

# Leicester, Leicestershire and Rutland 'How to' assess Mental Capacity in specific situations

## How to: Assess mental Capacity to manage financial affairs

Capacity to manage financial affairs should be assessed whenever there are concerns about a adult's ability to manage their finances or meet their financial obligations, or when there are concerns about a adult's ability to protect themselves from financial abuse.

Under section 2 of the MCA, capacity is decision specific. It therefore follows that a person may lack capacity to manage particular aspects of their financial affairs but not others. For example, a person with dementia may have capacity to manage their day-to-day financial affairs but lack capacity to make decisions about their savings and investments. Guidance produced by [Empowerment Matters](#) recommends that professionals break down the overall management of financial affairs into the component parts. For example, does the adult have capacity to:

- Manage their benefits
- Pay their bills
- Manage their personal allowance
- Manage savings and investments

In addition, there may be occasions when a adult needs to make one off financial decisions which may require a stand-alone assessment of mental capacity. This could include gifts, loans or large-ticket items such as paying for a holiday.

## The presumption of mental capacity and practicable steps

The starting point of the MCA is to presume a person has mental capacity to make a decision, including consenting to or refusing the intervention/assessment. Before concluding that a person lacks mental capacity to decide, it is important to take all practical and appropriate steps to enable the person to make the decision themselves (2<sup>nd</sup> principle of the MCA). Chapter 3 of the MCA Code of Practice gives detailed guidance on the steps that could be taken to support a person make a decision for themselves including: providing relevant information, communicating in an appropriate way, making the person feel at ease and supporting the person.

In relation to management of financial affairs, it is important to remember that capacity can be acquired, following a tailored programme of education or training.<sup>1</sup> Wherever possible, the professional carrying out the capacity assessment should use props, visual aids and documentation to support decision-making. This could include:

- Bank/building society statements, utility bills and other relevant documentation.
- Pictures and visual aids (e.g. pictures of everyday items along with the price).
- Real notes and coins.

## Relevant information

The Court of Protection has not, unlike in other areas of decision-making, provided detailed guidance on the relevant information that a person needs to understand, retain and use or weigh in order to make capacitated decisions about their financial affairs. However, when considering the knowledge and skills that are required to manage financial affairs, the relevant information may include:

- Recognition and awareness of money
- The relative value of everyday items
- Approximate income and outgoings

<sup>1</sup> As an example, see [The Money Advice Service: Helping Young People with Learning Disabilities to Understand Money](#)

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- The importance of budgeting and financial planning
- How to manage a bank account
- How to use ATMs and debit cards
- How to manage investments, savings and shares
- The different mechanisms that could be implemented to support the adult to manage their financial affairs (e.g. informal support, granting a Lasting Power of Attorney for property and financial affairs).<sup>2</sup>

### In cases of financial abuse, the relevant information would also include:

- The nature and character of the abuse (e.g. whether the abuse was a one-off incident or is ongoing; whether the perpetrator is a stranger or someone known to the adult).

## Carrying out the assessment

A capacity assessment is a dynamic process of providing the relevant information to the person and then asking the person questions to assess their ability to understand, retain, use or weigh that information, and communicate their decision. It may be necessary to provide the relevant information more than once and in different formats. For example, if a person doesn't understand something the first time, it would be appropriate to explain it in a different way using a different method. Due to the breadth and complexity of financial affairs, the capacity assessment may need to be carried out over several visits.

It is fundamental to the assessment process that the person is informed of the purpose of the assessment.<sup>3</sup> This could, for example, involve informing the adult at risk that there are concerns about their ability to manage their finances and that you need to check that they are making informed decisions.

### Understanding the relevant information

The case law is clear that *'It is not necessary for a person to demonstrate a capacity to understand and weigh up every detail of the respective options, but merely the salient factors.'*<sup>4</sup> Similarly, assessors *'...must guard against imposing too high a test of capacity...because to do so would run the risk of discriminating against people suffering from a mental disability.'*<sup>5</sup>

After giving the adult **the relevant information** (see the box on the first page), potential questions to ask to assess the person's ability to understand it could include:

#### Recognition and awareness of money:

- *What is money for?*
- *How much is this coin/note worth (show a range of notes and coins)?*
- *Can you sort the coins and notes into order starting with the smallest (demonstrate if necessary)?*
- *Can you give me £2.50 from the coins?*
- *Can you tell me how much money you have in your purse/wallet?*

#### The relative value of everyday items:

- *What could you buy from the shop with £10 (show pictures of everyday items along with the price)?*

<sup>2</sup> This does **not** include appointeeship, which in general can only be used when a adult lacks capacity to manage their financial affairs. This is reflected in government [guidance](#), which states that: *'An appointment must never be made because it is 'convenient' either for the Secretary of State or the prospective appointee. The customer must, because of mental incapacity (or, exceptionally, severe physical disability), be incapable of managing their affairs.'*

<sup>3</sup> Paragraphs 47-49 of [LB Wandsworth v M & Ors \[2017\] EWHC 2435](#)

<sup>4</sup> Paragraphs 22 & 69 of [KK v STCC \[2012\] EWCOP 2136 \[2012\]](#)

<sup>5</sup> Paragraph 16 of [PH v A local authority \[2011\] EWCOP 1704](#)

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- *Would you get change from £10 if you bought a loaf of bread and a pint of milk? How would you know if the change was correct?*
- *If you wanted to buy an iPad and a shirt, which would cost more?*
- *What is more expensive e.g. a pint of milk or a pair of trainers?*
- *What costs less e.g. an iPad or a cup of coffee?*

### **Approximate income and outgoings:**

- *Do you receive any benefits? Which ones?*
- *How are your benefits paid?*
- *Roughly how much money do you receive each week/month?*
- *Do you receive money from anywhere else?*
- *What bills do you have to pay?*
- *What else do you spend your money on?*

### **The importance of budgeting and financial planning:**

- *What are the most important things you have to pay for each week/month?*
- *How do you make sure you have enough money to pay for those things?*
- *Does anyone help you decide how to spend your money? If so, what help do they provide?*
- *How do you pay your rent and bills (e.g. direct debit)?*
- *Do you owe money? If so, who do you owe money to and roughly how much do you owe?*
- *Do you ever run out of money? If so, what happens?*
- *What could happen if you spend all your money on a holiday and had no money left to pay your rent and bills?*
- *If you didn't pay your rent, what could happen?*
- *If you didn't pay for your bills, what could happen?*
- *If you didn't pay for your care, what could happen?*
- *If you don't pay the money that you owe, what could happen?*

### **How to manage a bank account:**

- *Do you have a bank/building society account?*
- *Is it a joint account or a single account (explain the difference)?*
- *What is the name of your bank/building society?*
- *How do you get money from your bank/building society account?*
- *Do you have any difficulties getting to the bank or communicating with the bank?*
- *From your bank/building society statement, can you tell me how much money you have in your account?*
- *From your bank/building society statement, can you tell me what money you have coming in and what money you have going out?*
- *What would you do if you thought money was missing from your account?*
- *Does anyone help you with your banking?*

### **How to use ATMs and debit cards:**

- *Do you have a cash card/debit card? What is it for?*
- *What is the PIN for (don't ask the adult to divulge their PIN)?*
- *Can you remember your PIN (don't ask them what it is)?*

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- Does anyone else know your PIN? If so who?
- Is it a good idea to share your PIN with a stranger?
- Does anything prevent you from using your cash card/debit card?

### How to manage investments, savings and shares:

- Roughly how much do you have in savings?
- Which bank or building society are your savings held in?
- Do you have any ISAs/shares? If so, roughly how much are they worth?
- How do you check how your ISAs/shares are performing?
- If you wanted to sell your shares what would you do?
- Does anyone help you to manage your savings/ISAs/shares? If so, what help do they provide?

### The different mechanisms that could be implemented to support the adult to manage their financial affairs:

- How could X (e.g. support worker) support you to manage your money?
- What is an attorney for property and financial affairs?
- How could an attorney help you manage your money?
- If you gave X (name potential candidate) power of attorney for your property and financial affairs, what would they be allowed to do/what would their role be?

### In cases of financial abuse, potential questions may include:

- Financial abuse includes theft/fraud/exploitation/the misuse of money. Have any of these things ever happened to you? What happened?
- Has anyone ever stolen money from you? Who stole from you? How much did they steal? How many times did it happen?
- Have you even been forced to give money to someone when you didn't want to? Who forced you? How much did you give them? How many times did it happen?
- Have you ever been tricked/pressured into buying something that you didn't need? Who tricked you? What happened?
- Do you have to give money to X whenever they ask for it?
- Are you allowed to say no if X asks you for money?
- How could X (e.g. support worker) help prevent further incidents of financial abuse?
- How could an attorney help prevent further incidents of financial abuse?

### Retaining the relevant information

Section 3(3) of the Mental Capacity Act 2005 states that *'The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.'* Therefore, if information can be retained long enough for the adult to make the decision, that is sufficient, even if they cannot then retain that information for a longer period. To assess the adult's ability to retain information, it is likely that the same methods and tools used to provide the relevant information and assess understanding will need to be used again. For adults who have good verbal communication, it would be appropriate to ask them to recite the key points of the relevant information. For adults with communication difficulties, it may be appropriate to use written words or visual aids to establish whether the adult recalls the key information a short while after it has been provided.

### Use or weigh the relevant information

This part of the assessment will build upon questions asked to assess the adult's understanding of the relevant information. The aim is to determine whether the adult is *'...able to **employ** the relevant information in the decision-making process and determine **what weight to give** it relative to other information required to make the*

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*decision.*<sup>6</sup> It is therefore necessary for the adult at risk to be able to **apply the relevant information** to themselves and the particular financial decision in question. Another way of putting it is, can the person having understood the information, take account of it?

To assess the adult's ability to use or weigh information, questions should aim to find out how they make financial decisions and what factors they take into account. Equally important are the values that influence how they weigh up information. For example, two people who are able to understand and retain the relevant information may choose to behave very differently: one may prefer to spend their money because they want to enjoy their last years, whereas another may choose to be thrifty because they want to leave money to their grandchildren. Potential questions to ask include:

- *Do you have any money problems?*
- *Why do you think others are concerned about the way you manage your finances?*
- *Why do you often run out of money to buy food/pay bills/rent?*
- *Why do you choose to spend money on X rather than buy food/pay bills/rent?*
- *Describe what you were thinking when you chose to spend your money on X rather than paying your bills/rent?*
- *Do you think you need help to manage your finances (ask the vulnerable adult to qualify their answer)?*
- *What are the advantages/disadvantages of accepting help with managing your finances? What are the advantages/disadvantages of managing your finances independently (it may be helpful to provide the vulnerable adult with a record of their answers to reflect upon)?*
- *Have your benefits ever stopped? If so why and what did you do to sort it out?*
- *Why is it inadvisable to keep more than £85,000 in one bank account/building society?*<sup>7</sup>
- *What actions could you take to prevent further incidents of financial abuse?*
- *What are the advantages/disadvantages of appointing an attorney to manage your financial affairs?*
- *What are the advantages/disadvantages of X (e.g. support worker) supporting you with your financial affairs?*

There are two common areas of difficulty in assessing whether a person can use or weigh information. The first is where a adult denies factual information about a situation. For example, a adult denying or refusing to accept that they are being financially abused. Here it is important to ensure that the evidence of harm is presented objectively, to support the person's acceptance of it (e.g. providing documentary evidence of debts or financial abuse). If denial persists, it may be necessary to then respectfully question or challenge false beliefs or assumptions. If they continue to refute the evidence, then this would point to an inability to use or weigh relevant information. Conversely, if the adult accepts that they have been financially abused, the weight they attach to that information is a matter for them and will depend on their own values or outlook.<sup>8</sup> This may result in the adult at risk making an unwise but capacitated decision.

The second area of difficulty is where the adult gives coherent answers to questions but is then unable to translate their intentions into actions due to executive dysfunction. The adult says one thing but then does something else in practice. Executive functioning was recently described by a judge as, '*...the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life.*'<sup>9</sup>

<sup>6</sup> See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

<sup>7</sup> [The Financial Services Compensation Scheme](#) (FSCS), protects savings of up to £85,000. It is therefore inadvisable to deposit more than £85,000 in a single bank or building society.

<sup>8</sup> See paragraph 38 of [Kings College Hospital NHS Trust v C and V \[2015\] EWCOP 80](#)

<sup>9</sup> See paragraph 39 of [A Local Authority v AW \[2020\] EWCOP 24 \(20 May 2020\)](#)

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It may be necessary to gather further collateral information and ask further probing questions if there appears to be a mismatch between the adult’s words and their actions. It would be legitimate to conclude that the adult lacks capacity to make a decision if they are unaware of, or deny the fact that they cannot implement their stated intentions, or deny that when needed they are unable to bring to mind the information required to implement a decision (e.g. due to impulsivity). However, it would only be legitimate to reach such a conclusion where there is clearly documented evidence of repeated mismatch.<sup>10</sup> For example, if a adult understands their income and outgoings and the importance of budgeting but repeatedly runs out of money, it would be appropriate to ask them the reasons why and explore the mismatch between their words and actions. If they are aware of and accept their difficulties and the associated risks, but choose to refuse support then this would be deemed an unwise decision rather than a lack of capacity.

### **Communicate the decision**

To have capacity to manage financial affairs, the adults needs to have a method of communication that is consistent and reliable enough to respond to questions and eliminate any ambiguity. This is an area where it is particularly important to show that you have taken practicable steps to facilitate communication. For example, reproducing as best as possible the manner by which they usually communicate, providing all necessary tools and aids, and enlisting the support of carers, friends or professionals who may be able to facilitate communication.

### **After the assessment**

Reflect upon the following points:

- Do you have enough information to displace the presumption of capacity?
- Do you need to carry out further visits to make a judgment?
- Remember the assessment of mental capacity is made on the balance of probabilities.
- Have you established the causative nexus (e.g. the causal link between inability to decide and the identified impairment of or disturbance in functioning of the mind or brain)? A formal diagnosis is not required.

### **Outcomes**

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<sup>10</sup> [39 Essex Street - Carrying out and recording capacity assessments \(June 2020\)](#)

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### 1. The adult has mental capacity to manage their financial affairs

That is the end of the MCA at this point. Staff can still support and provide advice and guidance and this may include supporting the adult to make a Lasting Power of Attorney for Property and Financial affairs (this **does not** necessarily require a solicitor, and there are no ethical or legal barriers to a social worker supporting someone to make an LPA) and/or supporting the adult to report any financial abuse to the Police if it appears that a crime has been committed. Please note that any financial abuse which potentially affects other people (children or adults) **must** be reported to the appropriate agency (e.g. the Police and/or Trading Standards in the case of rogue traders) irrespective of the adult’s capacity to consent to this.<sup>11</sup>

If the adult **has** mental capacity to manage their financial affairs, have you considered whether their decision-making is affected by coercion, constraint or undue influence? If so, it may be possible for the local authority to bring proceedings under the Inherent Jurisdiction of the High Court. Speak to your manager about this.

### 2. The adult lacks mental capacity to manage their financial affairs

Formal arrangements will need to be put in place to manage the adult’s financial affairs in their best interests. If the adult has property, savings or other assets an application will need to be made to the Court of Protection for **deputyship** for property and financial affairs. The deputy can either be an individual, such as a family member or friend, or an organisation, such as a local authority. If the adult’s only income is social security benefits and they have no property or savings, there will usually be no need for a Deputy. This is because the adult’s finances can be managed by an **Appointee** appointed by the Department for Work and Pensions (DWP). The appointee can also be an individual or an organisation.

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<sup>11</sup> See paragraph 14.95 of [Care & Support Statutory Guidance](#)