

# **STEP JOURNAL**

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## **Dementia and the law**

The key issues that must be taken into consideration when dealing with individuals who lack or may lack mental capacity.

Dementia is an umbrella term that is used to describe various different brain disorders that result in loss of brain function. It is a progressive condition, which means that it gets gradually worse over time.

There are approximately 750,000 people with dementia in the UK, and there is no known cure. By 2025 it is estimated that there will be over a million sufferers. The most common form of dementia is Alzheimer's disease.

Two thirds of people with dementia live in the community while one third live in a care home. The financial cost of dementia to the UK is calculated at over GBP20 billion a year.

## Assessing mental capacity

There are two areas of guidance that should be considered when assessing an individual's mental capacity. The first is the Mental Capacity Act 2005; and the second is the Common Law.

The Act lays down five key principles (Section 1):

- A person is assumed to have mental capacity until evidence is produced to the contrary.
- A person is not to be treated as unable to make a decision unless all practical steps have been taken to allow them to make their own decision.
- A person is not to be treated as unable to make a decision simply because that decision is unwise.
- Anything done for or on behalf of a person lacking capacity must be in their best interests.
- Consideration must be made as to whether the act that is to be carried out or the decision taken is needed, or whether there is an alternative that is less restrictive on the individual.

## What is mental capacity?

Mental capacity is the ability to make a decision, which could be a day-to-day decision, such as what to eat or what to wear, or something more complicated, such as purchasing a property.

Under section 2(1) of the *Mental Capacity Act 2005* there is a two tier test for mental capacity:

1. Does the person have an impairment of, or a disturbance in the functioning of their mind or brain?
2. Does that impairment or disturbance mean that the person is unable to make a specific decision at the time it needs to be made?

The test above assesses an individual in relation to each decision that needs to be made by them. As a result, the person who is assessing an individual and making decisions on their behalf must carry out a regular review of that individual's capacity before each decision is made.

## **When should capacity be assessed?**

The guidance under the Act advises that an individual's capacity should be assessed when there are reasons to doubt an individual's capacity, either as a result of their behaviour or as a result of a medical diagnosis. Clearly it will also be important to carry out assessments when individuals make important legal decisions such as making a will, selling or buying a property or executing a power of attorney, for example.

## **Who should assess capacity?**

Capacity should be assessed by the person directly concerned with the particular individual when a decision needs to be made. The person carrying out the assessment need not always be an expert, and could be a family member, carer or a district nurse. However, on occasions it is recommended or may even be essential that a professional opinion is obtained from a GP or consultant (for example, when an individual is considering making a will).

## **What evidence is required?**

The assessment of capacity is done on the balance of probabilities. The assessor must provide evidence that it is more likely than not that the individual who is being assessed lacks capacity, to support such a finding. Reasonable steps must be taken by the individual carrying out the assessment to confirm whether or not an individual has capacity.

This will often include discussing with the individual concerned the decision that needs to be made and their wishes, but also (subject to considerations of confidentiality) discussing with their family and friends and carer their past wishes and preferences so that the person carrying out the assessment can understand more about how the individual would approach a matter. It is important to be patient with the individual concerned.

The key point under the Act is that it must be in the person's best interests to have the decision taken on their behalf.

## **Evidence of assessment**

There is no particular requirement under the Act for a written record to be taken of assessments involving day-to-day decisions, however it is good practice for those involved in providing professional care to keep records of assessments and decisions made on behalf of individuals.

Those working in the legal profession and advising clients who may lack capacity will carry out assessments on the basis of their experience and professional judgment. However, there will obviously be occasions, such as when taking instructions for the drafting of a new will, when it will be good practice and may indeed be necessary (if only to avoid a subsequent negligence claim) to ensure an assessment is also carried out by a medical expert, such as the client's GP or consultant. In those circumstances, practitioners should ensure that they keep careful records of the assessments carried out and the decisions taken by or on behalf of the client.

## **Common law test of capacity**

The *Mental Health Act 2005* does not replace the Common Law, it expands it.

The Common Law will still be relevant to assessments carried out on individuals. For example, the test of an individual's testamentary capacity to execute a will is well established following the case of *Banks v Goodfellow (1870)*.

If there is a disagreement over a finding of capacity, which may arise where one family member is actively involved with an individual and another family member is more distant, the Court of Protection can be asked to make a final decision one way or the other.

## **Issues for the patient**

Clearly in circumstances where an individual lacks or may lack capacity it will be very important to ensure that their estate is safeguarded either before they lose their ability to manage their own affairs or afterwards so that they are protected.

Briefly, this can be done in a number of ways:

- By ensuring that the individual has an up-to-date and comprehensive will.
- Establishing a trust.
- Making use of an Enduring Power of Attorney or putting into place a Lasting Power of Attorney.
- Involving the Court of Protection or Office of the Public Guardian in circumstances where, for example, no Power of Attorney is in place.

## **Legal remedies for financial abuse**

Unfortunately, those who lack or may lack capacity can become targets for financial abuse, and whilst it is very important to do everything possible to ensure that that financial abuse does not take place, if it does it is also important to know what remedies are available for the victim, their families and carers.

Some of those remedies may include:

- Revoking the Enduring Power of Attorney or lasting Power of Attorney.
- An investigation by the Office of the Public Guardian.
- The appointment of a financial deputy.
- A Court Order prohibiting access to the victim concerned.
- High Court injunction to freeze assets to prevent them from being dissipated.
- The involvement of the Department for Works and Pensions in relation to benefits or pension provision that has been improperly used.
- Criminal remedies (such as dealing with unauthorised and inappropriate use of monies under the Fraud Act 2006).
- A civil claim for damages against the perpetrator.

If an individual does suffer financial abuse, then it is important to weigh up the cost of pursuing the available remedies against the likely outcome. The delay and cost may not be in the best interests of the victim (for example if the perpetrator has no assets).

## Identifying signs of financial abuse

Those working with, or coming into contact with, individuals who lack capacity will need to be able to identify the signs of financial abuse, so that if possible they can prevent that abuse from happening. Such signs may include:

- False signatures, which do not bear any resemblance to the signature of the individual concerned.
- Abrupt changes to wills.
- The sudden involvement of long lost relatives in a patient's affairs.
- The deliberate isolation of the individual from their family and friends (often by another member of the family or a carer).
- A lack of personal possessions that an individual should be able to afford (a sign perhaps that they are being prevented from using their own funds).

## Summary

Professionals will need to tread very carefully when dealing with individuals who lack or may lack capacity. They should ensure that they follow the guidelines set out under the *Mental Capacity Act 2005* and, if appropriate, the Common Law.

A second opinion should be sought from a medical expert in cases where an individual is considering executing a legal document. Any decisions that are taken on behalf of an individual who lacks or may lack capacity must be in their best interests.

In circumstances where an individual lacks capacity or may lack capacity, it is vital to ensure that their assets are safeguarded, so as to minimise the risk of financial abuse.

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