



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1 **E+W**

#### PERSONS WHO LACK CAPACITY

##### *Preliminary*

## 2 **People who lack capacity** **E+W**

- (1) For the purposes of this Act, 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 the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
  - (a) a person's age or appearance, or
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person (“D”) may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or
  - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

*Status: Point in time view as at 01/10/2007. This version of this cross heading contains provisions that are not valid for this point in time.*

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#### Commencement Information

- II** S. 2 wholly in force at 1.10.2007; s. 2 not in force at Royal Assent see s. 68(1)-(3); s. 2 in force for certain purposes at 1.4.2007 by S.I. 2007/563, arts. 1(2)(3), 2(2)(b)(3) and s. 2 in force otherwise at 1.10.2007 by S.I. 2007/1897, art. 2(2)(b)

### 3 Inability to make decisions **E+W**

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
  - (b) failing to make the decision.

#### Commencement Information

- I2** S. 3 wholly in force at 1.10.2007; s. 3 not in force at Royal Assent see s. 68(1)-(3); s. 3 in force for certain purposes at 1.4.2007 by S.I. 2007/563, arts. 1(2)(3), 2(2)(c)(3) and s. 3 in force otherwise at 1.10.2007 by S.I. 2007/1897, art. 2(2)(c)

### 4 Best interests **E+W**

- (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
- (a) the person's age or appearance, or
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
- (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
- (3) He must consider—
- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

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- (b) if it appears likely that he will, when that is likely to be.
- (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
- (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
- (6) He must consider, so far as is reasonably ascertainable—
- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
  - (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
  - (c) the other factors that he would be likely to consider if he were able to do so.
- (7) He must take into account, if it is practicable and appropriate to consult them, the views of—
- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
  - (b) anyone engaged in caring for the person or interested in his welfare,
  - (c) any donee of a lasting power of attorney granted by the person, and
  - (d) any deputy appointed for the person by the court,
- as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).
- (8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—
- (a) are exercisable under a lasting power of attorney, or
  - (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
- (9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
- (10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
- (11) “Relevant circumstances” are those—
- (a) of which the person making the determination is aware, and
  - (b) which it would be reasonable to regard as relevant.

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**Modifications etc. (not altering text)**

- C1 S. 4(1)-(7) applied (E.) (1.6.2010) by [The National Health Service \(Direct Payments\) Regulations 2010 \(S.I. 2010/1000\)](#), [art. 1\(3\)](#)

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### Commencement Information

- I3** S. 4 wholly in force at 1.10.2007; s. 4 not in force at Royal Assent see s. 68(1)-(3); s. 4 in force for certain purposes at 1.4.2007 by S.I. 2007/563, arts. 1(2)(3), 2(2)(d)(3) and s. 4 in force otherwise at 1.10.2007 by S.I. 2007/1897, art. 2(2)(d)

VALID FROM 01/04/2009

### [<sup>F1</sup>4A Restriction on deprivation of liberty **E+W**

- (1) This Act does not authorise any person (“D”) to deprive any other person (“P”) of his liberty.
- (2) But that is subject to—
  - (a) the following provisions of this section, and
  - (b) section 4B.
- (3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
- (4) A relevant decision of the court is a decision made by an order under section 16(2)
  - (a) in relation to a matter concerning P’s personal welfare.
- (5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

### Textual Amendments

- F1** Ss. 4A, 4B inserted (1.4.2009) by Mental Health Act 2007 (c. 12), ss. 50(2), 56; S.I. 2009/139, art. 2(b) (with art. 3)

VALID FROM 01/04/2009

### 4B Deprivation of liberty necessary for life-sustaining treatment etc **E+W**

- (1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.
- (2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.
- (3) The second condition is that the deprivation of liberty—
  - (a) is wholly or partly for the purpose of—
    - (i) giving P life-sustaining treatment, or
    - (ii) doing any vital act, or
  - (b) consists wholly or partly of—
    - (i) giving P life-sustaining treatment, or
    - (ii) doing any vital act.
- (4) The third condition is that the deprivation of liberty is necessary in order to—

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- (a) give the life-sustaining treatment, or
- (b) do the vital act.

(5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.]

#### Textual Amendments

F1 Ss. 4A, 4B inserted (1.4.2009) by Mental Health Act 2007 (c. 12), ss. 50(2), 56; S.I. 2009/139, art. 2(b) (with art. 3)

## 5 Acts in connection with care or treatment **E+W**

- (1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if—
  - (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
  - (b) when doing the act, D reasonably believes—
    - (i) that P lacks capacity in relation to the matter, and
    - (ii) that it will be in P's best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that he would not have incurred if P—
  - (a) had had capacity to consent in relation to the matter, and
  - (b) had consented to D's doing the act.
- (3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.
- (4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment).

## 6 Section 5 acts: limitations **E+W**

- (1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (3) The second is that the act is a proportionate response to—
  - (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.
- (4) For the purposes of this section D restrains P if he—
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists.
- (5) But D does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention (whether or not D is a public authority).

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- (6) Section 5 does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by—
- (a) a donee of a lasting power of attorney granted by P, or
  - (b) a deputy appointed for P by the court.
- (7) But nothing in subsection (6) stops a person—
- (a) providing life-sustaining treatment, or
  - (b) doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition,
- while a decision as respects any relevant issue is sought from the court.

## 7 **Payment for necessary goods and services** **E+W**

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.
- (2) “Necessary” means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.

## 8 **Expenditure** **E+W**

- (1) If an act to which section 5 applies involves expenditure, it is lawful for D—
- (a) to pledge P's credit for the purpose of the expenditure, and
  - (b) to apply money in P's possession for meeting the expenditure.
- (2) If the expenditure is borne for P by D, it is lawful for D—
- (a) to reimburse himself out of money in P's possession, or
  - (b) to be otherwise indemnified by P.
- (3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person—
- (a) has lawful control of P's money or other property, and
  - (b) has power to spend money for P's benefit.

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