

**GLOUCESTERSHIRE MULTI AGENCY MENTAL CAPACITY
ACT POLICY**

APPENDIX 4

**Gloucestershire Mental Capacity Act Governance Group
(MCAGG)**

MCA - BEST INTERESTS GUIDANCE

Author: David Pugh, MCA and MHA Implementation Manager

Date: 21 August 2013

UPDATED August 2019: Simon Thomason, MCA Governance Manager

Contents

Mental Capacity Act 2005 Best Interests Guidance	
Subject	Page
1. Context – When Is a best interest decision necessary ?	
2. The Best Interest Checklist	
3. Who is the best interest decision maker?	
4. The Best Interest Meeting	
5. Meeting When is a best interest meeting required?	
6. The best interests meeting – who should attend?	
7 The best interests meeting - preparing for the meeting and supporting attendees	
8. The best interests meeting – who chairs?	
9. The best interests meeting – how is it recorded?	
10. Confidentiality	
<i>Appendix 1 Best Interests Meeting Agenda Template</i>	
<i>Appendix 2 Best Interests Meeting Minutes Template</i>	
<i>Appendix 3 Best Interests Case Conference Guidance for the Chair</i>	
<i>Appendix 4 The Best Interest Checklist</i>	

1. Context – When is a Best Interests Decision necessary?

When the individual has been assessed as lacking capacity for a particular decision.

Any decision taken for that individual must be taken in their best interest

the mental capacity act provides a process to follow so that the decision maker can arrive at a decision which has taken all the relevant circumstances into account and one which is as reflective of the individuals own wishes (where possible) and is in their best interests.

Assessing best interests is a process. It might perhaps best be considered as a process of constructing a decision on behalf of the person who cannot make that decision themselves. As the Supreme Court emphasized in *Aintree University NHS Hospitals Trust v James* (a medical treatment case) “[t]he purpose of the best interests test is to consider matters from the patient’s point of view.”

It is important to understand that the purpose of the process is to arrive at the decision that health and social professionals reasonably believe is the right decision for the person themselves not the decision that best fits with the outcome that the professionals desire.

The term ‘best interests’ is not actually defined in the Act. This is because so many different types of decisions and actions are covered by the Act, and so many different people and circumstances are affected by it.

This guidance forms an appendix to the multi-agency Mental Capacity Act Policy, Procedure and Guidance and builds on Section 7 ‘Assessment and Best Interests Decisions’. The MCA Code of Practice should also be referred to as necessary.

A failure to make decisions that are in the best interests of the person may have serious implications, and could lead to legal challenge.

2. The Best Interest Checklist:

- Encourage Participation - Make every effort to permit and encourage the person to participate in the decision to be made:
- Identify all relevant circumstances - Identify all the relevant issues and circumstances relating to the decision in question:
- Find out the person's wishes, feelings, beliefs and values, past and present:
- Avoid discrimination - the decision must not be made merely on the basis of the person's age or appearance:
- Assess whether the person might regain capacity and if so, whether the decision can be delayed:
- If the decision concerns life-sustaining treatment staff must not be motivated in any way by a desire to bring about the person's death:
- Consult others: including family and other professionals:
- Avoid restricting the person's rights - the decision maker must assess whether there is a less restrictive option.
- Take all of this information into account when deciding on the best interest decision.

3. Who is the Decision Maker

The decision-maker is whoever is responsible for deciding what is in the best interests of the person who lacks capacity.

For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time. Where the decision involves the provision of medical treatment, the doctor or other member of healthcare staff responsible for carrying out the particular treatment or procedure is the decision-maker. Where nursing or paid care is provided, the nurse or paid carer will be the decision-maker. If a Lasting Power of Attorney (or Enduring Power of Attorney) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.

What this means is that a range of different decision-makers may be involved with a person who lacks capacity to make different decisions.
(MCA Code of Practice S5.8 -9)

4. The Best Interest Meeting

A best interests meeting may be needed following a formal recorded

assessment of mental capacity in relation to the following sorts of decisions:

- where to live, if a significant change is envisaged;
- what care services support to receive at home;
- whether to report a criminal or abusive act;
- where there is a dispute with the person, the family and/or the care team as to the capacity or views of a person;
- where the capacity of a person could be open to a legal challenge, such as in relation to a claim for personal injury;
- where the person concerned is repeatedly making decisions that place him/herself at risk or could result in preventable suffering or damage;
- having serious medical treatment – whilst noting that permission for some serious medical treatments, such as sterilisation, can only be granted by the Court of Protection.

These examples are not exhaustive and each situation needs to be judged on its merits,

A best interests meeting may be needed where an adult (16+) lacks mental capacity to make significant decisions for themselves and needs others to make those decisions on their behalf. It is particularly helpful where there are issues that need resolution regarding either the issue of capacity or Best Interests and this has not been able to be resolved.

A formal best interests meeting may be required to plan the decisions needed where the issues facing the person are complex and cannot be easily made by the decision-maker and immediate colleagues. There may be a range of options and issues that require the considered input of a number of different staff as well as those with a personal and/or legal interest in the needs of the person lacking mental capacity. Making sense of these issues and options may only be properly covered and addressed through holding such a meeting, and clearly recording the discussions.

A best interests meeting should mean that the decision-making process is transparent, clearly recorded, and can stand up to subsequent scrutiny. In addition a best interests meeting should ensure that the person is empowered and protected from random or unsound decision-making.

Where a decision cannot be made, for whatever reason, the best interests meeting will also have to decide what further actions may be required to expedite future decision-making, by whom and in what timescale. This may ultimately include referral to the Court of Protection.

Urgent situations

If the situation is very urgent however, a meeting may not be possible and

decisions will have to be made based on the information available - including the availability of people for consultation. The 'doctrine of necessity' may be invoked in an emergency situation. Actions in the person's best interests can be made providing the professional 'reasonably believes' a person lacks capacity and that the proposed treatment/action is necessary to save their life or to prevent a significant deterioration in their condition without formal documentation of the capacity assessment and best interests decision.

The MCA does not give any clear indication as to how long it would be acceptable for decisions to be made under the doctrine of necessity. It is sensible to assume that as soon as someone's capacity can be formally assessed and their best interests decided, then this is what should happen. If the proposed treatment is not clearly 'necessary' then MCA processes should always be followed.

5. When is a Best Interests Meeting Required?

Where there is, or is likely to be, a dispute as to how to serve the best interests of the person who lacks mental capacity, there is recourse in law to the Court of Protection. The Court will expect to see evidence of professional decision-making and best interests recording having already taken place, and this is another reason why holding a best interests meeting will be useful in ensuring that the decisions needing to be made are clearly understood.

A best interests meeting should be held and formally recorded where:

- the decision that needs to be made is complicated or has serious consequences for the person;
- an assessor concludes a person lacks capacity, and the person, family members, informal carers and/or professionals disagree with the assessment about a person's capacity e.g. home based support as opposed to a residential placement;
- the person being assessed is expressing different views to different people, anticipating what they think they want to hear;
- somebody wants to challenge the person's capacity to make the decision – either at the time of the decision or later (for example, a family member challenging a will after a person has died);

- somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them;
- a person is repeatedly making decisions that put them at risk or could result in suffering or damage.

6. The Best Interests Meeting – Who Should Attend?

This needs to be considered by the person who is identified in the Mental Capacity Act Code of Practice as the 'decision-maker'. The decision-maker is whoever is responsible for deciding what is in the best interests of the person who lacks capacity. It is desirable to aim for consensus, but ultimately there is only one decision-maker.

Anyone who attends a best interests meeting must be clear about their role and the contribution they can make in the meeting. They should also come prepared with relevant information, and be prepared to contribute this to the discussion. Agreement should be reached about how to include the contribution of any person who is unable to attend, so that the meeting can still serve its purpose, rather than be unduly delayed.

Careful consideration should be about people who have an interest in the decision can be included in the decision making process:

- the person assessed as lacking mental capacity;
- family members, parents, carers and other people interested in the welfare of the person, if this is practical and appropriate;
- any person who holds an Enduring Power of Attorney (pre-October 2007) or one or both of the two Lasting Powers of Attorney (from October 2007) made by the person now lacking capacity;
- Any advocate who is involved including the statutory Independent Mental Capacity Advocate (IMCA) Service.
- Any Deputy appointed by the Court of Protection who can make decisions on behalf of the person lacking mental capacity.
- Any professional person who can contribute to the outcome of the best interests meeting.
-

7. The Best Interests Meeting - Preparing for the Meeting and Supporting Attendees.

For some, being invited to a best interests meeting can lead to that person experiencing feelings of increased anxiety and uncertainty about what may be expected of them during it.

It is important that the person who is convening the meeting communicates clearly with those who have been invited at the earliest possible opportunity. This is particularly relevant when the person deemed to lack capacity is attending and for any family members, people appointed with Power of Attorney and carers etc.

The person who convened the meeting should also ensure that the following information is sent out to attendees prior to the meeting taking place:

- The contact details of a person who will be able to answer any questions relating to the meeting.
- Information on how to access the Mental Capacity Act 2005 Code of Practice.
- An information booklet (appropriate to their need). The Gloucestershire MCA public information leaflet can be downloaded from www.gloucestershire.gov.uk/mca
- An Agenda – Appendix 1 provides an agenda template.
- A list of people who have been invited and their roles.
- Special consideration should be given to the venue chosen for the meeting for e.g. wheelchair access/lifts/accessible parking, easy access to toilets, provision of refreshments etc. It may be appropriate for the meeting to take place at the relevant person's home or day care setting to maximise their ability to attend for some or all of the meeting, if it has been assessed as appropriate for the person to attend and the person wants to.

8. The Best Interests Meeting – Who Chairs?

It is generally best practice that the person who chairs or co-ordinates the best interests meeting is not the person who is the decision-maker. This avoids any possible conflict of interest. The decision-maker must attend the meeting.

At the very least it needs to be someone who is able to chair a meeting at which competing views and opinions may be expressed. The chair of the meeting may be required to provide some mediation and negotiation so that the best interests of the person lacking mental capacity are not

overlooked. The chair will also need to be able to summarise the discussion and confirm the way forward, and actions to be taken.

To support clients, their family members and/or their representatives in feeling as comfortable as possible on the day of the meeting, it is good practice for the chair to arrange to meet, (with those identified above) at the venue approximately 20 minutes before the meeting is due to commence. This allows attendee's to have an opportunity to meet face to face and express any concerns or fears they may have about the process. It also allows time for the chair to orientate the attendees to the environment e.g. where the toilets are situated etc, explain the best interests decision making process, outline the meeting agenda, identify who will be attending and allow people to settle in the room before the other attendees arrive.

The chair may also consider the value of staggering or holding the meeting in sections, with some people invited to attend at a specific time. This is a useful strategy to implement in situations where family members do not get on with one another, but wish to attend. The Chair should also consider whether it would be too distressing for the client/patient, if certain people attend the meeting and make arrangements for their views and opinions to be identified and recorded prior to the meeting and ensure they are tabled as part of the process.

7. The Best Interests Meeting – How is it Recorded?

The outcome of the best interests meeting and associated viewpoints will need to be recorded on the MCA2/Best Interest Decision form if it is also felt necessary and useful to make a separate report of the best interests meeting Appendix 2 offers a framework which incorporates the balance sheet approach. The best interests meeting needs to be structured and recorded in such a way that it is clear who attended (and those who were unable to attend) what discussions took place, and what outcomes were agreed. Whilst the notes should record the issues and the discussion that took place, the emphasis needs to be on an analysis of the risks and benefits attached to the different options and the identification of those responsible for undertaking the agreed actions as well as the timescales within which those actions will be taken.

In line with the approach taken in the Court of Protection and widely accepted best practice a 'balance sheet' approach should be adopted to reaching a best interests decision. Medical, emotional, social and welfare interests may be relevant and should be entered onto the 'balance sheet'. This approach includes:

- Identifying all the options
- Entering all the actions and potential benefits, risks, advantages and disadvantages of each option including the likelihood or certainty they will happen
- Underlining factors that are particularly important
- Highlighting any one factor that has over-riding importance
- Assessing which option is in the person's best interests.

At the end of the process it should be possible to 'strike a balance' between the sum of the certain and possible gains against the sum of the certain and possible losses.

The notes should clearly identify the name of the person who has prepared the record together with the name of the organisation on whose behalf the notes have been prepared.

In order to ensure that appropriate communication is forwarded to the person concerned, the notes of the meeting must be presented in a way that is accessible to all.

8. Confidentiality

Attendance and the subsequent sharing of information relating to the person lacking mental capacity, must always happen in line with the Data Protection Act 2018 requirements and should be provided on a need-to-know basis. It may be appropriate for some contributors to only attend part of the meeting, or provide information through earlier discussion or in writing. Everyone attending a best interest decision meeting should be informed that if necessary the minutes will be supplied to Courts or Tribunals.

Annexe 1

BEST INTERESTS MEETING AGENDA	
1.	<p>Introductions and Apologies</p> <ul style="list-style-type: none"> • Housekeeping • Outline format of meeting – provide clarity that each person will have the opportunity to contribute • Information sharing and confidentiality • Statement of the legal framework
2.	<p>Purpose of the Best Interest Meeting</p> <ul style="list-style-type: none"> • Outline background facts • Clarification of decision/s required • Outline mental capacity assessment. If there is no capacity assessment specific to the best interests decision/s, THE MEETING MUST STOP.
3.	<p>Review of Requirements of the Best Interests Checklist</p> <p>Please see the reverse side of the agenda for the checklist.</p>
4.	<p>View of the Relevant Person</p> <ul style="list-style-type: none"> • What is known about their previous wishes, feelings, their values and beliefs (sustain this focus)?
5.	<p>Information from Relevant Parties</p> <ul style="list-style-type: none"> • Views from anyone named to be consulted, any LPA, EPA or Deputy of the Court of Protection • Family members opinion • Professional opinion • IMCA (if involved) • Decision makers opinion
6.	<p>Discussion of Viewpoints</p> <ul style="list-style-type: none"> • Identify and be clear about the options • Discuss benefits and advantages of each option • Assess likelihood of each option
7.	<p>Summary and Evaluation of Options</p> <ul style="list-style-type: none"> • Summary of the information gathered and discussion (consider having this available visually) • Recommendations highlighting and dealing with any counterbalancing factors
8.	<p>Decision of the meeting about the person's best interests</p> <p>Allow the opportunity for reaction and expression of feelings</p> <p>Please note that the decision maker is not obliged to follow the decision of the meeting, but would need to give clear reasons why they did not do so.</p>
9.	<p>Action plan</p> <p>If the meeting cannot agree, decisions will need to be made about how to proceed e.g. 2nd opinion, involvement of an IMCA, mediation, Best Interests Case Conference, Court of Protection</p>
10.	<p>Communication Strategy</p> <p>The Individual's and Carer Involvement and Feedback</p>
11.	<p>Any Other Business</p>

Annexe 2

BEST INTERESTS MEETING MINUTES STRICTLY CONFIDENTIAL

Information Sharing and Confidentiality

This Best Interests Meeting was convened under Gloucestershire's multi-agency Mental Capacity Act Policy, Procedure and Guidance. These minutes are strictly confidential; they must not be photocopied and should be transferred and stored securely. Statutory agencies will store electronic copies on a secure database.

Access should only be on a legitimate need to know basis. Additional requests to show these minutes to other people will only be considered by the Chair of the meeting and permission given, if there is a legitimate reason to disclose the information. Minutes of the meeting will be circulated to all attendees and those who have given apologies.

Copies of these minutes may be requested and disclosed in the event of a Data Protection access to records request, subject to exemptions.

Amendments:

PLEASE NOTE: Requests for amendments to these minutes should be forwarded in writing to the Chair of the meeting, within seven days of the circulation date; otherwise they will be taken as an accurate record.

Mental Capacity Act (2005)

If a person has been assessed as lacking capacity, then any action taken, or any decision made for, or on behalf of that person, must be made in his/her best interests-Principle 4.

Date:		Venue		
Name:		Personal identifier:		
Address:				
Chair:		Decision Maker:		Minute Taker:
Name:	Designation/Location	Invited	Present	Apologies
Purpose of the Best Interest Meeting				

Confirmation of Capacity Assessment:

Review of the Best Interests Checklist (see rear of agenda):
These points must be considered.

View of the relevant person:

Information from relevant parties:

Discussion of viewpoints:

Option 1

Points in favour	Likelihood (High, Medium Low)	Points against	Likelihood (High, Medium Low)

Option 2 etc

Points in favour	Likelihood (H, M L)	Points against	Likelihood (H, M L)

Summary and Evaluation of Options:

Outcome of discussions and conclusion – ‘reasonable belief’ as to best interests:

ACTION PLAN

Action	Responsible Person	By when

Communication Strategy

Where the court is not involved, carers, relatives and others can only be expected to have reasonable grounds for believing that what they are doing or deciding is in the best interests of the person concerned. They must be able to point to objective reasons to demonstrate why they believe they are acting in the person's best interests. They must consider all relevant circumstances.

The undersigned believe this to be a fair representation of the discussions that took place. We have reasonable grounds for believing that what they are doing or deciding is in the best interests of the person concerned at this point in time.

Name:

Designation:

Signature

Name:

Designation:

Signature

Name:

Designation:

Signature

Name:

Designation:

Signature

Name:

Name:

Designation: Signature	Designation: Signature
Name: Designation: Signature	Name: Designation: Signature

Annexe 3

BEST INTERESTS CASE CONFERENCE GUIDANCE FOR THE CHAIR

Preparation

- The Chair should request to see all previous best interests meeting minutes.
- Understand any disputes or known challenges, which will help in making decisions about how to best organise and facilitate the case conference.
- Consider whether to request a legal adviser to be present.
- Understand who the essential attendees are and why any other people are considered relevant to consult in the decision.
- Consider how to manage any issues relating to confidentiality and Data protection within the meeting.
- Understand what information and guidance has already been provided to the attendees.

The day of the case conference.

The chair should meet in a quiet area with the person and any family members, LPA/EPA/CoP Deputy prior to the meeting commencing to explain the purpose of the meeting, the legislation to be used, who will be attending the meeting and why, and finally to offer the opportunity for any questions / concerns to be explored.

As with best interests meetings, the Chair should consider whether this should take place immediately before the meeting, or to consider whether it would be more appropriate to offer the opportunity to meet with the person/family at an earlier stage. Where there are known tensions, open and timely communication between the Chair and the person/family etc. can help to reduce any building tensions and help both parties to plan how to achieve a more relaxed meeting process. This process is especially important in situations where there is dispute.

The Chair must remain mindful that at this stage they should not engage in any level of discussion about the decision to be made, but to remain solely focused on supporting attendees to understand the process and be as comfortable as possible throughout.

Opening the case conference

Open the meeting by reminding the attendees that the case conference is being held under the principles and provisions as set out in the Mental Capacity Act 2005. The meeting will be paying particular regard to the Statutory Best Interests Checklist, and lastly remind all of the need to pay regard to confidentiality. Ask each person to say who they are and why they are attending the case conference.

(The minute taker may find it useful to use the questions set out below as mini headings to capture and clearly record the content of the meeting).

Inform everyone that the meeting will focus on the decision/s that is required to be made and no other.

The following questions should be covered in the meeting and generally in this chronological order:

1. What is the specific decision/s to be made? (the meeting must agree as this will be the focus of the meeting from this point onwards).
2. Why is it being proposed?
3. What steps have been taken to help the person attend the conference today and be involved in the decision making process?
4. What steps have been taken to support the person in making the decision themselves? Why have these attempts failed?)
5. Is there an up to date Mental Capacity Assessment to evidence the person lacks the capacity to make the decision required? **(if not the meeting must stop).**
6. Is it possible to delay the decision until the person regains capacity and will be able to make the decision themselves. Are there any risks to the person in delaying the decision?
7. Who is the Decision Maker? Is an EPA or appropriate LPA/Court Appointed Deputy (CAD) in place who has the relevant authority to make the required decision?
8. Is there a valid and applicable Advance Decision, or Advance Statement that is relevant to the decision?
9. What do we already know about the person's values, wants and wishes?
10. What are the available/possible options to be considered? What are the positive and negative aspects of each, keeping the person's views and opinions central and taking into consideration all assessed and known risk.
11. How will the options impact on the following:
 - Any medical aspects
 - Any welfare aspects (how they live their lives)
 - Any social aspects (relationships)
 - Any emotional aspects (how they may feel or react).

12. What Health and Social Care staff/professionals have been consulted?
What are their views and opinions?
13. Is there a report from an Independent Mental Capacity Advocate (IMCA)? If the person reaches the qualifying criteria for an IMCA instruction, it becomes a statutory requirement.
If the person has reached the qualifying criteria and an IMCA has not been instructed why is this case?
14. Is there any feedback from an Independent Advocate?
15. Are there any other reports to be tabled?
16. Now that the family, EPA/LPA/CAD have heard all the relevant information, what are their views?
17. Outcome of decision. The identified decision maker to make the final decision once all reports etc. have been tabled.
18. Has the decision maker chosen the least restrictive option? If not what is the rationale for the decision made?
19. Identify any actions, who has responsibility for each action and the timescale within which each must be completed.
20. If there is continued dispute or challenge at this stage, Chair to provide information on how to make a complaint, consider whether it would be appropriate to offer independent mediation and advise that consultation will be sought immediately with the legal service for advice. Consideration will need to be given as to whether the decision should be taken to the Court of Protection.

Best Interests Checklist

Criterion	Guidance
Encourage Participation	<p>Make every effort to permit and encourage the customer to participate in the decision to be made. Staff may need to seek support from family members, friends or other professionals to facilitate participation.</p>
Identify all relevant circumstances	<p>Try to identify all the issues and circumstances relating to the decision in question which are most relevant to the customer.</p>
Find out the person's wishes, feelings, beliefs and values	<p>Try to find out the person's past and present wishes and feelings – both current views and whether any relevant views have been expressed in the past, either verbally, in writing or through behaviour or habits.</p> <p>Any beliefs and values (e.g. religious, cultural, moral or political) that would be likely to influence the decision in question.</p> <p>Any other factors the person would be likely to consider if they could make the decision themselves. This could include the impact of the decision on other people, such as dependents.</p> <p>It is important that the decision-maker understands that they are not trying to take the choice that they think the person would have made. Instead, the decision-maker is taking the person's views into account as a factor in making the best interest's decision making process.</p>
Avoid discrimination	<p>Working out best interests cannot be based simply upon age, appearance, condition or behaviour. Staff therefore needs to take care not to make assumptions about what is in a person's best interests. For example, assuming that people with learning disabilities are better off not living with their parents would be discriminatory if applied to all customers irrespective of their individual circumstances.</p>
Assess whether the person might regain capacity	<p>Consider whether the person is likely to regain capacity and if so, whether the decision can be delayed. For example, staff will need to address whether the person's condition will improve for treatment.</p>
If the decision concerns life-sustaining treatment	<p>Not be motivated in any way by a desire to bring about the person's death. They should not make assumptions about the person's quality of life (This only applies to medical decisions, and LBM staff will not be the best interests decision-maker when a decision needs to be</p>

	<p>made about life sustaining treatment).</p> <p>For views about the customer's best interests and to see if they have any information about the person's wishes, feelings, beliefs or values. Staff must consult:</p> <ul style="list-style-type: none"> • Anyone previously named by the person as someone to be consulted on the decision in question or matters of a similar kind; • Anyone engaged in caring for the person, or close relatives, friends or others who take an interest in a person's welfare • Any attorney or Lasting Power of Attorney (LPA) made by the person (even if they are not the decision-maker for this specific decision). • Any deputy appointed by the Court of Protection to make decisions for the person (even if they are not the decision-maker for this specific decision). • An Independent Mental Capacity Advocate (IMCA) in prescribed circumstances <p>Reasons where consultation may not be practicable or appropriate may include the following:</p> <ul style="list-style-type: none"> • The person lives abroad and has no contact with the person; • An estranged relative • A family member who refuses to be consulted.
<p>Avoid restricting the person's rights</p>	<p>The decision maker must assess whether there is a less restrictive option. The decision-maker should be open to all options, and for each identify the risks, and whether restricting the customer's rights would be a proportionate response to the level of risk. For example when a person lacks capacity to make a decision about where they should live, the options might be: staying in their present accommodation with a higher level of care, moving to residential or nursing care, living with relatives or moving to extra-care housing.</p>
<p>Take all of this into account</p>	<p>The decision maker needs to weigh up all of these factors in order to work out what is in a person's best interests. It is helpful to use a 'balance sheet'. This involves drawing up a list of the emotional, medical, social and welfare benefits and disadvantages of the proposed alternatives (including the likelihood of each benefit or disadvantage occurring).</p>