

Mental Capacity: Key considerations in relation to those with special educational needs

All adults, and in general terms, young people are assumed to have capacity to make decisions regarding their daily life. These decisions can include

- Where an individual should live
- Who an individual should have contact with
- What education an individual should receive
- What social care an individual should receive
- What medical treatment an individual should receive
- Access to the internet and social media
- Managing property and finances

What happens where there is a question mark in relation to an individual's ability to make such decisions? Who can/should make those decisions? How should those decisions be made? What decisions should be made? What safeguards are in place?

These are just some of the questions faced by parents, carers and professionals working with young people with special educational needs and disabilities.

This intricate area of law is governed by the Mental Capacity Act 2005. The starting point is that every individual of 16 years and older is assumed to have capacity. There are some caveats for those aged between 16 and 18.

REBUTTING THE PRESUMPTION IN FAVOUR OF CAPACITY.

As set out above, the starting point is that every adult, and in general terms, young person is presumed to have capacity to make individual decisions regarding their life. This reinforces the principle of autonomy and allows individuals to make their own decisions, even if harmful or others would consider unwise.

It is only if this presumption is rebutted that decisions can be made on behalf of an individual in their best interests.

To rebut the presumption it must be established, on the balance of probabilities, that at the material time an individual has an impairment of, or a disturbance in functioning of, the mind or brain and as a direct consequence of that difficulty the individual is unable to:

1. understand the information relevant to a decision; and/or
2. retain that information for a sufficient amount of time in order to weigh it up; and/or
3. communicate their decision (not necessarily orally).

The Mental Capacity Act 2005 is clear that a lack of capacity cannot be established merely by reference to a person's age/appearance or any condition/behaviour which might lead others to make unjustified assumptions about their capacity.

As the information an individual will be required to understand, retain and weigh up is unique to the decision being made, whether an individual has capacity is not only time, but also decision specific. Consequently, an individual may have capacity to make a decision one day, but not the next and may have capacity to make certain decisions, but not others. It is important to be aware that capacity can also be regained. A good example is in relation to sexual relations, where a number of young people initially assessed as lacking capacity in this domain, following education and training on the relevant information to be considered, have then be assessed as having capacity.

MAKING DECISIONS ON BEHALF OF THOSE WHO LACK CAPACITY

Where an individual has been assessed as lacking capacity in relation to a specific decision, and a decision is required, that decision must be made in the individual's best interests. When forming a decision as to what is in an individual's "best interests", as far as is reasonably ascertainable, the following must be considered:

1. The individual's past and present wishes and feelings (and, in particular, any relevant written statement made by them when they had capacity;
2. The beliefs and values that would be likely to influence their decision if they had capacity; and
3. Other factors the individual would be likely to consider if they were able to do so.

In so far as is reasonably practicable an individual must be permitted and encouraged to participate (including improving their ability to participate) in the decision-making process.

WHO IS INVOLVED IN MAKING BEST INTEREST DECISIONS

Who is involved in the best interest decision making process is case specific. Where an individual is over the age of 18 and has capacity, they are able to execute a Lasting Power of Attorney (LPA). There are two types: i. property and finance ii. personal welfare. An individual must have capacity at the time of executing these documents. LPAs allows an individual to appoint Attorney(s) to make decisions on their behalf in the event they lose capacity

in relation to personal welfare decisions. In relation to property and finance, an individual can appoint an Attorney to assist them whilst they still have capacity, when they lose capacity or both.

Where an individual lacks capacity, and therefore cannot execute a Lasting Power of Attorney, it is possible for other individuals, usually family members and sometimes close friends, to apply for a Deputyship Order. Again, there are two types i. property and finance ii. personal welfare. Such Orders are made by the Court of Protection in appropriate circumstances and permit Deputies to make certain best interests decisions on an individual's behalf. Potential deputies should seek advice before applying for either, as these Orders are not always necessary or appropriate.

Where an individual lacks capacity and there is neither an LPA or Deputyship Order in place decisions will need to be made on a one off basis. All relevant stakeholders to the decision will need to be involved. This should include family members (including parents) and professionals. All should apply the "best interests" principles set out above. A "best interest" meeting should take place where all of the available options are considered, weighed up together with the benefits and drawbacks of each option, finally a best "best interests" decision should be made where all relevant stakeholders are agreed. This should be documented. If agreement cannot be reached, even if only one stakeholder disagrees, the matter should be referred to the Court of Protection where a Judge will ultimately determine what is in the individual's "best interests" for that particular decision. Proceedings before the Court of Protection should be collaborative with all parties working together to agree what is in an individual's "best interests". If agreement cannot be reached the Court will ultimately decide.

PARENTAL RESPONSIBILITY

The principle of parental responsibility allows parents to make decisions on their child's behalf. This, in theory, applies until an individual reaches 18 years of age. However, where it can be shown that an individual below the age of 18 has capacity to make a specific decision the law allows them to do so. An example includes consenting to medical treatment. Parents should be aware there is no equivalent to parental responsibility where a young person reaches the age of 18 and lacks capacity.

CAPACITY AND APPEAL TO THE SEND TRIBUNAL

In the sphere of special educational needs (both in England and Wales) where an individual reaches the age of 16 the right of appeal to challenge decisions regarding their Education, Health and Care Plan (EHCP) or Individual Development Plan (IDP) rests with the young person. This is unusual as in nearly every other type of litigation an individual will be required to reach the age of 18 to bring proceedings by themselves. It is only if the presumption in favour of capacity can be rebutted that someone else is able to bring an appeal on the young person's behalf. In England, where the presumption is rebutted the right

of appeal transfers to an Attorney (where a relevant Lasting Power of Attorney has been executed), a Deputy (where a relevant Deputyship Order is in place) or the parents if neither are in place. The person replacing the young person and exercising their right of appeal is referred to as an "Alternative Person". When looking to rebut the presumption in favour of capacity it will need to be established that the young person lacks "litigation capacity". It is therefore important for anyone advising or assisting in relation to an appeal regarding a young person aged 16 years or older to properly consider who is the correct Applicant to bring an appeal.

DEPRIVATION OF LIBERTY CONSIDERATIONS

Where an individual is under constant control and supervision and this is attributable to the state they are considered to have their liberty deprived. On its face this is a fundamental breach of that individual's human rights. In such circumstances, in order for such a deprivation of liberty to be lawful specific safeguards must be followed.

For those aged 18 years and over, if their liberty is being deprived in a registered care home or hospital a local authority, integrated Care Board (or Health Board in Wales) can lawfully approve such a deprivation through a system known as Deprivation of Liberty Safeguards (DOLS). Where specific requirements are met the relevant body can issue a standard authorisation. This will need to be time limited (maximum 12 months) and appoint a Relevant Person's Representative (RPR) to safeguard the individual's best interests and challenge the standard authorisation through the Court of Protection if necessary. In urgent situations a care home or hospital can issue an urgent authorisation (usually whilst a standard authorisation is being considered). An urgent authorisation has a maximum duration of 14 days.

In all other scenarios' including where the individual is aged between 16-18 and/or where the deprivation of liberty is not taking place in a care home or hospital, authorisation will need to be sought by the relevant local authority from the Court of Protection. This includes where a young person is placed within a residential school setting (that is not a registered care home) and where a young person is being deprived of their liberty within the home environment or a mixture of school and home environment.

The onus is on the local authority to make the relevant application to the Court of Protection. Where all relevant stakeholders are in agreement an application for approval can be made on the papers to the Court of Protection under what is referred to as the Re:X procedure. It will be for the Court to approve, however, if there is any disagreement from any relevant stakeholder the Court will in all probability list the matter for an oral hearing.

Where a deprivation of liberty is being imposed the least restrictive option should always be considered. All restrictions being imposed must be in the individual's best interests. When considering different options the Court of Protection can only consider available options and not

theoretical ones. It is in effect stepping in to the shoes of the individual who lacks capacity to make a decision on their behalf.

It is important to be aware that parental responsibility cannot be used to authorise a deprivation of liberty of a young person 16 years and older.

What parents should be aware of

- Capacity is time and decision specific
- The Mental Capacity Act 2005 only applies to those 16 years of age and older.
- Parental responsibility cannot be relied upon once a young person has reached the age of 18 and there is no equivalent concept where the young person lacks capacity.
- Once a young person turns 16 it is they who have the right to appeal decisions relating to their EHCP, unless it can be established they lack litigation capacity.
- From the age of 16, if under constant control and supervision, a young person may well be deprived of their liberty within the home or school environment and their must be Court authorisation for this

What professionals should be aware of

- Having SEND does not establish that a young person lacks capacity in relation to any particular decision.
- It is not unusual for a young person with SEND to have capacity in relation to some decisions, but not others.
- Education and training can assist young people to understand the relevant information required for some decisions. This should always be considered.
- Placement of a young person with special educational needs within a residential school setting may well amount to a deprivation of liberty requiring Court authorisation.
- A young person attending a school day placement could be subject to a deprivation of liberty if they are under constant control and supervision at school and where they reside. This would require Court authorisation.

For further information, please contact Kevin McManamon:



KEVIN MCMANAMON

Partner
+44 (0)20 7593 5276
kmcmanamon@wslaw.co.uk