

Capacity Evidence in the Court of Protection – Hot Topics Webinar



DGLEGAL

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Presenters

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Ben has been a lawyer for the past 20 years, specialising in housing, public law and mental capacity cases. He started out as a solicitor in a small firm on an estate on the outskirts of Manchester, before becoming a barrister at Garden Court North Chambers in 2005.

To view Ben's full bio, please visit <https://gcnchambers.co.uk/barrister/ben-mccormack/>

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Gary has a very wide practice in housing law and in particular where tenants are mentally ill, lack mental capacity or are vulnerable in some other way. He is regularly instructed on cases which involve the Equality Act 2010 and the Mental Capacity Act 2005.

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Agenda

- Welcome and Introduction
- Identifying decisions and avoiding silos
- Who should do the assessment?
- How should they do it?

Identifying decisions

- ⦿ The starting point is ss2 and 3 Mental Capacity Act 2005.
- ⦿ A person must be unable to make a ‘decision’ in relation to a ‘matter’ by reason of an impairment of, or a disturbance in the functioning of, the mind or brain.
- ⦿ The first step is to identify the matter that requires a decision: see *PC v City of York* [2013] EWCA Civ 478 at [35] – essentially making the point that capacity is ‘decision-specific’

Pause – do we need to assess capacity at all?

- ⦿ Recall we have to consider whether there is a matter that *requires* a decision.
- ⦿ So we need to ask ourselves whether it does! A capacity assessment can be a significant intrusion into P's life; it may be upsetting or stressful. Is there a good reason we are encouraging such a step?
- ⦿ We want to be clear that there is a reason we are asking for an assessment at all, or in relation to a particular decision. In many cases it will be obvious. In some, not so.

Identifying decisions - examples

Examples:

- Where should I live?
- What care and support do I need?
- What contact should I have with my boyfriend?
- Whether I should engage in a sexual relationship.
- Whether I should manage my financial affairs.

Identifying decisions – enabling autonomy?

- ⦿ Implications of too much being sheltered under the same umbrella
- ⦿ See *Re A* [2019] EWCOP 2 and *B v A Local Authority* [2019] EWCA Civ 913 – making the point that internet and social media use is not apt to be treated as a facet of P's 'care' or her 'contact'
- ⦿ Benefits to P in trying to separate out the various 'matters' if possible – can retain decision making abilities in some areas.
- ⦿ See also s1(3).

Avoiding silos

- ⦿ B v A Local Authority [2019] EWCA Civ 913. Judge had decided B had capacity to decide on where she ought to live although lacked capacity to decide on care and support she required. Court of Appeal accepted LA's argument that
- ⦿ "the Judge's flawed conclusion followed from his approach in analysing B's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them"
- ⦿ The crucial thing to try to avoid is a narrow focus on any specific decision (isolated from others that are also required) leading to mutually incompatible determinations being arrived at.

Who should assess?

- No right answer:
 - DOLS capacity assessor?
 - Social worker?
 - Treating clinician under s49?
 - Expert?
- We see excellent assessments by local authority social workers. May need a medical assessment of the diagnostic element of the test. Social worker likely to know P well – though this can be doubled edged and may increase the risk of the 'protection imperative' clouding the capacity assessment.
- Section 49 unlikely to be suitable for a full capacity assessment carried out by a doctor with no pre existing knowledge of P. Likely to result in application to set aside, delay and additional costs.

Who should assess

- Relevant factors might include:
 - Speed and costs of reporting?
 - Proposed method of assessment – in person or remote?
 - Likelihood of evidence being required in court; experience of giving such evidence
 - Filling a gap and providing a present day assessment – or resolving a dispute between assessors as to whether threshold crossed?
 - Relative complexity of case

How should an assessor assess

- Apply the test in ss2/3 MCA 2005; have the s1 principles in mind throughout, show clearly how you arrived at your conclusions.
- Not always easy!
- *AMDC v AG [2020]* EWCOP 58 – very well qualified expert with much court and tribunal experience – evidence rejected by court and parties after cross examination.
- Poole J ordering further report from different expert and giving guidance as to what expected (from experts in court, but applicable to other assessors of capacity too)
- Headline– SHOW YOUR WORKING...

Poole J's guide to experts/assessors

- ❖ Bear in mind the terms of the MCA 2005 and Code of Practice, and the letter of instruction ('LOI').
- ❖ LOI to set out the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and the inability to decide. Report ought to be structured accordingly.
- ❖ If unsure what being asked to do– ask the instructing solicitor!
- ❖ If looking at more than one decision;
 - ❖ broad-brush conclusions are unlikely to be as helpful as specific conclusions as to the capacity to make each decision;
- ❖ Ensure opinions in relation to each decision are consistent and coherent.

Poole J's guide – part 2

- Reports should not only state the expert's opinions, but also explain the *basis* of each opinion.
- If you change your mind (following re-assessment or otherwise) *explain why*.
- The interview with P need not be fully transcribed in the body of the report (although it might be provided in an appendix), but if the expert relies on a particular exchange or something said by P during interview, then at least an account of what was said should be included
- If on assessment P does not engage with the expert, then the expert is not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating. However, the report should record what attempts were made to assist P to engage and what alternative strategies were used. If an expert hits a "brick wall" with P then they might want to liaise with others to formulate alternative strategies to engage P. The expert might consider what further bespoke education or support can be given to P to promote P's capacity or P's engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist P to engage and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 ss 1(3) and 3(2).

But bear in mind the pressures on experts

- ❖ Sir Andrew McFarlane's *Working Group on Medical Experts in the Family Courts 2020*
- ❖ Highlights the pressures on expert witnesses in family cases, equally applicable to those giving evidence in the Court of Protection – the rates of remuneration, the lack of support and training, the court processes and perceived criticism by lawyers, judiciary and the press.

AMDC v AG (no 2) [2021] EWCOP 5

- ⦿ The court ordered further capacity evidence, from a different expert.
- ⦿ That report was obtained and a further hearing held before Poole J
- ⦿ The new expert concluded AG has capacity to make decisions as to contact and sex. And the court agreed.
- ⦿ But for the past 12 months there had been interim declarations that she lacked that capacity – and thus no prospect of AG and CI enjoying any form of intimate relationship during that time.
- ⦿ Getting the assessment and report right really matters.

Any Questions?

Thanks for watching!

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