

The Mental Capacity Act and the Deprivation of Liberty Safeguards



Introductions

- Name
- Job role
- Reasons for attending

Session Plans

- Background to the MCA
 - The five statutory principles
 - Assessing mental capacity
 - Making best interest decisions
 - Interactive case study preparation
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- Interactive case study
- Restriction and restraint
- Deprivation of Liberty
- The Safeguards

Background

The Act sets out a legal framework of how to act and make decisions on behalf of people who may lack capacity to make specific decisions for themselves.

Everyone working with and/or caring for an adult who may lack capacity to make specific decisions must comply with this Act.

The same rules apply whether the decisions are life-changing events or everyday matters.



The Mental Capacity Act, 2005

The Act is intended to assist and support people to make decisions for themselves, and to discourage anyone who is involved in caring for someone who lacks capacity from being overly restrictive or controlling.

The Act aims to balance an individual's right to make decisions for themselves with their right to be protected from harm if they lack capacity to make decisions to protect themselves.

The Act applies to those aged 16 and over.

What decisions have the people you support recently made?

- Everyday decisions
- Life-changing decisions

5 Statutory Principles

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. 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.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. 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.
5. Before an 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.

A person must be assumed to have capacity unless it is established that they lack capacity.

Every adult has the right to make their own decisions.

A person's age, condition, appearance or behaviour does not mean they cannot make a decision.

You must assess capacity if there is any reason to doubt a person's mental capacity to make a decision.

Assessments of mental capacity are time and decision specific.

You must have a 'reasonable belief' that a person lacks mental capacity before making a decision on their behalf.

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.

Choose the optimum time of day

Choose the optimum location/use of technology, ensure privacy and no distractions

Ask who they would like to support them

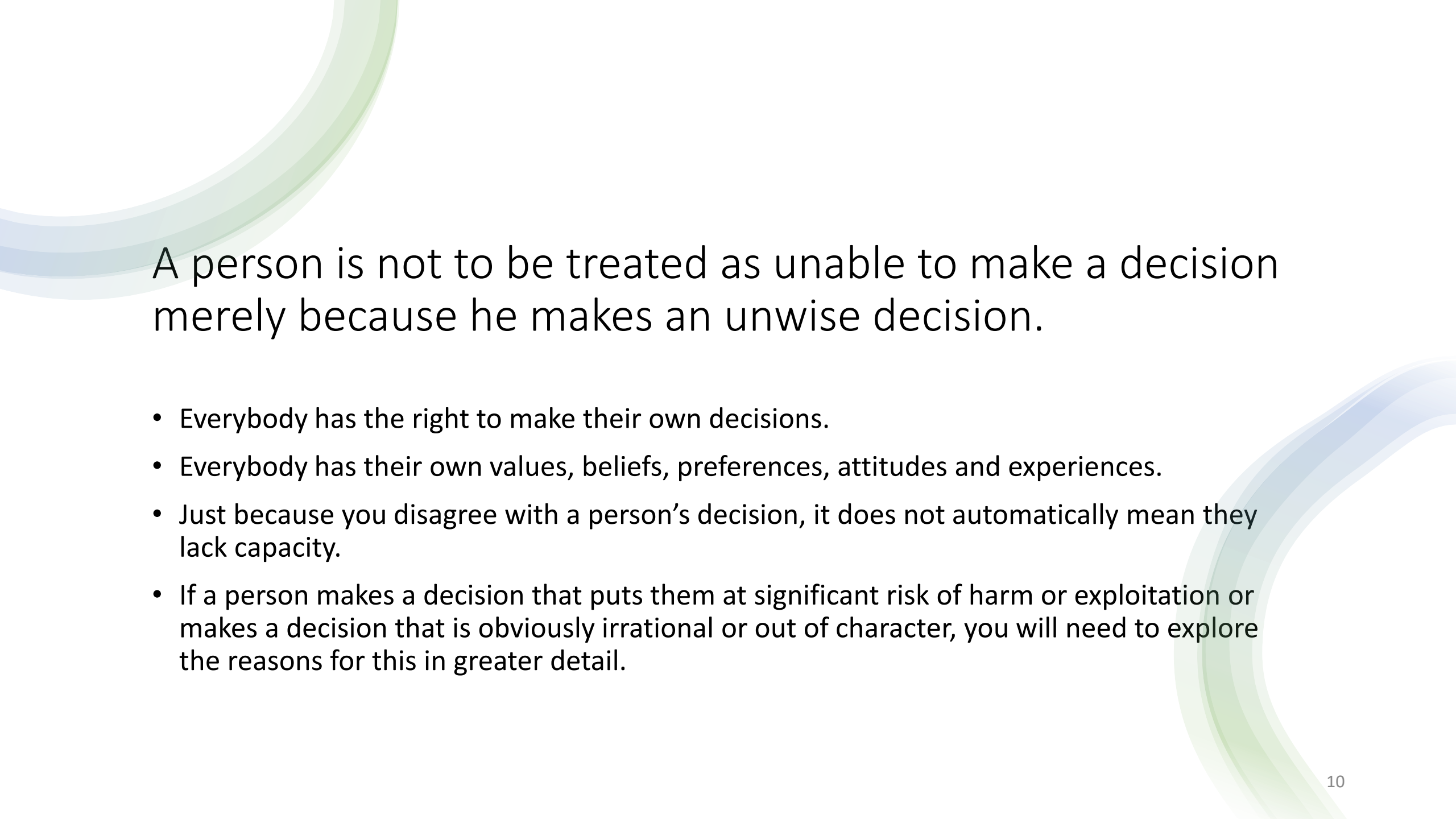
Ensure the person is well, is not hungry or thirsty, has taken their medication, has their glasses, hearing aids etc

Communicate in a way the person understands: simple language, BSL, interpreters, Makaton

Provide information in a format the person understands: photographs, drawings, symbols

Break the decision down

Delay the decision



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

- Everybody has the right to make their own decisions.
- Everybody has their own values, beliefs, preferences, attitudes and experiences.
- Just because you disagree with a person's decision, it does not automatically mean they lack capacity.
- If a person makes a decision that puts them at significant risk of harm or exploitation or makes a decision that is obviously irrational or out of character, you will need to explore the reasons for this in greater detail.

Assessing mental capacity

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

Assessing mental capacity

- Does the person have a **general understanding** of what decision they need to make and why they need to make it?
- Does the person have a general understanding of the options available to them?
- Does the person have a general understanding of the likely consequences of deciding one way or another, or of not making the decision?

Assessing mental capacity (2)

- On **balance of probabilities**, does the person:
 - Understand the information that is relevant to the decision?
 - Retain that information?
 - Use and weigh up that information as part of the decision-making process?
- Can the person communicate their decision?
- If not, is this because of an impairment or disturbance in the functioning of the mind or brain?

Assessing mental capacity (3)

The causative nexus

If not, **is this because of** an impairment or disturbance in the functioning of the mind or brain?

Case Discussion

Syrah, who has dementia, lives in her own home. Recently she has been losing weight as she forgets to cook, and her clothes are too big for her. Her daughter has some ideas that she thinks may help.

What might some of the options be?

What information should she provide to Syrah?

How should she test whether Syrah has capacity to make a decision about her weight loss?

Remember

- Assume a person has capacity
- Assess capacity if there is a reason to do so
- Assessment of capacity is time specific and decision specific
- You must provide the information that is relevant to the decision
- You must take all reasonable steps to enable a person to make the decision



Case Study

Brian, who has a learning disability, has developed an irregular heartbeat. His GP would like to do some blood tests to ensure he is prescribed the correct medication.

What information should the GP provide to him?

How should the GP test whether Mr Jones has capacity to consent to the blood tests?

Three elements to valid consent

- Consent must be voluntary
- Person must be informed about the options and the risks and benefits of each
- Person must have capacity

Consent is not just a signature on a form!



Valid Consent

“A right to consent is also a right to refuse”

Must be voluntary:

- no pressure
- no coercion
- no duress

Sources of coercion:

- Family members/friends
- Religious leaders
- Carers/clinicians/professionals

Legal risks

A failure to ensure valid consent could:

- Impact on relationships (trust):

“I wouldn’t have made that decision if you had told me about the risks...”

“I didn’t realise I had a choice...”

“I wasn’t aware that was an option...”

- Impact on physical or mental health (serious incidents and inquests)
- Be negligent/a breach of professional standards (SWE, HCPC, NMC, GMC).
- Lead to criminal prosecution: assault and battery

Remember

You must give sufficient/appropriate information about the options (including what happens if we do nothing) and the nature, consequences and any likely risk/benefit of each option.

You must ensure the person:

- has an adequate understanding of that information
- is able to retain, use and weigh that information whilst making a decision

You must not put - or allow pressure to be put - on a person to decide one way or another.

Professional judgement or established case law will inform what information a person should be given.



Consent, Duty of Care & the Right to Life

Public officials must take reasonable steps to protect your life when they know (or should know) that your life is at **real and immediate** risk. This risk could be from yourself or others.

- Urgent medical treatment
- Restraint to prevent likely accident or incident
- Removal of items to prevent suicide

Assessing Capacity

Case Law - Relevant Information

- Medical Treatment
- Care
- Residence
- Contact with others
- Education & Health Care Plan
- Sexual relations
- Contraception
- Marriage
- Social Media

www.39essex.com/information-hub/mental-capacity-resource-centre/mental-capacity-resources/mental-capacity-guidance

Assessing Capacity to use social media

[Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2]

What information do you think would be relevant to this assessment?

How might you test someone's capacity in this area?

Social Media

[Re A (Capacity: Social Media and Internet Use: Best Interests) [2019] EWCOP 2]

(a) That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;

(b) That It is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites.

(c) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended.

(d) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;

(e) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;

(f) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime

Social Media

What's not relevant?

Not relevant is the information that internet use may have a psychologically harmful impact on the user.

“It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress.

I take the view that many capacious internet users do not specifically consider this risk, or if they do, they are indifferent to this risk.

I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005.”

What may cause fluctuating capacity?

Temporary illness e.g. infection

Mental disorder e.g. bipolar disorder or psychosis

Pain

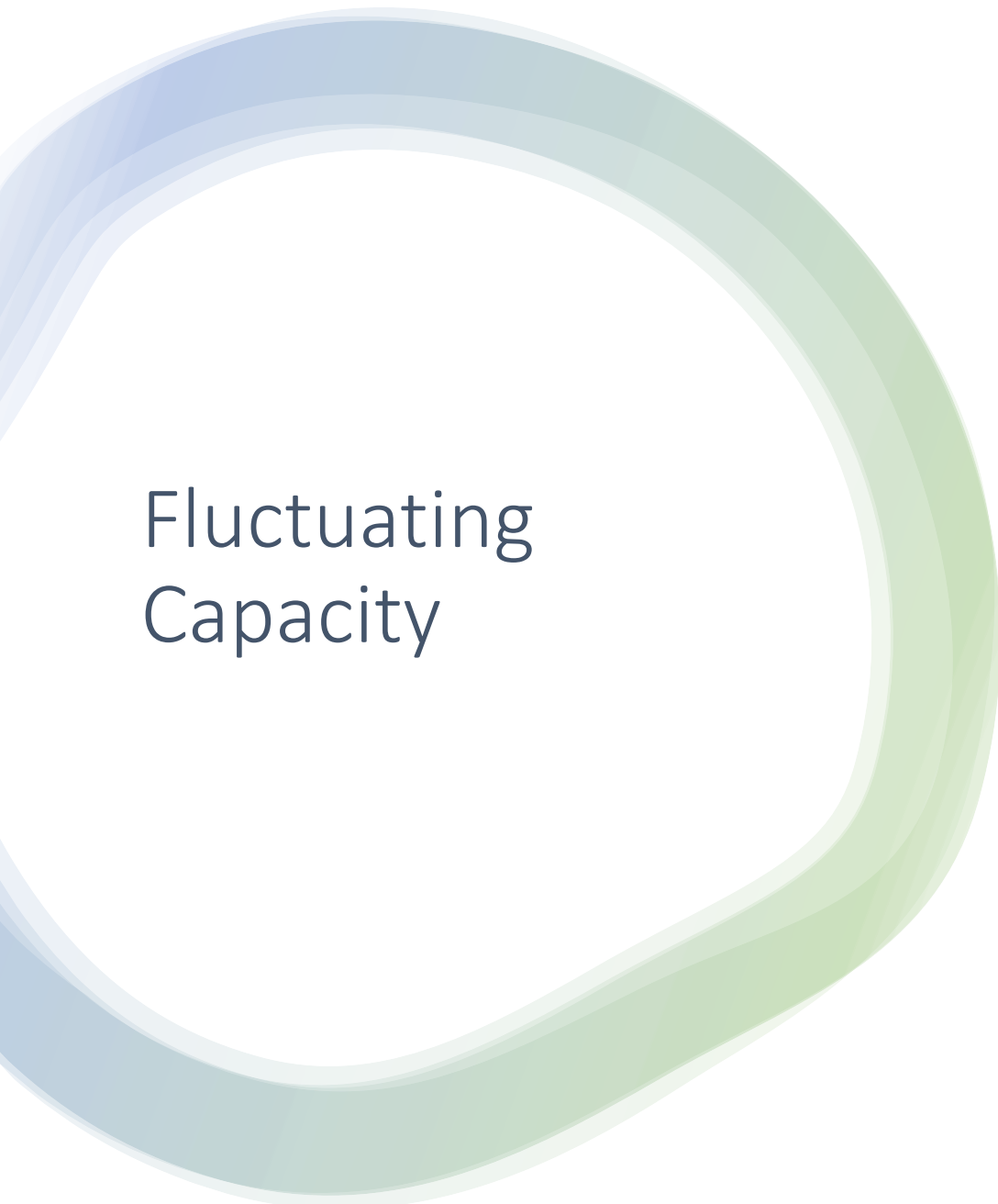
Medication or lack of medication

Stress/anxiety

Shock

Time of day e.g. sundowning

Alcohol/drug use



Fluctuating Capacity

Fluctuating capacity

- Is it a one-off or micro-decision that can be delayed?
- Is it a longitudinal decision - one that needs to be repeated through the course of a day/week?



Fluctuating Capacity and Executive Function

Executive function

- Does the person say one thing and do another (or nothing)?

Serious consequences

- Does the Court of Protection need to make the decision about the person's mental capacity?

Live Case Study Preparation

Angela is a 21-year old living in a residential home. She has a moderate learning disability.

Her key worker is becoming increasingly worried about Angela as she has started coming back to the residential home intoxicated almost on a daily basis.

The key worker contacts Adult Social Care to express her concerns around whether Angela has capacity around drinking alcohol and keeping herself safe.

A new social worker is appointed, who agrees to come out to undertake a mental capacity assessment around drinking alcohol and keeping safe.

- What do you think is the relevant information?
- How might you test Angela's understanding, ability to retain, use/weigh and this information?



Recording mental capacity assessments

No standard form

What is the decision?

Why does the decision need to be made?

What is the relevant information?

What are the options?

What are the likely consequences of deciding one way or the other?



Recording mental capacity assessments (2)

Give examples to demonstrate your reasoning for the following:

- Can the person understand the decision related to the information?
- Can the person retain the information?
- Can the person use or weigh the information **whilst making the decision?**
- Can the person communicate their decision?



Recording mental capacity assessments (3)

Is the person unable to make the decision because of an impairment or disturbance in the functioning of the mind or brain?

The Court of Protection

Has the power to decide:

- Whether the person has capacity to make the decision
- Make the decision on behalf of the person who lacks mental capacity
- Appoint deputies to make decisions on behalf the person who lacks capacity
- Decide whether an LPA/EPA is valid
- Remove deputies or attorneys who fail to carry out their duties



Inherent Jurisdiction – The High Court

[Re SA (Vulnerable Adult with Capacity: Marriage)
[2006] 1 FLR 867]

"[T]he inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either

- (i) under constraint or
- (ii) subject to coercion or undue influence or
- (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."

Inherent Jurisdiction – The High Court

[Re SA (Vulnerable Adult with Capacity: Marriage)
[2006] 1 FLR 867]

“In the context of the inherent jurisdiction I would treat as a vulnerable adult someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder, is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation [...]”

Making Best Interest decisions – who is the decision maker?

The decision maker is the person who is likely to carry out the required action e.g. family member, care worker, nurse, doctor, social worker, solicitor..

Or,

The person who holds Lasting Power of Attorney, Enduring Power of Attorney, or a Court Appointed Deputy if the decision is within the scope of their authority.



Attorneys and Deputies

Two types of Lasting Power of Attorney/Deputy:

Personal Welfare

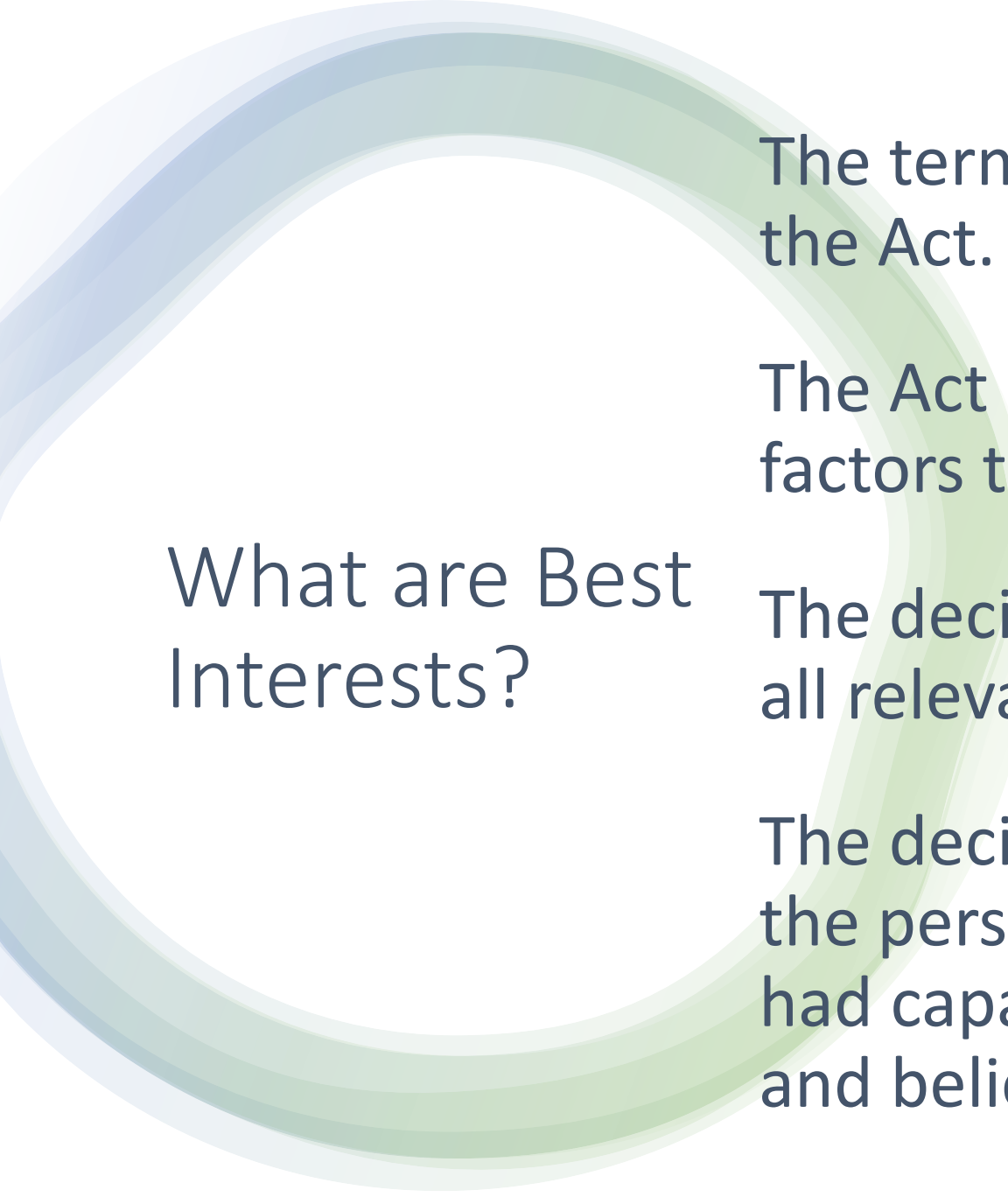
Property and Affairs

Enduring Power of Attorney:

Pre-dates the MCA and is only for decisions relating to Property and Affairs

Making Best Interest decisions Statutory Principles

4. 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.
5. Before an 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.




What are Best Interests?

The term 'best interests' is not defined in the Act.

The Act sets out a checklist of common factors that **must always be considered**.

The decision maker must take into account all relevant factors.

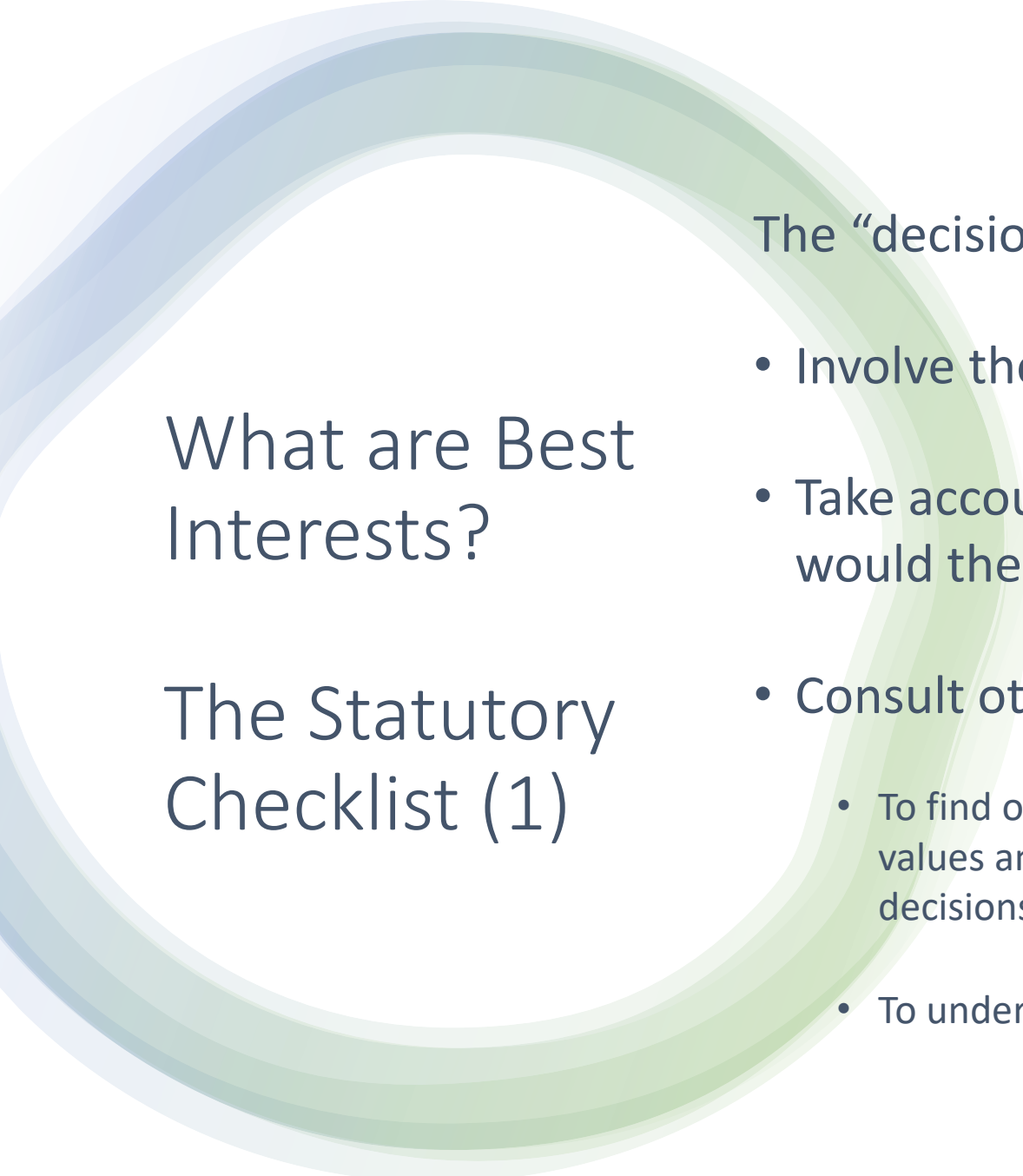
The decision maker should consider what the person would have chosen, had they had capacity – their wishes, feelings, values and beliefs are of primary importance.



What are Best Interests?

S.5 of the MCA provides ‘protection from liability’ for actions carried out in connection with care or treatment.

The Decision Maker must have a **reasonable belief** that the decision they are making is in the person’s best interests.




What are Best Interests?

The Statutory Checklist (1)

The “decision-maker” must:

- Involve the person
- Take account of all the “relevant” circumstances – what would the person consider if able to do so?
- Consult others:
 - To find out about the person’s past and present wishes, feelings, values and beliefs, including any written statements or advanced decisions to refuse treatment
 - To understand what they feel would be in the person’s best interests



What are Best Interests?

The Statutory Checklist (2)

The “decision-maker” must:

- Avoid discrimination
- Avoid restricting person’s rights
- Not be motivated by a desire to bring about the person’s death
- Weigh up all of these factors – from the person’s point of view

Consulting others

- For decisions about major medical treatment or where the person should live and where there is no-one who is unpaid who can be consulted, an Independent Mental Capacity Advocate (IMCA) must be consulted.
- When consulting, remember that the person who lacks the capacity to make the decision or act for themselves still has a right to keep their affairs private – so it would not be right to share every piece of information with everyone.

Restraint and Restrictions

The Mental Capacity Act allows health and social care staff to provide care and treatment to a person who lacks the mental capacity to consent to it, if they reasonably believe it is the person's best interests. This may include using restraint or restrictions if:

- They are **necessary to prevent harm to the person**
- The amount of restraint and the amount of time it lasts is **proportionate to the likelihood and seriousness of the harm**
- They are the **least restrictive** way of meeting the need
- They do not amount to a deprivation of liberty

Best Interests Excluded Decisions

- Consent to marriage or civil partnership
- Consent to sexual relations
- Consent to divorce/dissolution of a civil partnership
- Consent to adoption
- Discharging parental responsibility (unless related to the child's property)
- Consent under the Human Fertilisation and Embryology Act, 1990
- Consent to treatment under the Mental Health Act, 1983
- Voting

Disputes about best interests

It is not necessary to reach an agreement with all those consulted however the decision maker must have a reasonable belief that the action they propose to take is in the person's best interests. It may therefore be appropriate to:

- Involve an advocate
- Get a second opinion
- Hold a formal best interests meeting
- Arrange mediation
- Apply to the Court of Protection to make the decision

