
MENTAL CAPACITY: What is it and how does it relate to you?

The mental capacity to make decisions for ourselves is something many of us take for granted. We make all kinds of decisions in our daily lives, on all kinds of topics, from mundane matters to important issues, which may have long-term consequences.

So, if someone close to you loses the mental capacity to make certain decisions, it can be a confusing and difficult situation to deal with. Their life, and their ability to plan for the future, could be seriously affected.

In this factsheet, we look at what mental capacity is and how it is assessed. We also look at how questions of mental capacity might arise and, if you are called to make a decision on someone's behalf, how you should approach your responsibilities.

What is mental capacity?

Mental capacity is a measure of someone's ability to make a decision for themselves. In the legal sense of the term, mental capacity is not a question of intelligence. It is more a question of whether someone can go through the process of making an informed decision. In other words, whether a valid decision can be reached on the particular issue at hand.

If someone is found to lack the required mental capacity to make a certain decision, any choice they make (if they are able to make one) will be treated as invalid. As such, important legal decisions made by someone without the required mental capacity to make them will have no legal effect. For example, a Will would be invalid if made at a time when the testator lacked mental capacity to do so.

Mental capacity is separate for each decision

Mental capacity is not treated as a 'blanket' state of being. If someone is found to lack mental capacity regarding one decision, it does not mean they cannot make *any* decision. It is entirely possible for them to lack mental capacity for some decisions yet be considered able to make others.

How is mental capacity for a decision determined?

The Mental Capacity Act 2005 (MCA) sets out a test for determining mental capacity. This is used in most situations where mental capacity needs to be assessed.

Before looking at the test, it is important to be aware of the starting point when dealing with questions of mental capacity. Amongst its many provisions, the MCA contains five fundamental principles. The first of these principles is:

“A person must be assumed to have capacity unless it is established that he lacks capacity.”

This starting point means that everyone should be treated as having mental capacity unless the requirements of the test are met, establishing that they do not have capacity.

The Mental Capacity Act test

The test has two main conditions. If both of these are satisfied, then the person taking the decision is considered to lack the mental capacity required for the decision in question:

1. The person must be experiencing an impairment of the mind or brain, or a disturbance affecting the function of their mind or brain; **and**
2. That impairment or disturbance must be the reason the person is unable to make the decision at the time it needs to be made.

Although the test sounds straightforward, some of the terms need further explanation as to how they operate in practice.

What is impaired or disturbed function of the mind or brain?

The Mental Capacity Act Code of Practice, which accompanies the MCA, gives some examples of what these terms cover. They may include:

- Dementia.
- Significant learning disabilities.
- Conditions associated with some forms of mental illness.
- Delirium.
- The long-term effects of brain damage.
- Concussion following a head injury, and the symptoms of alcohol or drug use.

- Physical or medical conditions that cause confusion, drowsiness or loss of consciousness.

What counts as being 'unable to make a decision'?

According to the MCA, someone is "unable to make a decision" if they cannot:

- 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 (whether by talking, using sign language or any other means).

Another of the MCA's fundamental principles comes into play here:

"A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."

This means all reasonable efforts must be made to help the person with each part of the decision-making process described above.

Chapter 3 of the [Mental Capacity Act Code of Practice](#) provides more detail on the different ways in which you could help someone to make a decision for themselves.

Timing of the decision

It doesn't matter if the impairment or disturbance is permanent or temporary, if the decision needs to be made at that time, and the other parts of the MCA test are satisfied, the person will still be considered to lack capacity.

For example, if Dave needs to make a certain decision now, but he happens to be drunk, he may meet the requirements of the MCA test and be deemed to lack mental capacity for the decision.

If time is not an issue, postponing a decision may allow a person to decide for themselves, particularly where their mental capacity may be changeable, or they are suffering only a temporary impairment. This is in keeping with the principle that the person should be helped to make the decision for themselves where possible,

Other tests for mental capacity in different situations

The MCA test is used in most situations where mental capacity needs to be assessed. However, other tests are used in some specific situations. For example, assessing the required mental capacity to [make a Will](#) uses a different test. It specifies that the person making the Will (the testator) must:

- Understand the nature of making a Will and its effects.
- Understand the extent of the property of which they are disposing.
- Be able to comprehend and appreciate the claims to which they ought to give effect.
- Have no disorder of the mind that perverts their sense of right or prevents the exercise of their natural faculties.

Some situations might alter the level of understanding that the testator must demonstrate for the Will to be valid. If their Will is complicated, they have many assets, and/or there are likely to be claims on the testator's estate, they will need to demonstrate a greater degree of understanding than a testator making a Will in less complex circumstances.

Any Will made without the required mental capacity will be invalid. Challenging the mental capacity of a testator retrospectively is one way of [contesting a Will](#).

The test for mental capacity when making a Will is not contained in the MCA. It comes from a case decided in 1870 called *Banks v Goodfellow*. It still remains valid law today.

What behaviour might raise questions over someone's mental capacity?

Both the MCA and its Code of Practice are keen to point out that everyone should be treated equally when assessing mental capacity. It is important not to make assumptions about someone's mental capacity based only on:

- Their age.
- Their appearance.
- Any assumptions about their condition.
- Any aspects of their behaviour.

If a loved one is acting out of character or making seemingly irrational decisions, it may indicate there are issues with mental capacity. However, another fundamental principle of the MCA is:

"A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

Someone close to you may make a decision you do not agree with, but this does not necessarily mean they lacked mental capacity to make the decision.

If someone close to you repeatedly makes unwise decisions, this may be worthy of investigation. However, it should be remembered that mental capacity is not a 'blanket' situation. Even if your loved one does lack mental capacity for some kinds of decision, they may be capable to decide other matters themselves.

Who determines if someone lacks mental capacity?

Determining mental capacity should be done by the person who is directly concerned with the individual at the time they need to make the decision. For example, if you are caring for an elderly relative and a decision needs to be made regarding their care, you should assess your relative's mental capacity.

A legal or medical professional is not necessarily required to assess mental capacity, although for it may be advisable in important or potentially controversial decisions. It might also be necessary to consult a person's GP or treating consultant in relation to the function of their mind or brain.

However, even if a professional is involved, it does not mean they should take over in making the actual decision. Their role should be just to assess and provide their opinion on the person's mental capacity to make the decision at hand.

How should a decision be made for someone lacking mental capacity?

If someone close to you lacks mental capacity, and it falls to you to make their decision for them, there are two final fundamental principles in the MCA which you must follow. These are:

"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 his best interests."

And:

"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."

There are many aspects to acting in someone's best interests. In general, it involves considering all relevant circumstances, including the opinions of others and the person themselves, if possible, then weighing all of the available

information and making a decision. Your final decision should then be in line with what you reasonably believe to be your loved one's best interests. You shouldn't just decide based upon what you think your loved one would have done, especially if other information indicates that such a decision would not be in their best interests.

The concept of 'best interests' can be complicated. Chapter 5 of the [Mental Capacity Act Code of Practice](#) provides detailed guidance on how to act in someone else's best interests.

There are some decisions which can never be taken on someone else's behalf. These are:

- Consenting to marriage.
- Consenting to sex.
- Agreeing to the adoption of that person's child.
- Voting in an election.

What happens if mental capacity is disputed?

When a lot depends on the outcome of a decision, arguments may arise over whether the decision-maker lacked the mental capacity to decide at the time.

As mentioned above, one of the fundamental principles of mental capacity is that someone is presumed to have mental capacity unless it is proved otherwise. This means, anyone seeking to challenge a Will or other decision has to present the proof necessary to render the decision invalid. They have to prove it was more likely than not that the person lacked capacity.

Alternatively, people could contend that a decision which was taken on a person's behalf was improper, that the person was mentally capable to do it themselves, or that the decision was not in their best interests. In this situation, the actual decision-maker must support their contention that the person was mentally incapable to make the decision for themselves, and/or that the decision they made was the right one.

You can apply to the [Court of Protection](#) to seek a ruling on whether someone does, or does not, have the required mental capacity for a particular decision.

What can I do to prepare for a possible loss of mental capacity in future?

A [Lasting Power of Attorney](#) (LPA) is one of the best ways to safeguard your affairs should you lose mental capacity in later life. Making an LPA involves appointing one or more 'attorneys' as people with clear authority to make decisions on your behalf.

There are two kinds of LPA:

- Property and Finance.
- Health and Welfare.

Both types have to be registered with the Office of the Public Guardian to allow your attorneys to make decisions for you. With a Health and Welfare LPA, decisions can only be taken on your behalf by your attorneys *if you lose* mental capacity. However, under a Property and Finance LPA, it is possible to grant your attorneys permission to make decisions for you as soon as the LPA has been registered.

To find out more about Lasting Powers of Attorney. Have a look at our [factsheets](#) about them.

LPAs are useful documents when planning for the future. However, you must have mental capacity when you make an LPA, using the MCA test described above.

Because the MCA test means you must understand the information relevant to a decision, the kind of information you must be able to understand when making an LPA includes:

- What the LPA is.
- The purpose of the LPA.
- The powers their attorneys will have i.e. what they can and can't do as well as which type of LPA they will act under – Health and Welfare, Property and Finance, or both.
- Who you want to appoint as attorneys and why those people.

Following a decision by the Court of Protection, if you make an LPA you must also understand that:

- The LPA cannot be used until registered with Office of the Public Guardian.
- Under a Health and Welfare LPA, your attorneys can only make decisions for you when you do not have capacity to make the decisions yourself. As mentioned above, this is not necessarily the case with a Property and Finance LPA.

As you can see, these are relatively complicated concepts for someone to understand. This is one reason why making an LPA sooner rather than later can avoid issues over whether you have the mental capacity to make one.

If someone is unable to make an LPA due to a lack of mental capacity, the Court of Protection can appoint 'Deputies' who act in a similar way to Attorneys. The heavy involvement of the Court of Protection, however, means that the process can be

more difficult, lengthy, and expensive. Have a look at [our factsheet](#) on the Court of Protection and Deputies for more information.

How we can help

We are here to help. If you would like assistance with any matter regarding mental capacity or safeguarding your affairs against a future loss of mental capacity, Roche Legal are here to help you. We are reassuring experts who specialise in Wills, Lasting Powers of Attorney, and Court of Protection matters. Please [contact us](#) for friendly, honest, and clear advice.

If you'd like more information call **01904 866139**
or email hello@rochelegal.co.uk



Roche Legal is a trading name of Roche Legal Limited - Company No. 09667485.

Roche Legal Limited is authorised and regulated by the Solicitors' Regulation Authority - SRA No. 624200.

Roche Legal Limited is registered with the Information Commissioner's Office - Registration No. ZA144874.

Rachel Roche LL.M TEP is a Full Member of the Society of Trust and Estate Practitioners and a Full Accredited Member of Solicitors for the Elderly.

This factsheet has been prepared by Roche Legal and contains general advice only which we hope will be of use to you. Nothing in this factsheet should be relied upon as a basis for any decision or action without the appropriate legal advice, tailed to your individual circumstances. Roche Legal © 2016.