

Guidance on mental capacity

Mental capacity is the term given to define when a person is capable of understanding and making decisions. It is specific to the time and decision being made.

Before you can enter into contracts to purchase or sell assets or to give instructions about a house sale to be dealt with, whether it is appropriate to engage in court action to recover assets or to participate in divorce proceedings – these are all decisions which require mental capacity to give instructions. If you don't fully understand the implications of what you are doing, you cannot create a binding agreement to do the act in question. The people you are dealing with may want assurance you can enter into the agreement by asking for an assessment of capacity.

Principles of the Mental Capacity Act 2005

1) Presumption of capacity: The core assumption is that you are deemed to have capacity to make a decision unless there is evidence you do not understand the issues.

2) Supporting individuals to make their own decisions: Attempts must be made to help an individual to participate in the decision-making process. Capacity is assessed on a time and decision specific basis and so – you may understand that you would like to buy presents for particular people at Christmas, but do you understand the implications of such expenditure on your overall wealth? You may prefer to live in your home for as long as you are able to, but do you understand the risks that can be associated with that decision?

Capacity can fluctuate – for example, a urinary tract infection can impact on a person's capacity to make decisions until the infection has been cleared. Post operative problems can arise with older people where general anaesthetics have been given. With many, this may be temporary confusion which clears. Some people can make decisions in the morning but not in the afternoon and vice versa.

3) Freedom to make unwise decisions: An unwise decision does not mean you lack capacity necessarily.

4) Acting in your best interests: If someone has to make a decision for you, they must make it in your best interests, considering your views (past and present).

5) Least restrictive option: The choice must be the least restrictive of your options. For example, if you became less mobile, enabling use of a wheelchair would be a less restrictive option than being bed-bound. Selling your house if you have other money will stop you returning home if your health recovers, so perhaps renting it out as an interim measure, would be more appropriate.

Assessing mental capacity

Before trying to assess someone's capacity, you must understand the decisions that need to be made. In most cases there is a legal test but the opinions and views of doctors on the ability of a person to process the information to make the legal decision is important.

Capacity can be complex, but in some cases surprisingly easy to resolve. The fact that someone is blind or has hearing difficulties does not mean they do not have capacity to make decisions.

Capacity is core to many decisions that need to be made when working with local authorities, doctors and courts. We are experienced in dealing with capacity assessments of all kinds and can support best interest processes.

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