Mental Capacity, decision making & the Mental Capacity Act 2005

Luke Clements

www.lukeclements.com

Key Principles / Concepts

1. Presumption of capacity
2. A functional question
3. Understanding the consequences
4. Ability to rationalise
5. Appreciating there is a problem.
6. Ultimately a legal question
7. Next of kin – of limited meaning
8. Best interests

Section 1 checklist

(2) presumption of capacity.

(3) not to be treated as unable to make a decision unless all practicable steps … taken without success.

(4) not to be treated as unable to make a decision merely because … makes an unwise decision.

(5) an act done … on behalf of a person who lacks capacity must be done … in his best interests.

(6) before the act is done … regard must be had to whether the purpose … effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Code of Practice

Presumption of capacity

Re SB (A Patient; Capacity to Consent to Termination) (2013)

- 'high-achieving information technologist' with bi-polar disorder
- some of her views were influenced by her paranoid thoughts but she also held a range of rational reasons for wanting to have a termination.

a 'right' to make unwise decisions?

Joint Ombudsmen report (2011)

- Patient with a significant mental illness who was receiving support from a CMHT
- Health deteriorated, cousin complained:
- response was that he was:

  'a long standing, voluntary patient with capacity, entitled to reject assistance, which he did'.

a 'right' to make unwise decisions?

Ombudsmen concluded:

- no evidence that CMHT had actually considered this issue from the perspective, not only of the Mental Capacity Act 2005, but also 'human rights law':
- of the 'balance to be struck between an individual's autonomy and dignity'.

See also Leeds Ombudsman Report (2011)

2. Functional Test

Section 2(1) MCA 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 the matter

because of an impairment of, or a disturbance in the functioning of, the mind or brain

Functional Test

A local authority v MM and KM (2007)

- lacked capacity to decide where she should live; to marry; and to manage her own money
- But did have capacity to have sexual relations.

Section 3(1) MCA 2005

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).

Understand, retain & 'weigh' "relevant information' & communicate decision

RT & LT v A Local Authority (2010)

- avoided taking in information that she did not want to hear – and this meant that it impaired her ability to understand all relevant information;

Understand, retain & 'weigh' "relevant information' & communicate decision

A local authority v. E (2012)

- Could understood and retain the relevant information and communicate her decision.

However

- obsessive fear of gaining weight made her incapable of weighing the pros / cons of eating:
  - the compulsion to prevent calories entering her system has become the card that trumps all others. The need not to gain weight overpowers all other thoughts'
-

5. Understanding there is a problem

***White v Fell* (1987)**

Few people have the capacity to manage all their affairs unaided …

…

To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice

6. Ultimately a legal test

Ultimately whether or not a person has capacity is a legal question.

Re K (Enduring Powers of Attorney) (1988)

Concerned an Enduring Power of Attorney (EPA).

A person makes an EPA whilst s/he has capacity. It takes effect once s/he has lost the capacity to handle their financial affairs.

7. Next of Kin – limited relevance

If a person lacks capacity,
the views of ‘next of kin’ important,
but not necessarily determinative.

Best interests

- Elusive and subjective concept.
- Does not necessarily mean ‘what is best for’ a person in the ordinary meaning of the phrase.
- Meaning more akin to ‘what the person would have done’ if s/he had not lost capacity
- Whose best interests?

Best interests ~ s4 MCA 2005

- Can the decision be put off?
- Not based on an age/condition specific assumption
- Duty to encourage / promote participation & ability to decide
- Ascertain past views
- Seek out views of significant others

Best interests v. CC assessments

R (W) v Croydon LBC (2011)

Facts

AH v. Hertfordshire Partnership NHS Foundation Trust & Ealing PCT (2011)

Facts

AH v. Hertfordshire Partnership NHS Foundation Trust & Ealing PCT (2011)

- accepted no 'balance-sheet' BI assessment
- unable 'to identify a single dependable benefit arising from the proposed move'
- the reality was that community living did not hold benefits for him – and that 'facing up to these realities does not in any way diminish or demean [him], but values and respects him for who he is.'

AH v. Hertfordshire Partnership NHS Foundation Trust & Ealing PCT (2011)

Mr Justice Jackson (para 80):

guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect.

… .

These residents are not an anomaly simply because they are among the few remaining recipients of this style of social care. They might better be seen as a good example of the kind of personal planning that lies at the heart of the philosophy of care in the community.

CC v KK (2012)

Facts

- 82 year old; Parkinson's Disease and vascular dementia,
- Several short periods in hospital but returned home to her bungalow
- telephone lifeline service which she used over a 1,000 times in a 6 month period.
- assessed by community matron as lacking the capacity to make decisions about her care needs and residence;

CC v KK (2012)

Facts

- On admission to nursing home suffering from dehydration and a urinary tract infection.
- KK wanted to return home but 2 experts considered she lacked capacity to make this decision and that – on a balance sheet assessment – it was in her best interests to remain in the care home.

Judgment

- Given the risks – there was a danger of being overly protective and failing 'to carry out an assessment of capacity that is detached and objective.'

CC v KK (2012)

Judgment

KK gave evidence:

"if I fall over and die on the floor, then I die on the floor"

Judge considered that this:

"demonstrates … she is aware of, and has weighed up, the greater risk of physical harm if she goes home. I venture to think that many and probably most people in her position would take a similar view."

.

CC v KK (2012)

Judgement:

- In assessing KK's capacity it had to ascertained if she understood the 'relevant information'

LA obliged therefore to:

- identify the care package that would or might be available if she returned home
- 'The choice which KK should be asked to weigh up is not between the nursing home & a return to the bungalow with no or limited support, but rather between staying in the nursing home & a return home with all practicable support'.

Re M (Best Interests: Deprivation of Liberty) (2013)

M (lacked capacity to decide where to live & in care home subject to DoLS)

NHS believed that if she left she might not comply diabetes management / become very ill / die.

M was bitterly unhappy in the care home – where she had threatened self harm / suicide

Held

- she should be allowed to return to her bungalow.
- there was 'little to be said for a solution that attempts, without any guarantee of success, to preserve for her a daily life without meaning or happiness and which she, with some justification, regards as insupportable.'

Care planning and 'incapacity'

***Re MN* (2015)**

Courts can only choose between the available options.

Can 'probe'; and ask for a 're-think

But not compel

***Milton Keynes Council v RR & Ors* (2014)**

RR was moved into care home on basis of flawed 'safeguarding' concern

Independent Social Worker and OS recommended that she should go home. However MKC only prepared to offer a care home placement.

Best interests

MCA 2005 Guidance

16.21 Sometimes it will be fairly obvious that staff should disclose information …

16.22 … information may need to be disclosed as part of the process of working out someone's best interests. A social worker might decide to reveal information about someone's past when discussing their best interests with a close family member. But staff should always bear in mind that the Act requires them to consider the wishes and feelings of the person who lacks capacity.

Best interests

GMC guidance (2009)

You should establish with the patient what information they want you to share, who with, and in what circumstances. This will be particularly important if the patient has fluctuating or diminished capacity or is likely to lose capacity, even temporarily. Early discussions of this nature can help to avoid disclosures that patients would object to. They can also help to avoid misunderstandings with, or causing offence to, anyone the patient would want information to be shared with. [para 64]

Best interests

GMC guidance (2009) para 65

- where a patent lacks capacity, unless they indicate otherwise:

  it is reasonable to assume that patients would want those closest to them to be kept informed of their general condition and prognosis

Best interests

Local Government Ombudsman (1999)

Confidentiality' should not have been used (in specific case) as a reason for not disclosing information to parents of a 24-year-old man with serious LD

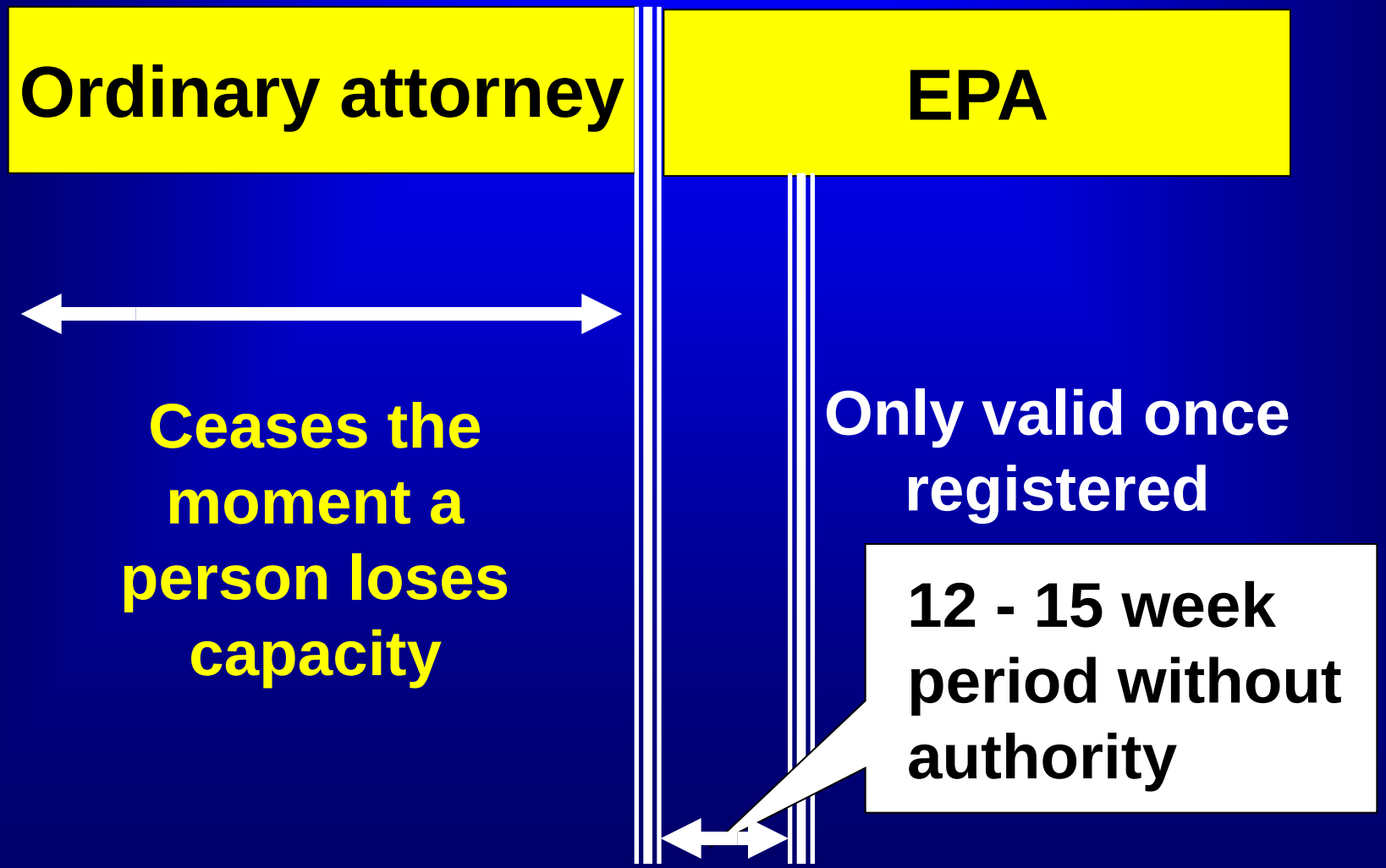
– I accept that this would not be regular practice when the Council is looking after an adult: the privacy of the individual demands that the parents be kept at some distance. But [the user] had such a high level of dependency that the Council should have been willing to reconsider its approach to parental involvement in this case

Powers of Attorney

Three types

1. Ordinary power of attorney
2. Enduring Power of Attorney
3. Lasting Power of Attorney

Enduring powers of Attorney



Lasting powers of Attorney

Financial LPA

Personal Welfare LPA

Financial LPA's

- Buying or selling property
- Opening & operating bank a/c etc
- Claiming & receiving benefits etc.
- Dealing with tax affairs
- Investing savings
- Making limited gifts
- paying for private medical care and residential care or nursing home fees.

Personal Welfare LPA's

- where the donor should live;
- day-to-day care, decisions eg diet and dress
- Contact decisions
- Consenting & refusing medical examination & treatment
- Arrangements for medical treatment
- Community care assessments
- Agreeing to social, education etc activities
- Rights to access to personal information
- Complaints about care or treatment.

Lasting Powers of Attorney

- Separate forms must be completed to create Financial and Personal Welfare LPAs;
- Financial LPAs can be used before loss of capacity;
- Personal welfare LPAs only after loss of capacity;
- Procedure for creation;
- Procedure for registration.

Court of Protection

- MCA 2005 sections 45 – 61.
- Appoint ‘deputies’.
- Deputies’ powers limited to what is strictly necessary
- Potentially very wide powers however

Appointeeships

- **Reg 33 Social Security (**Claims & Payments**) Regs 1987 allows for an appointee … where the claimant is "unable for the time being to act".**
- **Guidance states that a person is unable to act if they "do not have the mental ability to understand and control their own affairs, for example because of senility or mentally illness".**
- **The DWP is the responsible authority for the appointment, supervision and revocation of appointeeships.**
- **The appointee is personally responsible for ensuring that the social security monies are applied in the patient's interests**

Common law principle of necessity

Where a person believes:

- **That another person lacks capacity: and**
- **It is necessary to do something for that person; and**
- **It is in that other person's 'best interests'.**

Then (in general) it will not be unlawful to act accordingly

Section 5 Acts

- Where a person ‘acts in connection with the care or treatment of a someone believed to lack capacity; and
- The person has formed a reasonable belief as to
- the person’s lack of capacity and
- best interests
- then the person will not be liable for the action
- provided it is something that the incapacitated person could have consented to had s/he capacity.

Section 6 ~ restraint

Restraint can only be used when:

1. **the person restraining reasonably believes it is necessary to prevent harm to the incapacitated person; and**
2. **it is proportionate both to:**

   the likelihood of the harm and

   the seriousness of the harm.
3. **if it would not constitute detention under article 5(1) ECHR**

ZH v Commissioner of Police (2012)

FACTS

16 years old severely autistic and epileptic young man … was highly reactive if touched

- Purportedly under MCA 2005;
- Requirements of section 5 & 6 -
- Underpinning principles (section 1(6)) -x
- Was this a deprivations of liberty?
- Was it a disproportionate interference with family life?

Article 5(1)

- **No one shall be deprived of liberty**
- **Except**
- For a specified reason (eg a person's mental disorder)
- BUT in every case it must be 'in accordance with a procedure prescribed by law and
-

The Deprivation of Liberty Safeguards

The Bournewood Gap

- *R v Bournewood Community & Mental Health NHS Trust ex p L* **(1998)**
- *HL v UK* 5th October 2004.
- MHA 2007 amends the MCA 2005
- 2008 ~ DOLS Code of Practice Addendum to 'Main' MCA Code

Capacity to decide where to live?

JE v DE and Surrey CC (2006)

Newham LBC v BS & S (2003)

HL v UK **(2004)**

Deprivation of liberty

***HL v UK* (2004)**

- restraint used, including sedation where resisting
- complete control over care significant period
- control over treatment, contacts, residence
- would be prevented from leaving if attempt to
- request by carers for discharge refused
- unable to maintain social contacts because of restrictions placed on access to other people
- lost autonomy because of continuous supervision & control.

Code of Practice 2.5

P v. Cheshire West (2014)

A deprivation of liberty occurs when a person is

under continuous supervision and control and is not free to leave.

The Department of Health interim guidance stresses that 'factors which are NOT relevant':

- the person's compliance or lack of objection and
- the reason or purpose behind a particular placement.

MCA DoLS
Three routes to detention

The MHA 2007 amends MCA 2005 and provides for 3 routes to MCA detention:

1. Standard or urgent authorisations, under s4A & Sch A1; and
2. Court of Protection orders under s16(2)(a) ~ eg supported living / day centres.
3. MHS action necessary for life-saving or other emergency treatment under s4B

MCA Deprivation of Liberty Terminology

Managing Authority

- A hospital (private or NHS) or care home

Supervisory body

For a care home

- the LA where the person is 'ordinarily resident';

For a hospital

- the commissioning PCT (in Wales – LHB / WAG)

NB

it follows that MA & SB may be the same

MCA Deprivation of Liberty Standard Authorisations

- duty on hospitals and care homes to identify anyone at risk of deprivation of liberty and,
- if they do not consider that a less restrictive regime is possible,
- request a standard authorisation from the supervisory body.
- If deprivation necessary straight away – then the 'managing authority' can give itself an 'urgent authorisation, pending determination of the standard authorisation

MCA Deprivation of Liberty Standard Authorisations

It is unlawful for a hospital or care home to detain a person without an authorisation

The supervisory body must:

- Consider need for IMCA
- commission 6 assessments
- Standard non-statutory forms – different in England & Wales

MCA Deprivation of Liberty Timescales

Standard authorisations

- 21 days
- England ~ from date SB receives request
- Wales ~ from date assessors instructed

Urgent authorisations

- 7 days (max) extendable a further 7 days

MCA Deprivation of Liberty Assessments required

- an 'age' assessment
- a "mental health" assessment
- a "mental capacity" assessment;
- a "best interests" assessment ie is the deprivation of liberty is necessary in the person's best interests.
- an "eligibility" assessment
- a "no refusals" assessment

AM v South London & Maudsley NHS Foundation Trust (2013)

Difficult MHA vs MCA case

- 78 yr woman with depression removed from her home on s135(1) MHA 1983 warrant & detained under s2.
- Compliant incapacitated (ie lacked capacity to consent to treatment).
- Argued that s 2 detention unnecessary / unwarranted as was willing to remain voluntarily under s5 MCA 2005 & therefore violated article 5(1) ECHR.

Key issues:

1. Does person have the capacity to consent to the arrangements under the MHA s.131 (if so – then MHA 1983 to be used);

AM v South London & Maudsley NHS Foundation Trust (2013)

2. If not MCA engaged;
3. Is person compliant or non-compliant;
4. If non- compliant – then is this within MCA s.5 / s.6 without being 'deprived of liberty'
5. DOLS regime applies if circumstances could objectively amounted to a deprivation
6. With compliant incapacitated persons, it was generally but not always more appropriate to rely on DOLS; there could, however, be circumstances in which a person could be treated under the MHA when that person could be treated under the MCA and DOLS.
7. A need to consider the availability of the MCA regime and compare its impact with that if detained under MHA 1983

MCA Deprivation of Liberty Urgent Authorisations

Authorisation should be obtained in advance, except if 'so urgent that deprivation of liberty needs to begin before':

- the request is made; or
- the request is dealt with by the supervisory body.

Timescale 7 days (max) extendable further 7 days

MCA Deprivation of Liberty Standard Authorisations

The supervisory body will only grant an authorisation if all the assessments recommend it.

- Standard form
- duration of the order
- reasons why the authorisation is required
- reasons why any conditions have been imposed.
- Named representative
- Set a review date

MCA Deprivation of Liberty Representative

Representatives must:

- be 18 years of age or over:
- be able to keep in contact:
- be willing to be appointed.
- not have a conflict of interest

But

- Not necessarily LPA / deputy / nearest relative.
- Can be paid (ie advocacy organisation)
- IMCA during any gaps

MCA Deprivation of Liberty Reviews

- The supervisory body can review a standard authorisation at any time it thinks appropriate and must undertake a review if requested so to do, by the detained person or his/her representative or the managing authority or if:
- person no longer meets the key requirements (nb MHA 1983 ground);
- the person's situation has changed
- the reason the person now meets the qualifying requirements has changed

Impact of *Cheshire West*

	2013-14	2014-15
Monthly average DoLs referrals	713	6,643
% timescales missed	2%	50%

Estimate cost of current system pa

£1.039 billion

Community Care 1st October 2014

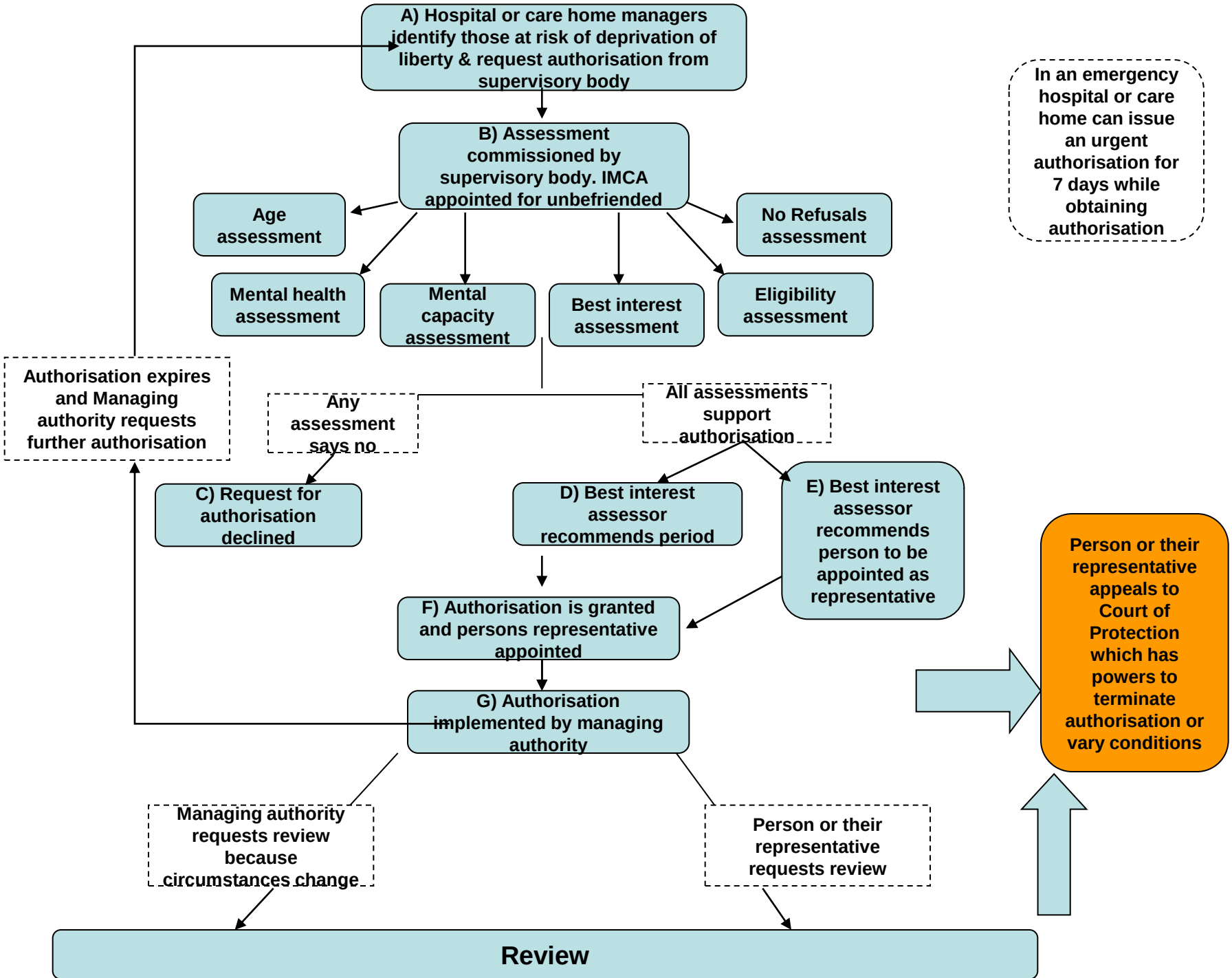
Law Commission Impact Assessment 1 August 2015

Deprivation of liberty

The Mental Capacity Act 2005
Deprivation of Liberty Safeguards

Addendum to the Mental Capacity Act 2005 Code of Practice

Flow diagrams ~ pages 33 81


A) Hospital or care home managers identify those at risk of deprivation of liberty & request authorisation from supervisory body
In an emergency hospital or care home can issue an urgent authorisation for 7 days while obtaining authorisation
B) Assessment commissioned by supervisory body. IMCA appointed for unbefriended
Age assessment
No Refusals assessment
Mental health assessment
Mental capacity assessment
Best interest assessment
Eligibility assessment
Authorisation expires and Managing authority requests further authorisation
Any assessment says no
All assessments support authorisation
C) Request for authorisation declined
D) Best interest assessor recommends period
E) Best interest assessor recommends person to be appointed as representative
F) Authorisation is granted and persons representative appointed
G) Authorisation implemented by managing authority
Person or their representative appeals to Court of Protection which has powers to terminate authorisation or vary conditions
Managing authority requests review because circumstances change
Person or their representative requests review
Review

Advance decisions to refuse life sustaining treatment

- Can include refusal of artificial nutrition and hydration;
- Formal requirements – in writing and witnessed
- Must be 18 or over;
- Responsibility of patient to bring AD to attention of health care professionals

Independent Mental Capacity Advocates (IMCAs)

1. **Person is unbefriended;**
2. **Major decision contemplated;**

- **Either an NHS body is proposing to provide (or withhold) serious medical treatment, or**
- **an NHS body or local authority is wants to arrange / change hospital or 'care home', <u>and</u>**

  will involve hospital stay 28 days +, <u>or</u>

  'care home' stay 8 weeks or more

Independent Mental Capacity Advocates (IMCAs)

Discretion to appoint an IMCA where:

- **Care review, or**
- **Vulnerable adults investigation**