

Carers and the Mental Capacity Act

Making choices

Presented by:
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Making Choices

Under what legal framework?

- In the UK when a person reaches the age of 16 years, they have reached the **age of consent** (Family Law reform Act 1969, s8. & Mental Capacity Act 2005).
- This is regardless of their maturity, level of ability, competency, their experiences or diagnosis [MASMC – MASMC \(myadultstillmychild.co.uk\)](http://myadultstillmychild.co.uk).



Under what legal framework?

Our society is based on the sense of '*autonomy of self*' – AKA self-determination and **informed choice**.



Before any intervention, a practitioner must ask themselves;

"Under what legal framework am I able to do so?"

There must be a basis in law ...



Consent is not just the absence of overt protest to the offered intervention – that is just passive acquiesce / acceptance. If someone is so incapacitated that cannot say 'No', then it stands to reason that they cannot say 'Yes' either.

Myth-Busting: Next of Kin



- Did you know that there is no legal basis for 'Next of Kin' (NoK)?
- The term 'Next of Kin' is often used in Health and Social Care as a euphemistic shorthand for 'Who is the person we communicate with about you?'
- In law NoK has no status when the patient is alive - it is misleading too because it does not clarify if this is the person who is the nearest relative of the patient or the person most important to the patient. Indeed, these can often be different people.
- If someone is in hospital and unable to consent to treatment, NoK have no legal right to give consent on their behalf unless certain legal procedures are in place, such as a Lasting Power of Attorney (LPA)
<https://www.hampshiresab.org.uk/lasting-power-of-attorney/>
- There is actually only one situation where 'next of kin' is legally valid; this is if someone dies without leaving a will.
- In this case, the deceased person's estate will be passed on to the person or people who are their closest blood relation, also termed as their next of kin.
- [NoK-Booklet-for-interactivepdf.pdf \(bournemouth.ac.uk\)](#)



Making Choices; making decisions

The Mental Capacity Act 2005

Whilst there are a few legal frameworks in England and Wales that govern some aspects of decision making and consent, today we will be focussing on the main one, the Mental Capacity Act (2005).

The MCA presumes that a person aged 16 and over have the capacity to make their own decisions unless proven otherwise (they have had an assessment showing they don't) and aims to support and protect them in decision making.

Where the person has been assessed as not being able to make the decision the MCA sets out how decisions can be made in their 'Best Interest'.

A person's rights under the MCA are:

- To make their own decisions.
- Assumption of capacity.
- Support to make decisions.
- Any decisions made for the person must be in their Best Interest.

[What is the Mental Capacity Act? - Mind](#)

The Mental Capacity Act (2005)

- Applies to decisions/treatment for both physical health and mental health needs.
- Also applies to welfare and financial decisions.
- Allows decisions to be made by the 'decision maker(s)' subject to acting in the person's **best interests**, using the **least restrictive** option and other safeguards [Who is the best interests decision maker? – MASMC \(myadultstillmychild.co.uk\)](http://myadultstillmychild.co.uk).
- Uses criteria based on assessment of capacity so that as soon as the person regains the power to make a decision/mental capacity, any best interest actions cease for them.
- Practitioners are protected from liability for decisions taken in a person's best interest under Section 5 of the MCA 2005.
- Best interest decisions can only be taken for those assessed as lacking capacity for the decision, at the time the decision needs to be taken (time and decision specific).
- The MCA is underpinned by 5 Principles, which we will go through now.

The Five Principles of the Mental Capacity Act 2005



1. **A presumption of capacity.**
 - Start by thinking I can make this decision.
2. **Individuals are supported to make their own decision.**
 - Do all you can to help me make this decision.
3. **Unwise Decisions.**
 - You must not say I lack capacity just because my decision seems unwise.
4. **Best Interests.**
 - Use a best interest checklist for me if I can't make the decision.
5. **Less Restrictive Option.**
 - Check the decision does not stop my freedom more than needed.

The 5 Principles of the MCA 2005



After Shropshire Council

1. A presumption of capacity.

Start off by thinking that everyone can make their own decisions. Ask yourself, “does it appear that this person can make this decision?” Are you assured that they have understood?

If not, apply principle 2.

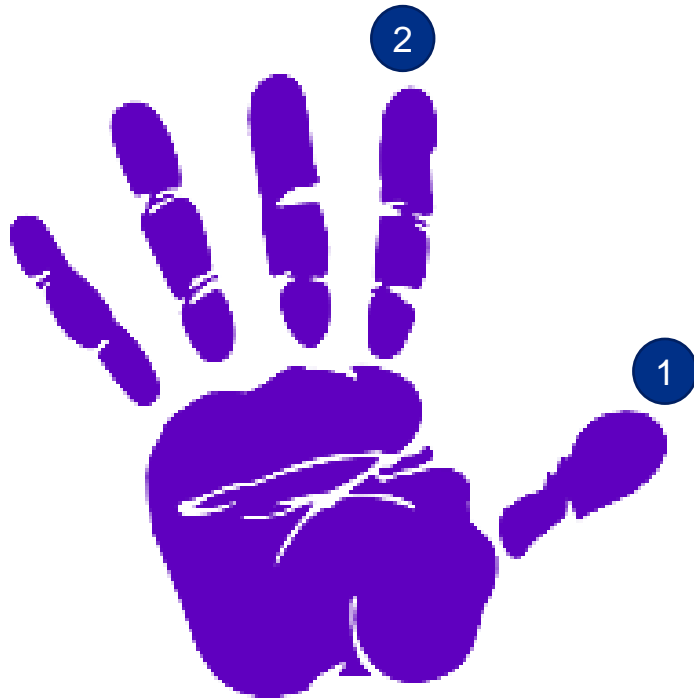


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#MCA

The 5 Principles of the MCA 2005



After Shropshire Council

1. A presumption of capacity.
2. Individuals are supported to make their own decision.

To justify any intervention, you must show that you have taken all practicable steps to help them to make the decision themselves.



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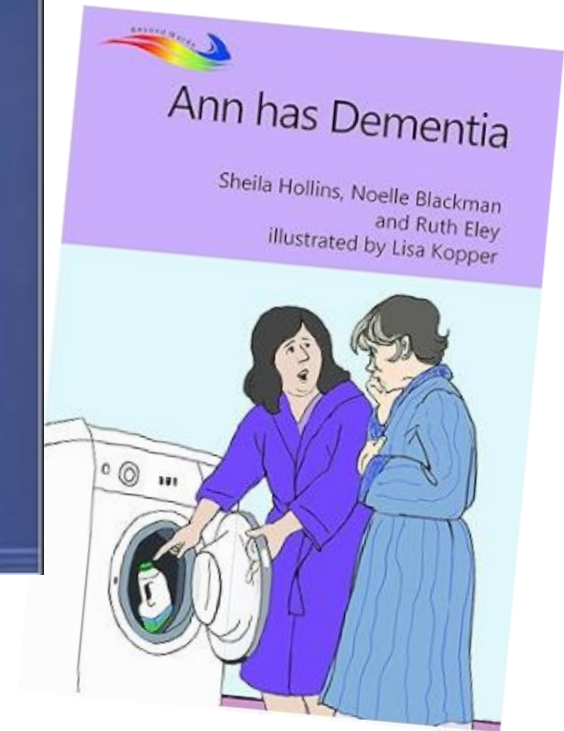
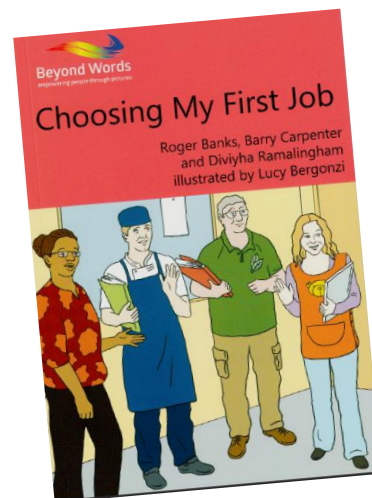
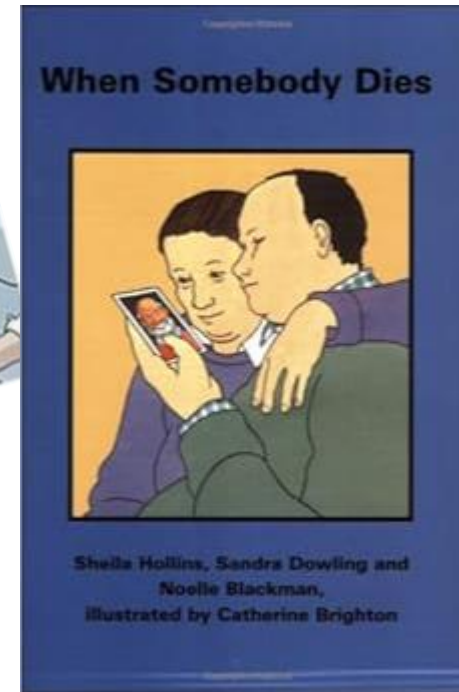
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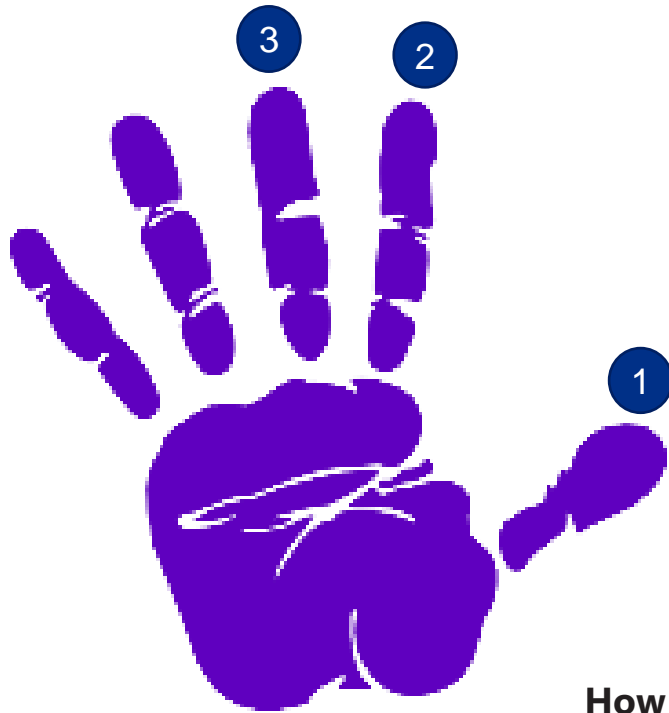
Helping people to understand the decision

A wide range of resources are available to support Principle 2, such as the invaluable 'Beyond Words' series of books and videos that cover a wide range of topics, some quite difficult, in an accessible pictorial format ...

[Stories for health & social care — Beyond Words \(booksbeyondwords.co.uk\)](http://booksbeyondwords.co.uk)



The 5 Principles of the MCA 2005



1. A presumption of capacity.
2. Individuals are supported to make their own decision.
3. Unwise Decisions.
These do not necessarily mean a lack of capacity

How do I know if it's an unwise mental capacity decision?

Beth Yolland-Jones | 14 Oct 2022

After Shropshire Council <https://www.linkedin.com/pulse/how-do-i-know-its-unwise-decision-beth-yolland-jones>



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The unwise decision mouse!

One person's (so called) unwise decision could be another person's calculated risk ...

Me, getting ready to make the same bad choice but also being a little more prepared from the last time it backfired.



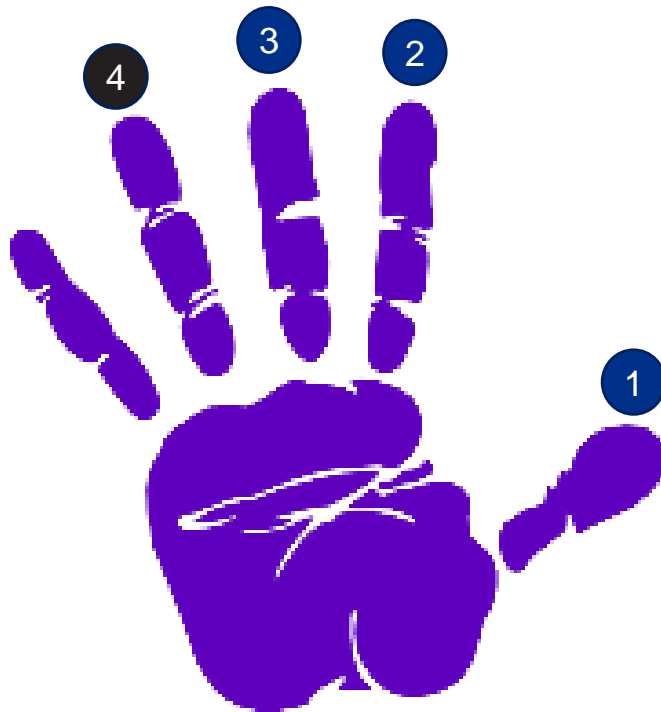
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The 5 Principles of the MCA 2005



After Shropshire Council

1. A presumption of capacity.
2. Individuals are supported to make their own decision.
3. Unwise Decisions.
4. Best Interests.

This must be in the person's best interests, not others.

It is crucial to consult with those people who know the person well such the person's primary carers to establish what is truly in their best interest.



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Best interest decisions include considering the persons emotional well-being ...

Local Authority X v
MM & Anor (No. 1)
(2007)

"What good is it
making someone
safer if it merely
makes them
miserable?"

- Lord Justice Munby





Who is the Best Interest Decision Maker?

“Wherever possible all individuals should be involved in decisions about their care and treatment.

Every effort should be made to ensure that their views are sought and shared.

Where individuals are unable to express their wishes a Best Interest decision should be made.

The decision about who is the Best Interests decision maker is a crucial point.

For day-to-day decisions about care or activities of daily life, it is likely to be the person’s primary carer. (This will often be the parent(s) who may have already cared for that young adult all their lives making decisions under parental

responsibility. But from the age of 16, this is governed by the MCA, and not a right under parental responsibility).

For decisions about serious medical treatment, the law regards the decision maker as being the person responsible for delivering the treatment – e.g., the key surgeon or doctor.

Understandably, this can cause distress and conflict where a parent who has made every decision all the child’s life is then told that the parent is not the sole decision maker when a child over 16 needs serious medical treatment.”

[Who is the best interests decision maker? – MASMC \(myadultstillmychild.co.uk\)](#)

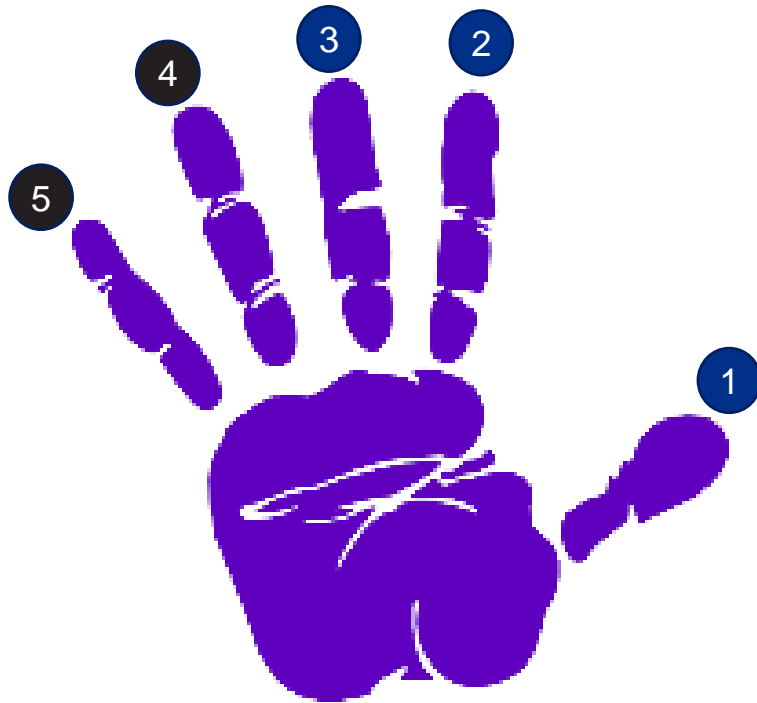
Best Interest Check List

1. Avoid making assumptions based on age, appearance, condition or behaviour.
2. Consider a person's own known wishes, values and beliefs.
3. Take account of the views of family and informal carers regarding the care or treatment.
4. Consider if the decision can be delayed until the person regains capacity.
5. Involve the person in decision-making, even if they lack capacity to consent.
6. Demonstrate that all views and evidence have been considered
 - especially pertinent if there is conflict.
7. Provide clear objective reasons to support why a decision is in the person's best interest.
8. Take account of any Independent Mental Capacity Advocate (IMCA) involved.
9. Take the less restrictive alternative or intervention.

Best Interest Checklist taken from Department of Health 2007 – MCA Acute Hospitals Training Set

[The best interests checklist - Mental Capacity Toolkit](#)

The 5 Principles of the MCA 2005



1. A presumption of capacity.
2. Individuals are supported to make their own decision.
3. Unwise Decisions.
4. Best Interests.
5. Less Restrictive Option.

After Shropshire Council



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Less Restrictive Option



H·A·M·M·E·R

DON'T USE A SLEDGEHAMMER TO CRACK A NUT.
(ENGLISH PROVERB)

Assessing a person's capacity in respect of care and support

LBX v K, L and M [2013] EWHC 3230 (Fam) and A Local Authority v GP [2020] EWCOP 56

C A a s p s a e c s i s t m y e n t

The Legal Test

Section 2(1) Mental Capacity Act 2005 -

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

To apply the test, it can best be broken down into three questions:

a. Is the person able to make a decision about where to live?

If they cannot:

b. Is there an impairment or disturbance in the functioning of the person's mind or brain?

If so:

c. Is the person's inability to make the decision because of the identified impairment or disturbance?

Relevant
Information
to provide
to the
person

Information
NOT
relevant

A person is unable to make a decision on residence if he / she / they are unable to:

- **Understand** the information relevant to the decision
- or
- **Retain** that information
- or
- **Use or weigh** that information as part of the process of making the decision
- or
- **Communicate** his / her / their decision (by any means)

- How his/her care will be funded
- How the overarching arrangements for monitoring and appointing care staff work
- Why having a support worker is important to access the community
- The importance of structure and routine in a person's day
- The importance of regular access to the local community to build and maintain confidence in daily life and independence and to avoid a deterioration in anxiety
- The importance of developing relationships with others outside of close family to build and maintain his/her confidence in daily life and independence and to avoid a dependency upon close family members and to develop the person's own interests and opportunities for a social life with peers
- The opportunities that may be available to engage in training, education, volunteering or employment.

As highlighted in **B v A Local Authority [2019] EWCA Civ 913** the relevant information provided to a person must always be **tailored to the specific situation of the individual in question.**

- What areas he/she needs support with
- What sort of support he/she needs
- Who will be providing him/her with support
- What would happen if he/she did not have any support or he/she refused it
- That carers might not always treat him/her properly and that he/she can complain if he/she is not happy about their care



Making Choices; making decisions; consent

Resources

- [Consent to treatment - Children and young people - NHS](http://www.nhs.uk)
- [Mental Capacity Act 2005 | Parents Guide To Support | YoungMinds](#)
- [What is The Mental Capacity Act? | Mencap](#)
- [What is the Mental Capacity Act? - Mind](#)
- [Mental Capacity Act – MASMC](http://myadultstillmychild.co.uk)
- [Who is the best interests decision maker? – MASMC](http://myadultstillmychild.co.uk)

A hand is holding a light-colored sign with dark, handwritten-style text. The text on the sign reads "Under What Legal Framework?". Overlaid on the sign is the text "Any Questions please?" in a white, bold, sans-serif font with a dark outline. The background is slightly blurred, showing what appears to be a window with blinds.

Any Questions please?

Thank You



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england.nhs.uk