



Mental Capacity Act and DOLS LPA and Court of Protection

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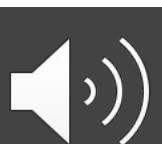
Course Objectives

- **At the end of the session participants will in relation to MCA & DOL's be able to:**
 - List the functions of the Mental Capacity
 - Describe the groups that will be affected by the legislation
 - Explain what is meant by the term 'best interests'
 - Explain the role of Lasting Power of Attorneys
 - Describe the function of the Court of Protection
 - Explain the Deprivation of Liberty Safeguards and LPS



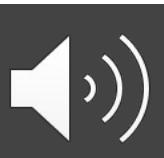
MCA

- The MCA enshrines in law that all individuals over the age of 16 (in England and Wales) have the right to autonomy
- i.e. the full legal capacity to make decisions for themselves including potentially life ending decisions (the minimum age for this is 18yrs), except it can be shown that they
- lack the mental capacity to make the required decision – MCA Code of Practice para 1.2.
- The Act also provides a statutory framework to empower and protect people who may lack capacity to make decisions for themselves and establishes a framework for making decisions on their behalf. This applies whether the decisions are life-changing events or everyday matters - OPG Safeguarding Policy, May 2011 para 8.1.



What is the Mental Capacity Act

- Developed to bring together and integrate existing law
- Puts the needs and wishes of a person who lacks capacity at the centre of any decision-making process.



People Who Are Affected By The Act

- People working in a professional capacity, e.g. doctors, nurses, dentists and social workers
- People who are paid to care or support, e.g. home care workers and care assistants
- Anyone who is a deputy appointed by the Court of Protection
- Anyone acting as an independent mental capacity advocate (IMCA)
- Anyone carrying out research involving people who may lack capacity.



Who Else Will Be Affected

- Many people with the following:

- Dementia
- Learning disabilities (especially severe learning disability)
- Brain injury
- Severe mental illness
- Temporary loss of capacity, for example because somebody is unconscious because of an accident or anaesthesia or because of alcohol or drugs or an infection
- and anyone planning for the future.



Five Principles

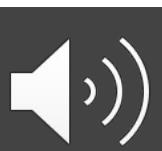
- A person must be assumed to have capacity unless it is established that they lack capacity
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success
- A person is not to be treated as unable to make a decision merely because they make an unwise decision
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

***Under the Act it is a criminal offence to wilfully neglect or ill treat an adult lacking mental capacity to make a required decision - MCA Section 44(2)



What Is Lack Of Capacity

- An individual lacks capacity if they are unable to make a particular decision
- This inability must be caused by an impairment or disturbance in the functioning of the mind or brain, whether temporary or permanent
- Capacity can vary over time and depends on the type of decision. It is time and decision specific.



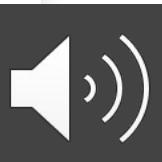


CASE STUDY

Re C

Questions To Be Considered

- Does the person have the ability to:
 - Understand the information?
 - Retain information related to the decision?
 - Weigh, use or assess the information while considering the decision?
 - Communicate the decision by any means?



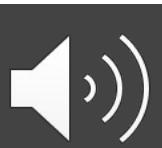
What Triggers An Assessment

- Staff should start from a presumption of capacity then take into account:
 - The person's behaviour
 - Any concerns raised by other people
 - The person's lack of capacity to make decisions in the past.



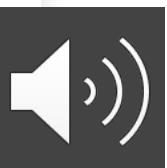
What Kind Of Help, Could Someone Need To Make A Decision?

- Provide all relevant information using simple language or other formats e.g. Pictorial, large print etc
- Don't give more detail than required
- Include information on the consequences of making, or not making, the decision
- Provide information on options
- Consult with family and care staff on the best way to communicate and known information about the person's previous views about the particular decision wanting to be made
- Be aware of any cultural, ethnic or religious factors that may have a bearing
- Make the person feel at ease
- Try to choose the best time of day for the person
- Try to ensure the effects of any medication are considered
- Take it easy-one decision at a time
- Don't rush
- Be prepared to try more than once i.e. can the decision be left to another time.



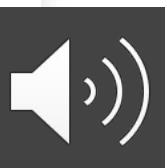
DECISION MAKING

- ‘it is not always necessary for a person to comprehend all peripheral details ...’
Macur J in LBL v RYJ and VJ [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795, [2011] 1 FLR 1279, at para [24], KK v STCC [2012] EWHC 2136 (COP)
- -----the question [is] whether the person under review can ‘comprehend and weigh the salient details relevant to the decision to be made’.
Macur J in LBL v RYJ and VJ [2010] EWHC 2665 (COP), [2010] COPLR Con Vol 795, [2011] 1 FLR 1279, at para [58], KK v STCC [2012] EWHC 2136 (COP)
- Professionals and the court must not be unduly influenced by the “protection imperative”; that is, the perceived need to protect the vulnerable adult
(Oldham MBC v GW and PW [2007] EWHC 136 (Fam); PH v A Local Authority, Z Ltd and R [2011] EWHC 1704 (Fam)).



GOOD PRACTICE IN ASSESSING CAPACITY

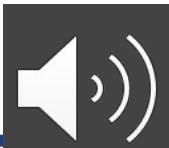
- Break down difficult information into smaller points that are easy to understand and repeat information several times if necessary
 - ↗ Is help available from people the person trusts
 - ↗ Be aware of cultural, ethnic or religious factors that shape a person's way of thinking, behaviour or communication.
 - ↗ If the person's capacity is likely to improve in the foreseeable future, wait until it has done so
 - ↗ Take one decision at a time – be careful to avoid making the person tired or confused and don't rush.
 - ↗ Information should be provided using the most effective form of communication for that person (such as simple language, sign language, visual representations, computer support or any other means) - Section 3(2).
 - Information must be given in the easiest and most appropriate form of communication for the person concerned to help them make an informed decision– code para 3.8



WHO SHOULD ASSESS CAPACITY

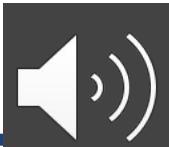
- The person who assesses an individual's capacity to make a decision will usually be the person who is directly concerned with the individual at the time the decision needs to be made – (Code para 4.38)
- On treatment related issues it is ultimately up to the professional responsible for the person's treatment to make sure that capacity has been assessed – (Code para 4.40)
- In complex decisions and where a professional gives advice on an individual's mental capacity, the final decision about a person's capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity – not the professional, who is there to advise – (Code para 4.42)

***Note: Section 5 of the MCA gives protection from liability.



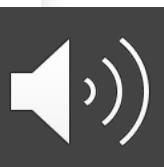
WHEN DO WE ASSESS CAPACITY

- When do we need to assess Mental Capacity (MCA)
- The starting assumption must be that the person has the capacity to make the specific decision (Code para 4.36).
- A mental capacity assessment is needed when a person's capacity is in doubt (Code para 4.34).
- The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision
- Somebody else says they are concerned about the person's capacity (Code para 4.35)
- or
- The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown they lack capacity to make other decisions in their life.



ASSESSING CAPACITY

- “[t]he presumption of capacity does not exempt authorities and services from undertaking robust assessments where a person’s apparent decision is manifestly contrary to his wellbeing”
-
- code para 4.44, para 4.63 of the MCA requires the assessor to provide objective evidence to support their assessment of the individual's capacity and steps to provide objective evidence to support their assessment.
- Assessments of capacity to take day-to-day decisions or consent to care require no formal assessment procedures or recorded documentation – code para 4.60.
- It is good practice to keep accurate records at all times as the mental capacity assessment can be challenged.

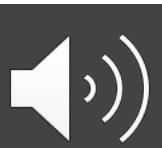


BEST INTERESTS

- Section 1(5) of the MCA sets out the best interests principle that 'any act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made in his [or her] best interest'. There is no definition of what constitutes best interests, because it is too individualised and case-specific a concept.
- What the MCA gives us instead is a checklist – set out in section 4 of the Act, and explained in chapter 5 of the **MCA Code of Practice** – of what needs to be, or should not be, considered whenever a best interests decision needs to be made for or on behalf of someone.
- If the person has a valid and applicable **Lasting Power of Attorney** or a **Court-Appointed Deputy** with the authority to make a particular decision, then that attorney or deputy can make the best interests decision.

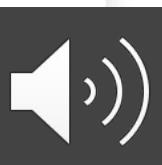
BEST INTERESTS AND LPA

- It is the decision-maker's responsibility to work out what would be in the best interests of the person who lacks capacity - MCA code of practice para 5.8 – 5.12.
- Balance sheet approach advocated by Courts.
- If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority - MCA code of Practice para 5.8.
- Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker – MCA code of Practice para 5.8.



BEST INTEREST AND EMERGENCY SITUATIONS

- In emergency medical situations (for example, where a person collapses with a heart attack or for some unknown reason and is brought unconscious into a hospital), urgent decisions will have to be made and immediate action taken in the person's best interests.
- In these situations, it may not be practical or appropriate to delay the treatment while trying to help the person make their own decisions, or to consult with any known attorneys or deputies. However, even in emergency situations, healthcare staff should try to communicate with the person
- and keep them informed of what is happening - Code para 3.6 see also s6(7)



TRANSFERRING OR TRANSPORTING PATIENTS

- In some cases, there may be no alternative but to move the person. Such a move
 - would normally require the person's formal consent if they had capacity to give, or
 - refuse, it. In cases where a person lacks capacity to consent, section 5 of the Act
 - allows carers to carry out actions relating to the move – as long as the Act's
 - principles and the requirements for working out best interests have been followed.
- This applies even if the person continues to object to the move - MCA Code of Practice para 6.11.
 - For the purposes of this section the person doing the act restrains the patient if he—
 - (a)uses, or threatens to use, force to secure the doing of an act which the patient resists, or
 - (b)restricts the patients liberty of movement, whether or not the patient resists. MCA Section 6 (1-4)
 - However, section 6 places clear limits on the use of force or restraint by only permitting restraint to be used (for example, to transport the person to their new home) where this is necessary to protect the person from harm and is a proportionate response to the risk of harm.
- (see paragraphs 6.40–6.53).
- However actions causing Deprivation of liberty may require use of DoLS or an order from the Court of Protection MCA section 4a/4b



POLICE POWERS

- Note:
- Section 135 and 136 of the MHA 1983 are the exclusive powers available to police officers to remove persons who appear to be mentally disordered to a place of safety.
- Sections 5 and 6 of the MCA 2005 do not confer on police officers authority to remove persons to hospital or other places of safety for the purpose set out in sections 135 and 136 of the MHA 1983
- Sessay v South London and Maudsley NHS and the commissioner of Police for the Metroplis [2011] EWHC 2617 (QB) para 4



COVID 19 AND BEST INTERESTS

- As we adjust to the impacts of the COVID-19 pandemic, the options available to people are likely to be reduced. You will also have to consider government rules and guidance relating to COVID-19. It is highly unlikely to be in the best interests of a person to do something that is prohibited under the government guidance which applies at the time – whatever the benefits to that person.
- Best interests decisions are individual in that they must be based on what is in the best interests of that person, not on what is right for other people. So, for example, the desire of other family members to see the person would be unlikely to be the primary basis for a best interests decision to be made about a family gathering involving the person you support. The judgement has to be whether it is right for them.

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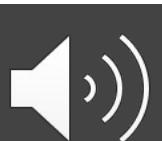
WHEN TO REVIEW A BEST INTERESTS DECISION

- Individual risk factors
- Proportionality.
- Prioritisation
- Alternatives.



COVID 19 TESTING

- Is it in the patients best interest?
- Have they expressed a refusal of treatment when they did have capacity?
- What about forced testing under the Coronavirus Act



SOCIAL DISTANCING AND BEST INTERESTS

- Social distancing puts constraints on people's rights to move and associate freely.
- In some ways, best interests decisions about social distancing are relatively straightforward: breaching government guidance on social distancing is highly unlikely to be in the person's best interests. But within that context, practitioners should be mindful of people's rights to a private and family life under Article 8 of the European Convention on Human Rights, and so support people to maintain their relationships with families and friends as much as possible.
- Patients who lack capacity may already be at heightened risk
- Risk should be weighed against benefits and consider government rules
- Consider psychological impact of restricting movement and contact with relatives and friends



MCA AND COVID19

- The ongoing limitations on family members seeing each other is causing a good deal of distress, both to people with a cognitive impairment, and to their loved ones. Social distancing measures remain in place,
- Remember people's rights to a family life under the Human Rights Act, and facilitate what contact you can.

IMPACT OF COVID 19



SAFEGUARDING

The COVID-19 outbreak is likely to have **safeguarding implications**, and practitioners need to understand the application of the MCA in safeguarding situations – in brief, that the MCA applies in safeguarding cases, and so if someone is making a capacitated yet seemingly unwise decision about a safeguarding situation, they have the right to do so, provided other people are not put at risk.



ADVANCE DECISIONS TO REFUSE TREATMENT

- Advance Decisions to Refuse Treatment – by which people can set out what medical care they would not want to have in given situations where they may lack the future capacity to make a choice – are an important part of the MCA.
- At a time when a lot of people will be thinking through the implications of falling ill to COVID-19, it may be useful to support people to consider what interventions they would not desire to have, should they lose decision-making capacity.



Restraint Issues

MCA defines restraint as:

- The use or threat of force to help to do an act which the person resists, or
- The restriction of the person's liberty of movement whether or not they resist.



Recording ‘Best Interest’ decision on a care plan

- example

‘Mrs X lacks capacity to decide if she should receive help with her personal care at this time. This is determined under MCA because her memory problems mean she is not able to understand that she cannot manage these tasks herself and cannot weigh up the risk she faces if she does not have this help. There is a high risk to Mrs X’s health and wellbeing if she does not receive this help. I have consulted with Mrs X’s daughter and I have concluded that it is in her best interests to receive help with her personal care. Care assistants should encourage and support Mrs X to accept this help in the least restrictive way.’



Deprivation Of Liberty Safeguards

Is an extension of the Mental Capacity Act

“Depriving someone of their liberty can be a necessary requirement in order to provide effective care or treatment”.

The Deprivation of Liberty Safeguards (DoLS), which apply only in England and Wales, are an amendment to the Mental Capacity Act 2005. The DoLS under the MCA allows restraint and restrictions that amount to a deprivation of liberty to be used in hospitals and care homes – but only if they are in a person’s best interests. To deprive a person of their liberty, care homes and hospitals must request standard authorisation from a local authority.



Deprivation of Liberty – overview of law



Dols

- LPS protect rights enshrined in human rights law (ECHR and HRA)
 - Human rights law is founded in philosophical principals:
 - Prevention of misuse of power by states to oppress or punish those lacking power
 - Recognition that ‘human rights are for everyone’ (Lady Hale)
 - The importance of individual autonomy and happiness



Why is the patients voice crucial

- People with lived experience of the MCA don't always find the same things important as professionals do (Article 8 more than Article 5?)
- It's their lives, not ours
- We can't presume to get it right if we don't ask, whether in words or by observation of what makes them happy or sad – and do our best to align care with their wishes and feelings
- Hence DoLS / LPS must look past 'process' to the effect on the person



ACID TEST

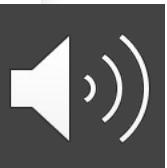
Acid test for deprivation of liberty applying in all care settings:

- The person is not free to leave
- They are under continuous supervision and
- They are under continuous control



Factors no longer relevant in determining if there is deprivation of liberty:

- Compliance or lack of objection
- Relative normality of the placement in comparison with a person of similar condition or disability
- Purpose must be to provide care or treatment



WHEN DO DoLS APPLY

- The Deprivation of Liberty Safeguards (DoLS) can only apply to people who are in a care home or hospital.
- This includes where there are plans to move a person to a care home or hospital where they may be deprived of their liberty.
- The care home or hospital is called the *managing authority* in the Deprivation of Liberty Safeguards.



Examples of potential deprivation of liberty

- Close supervision inside and out
 - Medication –including covert meds
 - Restricting contact with others
 - Having to stay somewhere against wishes of family member
 - Holding a person to give personal care
 - Bedrails, wheelchair straps
 - Removing items that could cause harm
-



COVERT MEDICATION

- Covert medication - medication given without consent or covertly must always call for close scrutiny
- It is a best interests decision and must be recorded appropriately in line with NICE and CQC guidance
- Written evidence of consultation with family, and agreement of GP, ideally a covert medication care plan
- Plan must be reviewed regularly by the managing authority and at any change in circumstances e.g. change of dose, change of meds, change in presentation

APPOINTMENT OF ASSESSORS

- The supervisory body appoints assessors to see if the conditions are met to allow the person to be deprived of their liberty under the safeguards. They include:
- The person is 18 or over (different safeguards apply for children).
- The person is suffering from a mental disorder.
- The person lacks capacity to decide for themselves about the restrictions which are proposed so they can receive the necessary care and treatment.
- The restrictions would deprive the person of their liberty.
- The proposed restrictions would be in the person's best interests.
- Whether the person should instead be considered for detention under the Mental Health Act.
- There is no valid advance decision to refuse treatment or support that would be overridden by any DoLS process

PRACTICE EXAMPLE

- Claire has an acquired brain injury. Her GP has referred her to the local hospital for a minor operation on her foot. The doctor assessed Claire as lacking capacity to make the treatment decision herself and so after consulting Claire's mother is proposing that it is in her best interests to have the surgery. From past experience it is known that Claire will need to be sedated throughout her stay in hospital.
- This is to stop her removing the dressing and picking at the wound. On the advice of the GP, the hospital makes an application for a standard authorisation for the use of sedation which is granted before she is admitted.

URGENT APPLICATIONS

- A person may need to be deprived of their liberty before the supervisory body can respond to a request for a standard authorisation.
- In these situations the managing authority can use an urgent authorisation.
- Urgent authorisations are granted by the managing authority itself.
- There is a form that they have to complete and send to the supervisory body.
- The managing authority can deprive a person of their liberty for up to seven days using an urgent authorisation.



EXAMPLE

- Brian has been living in a nursing home for the past three years. Recently he has become very agitated and distressed which is thought to be linked to his dementia. He tells people he wants to go home not remembering that he had to give his flat up when he moved into the home. He also spends a lot of time trying to open the front door which has a key pad lock on. An incident has occurred where he climbed out of his ground floor bedroom window and was only found a couple of hours later on a main road. The nursing home asks the local authority for a standard authorisation. They want to continue to use the key code so that Brian does not go out unaccompanied, and to put safety locks on some of the windows. Because of the seriousness of the recent incident, the home manager completes the form for the urgent authorisation and arranges the window locks to be fitted the same day.

What information is required?

- In all cases it is important to be clear that you believe the person lacks capacity to consent to care arrangements.
- Give details of the care provided e.g. support and assistance with all personal care, administration of medication, incontinence management, support to prevent risk of falls.
- Give details of the restrictions e.g. 2 carers for personal care, observed every 30 mins, not free to leave without permission, supervised 1:1 inside and out in the community
- Details of covert medication, if any

DoLS and Court of Protection

The local authority is following safeguarding proceedings for Mavis, a woman with dementia who is currently living at home with her husband. They are concerned her needs are not being met because her husband is refusing the support that is being offered. It is believed that he has untreated mental health needs. Mavis was assessed as lacking capacity to decide on her residence, though clearly communicates a wish to remain in her own home.

It has been proposed that a placement in a care home would be in Mavis's best interests. It is also believed that in the care home she will need a high level of restrictions to give her appropriate care and treatment.

Because the move is against Mavis's wishes and those of her husband, the local authority makes a fast-track application to the Court of Protection to make a decision in her best interests. If the court authorises a move to the care home, an application will be made by the home for a standard authorisation under the Deprivation of Liberty Safeguards

Other developments

- Coroner notification changes – a DOLS authorisation is no longer considered to be ‘state detention’ therefore no requirement for Coroner to hold an inquest.
- As has always been the case, where the cause of death is unknown or is unnatural (including where there is any concern that the care given may have contributed to the death) there is a requirement to report such a death to the coroner

Law Commission proposals for MCA and DOLS

- Report published March 2017 on proposed amendments to MCA and DOLS
- At this stage they are only proposals
- In summary:
- Replace DOLS with ‘Liberty Protection Safeguards’
- Responsible body (hospital, CCG or Council) will identify potential

Law Commission proposals for MCA and DOLS

For self funders, care home maintain responsibility for notifying Council

For state funded residents, the expectation is for authorisation to be in place prior to admission

Urgent authorisation replaced with express authority to deprive of liberty in emergency situations.

2 assessors – mental health, mental capacity and ‘proportionality’ assessment

Wider scope for using existing assessments to prevent duplication

Law Commission proposals for MCA and DOLS

- Same authorisation process for all settings (no need to apply to Court for supported living)
- Authorisation record can travel with the person to cover multiple settings, and the conveyance.
- Age reduced to 16+
- Ability to authorise for up to 3 years after initial 12 month period.
- Changes to BIA role – independent reviewer and Approved Mental Capacity Professional

Law Commission proposals for MCA and DOLS

- Amendments to MCA
- Active duty to give weight to person's wishes
- Increased requirements in relation to care plans and how best interests decisions are recorded

DOLS Discussion Points

- Isn't Deprivation of Liberty always a bad thing?
- Does DOLS affect everyone living in a care home that lacks capacity?
- Do care homes need an authorisation to use physical restraint?
- What if the door to the care home is locked?
- What do I do if I think someone is deprived of their liberty without an authorisation?.

For urgent new applications for Standard or Urgent Authorisations

- Consider whether the s12 doctor could visit to complete the mental health and the mental capacity assessments, to limit the number of professionals visiting.
 - A Best Interests Assessor (BIA) could then complete the rest of the assessments by phone interviews.
 - Where significant restrictions are needed, or the person is strongly objecting, the BIA may need to actually visit to assess the person.
 - Here, perhaps shorter authorisation periods with a reassessment planned later would be appropriate, or a longer authorisation period with a short-to-mid-term review planned, within two to three months.

IF VISITS ARE IMPOSSIBLE

- Can the mental health assessment be completed from existing notes?
- Is there a capacity assessment for the same or similar decision with adequate evidence, on which the BIA could rely?
- Is the person nonverbal, such that capacity is likely lacking on this basis alone?
- Is there evidence from other sources and previous assessments rendering it likely that capacity is lacking for most decisions other than day to day?
- If a capacity assessment can be completed by any of the above methods, then the remaining assessments could be completed by telephone.
- Ensure that the restrictions on visiting the person are noted in the assessments.

EXAMPLE FOR BEST INTERESTS REPORT

- This assessment occurred at a time when public health measures had been put in place by HM Government to contain the spread of the COVID-19 virus. Professionals were being advised only to carry out essential visits to care homes.

When completing this assessment, I had to balance the need to protect X's Article 5 rights against the need to protect them from transmission of the virus. COVID-19 infection would have posed a grave risk to X in view of their underlying health conditions.

In view of these concerns, I therefore decided to base my assessment on existing documents and on the views of X's carers and family/friends rather than visiting them in person.

AUTHORISATION DOCUMENT

- I note that the best interests assessor decided not to assess X face to face in view of the risk of COVID-19 transmission.
- I agree that this is the best way of promoting X's Article 5 rights whilst protecting them from serious illness.
- This authorisation will be reviewed when public health restrictions are lifted.

APPLYING TO THE COURT OF PROTECTION

- The practicalities of accessing the Court of Protection are also affected during the outbreak. Again, with thanks to 39 Essex Chambers, we set out here the main points made by Justice Hayden, the Vice-President of the Court of Protection:
 - Judicial visits to the person should be only made where ‘absolutely necessary’, and ‘strongly discouraged’ in the case of visits to care homes. Alternative arrangements such as telephone and video conferencing should be used instead.
 - Practitioners and judges need to bear in mind ‘creative options’ to enable the person’s views to be heard during court proceedings.
 - The Court still needs to be satisfied about the validity of the judgements it is making. And so, ‘if applicants are entirely prevented by the pandemic from obtaining any evidence of P’s lack of capacity but still seek an order, then they need to explain to the Court exactly why the evidence cannot be obtained and exactly what it is that the Court is asked to do on an interim basis’.
 - As of 24 March 2020, following the Prime Minister’s broadcast on Monday 23 March, ‘no hearings which require people to attend are to take place unless there is a genuine urgency and it is not possible to conduct a remote hearing. The existing procedures for assessing cases and allocating judges are intended to ensure identification of “genuinely urgent” cases’.
 - Hearings with time estimates of two hours or less will be conducted by telephone and it is the applicant’s role to make the necessary arrangements.
 - When attending court for any ‘genuinely urgent’ hearings that require in-person attendance, it is essential that there is a 2 metre separation at all times.

LASTING POWER OF ATTORNEY

- Sometimes one person (must be over 18) will want to give another person authority to make a decision on their behalf. A power of attorney is a legal document that allows them to do so. Under a power of attorney, the chosen person (the attorney or donee) can make decisions that are as valid as one made by the person (the donor).
- Note however that :
- LPAs cannot give attorneys the power to demand specific forms of medical treatment that healthcare staff do not believe are necessary or appropriate for the donor's particular condition. MCA Code of Practice para 7.28
- Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker – MCA code of Practice para 5.8



LPA AND BEST INTERESTS

- The document (creating the Power of Attorney) must include a certificate completed by an independent third party, confirming that: –
 - in their opinion, the donor understands the LPA's purpose
 - nobody used fraud or undue pressure to trick or force the donor
 - into making the LPA and
 - there is nothing to stop the LPA being created – para 7.7 MCA Code of Practice
- Note:
 - Anything done under the authority of the LPA must be in the person's best interests - MCA code para 7
- And:
 - They must also respect any conditions or restrictions that the LPA document contains - MCA code para 7.18



ISSUING AN LPA

- If the LPA is to be used:
 - check whether the person has the capacity to make that particular decision for themselves. If they do:
 - a personal welfare LPA cannot be used – the person must make the decision.
 - a property and affairs LPA can be used even if the person has capacity to make the decision, unless they have stated in the LPA that they should make decisions for themselves when they have capacity to do so MCA - Code of practice para 7
 - Ensure it is registered.
 - Avail yourself of its content as donor might have set a variety of conditions and limits on the powers given to the attorney.

LPA AND PERSONAL WELFARE

- LPAs can be used to appoint attorneys to make decisions about personal welfare, which can include healthcare and medical treatment decisions.
- The attorney(s) will only be able to act after the individual has lost mental capacity to make decision on the issue at hand.



Such decisions might include: (MCA code para 7.21)

- where the donor should live and who they should live with
- the donor's day-to-day care, including diet and dress
- who the donor may have contact with
- consenting to or refusing medical examination and treatment on the donor's behalf
- arrangements needed for the donor to be given medical, dental or Act say about Lasting Powers of Attorney?
- optical treatment
- assessments for and provision of community care services
- whether the donor should take part in social activities, leisure activities, education or training
- the donor's personal correspondence and papers
- rights of access to personal information about the donor, or
- complaints about the donor's care or treatment

LPA PROPERTY AND AFFAIRS

- Property and Affairs
- A donor can make an LPA giving an attorney the right to make decisions about property and affairs (including financial matters). Unless the donor states otherwise, once the LPA is registered, the attorney is allowed to make all decisions about the donor's property and affairs even if the donor still has capacity to make the decisions for themselves. In this situation, the LPA will continue to apply when the donor no longer has capacity - Code of practice para 7.32.
- If a donor does not restrict decisions the attorney can make, the attorney will be able to decide on any or all of the person's property and financial affairs - Code of practice para 7.36.

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Health and Welfare vs Property and Affairs

Health & Welfare

- HWLPA can only be granted to an individual (over 18) not a trust corporation - MCA s10(1)(a).
- A registered HWLPA can only be used if the donor does not have capacity to make the required health and welfare decision. MCA CODE Para 7.23

Property & Affairs

- Property and Affairs LPA can be a trust corporation.
- A registered property and Affairs LPA can take effect immediately and continue after the donor loses mental capacity to make relevant decisions. MCA code para 7.32-7.33

ADVANCED DECISIONS

“Advance decision” means a decision made by a person after he has reached 18 and when he has capacity to do so, that if—

- (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
- (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,
- the specified treatment is not to be carried out or continued Section 24(1)MCA

Only applicable to life sustaining treatment ie treatment not to be given/continued even if life is at risk if written and signed/witnessed - Section 25(5)

Does not apply to treatments carried out under MHA (MCA Code of Practice para 9) except those given under section 58A MHA eg ECT



COURT OF PROTECTION

- The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court S 47(1).
- The Court of Protection has powers to:
- decide whether a person has capacity to make a particular decision for themselves
- appoint deputies to make decisions for people lacking capacity to make those decisions
- decide whether an LPA or EPA is valid, and
- remove deputies or attorneys who fail to carry out their duties - MCA Code of Practice para 8



FINALLY

- Ensure that ‘necessary and proportionate’ is always our starting-point in care planning?
 - Be more aware of unhappiness in all its forms and look for ways to alleviate it?
 - Put Article 8 rights at the heart of decision-making?
 - Audit what elements of **our** MCA practice can we strengthen **now**?