Anyone caring for someone whose capacity may be affected, whether family, carers or professionals, needs to understand it.

The five principles

Section 1 of the Act sets out five principles. In plain words:

1. **Assume capacity.** Every adult is assumed to be able to make their own decisions unless it is shown that they cannot.
2. **Help first.** A person must not be treated as unable to decide until everything practicable has been done to help them decide.
3. **Unwise is not the same as unable.** Making a decision others think is unwise does not, by itself, mean a person lacks capacity.
4. **Best interests.** Anything done for someone who lacks capacity must be done in their best interests.
5. **Least restrictive option.** Before acting, consider whether the same purpose can be achieved in a way that restricts the person's rights and freedom less.

What lacking capacity means

Capacity is always about **a particular decision at a particular time**. Someone may have capacity to decide what to have for lunch but not to sell their house, or be able to decide in the morning but not late in the evening.

Under sections 2 and 3 of the Act, a person is unable to make a decision if they cannot do one or more of these things:

- **understand** the information relevant to the decision
- **retain** it for long enough to make the decision

- **use or weigh** it as part of making the decision
- **communicate** their decision, by any means

The inability must also be caused by an impairment of, or a disturbance in the functioning of, the mind or brain, such as dementia, a brain injury, a learning disability, delirium or the effects of medication. Assessors should look first at whether the person can make the decision, and then at whether any inability is because of such an impairment.

How a capacity assessment works

The person responsible for the decision carries out the assessment. A good assessment:

- focuses on one specific decision
- gives the person the relevant information in a way they can understand, including the realistic options and their consequences
- chooses a good time and place, when the person is most alert and comfortable
- involves people who know the person well, if the person agrees
- is recorded, with the reasons for the conclusion

Families can help enormously by explaining how the person usually communicates and when they are at their best.

Supporting someone to make their own decision

Before concluding someone lacks capacity, everyone involved must try to help them decide. Practical steps include:

- making sure they have their glasses, hearing aids and dentures
- choosing the time of day when they are most alert
- using simple words, short sentences, pictures or written notes
- breaking information into small pieces and giving time to think
- using an interpreter, or communication aids, where needed
- having a familiar, trusted person present
- treating any infection or pain first, if the decision can wait

Best interests decisions



When someone lacks capacity for a decision, section 4 of the Act sets out what the decision-maker must consider. They must:

- not make assumptions based on the person's age, appearance, condition or behaviour
- consider whether the person is likely to regain capacity, and whether the decision can wait
- encourage the person to take part as fully as possible
- consider the person's past and present wishes and feelings, especially anything written down, such as an advance statement
- consider the beliefs and values that would have influenced them
- consult others: anyone the person has named, family and carers, and any attorney or deputy

For life-sustaining treatment, the decision-maker must not be motivated by a desire to bring about the person's death.

If a registered Lasting Power of Attorney covers the decision, the attorney is the decision-maker. If there is serious disagreement that cannot be resolved, the Court of Protection can decide.

Preparing for a best interests meeting

For bigger decisions, such as where someone should live, professionals often hold a best interests meeting with the family. To make sure the person's voice is heard, bring:

- what the person has said, now or in the past, about this kind of decision

- any advance statement, advance decision or letter of wishes
- what a good day looks like for them, and what upsets them
- their beliefs, values and the things that have always mattered to them
- practical facts: who lives nearby, what support the family can realistically give
- a copy of any LPA or deputyship order

Ask for the options to be set out clearly, including the less restrictive ones, such as more care at home, before a move is considered. Ask for a copy of the written decision and the reasons.

Words you can use

Asking how a capacity decision was reached:

> "We understand a capacity assessment has been carried out for [name] about [decision]. Please could you tell us what information was given, how [name] was helped to understand it, and why it was concluded that they could not make this decision? We would like a copy of the record."

Asking to be consulted on a best interests decision:

> "As [name]'s daughter, I would like to be consulted before any decision is made about [decision]. I can tell you about [name]'s wishes, values and what has always mattered to them."

Asking about deprivation of liberty:

> "[Name] is now under close supervision and the doors are kept locked. Please could you confirm whether this has been considered as a possible deprivation of liberty, and whether authorisation has been sought?"

Restrictions and deprivation of liberty

Caring for someone who lacks capacity sometimes involves restricting what they can do, for example to stop them leaving the house alone at night. Section 6 of the Act allows restraint only when it is needed to prevent harm and is proportionate to the risk.

When restrictions go further and amount to a **deprivation of liberty**, legal authorisation is needed:

- **In care homes and hospitals:** through the Deprivation of Liberty Safeguards (DoLS), for adults aged 18 and over. The care home or hospital applies to the local council.
- **At home, in supported living or elsewhere:** through an application to the Court of Protection.

The 2026 Supreme Court ruling. On 2 June 2026, in a reference from the Attorney General for Northern Ireland ([2026] UKSC 16), the Supreme Court overruled its 2014 Cheshire West decision. Cheshire West had set an "acid test": a person lacking capacity was deprived of liberty if they were under continuous supervision and control and not free to leave. The court has now said the question needs a broader look at the person's real situation: the type, length, effect and purpose of the restrictions, and the normality of the setting, including living in one's own home. It also held that a person who lacks capacity under the Act may still give valid consent to their living arrangements, through their wishes and feelings, if they understand enough to be content with them. Where there is serious doubt about what they want, consent should not be assumed.

The change took effect immediately across the UK. Government guidance says many current DoLS authorisations will need review, that safeguards such as advocacy continue meanwhile, and that further interim guidance will follow.

Liberty Protection Safeguards (LPS). Parliament passed the LPS in 2019 to replace DoLS, but they have never been brought into force. The government said in October 2025 that it would consult on them in 2026; by October 2026 it had not yet set out its plans and was still considering the effect of the Supreme Court ruling. For now, DoLS and Court of Protection authorisations remain the law.

What this means for care at home

For most people receiving care at home, including live-in care, everyday support given in their best interests needs no special authorisation. Where someone is settled and content with their care, the 2026 ruling makes it less likely that their arrangements amount to a deprivation of liberty. Where they clearly object, try to leave or are distressed, or the restrictions are significant, the council or NHS body that funds the care should consider whether Court of Protection authorisation is needed. If care is privately arranged, the family, care provider and council should discuss it together.

Raising concerns or challenging a decision

- Ask the decision-maker how capacity was assessed and how the decision was reached, and ask for the record.
- Ask for a second opinion, or a fresh assessment if the person's condition has changed.
- Ask for an advocate, especially if the person has nobody else to speak for them.
- Use the complaints procedure of the NHS body, council or provider.
- Report concerns about an attorney or deputy to the Office of the Public Guardian on 0300 456 0300.
- In serious disputes, take advice about applying to the Court of Protection.

What to do next

1. Start from the assumption that the person can decide, and ask how you can help them do so.
2. Find out whether there is an LPA, deputyship order or advance decision.
3. Share what you know about the person's wishes, values and best times of day.
4. Ask for capacity assessments and best interests decisions to be recorded.
5. If restrictions are needed, ask whether they are the least restrictive option and whether authorisation is required.

How we can help

The care we provide, from home care visits, waking nights and sleep-ins across Oxfordshire to live-in care anywhere in England from £1,550 a week, is planned around the person, their needs and their choices. If you are caring for someone

whose capacity is changing, perhaps because of dementia, our free initial assessment is a chance to talk through what support would help them stay at home safely. Call us on 01865 715780.

Common questions

Who decides whether someone has mental capacity?

The person who needs the decision to be made. For medical treatment, that is usually the doctor or nurse proposing it; for a move or a change in care, often a social worker; for everyday care, the carer helping at the time. Capacity is not a one-off verdict from a doctor: it is assessed for each decision, when it needs to be made. If you disagree with an assessment, ask how it was carried out and request a second opinion.

Can someone with dementia still make their own decisions?

Yes, very often. A diagnosis of dementia does not mean a person lacks capacity. Capacity is about a specific decision at a specific time, so someone may be able to choose what to wear or who to see, but not to manage complex finances. Capacity can also vary with the time of day, tiredness or infection. The law requires everyone to give people all practicable help to decide for themselves first.

Can family members make decisions for someone who lacks capacity?

Only if they hold the legal authority for that decision, through a registered Lasting Power of Attorney or a deputyship order from the Court of Protection. Otherwise, the decision-maker is the professional or carer responsible for that decision, who must consult the family about the person's wishes and best interests. Family views carry real weight, but being next of kin does not give anyone the power to decide.

What is an IMCA?

An Independent Mental Capacity Advocate (IMCA) is a trained, independent person who supports someone who lacks capacity when an important decision is being made and there is no family member or friend appropriate to consult. IMCAs must be involved for decisions about serious medical treatment or a long-term move into a hospital or care home, and may be involved in care reviews and safeguarding. The council or NHS body arranges the IMCA.

Does a live-in carer need legal authority to care for someone who lacks capacity?
Not for ordinary care given in the person's best interests. Section 5 of the Mental Capacity Act protects carers who reasonably believe the person lacks capacity for that care and act in their best interests, such as helping with washing or medicines. If the care involves significant restrictions the person objects to, such as locked doors or constant supervision, it may amount to a deprivation of liberty that needs authorisation from the Court of Protection.

Sources and further information

- legislation.gov.uk: Mental Capacity Act 2005
- GOV.UK: Mental Capacity Act code of practice
- GOV.UK: UK Supreme Court 2026 judgment on what constitutes a deprivation of liberty
- UK Supreme Court: press summary, Reference by the Attorney General for Northern Ireland [2026] UKSC 16
- NHS: Mental Capacity Act
- SCIE: Mental Capacity Act resources

Read next

LEGAL MATTERS AND PLANNING AHEAD

Lasting Power of Attorney: a guide for families

How Lasting Power of Attorney works in England and Wales: the two types, why to make one early, how to make and register it online or on paper, the £92 registration fee, the certificate provider, and what happens without one (deputyship and the Court of Protection).

Read the guide →

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Advance care planning: making your wishes known

A gentle guide to advance care planning in England: advance statements, advance decisions to refuse treatment, ReSPECT forms and DNACPR decisions, choosing your preferred place of care, and how to start the conversation with family and professionals.

Read the guide →

HEALTH CONDITIONS AND CARE AT HOME

Dementia care at home: a practical guide for families

How to support someone with dementia at home: the stages, communication, routines, eating and drinking, sundowning and nights, wandering and safety, Lasting Power of Attorney, support for carers and how care is funded, including NHS Continuing Healthcare and council tax.

Read the guide →

All guides in the information centre **Check what help you could get**

Talk to our care team: 01865 715780
enquiries@dayandnightcare.co.uk · Out of hours: 07775 686272
Day and Nightcare Live In Limited, 9 Hollow Way, Cowley, Oxford OX4 2NA
CQC overall rating: Good (report published 20 April 2018)

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Information, not advice: please check anything important with the organisation named.