

NCA Mental Capacity Act Seminar



Holiday Inn, Elstree
20 February, 2008

Mental Capacity Issues

A solicitor's view of the implications of the MCA for the care sector...

Aims of presentation

- A swift tour of the law
- Awareness of changes
- Hints & Tips
- Shared knowledge
- Shared information
- Shared experiences
- Challenge each other

What will we be looking at?

- MCA 2005
- Aims of MCA and principles underpinning it
- Decision-making process
- Lasting Power of Attorney/ Enduring Power of Attorney
- Independent Mental Capacity Advocates
- Court of Protection
- Office of Public Guardianship

MENTAL CAPACITY ACT 2005

('MCA')

Who feels like this?



Major changes?

- MCA mainly codifies law
- Introduces new concepts
- Gives legal status to advance directives
- Creates new bodies and functionaries
- Creates new processes and procedures

Aims of Act

- Maximise opportunity for those lacking capacity to make/participate in decisions
- Protect adults lacking legal capacity from neglect and abuse
- Provide clarity around making decisions for people you care for

NB: lack of capacity may be due to brain injury, learning disability, stroke, dementia, medical treatment, drugs, alcohol...

Key Principles (1)

- Legal capacity is to be presumed unless established contrary
- Person not to be regarded as lacking capacity to make decisions unless all practical steps have been taken to help person to make decision
- ‘Bad’/unwise decisions do not mean person lacks capacity

Key Principles (2)

- Acts done & decisions made must be in person's best interests
- Before act done/decision made regard must be had to whether the purpose can be achieved in a way less restrictive of the person's rights/freedom of action

To navigate, know the law...



Definitions (1)

- S 2 MCA
- *“a person lacks capacity in relation to a matter if at the material time he is unable to make a decision...in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain”*

Definitions (2)

- S 3 MCA
- *a person is unable to make a decision for himself if he is unable to:*
 - *Understand info relevant to the decision*
 - *Retain that info*
 - *Use or ‘weigh’ the info as part of the decision process*
 - *Communicate his decision*

Status of common law tests

- **MCA**

- intended to expand existing common law tests
- a ‘functional’ approach is to be taken to issues of legal capacity
- the approach is, can the person make a particular decision at a particular time
- NOT the person’s ability to make decisions generally
- Common law tests will continue to be relevant

Assessing legal capacity - 1

- Does the person have impairment or disturbance in function of the mind/brain?
- If **'No'** person has capacity and decision cant be made on his behalf
- If **'Yes'** go to second stage...

Assessing legal capacity - 2

Is impairment/disturbance such that it prevents person making decision/consent?

- Can person:
 - understand relevant info about the decision to be taken?
 - Retain info long enough to make decision?
 - Use/weigh info as part of decision-making process?
 - Communicate decision?

Decisions: helping someone...

- Provide relevant info – keep it simple
- Draw attention to possible consequences
- Summarise options
- Consult family, friends, significant others
- **Do not** judge capacity by appearance
- Can decision wait?
- Ensure capacity assessment is recorded

Acting in 'Best Interests'

- If person lacks capacity you **must** act in BI
- Help person participate in process
- Identify **all** relevant circumstances
- Establish person's – wishes, beliefs, values, feelings etc.
- Consult family, professionals, informal carers
- **Is there an Advance Directive/LPA?**

Lasting Power of Attorney (1)

- MCA replaces Enduring Powers of Attorney Act 1985
- BUT old EPAs continue to be effective
- Could use EPA and Advance Directive

Lasting Power of Attorney (2)

- Legal (common law) test for capacity to make an EPA – Re K, Re F (1998)
 - Donor must understand attorney
 - will be able to assume complete authority over donor's affairs
 - will be able to do anything with the donor's property which he could have done himself
 - will continue to be able to act if the donor becomes 'mentally incapable'
 - power will be irrevocable without court approval if donor becomes mentally incapable

Lasting Power of Attorney (3)

- If doubts exist about donor's capacity to make LPA (or EPA) get Drs opinion (written) & get Dr to witness donor's signature
- Should you be involved in the process?
 - Facilitating...
 - Pre-admission assessment...
 - Will you be insured?

Lasting Power of Attorney (4)

- If involved...
 - Is person (SU/resident) acting ‘freely’?
 - See person alone, in private
 - Don’t just accept what person says, s/he may still be subject to duress or undue influence
 - Make written records, particularly of the Q&As
 - Records may become essential if it is alleged that you have in some way been negligent

Lasting Power of Attorney (5)

- **NEW STUFF...**
- LPAs can go beyond dealing with property & finances
- Prescribed forms must be used
- LPA not effective until registered with Office of Public Guardianship
- May be negligent not to register LPA once executed

Lasting Power of Attorney (6)

- **NEW STUFF...**
- Nominations can be made for Attorney to be replaced (death, bankruptcy etc.)
- Donor can nominate who should be informed of the registration of the LPA
- Can also specify that no-one is informed
- A Certificate of Capacity will be required from a prescribed person

Lasting Power of Attorney (7)

Certificate of Capacity

- Prescribed person to confirm that in his opinion:
 - Donor understands purpose of form of LPA & and scope of the authority conferred by it
 - No fraud or undue pressure to induce making the LPA
 - There is nothing else which prevents creation of the LPA

Lasting Power of Attorney (8)

TIPS-n-HINTS

- EPA can be made now for a short time – until end September 2007
- Residents may prefer EPA
 - no Cert of Capacity needed
 - no welfare/treatment powers
 - no requirement to register EPA
 - likely to be less expensive

Advance Treatment

- **NEW STUFF...**
- Now, in LPA or in other written form personal welfare and medical treatment wishes can be made known– so called *‘living wills’* – Advance Directive
- Personal welfare/treatment can only become operative and acted upon once the donor becomes mentally incapable

Lasting Power of Attorney (10)

TIPS-n-HINTS cont...

- Consider legal capacity
- Get lawyer involved – better that it is not your own
- Use legal help-line



Enduring Power of Attorney	Lasting Power of Attorney
Limited to dealing with the donor's property and financial affairs.	As well as property and financial affairs, can also extend to the donor's personal welfare, including medical treatment. Prescribed forms must be used according to the power granted.
Can impose conditions and restrictions on the donor's authority.	As well as imposing restrictions and conditions, can also include a statement of personal views that the attorney will be obliged to take into account when making decisions.
Effective as soon as executed, unless made conditional on the donor becoming mentally incapable.	Not effective until registered with the Office of the Public Guardian. LPA regarding welfare only effective upon incapacity.
Continues in force after the donor becomes mentally incapable provided registered with the Court of Protection.	No requirement for registration when donor becomes mentally incapable (because already registered).
Not possible to provide for a successor attorney.	Can provide for a person to replace attorney in event of attorney's death, incapacity, bankruptcy, disclaimer of appointment, or dissolution or annulment of marriage/civil partnership between donor and attorney.
Before applying to register with the Court the attorney must notify a prescribed list of the donor's relatives regardless of whether the donor has any involvement with these people.	The donor can nominate people he wishes to be notified of the LPA's registration. The public Guardian must notify these people prior to registration of the LPA. The donor can specify that no one is to be notified.
No Certificate of Capacity required.	Certificate of donor's capacity required.

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Independent Mental Capacity Advocates - IMCAs

- Section 35 MCA requires ‘appropriate authority’ to arrange for IMCAs to be available to represent and support people making decisions concerning:
 - serious medical treatment by NHS S.37
 - accommodation by NHS S.38
 - accommodation by local authority S.39

Purpose of IMCAs (1)

To ensure that the person about whom there are concerns over his legal capacity has someone to represent his interests and assist in the process

Regulations will specify IMCAs will:

- provide support to a person so that the person can participate as fully as possible in decision processes
- obtain and consider info. medical records, local authority records, held under Part II CSA 2000

Care plans, health records, social/welfare records

Purpose of IMCAs (2)

Regulations will specify IMCAs will: continued...

- ascertain person's wishes/desires or what they are likely to be. IMCAs will need to consider person's beliefs and value systems
- Obtain medical report where treatment is proposed and IMCA considers one should be obtained

Court of Protection (1)

- New CoP replaces current CoP
- Jurisdiction over whole of MCA
- Wide powers, including, making order concerning person's legal capacity; whether it is in person's interests to make order
- Can call for records and order preparation of reports

Court of Protection (2)

- Permission not needed for application to be made to CoP
- Streamlined procedures
- Rules re fees and exemptions yet to be made
- Normal costs rules will not apply, wide discretions

The Public Guardian (1)

- MCA creates new officer, Public Guardian
- Functions
 - Create/maintain register of LPAs
 - Supervision of Deputies appointed by the CoP
 - Direct CoP Visitor to attend on Donor and/or Donee of LPA and make a report
 - Reporting to CoP
 - Dealing with representations & complaints about exercise of powers by Donee or Deputy

Unresolved Issues

- Bournemouth Gap
- People with dementia
 - Locked doors
 - Fumble locks
 - Key-pads
 - Electronic tagging
- Watch out for new guidelines from DoH

Key Messages

- Know the new law, regulations & Statutory Code of Practice - published 22.02.07
- Have an understanding of MCA for contracting reasons and decisions of day-to-day living decisions
- Have an awareness of IMCAs, Deputies, Visitors & Attorneys
- Facilitate rather than undertake
- Be cautious; consider insurance

Key Messages

- W. e. f. April 2007 new criminal offence created sect. 44 MCA of ill-treatment or neglect of person who lacks capacity
- Max sentence five years' imprisonment.
- Living wills can be made by persons who are at least 18 years' old
- 'Making decisions: A guide for people who work in health and social care'

Get one of these to take the strain...



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