

The Mental Capacity Act & care and support decisions

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agenda

- 1) Some basics
- 2) Needs assessments
- 3) Care decisions
- 4) The significance of best interests
- 5) Other overlaps

MCA v Care Act/SSWBA

Best interests

Decisions where the consent of the person is required

Decision-makers must choose between available options

Decision-makers have no greater powers than the person has if they had capacity

Court of Protection can take the best interests decision

Public law

Decisions by a local authority whether (or not) to provide a service

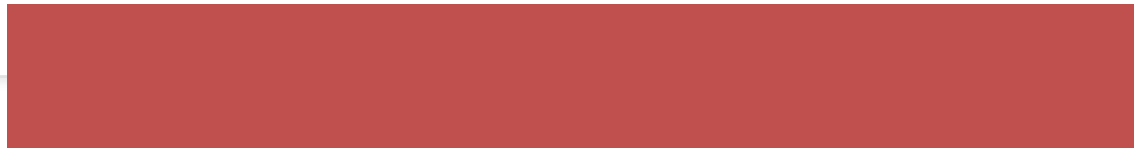
Relevant considerations include resources

Judicial review is vehicle through which to challenge unreasonable or irrational decisions

What is care & support?

- Broadly, care & support refers to decisions that relate to the provision of social care services
- Under Care Act/SSWBA it has broad meaning, including care homes, supported living, personal care at home, community facilities, personal assistants, etc
- It does not include (1) carer's services, (2) most health services & housing (which falls under housing legislation)
- Not limited to services provided by a local authority – includes self-funded and self-arranged services

Needs assessments



Duty to assess

Sections 9 & 11 Care Act & 19 & 20 SSWBA

- A local authority must carry out a needs assessment where it appears that an adult may have needs for care and support
- The duty to assess does not apply if the adult refuses the assessment
- However, the local authority is still required to assess if the adult lacks capacity & the assessment is in their best interests
- The duty also still applies in safeguarding cases
- In Wales, the local authority is also required to assess if the adult lacks capacity & there is an 'authorised person' to make the decision under the MCA

The capacity assessment

Sections 2-3 of the Mental Capacity Act

A person lacks capacity in relation to a matter if at the material time they are unable to make a decision because of an impairment of, or a disturbance in the functioning of, the mind or brain.

A person is unable to make a decision if they are unable:

- to understand the information relevant to the decision,
- to retain that information,
- to use or weigh that information, or
- to communicate the decision.

Capacity & assessments

A Local Authority v GP [2020] EWCOP 56

- GP was a 19-year-old man with autism, anxiety & severe learning disabilities
- He lived with his parents & had attended a special school from 2012
- Concerns when his father indicated that GP would be removed from the school
- Social worker unable to engage the family
- GP stopped attending school & concerns his skills were deteriorating
- Local authority applied to Court of Protection to determine if GP had capacity to accept or refuse care, support & education

“To refuse an assessment of his care and support needs pursuant to the Care Act 2014”

- A local authority has a statutory duty to meet a person’s eligible care needs, which may be to prevent or delay the development of needs for care & support or reducing needs that already exist
- The assessor may speak to other adults or professionals involved in GP’s care & that GP may refuse to consent to this
- The local authority will assess how GP’s well-being can be promoted & whether meeting these needs will help GP achieve his desired outcomes

The relevant info does not include “the importance of GP participating as fully as possible in the assessment”

“To request an EHC needs assessment under s.36(1) of the Children & Families Act 2014”

- An EHC plan is a document that says what support a child or young person who has SEN should have
- Other people will be consulted during the assessment process including parents, teachers & other professionals
- If assessed as requiring an EHC plan, the young person has an enforceable right to the education set out in their plan
- An EHC plan is only available up to the age of 25 years

The court's decision

- Interim declarations made that GP lacked capacity to refuse a Care Act assessment
- Specifically, he did not understand that if he refused to consent to the assessment, his needs would not be assessed & he would not receive the appropriate support
- Also, he did not understand what an EHC plan is & could not make a request for an assessment

Care decisions



Capacity to decide on care

LBX v K & Ors [2013] EWHC 3230 (Fam)

- L was a 29-year-old man with mild learning disabilities
- The local authority sought an order to move L from his supported living placement into his own supported flat
- There had been a long-running dispute between the local authority & family (particularly his father)
- Psychiatrist's evidence on capacity was described as superficial & based on generality – further assessment needed
- Five months later, in a further judgment, L was found to have capacity (borderline) on residence, care & contact

The relevant information for care decisions

- What areas the person needs support with
- What sort of support is needed
- Who will be providing the support
- What would happen if they did not have any support or they refused it
- Carers might not always treat them properly & they can complain if they are not happy about the care

The relevant info does not include (1) how care is funded & (2) overarching arrangements for monitoring & appointing care staff work

Relevant information also does not include ...

A Local Authority v GP [2020] EWCOP 56

- Why having a support worker is important to the person to access the community
- The importance of structure & routine in the person's day
- The importance of regular access to the local community to build and maintain the person's confidence
- The importance of developing relationships with others outside of the person's close family to build & maintain their confidence
- The opportunities that may be available to engage in training, education, volunteering or employment

Overlap – care & residence

Tower Hamlets LBC v A [2020] EWCOP 21

- A was aged 69 with Korsakoff's dementia
- Previously lived at home in a flat & supported by close group of friends (LPAs made)
- Admitted to hospital with eye problems
- Local authority sought court order to move her into care home
- Moved to care home pending final court decision
- Local authority willing to offer trial care package at home
- A wanted to go home but had 'settled' in care home

Decision of the court

- Care & residence are individual domains, but assessments should not be in 'silos'
- There is overlap between the relevant information for care & residence, but residence does not incorporate care
- Capacity to make residence decisions requires a broad understanding of the care available
- Judge agreed with psychiatrist that A lacked capacity to make care decisions, but had capacity to make residence decisions

The significance of best interests



Can best interests trump public law?

N v ACCG [2017] UKSC 22

- Young man (MN) with severe learning & physical disabilities
- Lacks capacity on all relevant areas (has cognitive ability of a child aged less than 1)
- Loving parents, but unable to co-operate with the authorities (father intimidating towards social workers & had assaulted one social worker)
- Led to care proceedings – & MN placed on a care order
- On his 18th birthday, NHS took over his care & following court proceedings he was placed in a residential care home
- Parents reluctantly accepted the placement, but their ultimate aim was for him to return to live at home

The two key issues

- 1) Whether MN could visit his parents at their home – 6 miles from the care home? (NB care home staff not willing due to intimidation, & CCG not willing to fund alternative carers to be trained and paid to do so)
- 2) Could his mother assist with intimate care (NB care home were not willing for this to be done – partly due to fears that mother would not co-operate but also she had refused to undertake the necessary training in manual handling)

The parents' arguments

- The Court of Protection has jurisdiction under s.16 MCA to make best interests declarations on welfare (inc contact)
- It is only when that decision is made should the funding options be considered
- If the CCG still refuses to fund what the court thinks best, that can be challenged through JR
- Otherwise, the CCG could just cut off the court's best interests inquiry at the outset by simply refusing to provide anything other than its own proposals
- Also, individual preferences should be at the centre of the care planning process & it is the role of the Court to substitute for the preferences of the person lacking capacity

Supreme Court's decision (1)

- Confirmed that the Court of Protection's jurisdiction is limited to decisions that a person is unable to take for themselves
- Since a person with capacity has no power to demand a service, then the court can do no such thing on the person's behalf
- This means that the court, just like the person, can only choose between available options

Supreme Court's decision (2)

- Legislation such as the Care Act has its own principles & criteria – including the allocation of scarce resources
- Court's case management powers can be used to identify the issues & investigate if modifications are possible
- But following this, the Court is entitled to conclude that no useful purposes will be served by continuing the hearing
- Appeal therefore dismissed



There were good reasons, not least in the history, for thinking that the parents' wishes were impracticable and that the CCG had good reasons for rejecting them

...

[This] was a case in which the court did not have power to order the CCG to fund what the parents wanted. Nor did it have power to order the actual care providers to do that which they were unwilling or unable to do.



Other overlaps



Other overlaps

- **Right to a supported self-assessment** (England only) – applies only to those with capacity
- **Duty to meet needs** – applies to self-funders who lack capacity & no-one else can arrange services for them
- **Power to charge** – applies irrespective of capacity (but MCA does not give a local authority access to a person's income or assets)
- **Agreeing the care plan** – in England, local authorities must take all reasonable steps to reach agreement with the adult
- **Direct payments** - Care Act and SSWBA which allow direct payments to be provided for people who lack the relevant capacity
- **Independent advocacy** - the duty to provide an advocate under the Care Act includes adults who lack capacity (but is broader)

ANY QUESTIONS

DO YOU HAVE?

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Thank you for listening