

# MENTAL CAPACITY ACT (2005) & DoLS (2009): Overview

Statutory principles, assessing capacity, Best Interests decisions

## Mental Capacity Act 2005

1, 2 & 3 All about me  
4 & 5 You do with me if I lack capacity

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# Mental Capacity Act Lead

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# ASSESSMENT

## Agenda Items

- Understanding Mental Capacity
- A focus on the five principles of the MCA 2005
- Assessment of Mental Capacity
- How to assess and determine someone's decision-making capacity
- Identifying the information relevant to different decisions
- Best Interests decisions
- Deprivation of Liberty and the Safeguards

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What do you remember about the MCA?

What do you remember about the Mental Capacity Act.  
It could be a word or a phrase.



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**Introduction**



The primary purpose of the **MCA 2005** is decision making and deciding whether someone has or lacks capacity to make their own decision. For those who do not have capacity to decide for themselves, the Act supplies a framework for making decisions for that person, based on whether the proposed action will be in the person's best interest or not. This might include decisions in relation to medical treatment.

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POWER OF DECISION MAKING AND HOW DECISIONS AFFECT YOUR LIFE

**YOU**



**DECIDE**

ANAMAN VERMA

**The Mental Capacity Act (2005)**

The Act applies to everyone involved on the care, treatment and support people aged 16 and over living in England & Wales who are unable to make all/some decisions for themselves.

The MCA is designed to protect and restore power to those vulnerable people who lack capacity.

Everyone working with (or caring for) any person from the age of 16 who may lack capacity must comply with the Act

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Capacity assessment in practice involves a structured approach to determine whether an individual can make a specific decision at a particular time.



Here are the key steps as written in the act:

**Understanding the Decision:** The assessor explains the decision that needs to be made, ensuring the individual understands the nature, purpose, and consequences of the decision.

**Two-Stage Test:**

- **Stage 1:** Diagnostic element: Determine if there is an impairment of the mind or brain. [This could be due to conditions like dementia, mental health issues, brain injury, or the effects of drugs or alcohol.](#)
- **Stage 2:** Functional element: Assess if the impairment means the person is unable to make the specific decision when required<sup>1</sup>.

**Functional Test of Capacity:** This involves evaluating whether the person can:

- **Understand** the information relevant to the decision.
- **Retain** that information long enough to make the decision.
- **Use or weigh** that information as part of the decision-making process.
- **Communicate their decision by any means** (e.g., verbally, sign language, etc.).
- We later added causation as Stage 3: is there a causal link between 1& 2 it means that for someone to be considered as lacking capacity to make a decision, their inability to do so must be directly caused by a mental impairment or disturbance

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Since the Mental Capacity Act (MCA) 2005, several changes and updates have been proposed and implemented to improve the assessment process because of caselaw.

- Functional Test First: Case law (A Local Authority v JB [2021] UKSC 52) established that assessors should carry out the functional test before the diagnostic test. This means assessing whether a person can make a specific decision, before determining if a mental impairment is the cause.
- If we begin with a functional approach, we can better practice supported decision making
- Support can be targeted appropriately i.e. to help them understand the information relevant to the decision, or to use and weigh it
- These changes aim to enhance the clarity, effectiveness, and fairness of the capacity assessment process



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The case of **A Local Authority v JB [2021] UKSC 52** brought significant clarity to the process of capacity assessment under the Mental Capacity Act (MCA) 2005. Here's a deeper look into the implications of this case:

#### Functional Test First

The Supreme Court in this case emphasised that assessors should first determine whether an individual can decide (the functional test) before considering if a mental impairment is the cause (the diagnostic test). [This approach ensures that the focus is on the individual's ability to make a specific decision at the time it needs to be made.](#)

**Key Points from the Case- Is the person able to make the specific decision**

**1. Functional Test:** Assessors must evaluate if the person can:

- Understand the information relevant to the decision.
- Retain that information long enough to make the decision.
- Use or weigh that information as part of the decision-making process.
- Communicate their decision by any means.

If they cannot do one or more of these things, they may lack capacity



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2. **Diagnostic Test:** This stage checks if the inability to make the decision is due to an impairment or disturbance in the functioning of the person's mind or brain. This could be due to conditions like dementia, mental illness, or the effects of drugs or alcohol

*Only after determining that the person cannot make the decision should the assessor consider whether this inability is due to an impairment of, or a disturbance in, the functioning of the mind or brain.*

3. **Causative Nexus:** This final stage establishes a direct link between the impairment or disturbance and the person's inability to make the decision. It ensures that the lack of capacity is specifically caused by the identified mental condition if so, is this impairment the reason that they cannot make the decision.

- If not, does the person have an impairment or disturbance in the functioning of the mind or brain.



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## Implications of the Ruling

• **Non-Discriminatory:** This approach helps prevent assumptions that a person lacks capacity solely based on the presence of a mental impairment. [It ensures that individuals are not unfairly judged and that their rights to make decisions are respected](#).

• **Focus on Decision-Making Ability:** By prioritising the functional test, the assessment process becomes more focused on the individual's actual decision-making abilities rather than their medical diagnosis.

• **Legal and Ethical Alignment:** This ruling aligns with the principles of the MCA, which aim to protect individuals' autonomy and ensure that any decisions made on their behalf are in their best interests<sup>1</sup>.

### Practical Steps for Assessors

• **Support and Assistance:** Assessors must take all practicable steps to help the person make their own decision, such as providing information in an accessible format or allowing more time.

• **Documentation:** Thorough documentation of the assessment process and the steps taken to support the individual is crucial for transparency and accountability. This case has reinforced the importance of a structured and fair approach to capacity assessments, ensuring that individuals' rights and autonomy are upheld.



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Being able to decide means having the capacity to make choices and take actions based on those choices. It's a fundamental aspect of our daily lives and involves several key elements:

1. **Recognising the Need for a Decision:** Understanding that a choice needs to be made is the first step. This could be anything from deciding what to eat for dinner to making a significant career move.

2. **Gathering Information:** Collecting relevant information to make an informed decision. This might involve researching options, seeking advice, or reflecting on past experiences.

3. **Weighing Options:** Evaluating the pros and cons of each option. This can include considering the potential outcomes, risks, and benefits.

4. **Making the Choice:** Selecting the option that best aligns with your goals, values, and the information you have gathered.

5. **Taking Action:** Implementing the decision and taking steps to follow through with it.

6. **Reflecting on the Outcome:** After making a decision, it's important to reflect on the results and learn from the experience, whether the outcome was positive or negative.



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3 Treat everyone equally PAGE 3 OF 8

**AGE**  
e.g. illnesses often related to age like alzheimer's disease or dementia.

**ANY ASPECT OF THEIR BEHAVIOUR**  
e.g. extrovert behaviour like shouting or gesticulating, or withdrawn behaviour like talking to themselves or avoiding eye contact.

**ASSUMPTIONS**  
about their condition e.g. learning difficulties and disabilities, drunkenness or unconsciousness.

An assessment that a person lacks capacity to make a decision **must never** be based simply on:

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**Legal Protection And Consent**

- Nurses and other health care workers need legal protection from a patient; in most cases, legal protection comes through the consent of the patient.
- To explain this, a patient giving a blood sample to the nurse is giving the nurse appropriate informed consent as the patient knows clearly why and what the blood test would involve.
- For consent to be valid, it must be voluntary and informed, and the person giving consent must have the capacity to make the decision.

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**Mental Capacity Video in Practice**

[Using the Mental Capacity Act in the community](#)

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**CODE OF PRACTICE**

The Code of Practice provides guidance to anyone who is working with and/ or caring for adults who may lack capacity to make decisions. It is not possible for a Code of Practice to create the law, as opposed to reflect what the law says. Still awaiting a revised Code of Practice.

*Remember :Can be downloaded onto your desktop*



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Mental Capacity Act 2005

**SO HOW DOES THE MCA 2005 & CODE OF PRACTICE HELP?**



- Provides a statutory framework/guidance to enable decisions to be made on behalf of people who lack decision-making capacity
- It provides guidance on how to assess Mental Capacity appropriately.
- It guides how we should record and account for any decisions made ensuring we have made considered judgements that stand up to scrutiny.
- Puts the needs and wishes of a person who lacks Mental capacity to make certain decisions at the centre of any decision-making process.
- Remember : both *Mental Capacity Act & Deprivation of Liberty Safeguards* come with a *Code of Practice* – It complements our working practice by providing more detailed information which informs our practice

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**continued...**

1. **Empowerment and Protection:** The MCA empowers individuals to make their own decisions wherever possible and protects those who lack capacity by ensuring decisions are made in their best interests decisions wherever possible and protects those who lack capacity by ensuring decisions are made in their best interests.
2. **Guidance for Decision-Makers:** The Code of Practice offers detailed guidance for anyone working with or caring for people who may lack capacity. This includes healthcare professionals, social workers, and family members.
3. **Best Interests Principle:** It ensures that any decision made on behalf of someone who lacks capacity is done with their best interests in mind. This involves considering the person's past and present wishes, feelings, beliefs, and values.
4. **Legal Clarity:** The MCA provides a clear legal framework for assessing capacity and making decisions, reducing the risk of legal disputes and ensuring consistency in how decisions are made.
5. **Planning Ahead :** It allows individuals to plan for a time when they might lack capacity, through mechanisms like Lasting Powers of Attorney and advance decisions to refuse treatment.



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Principle 1:  
"A person must be assumed to have capacity unless it is established that he lacks capacity"  
MCA 2005 s 1(2)

- The presumption that P has capacity is fundamental to the Act.
- Never for person to prove their own capacity.
- Must always have grounds to carry out a capacity assessment.
- Conversely, must also be prepared to justify a decision not to carry out an assessment - presumption is not a substitute for an assessment of capacity.
- Capacity is decision specific, no general lack of capacity.
- Remember that some people can 'talk the talk, but not walk the walk'.

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**Principle 2:**  
"A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success" MCA 2005 s1 (3)

- 1**  
People must be supported to make their own decisions.
- 2**  
Create the best environment.
- 3**  
Treat each decision separately.
- 4**  
Equal access – using communication equipment, interpreters, SaT support.  
 • Provide relevant information  
 • Provide options  
 • Encourage the person to become involved  
 • Make the person feel at ease  
 • Involve the family or any carers

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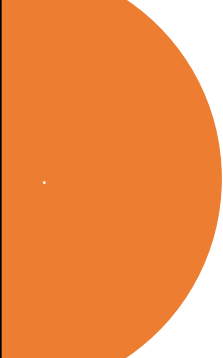
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- [MCA principle 2 – Supported Decision Making \\*MV \(youtube.com\)](#)

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Principle 3:  
"A person is not to be treated as unable to make a decision merely because he makes an unwise decision" MCA 2005 s 1 (4).

Not a 'right' to make unwise decisions.

Guarding against the 'protection imperative'

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### Need to know


An unwise decision is any decision made by the person that you, or anyone else thinks is not the best decision for them.

It is important you recognise that every decision a person makes will be influenced by their:

1. Attitudes;
2. Beliefs;
3. Values; and
4. Preferences.

It is not your place (or the place of anyone else) to judge whether:

1. A person's attitudes, values, beliefs or preferences are right or wrong; or
2. Whether the decision that a person makes based on them is wise or unwise.



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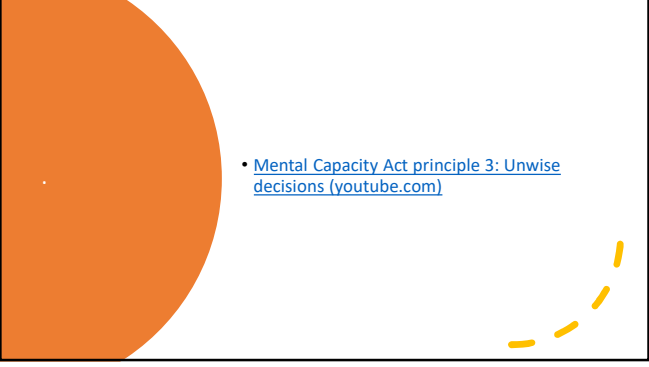
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- [Mental Capacity Act principle 3: Unwise decisions \(youtube.com\)](#)

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Principle 4  
"An act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests"  
MCA 2005 s1 (5)

Any decision you make for someone must *be right for them*.

Section 4 MCA sets out a process to determine best interests.

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- [Mental Capacity Act principle 4: Best interests \(youtube.com\)](#)

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**Principle 5**

"Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action" MCA 2005 s1 (6).

Anything done or decided in a person's best interests must be proportionate.

Is it possible to decide or act in a way that would interfere less with the person's rights and freedoms?

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### Making a Best Interest Decision

Consider the options and weigh up the pros and cons

- Encourage participation
- Identify all relevant circumstances
- Find out the person's views
- Avoid discrimination
- Assess whether the person may regain capacity
- Consult others
- Least restrictive decision
- Is the person happy? (Consider emotional wellbeing)



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### [Lancashire & South Cumbria NHS Foundation Trust & Lancashire County Council & AH \[2023\] EWCOP 1 - Court of Protection Hub](#)

- **Best interests' decision concerning AH, a female who may die if she mismanages her diabetes but who wants to return home from her current placement where she is unhappy**

- AH has been the subject of a previous judgment: [2022] EWCOP 45 and the background to these proceedings is set out there. In this judgment, HHJ Burrows has to determine AH's best interests, deciding whether she should stay in her current placement, which AH dislikes but where her medication is properly administered, or be allowed to return home with medication provided by district nurses. The current arrangement, approved by the judge earlier in proceedings, was that AH would remain in the placement but be allowed out during the day and stay at her home one night a week.

In the light of various funding and logistical challenges, that hybrid approach was unsustainable so the options available to the judge was either a full-time placement at the home (and in which case AH would lose her flat) or to allow AH to go home despite the risks. He reviews various cases and cites in particular *Re M (Best Interests: Deprivation of Liberty)* [2013] EWHC 3456 (COP) where Peter Jackson J comments:

*"The right to life and the state's obligation to protect it is not absolute and the court must surely have regard to the person's own assessment of her quality of life"*

In HHJ Burrows eyes, this is the nub of the matter in this case so, in that light and despite the risks, at [65] he concludes that AH has

*"the right to her liberty and to remove it from her would be a devastating blow to her and would not properly recognise her right as a disabled person to be afforded respect and dignity for the way she wishes to live her life."*

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Kings College Hospital NHS Foundation Trust-v-  
South London & Maudsley NHS Foundation Trust-  
anor-2024-ewcop-20

**Capacity and best interest's decision concerning GF and whether he should have his ulcerated leg amputated.**

F is 60 and has a history of paranoid schizophrenia. He was admitted to hospital via A&E after being taken there by his niece, AB. and GF was reported to be disorientated. His niece had noticed sores which he said were caused by lasers and Wi-Fi but, on examination, the sores were caused by infection and necrotic. Without amputation, the sores would be fatal. A mental health review found GF to be delusional.

After reviewing the law on capacity and best interests, Henke J first decides GF lacks capacity and then notes the medical evidence is unanimous that an above the knee amputation is the only feasible route to save GF's life. She therefore decides the surgery is in GF's best interests partly as has expressed a desire to live. She also sets out her reasons for publishing the judgment at [13] one of which is so that GF has a record of why his leg has been amputated.



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## Relevant information

**Case law:**

- A person only needs to understand the 'salient factors', that is the information relevant to the decision *LBL v RYJ* [2010] EWHC 2664 (Fam)
- We must not set the bar too high *PH and A Local Authority v Z Limited & R* [2011] EWHC 1704 (Fam)
- An individual is not a 'blank canvas' and highlights that professionals may "consciously or unconsciously attach excessive weight to their own views" and insufficient weight to the individual's views of how their emotional needs may best be met *CC v KK & STCC* [2012] EWHC 2136 (CoP)

39 Essex Chambers have written a standalone document. You can find it [here](#)



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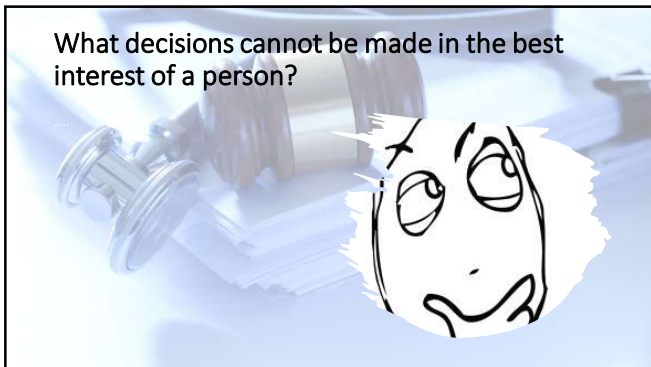
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**What decisions cannot be made in the best interest of a person?**



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### Decisions that cannot be made in Best Interests

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce being granted on the basis of two years' separation
- consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation
- consenting to a child's being placed for adoption by an adoption agency
- consenting to the making of an adoption order
- discharging parental responsibilities in matters not relating to a child's property
- giving a consent under the Human Fertilisation and Embryology Act 2008

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- [Mental Capacity Act principle 5: Less restrictive option \(youtube.com\)](#)

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### Powers and Bodies introduced

**Mental Capacity Act**  
The Mental Capacity Act is a legal framework in the UK that provides a statutory framework for decision-making on behalf of individuals who lack the capacity to make their own decisions.

- Court of Protection
- The Office of Public Guardianship
- Advance decisions to refuse treatment
- Lasting Power of Attorney/ Court Appointed Deputies
- The IMCA Independent Mental Capacity Advocate Service

[Using the Mental Capacity Act \(youtube.com\)](#)

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## Case Study 1

Ada has been admitted to hospital following a fall at home. She is 85 years old and lives on her own. Up until this point she has managed independently with some support from her daughter (who lives 50 miles away) and her neighbours. The fall has resulted in a marked reduction in Ada's mobility and currently she is unable to weight bear, requiring full support with her personal care needs. At times she is also getting confused. Ada has been assessed by a physiotherapist who feels that the best option would be for her to move into a nursing home. Her daughter supports this recommendation as she feels that she would not be able to offer her mother the support she needs if she returned home. However, at this stage Ada has not been assessed by a social worker and there is the potential for her needs to be met at home with a package of care. Ada has stated that she does not want to go into a nursing home.

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## Assessment of capacity.....

**Functional test A) Is Ada able to understand information relevant to the decision?**  
Ada understood the circumstances of her admission and described her fall as avoidable as she had slipped on a rug, she expressed her daughter's concern about her returning home however stated it is my home.

**Functional test B) Is Ada able to retain the information for the purposes of making the decision.**  
"Ada was able to share that she feels better having had her antibiotics I am not so doolally, I still feel unsteady, and I feel I have lost a little bit of my confidence."

**Functional test C) Is Ada able to weigh up and use information pertinent to the decision?**  
Ada was given all the information relevant to the decision and was able to share the options she explained that she needed a little more support to build up her strength.

**Functional test D) Is Ada able to communicate her decision though any means?**  
"Ada was able to communicate verbally throughout the conversation."

**Diagnostic test. Does Ada have an impairment or dysfunction of the mind or brain?**  
"Ada had a acute confusional state/ delirium."

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On the balance of probabilities do you consider Ada to have capacity to decide where to live?

 **YES**

 **NO**

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Please record.....

**Your capacity assessment as per previous slide**

**And.....**

*"I believe that Ada is able to weigh up and use information pertinent to this decision. On the balance of probability, I believe that Ada has the capacity to decide where she should live in order to receive care and support."*

*Ada did have the capacity to decide where she lived. However, she was not able to move home immediately as she was not well enough. A period in rehab was identified for further assessment of her needs and to identify whether a package of care at home would be successful.*

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Please record.....

**Your capacity assessment as per previous slide**

**And.....**

*"I believe that Emma's is able to weigh up and use information pertinent to this decision. On the balance of probability, I believe that Emma has the capacity to manage her finances."*

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[Using the Mental Capacity Act in the community \(youtube.com\)](https://www.youtube.com/watch?v=...)

# Mental Capacity In Practice

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## Legal Capacity Vs. Mental Capacity

### Legal Capacity

Legal capacity refers to a person's ability to make legally binding decisions, including entering into contracts, making wills, and consenting to medical treatment.

### Mental Capacity

Mental capacity refers to a person's ability to make informed decisions about their own health, welfare, and finances, including managing their own money, consenting to medical treatment, and making decisions about where they live.



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## Preparing to carry out the functional test

1. Make sure that you understand the nature of the decision to be made;
2. Make sure you understand the range of options available;
3. Make sure you consider and prepare the information that may be relevant to the decision;
4. Establish whether there is a donee of a Lasting Power of Attorney, or a Deputy appointed by the Court and arrange for them to be involved;
5. Consider any need that you may have for additional support (based on your own skills and abilities);
6. Consider any support the person may need during the assessment;
7. Read any information that is available to you that could indicate the practicable steps that could support the person to make their own decision;
8. Establish how the person is currently supported to make decisions and the kind of decisions they are able to make; and
9. Establish if any information has already been given to the person, what this was and how it was received



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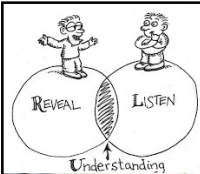
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### is P able to understand the relevant information?

The courts have repeatedly emphasised that the level of understanding required must not be set too high.

Further, you must not start with a 'blank canvas.' In other words, you must present the person you are assessing with detailed options so that their capacity to use and weigh those options can be fairly assessed. This is particularly important where a person's particular impairment may make it more difficult for them to envisage abstract concepts. But it is also important to give the person sufficient information about the options that they are being asked to choose between that they are given the opportunity to understand (if they are capable of doing so) the reality of those options. In other words, and to take a common example, you should not simply seek to assess a person's ability to decide between living at home and living in a care home in the abstract, but rather by reference to what continuing to live at home would be like (for instance, what care package would the relevant local authority provide) and what living in an actual care home would be like.

- The ability to understand also extends to understanding the reasonably foreseeable consequences of reaching a decision or failing to do so (s.3(4)).

**Inability example quote from court practice:**

- *[P] has barely an inkling of the health risks involved. She was unable to link sex to pregnancy. Indeed she had virtually no idea how her babies came to be in her tummy (as she put it)*



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**For a person to make their own decision they must be able to demonstrate all the following:**

1. A general understanding of the decision to be made;
2. A general understanding about why the decision needs to be made;
3. A general understanding about the effects of deciding one way or another, or of making no decision at all.

It is important not to assess a person's understanding until they have been:

1. Provided with all of the relevant information to the decision; and
2. All practicable steps have been taken to support them to understand it.

*Please note: One person being supported to decide about medical treatment may need to know the general purpose of treatment, the nature of the treatment and the likely consequences of either accepting or refusing the treatment; but Another person may also want to know who will be carrying out the procedure, what ward they will be on, how many people will be involved, and other finer details.*

## DECISION MAKING



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## Sample questions to ask to help determine Capacity - Following information giving.

\*The kind of support people might need to help them decide **varies**. It depends on **personal** circumstances, the **kind of decision** that must be made and the **time** available to make the decision i.e.

**Does P understand the treatment or plan or proposed options of care?**

- What is your understanding of your condition?
- What are your options...
- What is your understanding of the benefits of this treatment or plan?
- What are the risks ?
- What is your understanding of what will happen if nothing is done?
- Ability of P to reason with that information in a manner that is supported by the facts and P's values – *...you have been given a lot of information, how you decided what options are best for you and why?*

Remember: think about simplifying language, visuals, key words, written words. Recap information and ask questions to check understanding.



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## Difficulty in engaging the person in the assessment

1. A problem that can be encountered in practice is where it is difficult to engage the person in the process of assessment.
2. It is important to distinguish between the situation where the person is **unwilling** to take part in the assessment, and the one where they are **unable** to take part. As Hayden J emphasised in Re QJ: "[i]t is important to emphasise that *lack of capacity* cannot be established merely by reference to a person's condition or an aspect of his behaviour which might lead others to make unjustified assumptions about capacity (s.2(3) MCA). [In this case, a]n aspect of [the person's] behaviour included his reluctance to answer certain questions. It should not be construed from this that he is unable to. There is a good deal of evidence which suggests that this is a choice." [1]
3. However, you do not need mechanically to keep asking the person about each piece of relevant information if to do so would be obviously futile or even aggravating.[2]

**What you need to do is:**

- To consider what steps could be taken to assist the person to engage in the process; and
  - To record what steps were taken and what alternative strategies have been used.
4. It is also important to think of ways in which you can persuade the person to take part, for instance by explaining to them that helping you – the assessor – is likely to help them, because it will maximise the chances that you will find that they are able to make the decisions.

[I am finding it difficult to engage the person - Capacity guide](#)



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## Location, timing and presence of others

- When a person is at ease, they are better placed to think things through and make an informed decision.
- You should take practicable steps to ensure that the person is supported to make the decision:
  1. In a place that they feel at ease;
  2. At a time when they are best placed to make the decision; and
  3. In the presence of people in whose company they feel at ease.

### Location

Wherever possible the person should be supported to decide at a location where they feel most comfortable, even if this is at the inconvenience of others.



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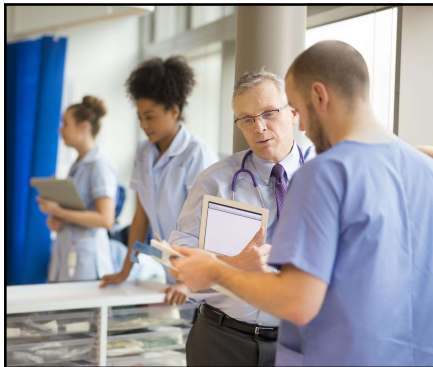
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## Role of Healthcare Professionals

Healthcare professionals are often the first point of contact for individuals with impaired capacity. They play a crucial role in the assessment of mental capacity and can help to identify potential issues and refer individuals for further evaluation.



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## Who is best placed to undertake assessment



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**What are the challenges of undertaking an MCA assessment?**

**Nothing is too trivial .**



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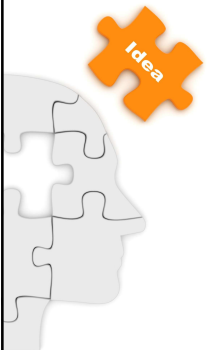
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### Challenges in Accurate Evaluation

**Language Barriers**  
Language barriers can make it difficult to accurately evaluate mental capacity, especially when the individual being evaluated is not proficient in the language used for assessment.

**Cultural Differences**  
Cultural differences can influence the way mental capacity is perceived or expressed, and can make accurate evaluation challenging.

**Fluctuating Nature of Mental Capacity**  
Mental capacity can fluctuate due to a variety of factors, such as illness, medication, or emotional distress. This can make accurate evaluation challenging.

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**Need to know:**

The decision to be tested must be clearly recorded on the formal record of the mental capacity assessment and, wherever possible set out in line with the first 3 statutory principles. You start by thinking they can make a decision, you support, and you understand their right to make a decision even if it seems unwise.

For example: you're recording on an assessment in relation to accommodation needs to look like this..

1. Is Jonathan Jones able to make a decision about where to live?; and not
2. Does Jonathan Jones lack capacity to make a decision about where to live?

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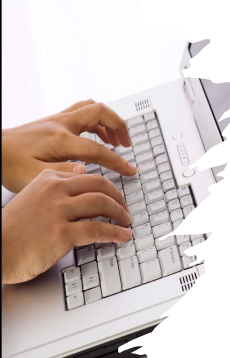
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## Recording the Assessment

A formal record of the assessment and determination should be recorded as soon as possible after it has been carried out. The record must demonstrate that the statutory principles of the Act have been applied, and each element of the functional test assessed.

The record should contain all the following:

- Be clear about the capacity decision that is being assessed.
- Ensure P (and you) have the concrete details of the choices available (e.g. options between living in a care home and living at home with a realistic package of care).
- The evidence that has been used to confirm the presence of an impairment or disturbance of the mind or brain;
- The relevant information that has been provided to the person;
- The practicable steps that have been taken to support the person to make their own decision;
- The outcome of each element of the functional test of capacity;
- The reason that the person has been deemed to have, or to lack capacity to make the decision for themselves; and
- Where the person has been deemed to lack capacity, the consideration that has been given to delaying the decision.

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## Good capacity assessment and recording

- Where there are concerns about a patient's capacity to make a decision, a capacity assessment should be documented in the patient record.
- For most simple events such as obtaining a patient's consent to ongoing treatment, or helping a patient with their self-care, this can be recorded in the progress notes under the heading MCA related issues.
- For more major events, or where there is doubt about a patient's capacity to consent to an intervention, you should complete the Mental Capacity Assessment form in RiO

Remember where there are no doubts about capacity there is no need to document a capacity assessment

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## Executive function and mental capacity

Executive function is an umbrella term used to describe a set of mental skills that are controlled by the frontal lobes of the brain. When executive function is impaired, it can inhibit appropriate decision-making and reduce a person's problem-solving abilities. Planning and organisation, flexibility in thinking, multi-tasking, social behaviour, emotion control and motivation are all executive functions. Professionals assessing capacity in this patient group are faced with several obstacles that make determination of capacity more challenging. This can have significant implications because failing to carry out a sufficiently thorough capacity assessment in these situations can expose a vulnerable person to substantial risk.



If you have concerns that a person's executive functioning may be affecting their decision-making capacity, it is probably worth seeking a specialist opinion from a psychiatrist or psychologist.

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## MCA & EXECUTIVE FUNCTIONING CASE LAW

Phobia or fear - for example MB (Caesarean Section) [1997] EWCA Civ. 1361

A pregnant woman with a needle phobia refused anaesthetic necessary for a C section. The court ruled that at the point of treatment her phobia overwhelmed her, and she was unable to use and weigh relevant information to that particular treatment.

Compulsive Disorders – such as Anorexia Nervosa. E.g. The NHS Trust v L and Ors [2012] EWHC 2742 (COP)

Judge stated, 'Ms L's judgement is critically impaired by a profound and illogical fear of weight gain.'

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## IMCA: INDEPENDENT MENTAL CAPACITY ADVOCATES

### • Eligibility:

- A person who lacks capacity AND
- Has no family or friends other than paid carers to represent them AND
- When decisions are being made about serious medical treatment or significant changes of residence:

### • This can include

- A stay in hospital longer than 28 days, or
- A stay in care home for more than 8 weeks.
- When an application is submitted under 'Deprivation of Liberty safeguards'

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## Who makes the decision?

- If there is a valid and applicable Advance Decision to Refuse Treatment, the person themselves is the decision maker even though they don't have capacity. Their decision cannot be overridden by others on the basis that it is not in the person's best interests.
- If there is a Lasting or Enduring Power of Attorney or a Court has appointed a Deputy, the Attorney or Deputy will be the 'decision maker' for decisions within the scope of their powers.
- The Court of Protection can also make decisions on behalf of someone who lacks capacity to decide

If there is conflict or doubt about whether a decision is truly in the individual's best interest (including if a professional believes an Attorney or Deputy is not acting in their best interests) the decision will need to be looked at by the Court of Protection.

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## Who makes the decision?

Otherwise,

- The decision maker will vary depending on the individual's circumstances and the type of decision involved.
- Health professionals will be decision makers for medical and related treatment, such as dental care and physiotherapy.
- Family members and unpaid carers who live with or care for people who lack capacity to make decisions will often be the decision makers for many day-to-day acts such as what people eat or wear.

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## Who makes the decision?

Have a look at the statements below and consider if you believe them to be true or not.

- A parent of an adult son or daughter with a learning disability can give consent on their behalf.
- A wife whose husband is in a coma can consent to a life support machine being switched off.
- A "next of kin" has the right to tell a care worker how care and support should be provided.

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## Regard to less restrictive options

The Mental Capacity Act says that restraint is when:

- someone uses force - or threatens to use force - to make a person do something they are resisting, or when
- someone restricts a person's freedom of movement, whether they are resisting or not.

Where possible we should try to avoid restrictions and restraint but sometimes it will be in a person's best interests to use restraint.

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## Lawful restraint?

If you are intending to restrain a person who lacks capacity to consent, you must:

- **Reasonably** believe the restraint is necessary to **prevent** harm to the person
- Use the **minimum** amount of force and for the shortest time necessary
- The restraint must be in the **best interests** of the **individual** who lacks capacity
- Your response must be **proportionate** to the likelihood and seriousness of harm.

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## Conclusion

### Understanding Mental Capacity

By understanding the definition and significance of mental capacity, as well as the various factors that can influence it, we can provide better care for individuals with impaired capacity.

### Assessment and Legal Frameworks

By examining the assessment methods and tools, ethical considerations, and legal frameworks and rights involved in cases involving mental capacity, we can ensure that these individuals are treated with respect and dignity and that their autonomy is protected.

### Case Studies and Best Practices

By examining case studies and real-world scenarios, we can learn valuable lessons about best practices and effective approaches to navigating issues related to mental capacity.

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**SHORT RECAP QUIZ**

1. Name the Five MCA statutory Principles.
2. What is the 2 stage test for assessing Mental Capacity?
3. Who should you consult when it comes to Best interest decision Making?
4. Where should you record MCA & Best interest decisions?
5. How can you support patients with decision making process?
6. When do you need to appoint an IMCA?

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**Deprivation of Liberty Safeguards**

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## DEPRIVATION OF LIBERTY SAFEGUARDS ('DOLS')

By way of amendments to the Mental Capacity Act 2005 ('the MCA'), the Deprivation of Liberty Safeguards ('DOLS') were brought into force in April 2009 to ensure that professionals applied checks and balances when they had to deprive people lacking capacity of their liberty.

The DOLS only applied to those in care homes and hospitals, and those aged over 18. However, the 2014 decision of the Supreme Court in P v Cheshire West and Chester Council and P & Q v Surrey County Council made clear that a DoL was much broader than before.

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### European Convention on Human Rights

Article 5(1), with para (e), states:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a **procedure prescribed by law**:

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, **of persons of unsound mind**, alcoholics or drug addicts or vagrants;

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## The evolution of DoLS

- The European Court of Human Rights in its October 2004 judgment in the *Bournewood* case (HL v UK) highlighted that additional safeguards are needed for people who lack capacity and who might be deprived of their liberty.
- Introduced into Mental Capacity Act 2005 (MCA) through the Mental Health Act 2007
- Safeguards are to protect service users who need to be deprived of their liberty and give them representatives, rights of appeal and for the "deprivation" to be reviewed and monitored.
- Safeguards cover people in hospital and care homes registered under the Care Standards Act 2000



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## MAIN AIM OF DOLS

- To focus additional scrutiny on the care arrangements for those vulnerable adults who may be deprived of their liberty.
- Avoid unnecessary restrictions being imposed on vulnerable adults.
- To ensure that when a deprivation of liberty, needs to occur, there is a lawful basis for doing so.

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## Who is covered by DoLS.

The safeguards apply to anyone:

- Aged 18 and over
- Who suffers from a mental disorder or disability of the mind
- Who lacks capacity to give informed consent to the arrangements made for their care and/or treatment, and
- For whom deprivation of liberty (within the meaning of Article 5) is considered after an independent assessment to be necessary in their best interests to protect them from harm.

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## RELEVANT DOLS MCA matters

- As part of MCA assessment Patients have to understand below. (note that this is not an exhaustive list) case link below.
- That P is in hospital to receive care and treatment for a mental disorder;
- That the care and treatment will include varying levels of supervision (including supervision in the community), use of physical restraint and the prescription and administration of medication to control her mood;
- That staff at the hospital will be entitled to carry out property and personal searches;
- That P must seek permission of the nursing staff to leave the hospital, and, until the staff at the hospital decide otherwise, will only be allowed to leave under supervision;
- That if P left the hospital without permission and without supervision, the staff would take steps to find and return her, including contacting the police.

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## Defining deprivation of liberty – The acid test



Is P under continuous control and supervision?

Is P not free to leave?

Does P lack capacity to consent to these arrangements?



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## Seeking authorisation

1. Identification of a potential DoL
2. Written application to the Supervisory Body
3. Urgent authorisation can be self-granted – maximum 14 days
4. Managing Authority responsible for informing family / carer / IMCA
5. Supervisory Body commission assessments

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## How does it work

A managing authority (Oxleas) must grant itself an urgent authorisation when it identifies a DoLS (7 days with an automatic request for a 7 day extension).

- applies for the authorisation to: a supervisory body who then
- Consider requests
- Commission assessments

A standard authorization should also be requested at the same time to facilitate external scrutiny by the managing authority.

*Remember: anybody who is subject to a standard authorisation is entitled to the right of immediate access to the Court of Protection that can review the lawfulness of their deprivation of liberty.*



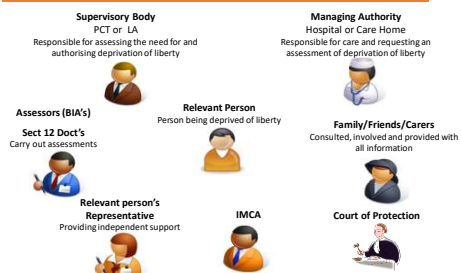
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## Supervisory Body assessments

Age	No refusals	Mental Capacity	Mental Health	Eligibility	Best Interests
<ul style="list-style-type: none"> <li>Is P over the age of 18?</li> </ul>	<ul style="list-style-type: none"> <li>Is there a valid and applicable advance decision to refuse the treatment being provided?</li> <li>Has a Deputy or Attorney refused the authorisation?</li> </ul>	<ul style="list-style-type: none"> <li>Does the person lack capacity to consent to the arrangements for their care and treatment?</li> </ul>	<ul style="list-style-type: none"> <li>Does the person have a mental disorder within the meaning of the MHA (Art 5(1)(a) persons of unsound mind).</li> </ul>	<ul style="list-style-type: none"> <li>DoLS cannot authorise if P objects to being in hospital for treatment/ would object if they were able to or if they fall within the scope of the MHA.</li> </ul>	<ul style="list-style-type: none"> <li>Is the person deprived of their liberty deprivation of liberty and is this in the person's best interests?</li> </ul>

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## UNDERSTANDING THE ROLES



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## Key safeguards in DoLS

### Relevant person's representative (RPR)

The RPR has two important powers:

- They can insist on having the standard authorisation reviewed by the supervisory body.
- They can challenge the deprivation of liberty in the Court of Protection. This would not cost them anything.

### The Court of Protection

Anybody who is subject to a standard authorisation is entitled to the right of immediate access to the Court of Protection that can review the lawfulness of their deprivation of liberty.

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## Authorisation otherwise by :

- Court of Protection (CoP) application
- Mental Health Act 1983 (MHA) in hospital where criteria met

*Complex interface with MCA/DoLS at times leading to potential for gaps (in practice rather than legal gaps?)*

- Court orders
- Inherent jurisdiction (*a vast power that the court has to protect children in areas where statutory remedies are inadequate*)

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Proper recognition  
of the jurisdiction of  
each statute by  
those responsible for  
using them is key -  
**whatever you do..  
DOCUMENTATION IS  
PARAMOUNT!**

Recap:

### Hospital

- *What treatment is hospital admission/detention meant to achieve? mental health? physical health treatment and what is the patients consenting capacity?*

### ➤ **and if for mental health purposes**

❖ *what is the 'compliance status' of the patient as per:*

- *i) The compliant capacitated – Voluntary/Informal (s131 MHA)*
- *(ii) The compliant incapacitated – Possibly MCA*
- *(iii) The non-compliant capacitated – MHA*
- *(iv) The non-compliant incapacitated - MHA*

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## Final Questions?



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## Further Information

- This video by Alex Ruck Keene, explaining the concept of capacity: [Capacity – the key points – Mental Capacity Law and Policy](#)
- The Code of Practice to the MCA 2005: [Mental Capacity Act Code of Practice – GOV.UK \(www.gov.uk\)](#)
- The easy read version of the MCA 2005 prepared by Care England: [Mental Capacity Act 2005: An easy read guide \(careengland.org.uk\)](#)
- The British Institute of Human Rights' "Know your Human Rights: Mental Health and Mental Capacity" tool: [Know your human rights | British Institute for Human Rights](#)
- Updated Guidance – The Law Society - including clarification of the position of: [Changes to the Mental Capacity Act code of practice – Law Society response | The Law Society](#)

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## Further Information

- The "you've got the capacity to choose to kill yourself" phenomenon, and what we can do about it | [The Small Places \(wordpress.com\)](#)
- [YouHaveCapacity.pdf](#)
- [Mental Capacity Toolkit](#)

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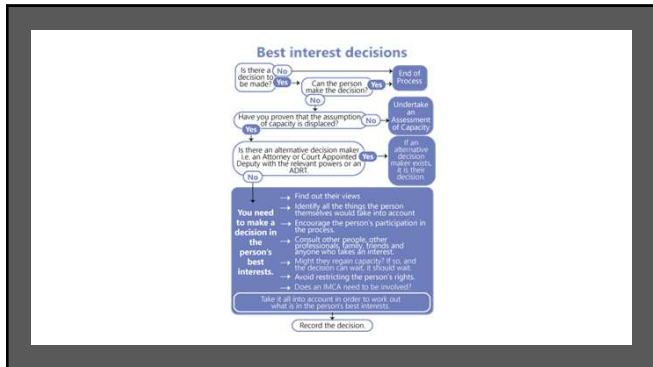
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