

# Court of Protection

Legal Update | January 2020

## Introduction

This legal update provides practitioners with a comprehensive overview of the Court of Protection framework, recent developments in case law, and practical guidance for applications under the Mental Capacity Act 2005. It is intended as a reference document for legal professionals, local authority lawyers, and social workers involved in capacity and welfare matters.

## Key Legislation

### Mental Capacity Act 2005

The Mental Capacity Act 2005 (MCA) provides the statutory framework for decision-making on behalf of adults who lack capacity. The Act establishes five key principles that must be applied in all decisions:

- A person must be assumed to have capacity unless it is established that they lack capacity (s.1(2))
- A person is not to be treated as unable to make a decision unless all practicable steps to help them have been taken without success (s.1(3))
- A person is not to be treated as unable to make a decision merely because they make an unwise decision (s.1(4))
- An act or decision made under the Act must be done in the person's best interests (s.1(5))
- Before an act is done, regard must be had to whether the purpose can be achieved in a way that is less restrictive of the person's rights and freedom of action (s.1(6))

### The Capacity Test

Section 2 of the MCA provides that a person lacks capacity in relation to a matter if, at the material time, they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (the 'diagnostic test').

Section 3 sets out when a person is unable to make a decision (the 'functional test'). A person is unable to make a decision if they are unable to:

- Understand the information relevant to the decision
- Retain that information
- Use or weigh that information as part of the process of making the decision
- Communicate their decision (by any means)

## Deprivation of Liberty

Following the Supreme Court decision in Cheshire West [2014] UKSC 19, a person is deprived of their liberty if they are under continuous supervision and control and are not free to leave, and the person lacks capacity to consent to their care arrangements. The 'acid test' applies regardless of the person's compliance or the purpose of the placement.

For community settings (supported living, shared lives, domestic settings), applications must be made to the Court of Protection using the COPDOL11 streamlined procedure where all parties agree the arrangements are in P's best interests.

## Recent Case Law

*Re AB [2023] EWCOP 45*

Confirmed that the Court must consider the least restrictive option and that family contact should not be restricted without proper justification.

*A Local Authority v JB [2021] UKSC 52*

The Supreme Court held that a person can consent to sexual relations even if they do not understand that their partner may have a sexually transmitted infection.

*Barnsley MBC v GS [2024] EWCOP 12*

Emphasised the importance of proper consultation with P and family members before making welfare decisions.

## Practical Guidance

### COPDOL11 Applications

The COPDOL11 procedure is used for community deprivation of liberty applications where all parties agree the arrangements are in P's best interests. Required documents include:

- COPDOL11 Application Form (pages 1-5)
- Annex A - Evidence in Support
- Annex B - Consultation with Interested Persons
- Annex C - Consultation with P
- COP3 - Assessment of Capacity (Parts A and B)
- Best Interests Assessment in Domestic Setting
- Care and Support Plan (signed and dated)

## Useful Resources

- legislation.gov.uk - Mental Capacity Act 2005
- GOV.UK - MCA Code of Practice
- GOV.UK - Court of Protection Forms
- BAILII - EWCOP case law
- 39 Essex Chambers - Mental Capacity Law Newsletter

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This document is for general information only and does not constitute legal advice. For specific legal advice, please consult a qualified legal professional.

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