

# The Court of Protection, the High Court, safeguarding and self-neglect – which court, and what can you ask for?

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## Situations of concern to be covered

- Risk posed by the person's own circumstances
- Risk posed by others

AND

- The person appears to have capacity to make relevant decisions

## What are your duties? (1)

- To undertake a safeguarding enquiry under the Care Act –but “Safeguarding” explains **why** you are doing something, not **how** you can do it
- To discharge the State’s positive obligations under the European Convention on Human Rights:
  - Article 2 – to protect life
  - Article 3 – to protect against torture, inhuman or degrading treatment
  - Article 5 – to protect against unlawful interferences with liberty, including by private individuals
  - Article 8 – to protect physical and moral integrity of the individual (especially, but not exclusively) from the acts of other persons.
- But again this explains **why** you might need to be acting, but not **what** you can do

## What are your duties? (2)

*Local Authority v Z* [2004] EWHC 2817 (Fam)

In my judgment in a case such as this the local authority incurred the following duties:

- i) To investigate the position of a vulnerable adult to consider what was her true position and intention;
- ii) To consider whether she was legally competent to make and carry out her decision and intention;
- iii) To consider whether any other (and if so, what) influence may be operating on her position and intention and to ensure that she has all relevant information and knows all available options;
- iv) To consider whether she was legally competent to make and carry out her decision and intention;
- v) To consider whether to invoke the inherent jurisdiction of the High Court so that the question of competence could be judicially investigated and determined;
- vi) In the event of the adult not being competent, to provide all such assistance as may be reasonably required both to determine and give effect to her best interests;
- vii) In the event of the adult being competent to allow her in any lawful way to give effect to her decision although that should not preclude the giving of advice or assistance in accordance with what are perceived to be her best interests;
- viii) Where there are reasonable grounds to suspect that the commission of a criminal offence may be involved, to draw that to the attention of the police;
- ix) In very exceptional circumstances, to invoke the jurisdiction of the court under Section 222 of the 1972 Act

[now – add to the list if relevant such things as Domestic Violence Protection Notice/Order, injunction under Protection from Harassment Act]

## What do you need to think about?

- Does the person lack capacity to make the material decisions?
- Is there any other mechanism that you can use to secure the person's interests (or those of others?)
- Is the intervention necessary and proportionate?
- Will the person be deprived of their liberty?
- Are you trying to get orders against the person themselves?

# Does the person really have capacity? The perils of the principles

- Principle 1 and the capacity conundrum

*The presumption of capacity, in particular, is widely misunderstood by those involved in care. It is sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm. In some cases this is because professionals struggle to understand how to apply the principle in practice. In other cases, the evidence suggests the principle has been deliberately misappropriated to avoid taking responsibility for a vulnerable adult.*

(House of Lords Select Committee post-legislative scrutiny of MCA 2005, para 105)

- See also “Learning from SARS: a report for the London Safeguarding Adults Board” (March 2017)
- The second principle: A person is not to be treated as unable to make a decision merely because he makes an unwise decision – a right to make unwise decisions?

# Capacity: what does the Act actually say?

## Section 2: People who lack capacity

- (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.

[...]

## Section 3: Inability to make decisions

- (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).

# Capacity: the three questions

(1) Is the person unable to make a decision? If so:

(2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

(3) Is the person's inability to make the decision because of the identified impairment or disturbance?



## Fluctuating capacity

- Not a concept expressly addressed or provided for in the MCA 2005, although it is referred to in the Code of Practice
- Taking a sensible approach to ‘the decision’:
  - *RB of Greenwich v CDM* [2019] EWCOP 32
  - *CD v London Borough of Croydon* [2019] EWHC 2943 (Fam)
- Taking the longitudinal view: *Cheshire West And Chester Council v PWK* [2019] EWCOP 57

## Capacity and vulnerability

- Is the adult's lack of capacity 'because of' the impairment of or disturbance of their mind or brain? *PC v NC and City of York Council* [2013] EWCA Civ 478
- Or the inability to take the material decision because of the presence and actions of the third party? *LB Redbridge v GC* [2014] EWCOP 485

*“the true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction.”*  
*NCC v PB and TB* [2014] EWCOP 14
- Can the person understand, retain use and weigh the fact that another person may have interests contrary to theirs, and if not, whether this inability is caused by mental impairment

# If the person lacks capacity to make the relevant decision(s)

- Do you need to go to court?
- If so, the right court is the Court of Protection **AND GO TO COURT FIRST!**
- NB, the threshold for the application is that “there is reason to believe” that the person lacks capacity to make the decision
- Evidence can be provided by registered –
  - medical practitioner
  - psychiatrist
  - approved mental health professional
  - social worker
  - psychologist
  - nurse, or
  - occupational therapist
- Who knows the person best?
- Follow the guidance in Court of Protection Practice Direction 3B (see <https://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/>)

## If the person does not lack capacity: is there another legal option?

(1) to protect against someone else, e.g.:

- Coercive or controlling behaviour - Section 76 Serious Crime Act 2015?
- Modern Slavery Act 2015
- Domestic Violence Protection Notices/Orders
- Injunctions under Protection from Harassment Act 1997

(2) to protect themselves or others against their own actions?

- Mental Health Act 1983?
- Environmental health legislation?

## If all else fails: the inherent jurisdiction

- The ‘great safety net’: *DL v A Local Authority* [2012] EWCA Civ 253

*77. It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*

Munby J in *Re SA(Vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867

## Is the intervention necessary and proportionate?

- *London Borough of Croydon v KR & Anor* [\[2019\] EWHC 2498 \(Fam\)](#)
- What are you trying to achieve?
  - Saving life?
  - Well-being?
  - Financial abuse?
- What else have you tried?
- The more draconian the step, the more you need to evidence

## Where no third party is involved

*57. The inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome. Here the vulnerability which the Health Board originally relied upon was JK's mental disorder, namely his ASD. Despite his ASD JK undoubtedly has capacity, so he cannot be compulsorily treated under the MCA. If I had found that his decision not to eat was not a manifestation of his mental disorder, then he could not have been compulsorily treated under the MHA. In my view that would have been the end of the matter, because the two statutory schemes deal precisely with someone in JK's situation, and there is no factor such as coercion which lies outside those considerations.*

*58. Therefore, either it can be said that there is no lacuna in the statutory scheme which would leave space for the inherent jurisdiction; or alternatively, as the Health Board now accept, JK is not "vulnerable" within the meaning of SA. He is not "vulnerable" because this is not a case of JK's will being overborn by some factor outside the scheme of the statutes, but rather his decision having been made in circumstances entirely contemplated by the statutes. These two analyses reach the same end result, that JK's situation either allows treatment without consent under the MHA, or not at all.*

*JK v A Local Health Board [2019] EWHC 67 (Fam)*

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## Will the person be deprived of their liberty?

- Should you even be asking?

*In terms of the manner in which the jurisdiction should be exercised, I would expressly commend the approach described by Macur J in *LBL v RYJ and VJ* [\[2010\] EWHC 2665 \(COP\)](#) [above]. The **facilitative, rather than dictatorial**, approach of the court that is described there would seem to me to be entirely on all fours with the **re-establishment of the individual's autonomy of decision making in a manner which enhances, rather than breaches, their ECHR Article 8 rights.** (DL)*

- Is there evidence of mental disorder?
- Is it an emergency?
- [A Local Authority v BF](#) [2018] EWCA Civ 2962: using the inherent jurisdiction whilst investigating



## Is the order to be directed against the person?

- Need to show consideration of whether the person
  - is likely to understand the purpose of the injunction;
  - will receive knowledge of the injunction; and
  - will appreciate the effect of breach of that injunction.
- If they won't, don't ask
- *Redcar & Cleveland Borough Council v PR & Ors*  
[2019] EWHC 2305 (Fam)

## An (annoying) health warning and guidance

- The judges are still trying to work out the limits of the inherent jurisdiction and they don't all take the same view
- Guidance:  
<https://www.39essex.com/mental-capacity-guidance-note-inherent-jurisdiction-october-2019/>

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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