Remote mental capacity assessment

This flowchart and guidance draws from DHSC guidance and legal commentary (see appendices) as well as practical tools in use in other local authorities and advocacy services, with permission to share.

Important note: During the pandemic, the principles of the MCA and the safeguards provided by DoLS still apply (DHSC guidance, 2020). As such, all efforts must be made to support a client who lacks mental capacity in a proportionate manner. MCA duties are not removed and Care Act easements, if enacted, do not apply to this area of primary legislation and its demands for practice.

Preparation for the mental capacity assessment

- Write in one sentence the decision to be made (i.e. change of accommodation, long-term care and treatment, money management, etc.) in a way that is most likely to be understandable by the service user.
- Plan your questions in advance (open/closed, specific, designed to achieve best evidence). It is possible your time for undertaking an assessment will be more limited, so ascertain the information that will give you the best evidence. Carefully structure the interview.
- Contact the carer / care home / hospital to request relevant information is sent to you in advance (i.e. care plans, daily records, a MAR chart). Ensure you are familiar with the relevant information yourself before assessing the service user's mental capacity.
- Contact the carer / care home / hospital in advance to agree a time of day and method of contact. Ask them to prepare the service user in advance for the assessment. This may include familiarising the service user with the technology, having a trial run, etc. Ask a carer to explain what is going to happen to the service user.

Methods of communication

1. Video call (i.e. Skype, WhatsApp, Zoom, FaceTime, etc.) **Important: see collaboration tools briefing note 03.04.2020 and ensure that confidentiality and GDPR rules are met**
2. Telephone call
3. At a distance. As a last resort, using appropriate PPE as per the latest government guidance, a physical visit may be required. This should only be in exceptional circumstances.

- Ensure that you are clearly visible on a video call, with sufficient lighting and so that the service user can see your face. Request the same of the service user and carer supporting the service user. Suggest that the service user has access to as large a screen as possible for the assessment.
- Avoid background noise. Take turns speaking and speak clearly. Ensure that volume is at a sufficient level for both yourself and the service user.

Supporting information and documenting the assessment

- Previous (recent) mental capacity assessments. These could have been completed by yourself, a colleague, another professional, or a care home / hospital professional
- Cheshire Care Record. This can be accessed through LiquidLogic and will contain information about the service user's medical history including mental health, diagnoses and possibly comments on mental capacity
- Other prior assessments including nursing assessments, Care Act assessments, SALT assessments, etc.
- When documenting the assessment, acknowledge the constraints imposed by COVID-19 (see sample wording on final page of this document)

Completing a remote best interests decision

A checklist before consultation

- Is it likely that this person will regain mental capacity? Does this decision need to be made now? If the decision is not time-sensitive, consider delaying making a best interests decision until the person's mental capacity is optimised.
- Complete the mental capacity assessment (see previous page)
- Review and analyse all the relevant paperwork pertaining to your client and particularly what is relevant for the decision to be made
- Ensure you have considered the concrete options that are available to your client (see *MN v ACCG [2017] UKSC 22* case referenced in appendix), and run through your own considerations of the burdens and benefits of each option.

Consultation with your client

- What are the person's wishes and feelings about the decision? This can be gathered through direct consultation with the person, through reviewing documentation and consulting others.
- How have you supported the client to best be able to contribute to the decision-making process?
- Ensure you have taken steps to consult your client using creative solutions (see 'methods of communication' section above.

Consultation with others

- Who do I need to consult? You must consult, as far as practicable, anyone named by your client, anyone engaged in caring for your client or with an interest in their welfare, any donee of an LPA, and any deputy appointed by the Court.
- Use technology such as telephone calls, video calls and emails. This may be 1:1 consultations or with multiple individuals on a video conference call, for example.
- Include others' views on the burdens and benefits of each available option

Documenting

- It is strongly advised that in your documentation you record that the assessment took place during the COVID-19 outbreak, and the impact that this has had on how you have conducted the assessment. An example of how this might be recorded from Shropshire's MCA Lead is available in the appendix.
- If the current available options are limited due to the pandemic, in a way which they would not otherwise be limited (for example they may not be able to be admitted to the first care home of their choice), ensure that you plan for this BI decision to be re-visited at an appropriate time.

APPENDIX

Sample wording for documentation of MCA and/or BI decision

"This assessment occurred at a time when public health measures had been put in place by HM Government to contain the spread of the COVID-19 virus. Professionals were being advised only to carry out essential visits to care homes.

When completing this assessment, I had to balance the need to protect X's rights under the Care Act / Mental Capacity Act / European Convention on Human Rights against the need to protect him/her from transmission of the virus. COVID-19 infection would have posed a grave risk to X in view of his/her underlying health conditions.

In view of these concerns, I therefore decided to base my assessment on existing documents, remote assessment, and on the views of X's carers and family/friends rather than visiting him/her in person."

- Lorraine Currie, MCA and DoLS Manager for Shropshire County Council *(with edits)*

Resources

- **DHSC guidance -** The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic
- **DHSC guidance** - Responding to COVID-19: the ethical framework for adult social care
- **DHSC guidance** - Care Act easements: guidance for local authorities
- **DHSC guidance** - Guidance on social distancing for everyone in the UK
- **Mental Capacity Law and Policy (Alex Ruck-Keene)** - DHSC MCA COVID-19 guidance – summary and commentary
- **Alex Ruck-Keene –** 'Capacity in the time of coronavirus' (article)

Case Law

- **Contact restrictions for family - BP v Surrey County Council & Anor [2020] EWCOP 17.** Useful commentary from Alex Ruck-Keene to be found here
- **Best interests decision-making: the availability of options – MN v ACCG [2017] UKSC 22.** Commentary from 39 Essex Chambers can be found here.

Sample MCA example of good practice

Mental Capacity Assessment	
Evidence that the assessor has considered the best time of day for the interview - ensure you record the date and time of your assessment - where you have a complex case undertake 2 visits at different times and record this.	This assessment occurred at a time when public health measures had been put in place by HM Government to contain the spread of the COVID-19 virus. Professionals were being advised only to carry out essential visits to care homes and limiting social contact. In balancing the need to protect Article 5 rights against the need to protect residents from transmission of the virus face-to-face DoLS assessments ceased. Arrangements were made with the care home to set up the assessment using mobile phone technology. The assessment was arranged for early afternoon on X date as I was informed this would be the best time for Mrs X to participate in the process. Due to difficulty getting care plans sent via secure email I did not have sight of the care plans so completed the capacity assessment based on the DoLS authorisation request submitted by the care home and discussions with the registered nurse on the unit. A selection of care plans was sent on X date indicating how care is managed so a more structured interview was completed via video call on X date at 3pm.
Evidence that the assessor has considered the location of the interview and given thought to privacy - for example in the person's bedroom because it was quite.	Mrs X was seated in an arm chair in a quiet area and supported by the activities co-ordinator for the 1st interview and by the clinical services manager for the 2nd interview. It appeared the room was quiet and we had privacy.
Evidence that the assessor has considered the persons communication and made necessary adaptations - Clarity whether any adaptations were necessary.	Both interviews were conducted using video calling over mobile phones. I was informed Mrs X has used this method of communication to contact her family during the Covid 19 pandemic so she is familiar with this method of communication. Members of the care team ensured the mobile phone was positioned correctly and Mrs X could hear and see me. Mrs X confirmed she could see and hear me adequately. She seemed a little more relaxed for the 2nd interview. Apart from the use of remote technology to complete the interview, no other adjustments were necessary.
Decision to be made	To determine whether Mrs X has the mental capacity to consent to her continuing accommodation, care and treatment at X Care Home.
Outcome:	In my opinion the person **HAS capacity** to decide whether or not they should be accommodated in this care home or hospital for the purpose of being given the proposed care and / or treatment
Stage One:	Mrs X does not have a diagnosed condition but it is reported she has displayed evidence of reduced cognitive function.
a. Is the person able to understand the information relevant to the decision *Record how you have tested whether the person can understand the information, the questions used, how you presented the information and your findings.*	**Yes** Mrs X was bright and alert during both interviews. She was able to confirm her full name, age and date of birth. She was able to tell me she resides in a care home as she is no longer able to manage her own care needs independently. She did not know the exact duration she has been at X care home but when she was orientated with dates she was able to work out she had been at the care home for approximately 4 months from December XXXX I asked if she felt she needed to be in a care home. She said although it was not her ultimate wish, she stated she has no other option as she is now reliant on this level of care and she would not be able to manage living in her previous home. Mrs X said she was involved in the decision with her sons and she is aware her previous house is in the process of being sold. I asked her to tell me about her medical conditions She said " *the usual for my age",* she is aware she has a Stoma bag and she takes medication for her heart and she has regular blood checks because she is on X. She acknowledged she can be a little forgetful but said " *that is expected when you get to my age* ". She confirmed she takes regular medication for her health conditions and members of the care team manage her medication regime. She was aware she had suffered some confusion, agitation and experienced hallucinations. She told me " *I'm not doolally anymore* ". She is aware she is on medication to manage these symptoms. I asked if she has help with personal care. She said she need support her with personal care and dressing but she is able to do

	some things for herself. I asked about mobility issues. She was aware she had been taken to hospital several times due to falls. She knows she has a sensor alarm to alert members of the care team if she gets up without support and paid carers will assist her and make sure she is safe. She knows she has bed rails to prevent her rolling or falling from bed. She agreed they need to remain in place at the present time but she would like this decision to remain under review. She is aware she has a nurse call bell to request assistance and asked if the carer assisting her to bed will always ensure she has this to hand. I asked if she knows the carers make checks on her. She knows she has checks through the day and night to make sure she is safe. I asked if she can go out alone. She said she cannot go out without support due to her poor mobility. She is aware that due to the COVID 19 virus restrictions are in place to keep older and more vulnerable people safe and therefore her family are unable to visit at this time. **I recognise the burden of proof is on me to demonstrate a lack of understanding and I did not find sufficient evidence to do this so conclude Mrs X does have understanding of the information relevant to the decision. She seems to understand the salient points that she is currently accommodated in a care home and support is available day and night. She is aware she would need support to go outside of the care home due to her poor mobility. She understands and members of the care team are aware of her location within the care home and make regular safety checks.**
b. Is the person able to retain the information relevant to the decision *Record how you tested whether the person could retain the information and your findings. Note that a person's ability to retain the information for only a short period does not prevent them from being able to make the decision.*	I conducted 2 interviews with Mrs X and a gap of 6 days between the 2 interviews. Her answers remained consistent and accurate. She was able to recall speaking to me several days earlier and although she could not recall my name she knew my job role. She was able to relay information about her delivery of care and the reason she needs to reside in a care home. I recognise the burden of proof is on me to demonstrate a lack of ability to retain information relevant to the decision and I was unable to do so. **I conclude that Mrs X is able to retain information relevant to the decision in question.**
c. Is the person able to use or weigh that information as part of the process of making the decision *Record how you tested whether the person could use and weigh the information and your findings.*	I am informed at times Mrs X's ability to weigh up risks is at times impaired and she is unable to appreciate why some restrictions need to be in place to keep her safe. These restrictions include her not being free to leave the care home without support, use of sensor mats and use of medication to manage her mental health . At the time of both of my assessments, Mrs X was able to confirm she needs the current level of care provided in a 24 hour residential unit such as X. She acknowledged she has suffered hallucinations in the past weeks and at these times the restrictions do need to be in place. Mrs X is confident she is over these episodes but knows she is still in receipt of medication to control this aspect of her mental health. She confirmed she would not attempt to leave the care home without support. She understands the benefits of 24 hour care and the risks to her safety if this level of support was not in place. I recognise the burden of proof is on me to demonstrate a lack of ability to weigh up and use information relevant to the decision and I was unable to do so. **I conclude Mrs X shows insight and awareness of her requirements, risks, vulnerabilities and the extent of help she receives within the care home setting.**
d. Is the person able to communicate their decision (whether by talking, using sign language or any other means) *Record your findings about whether the person can communicate the decision.*	Mrs X was able to speak verbally and confirm it is her choice to remain living in a 24 hour care setting with support for her mobility, medication regime, personal care and safety and she has care plans outlining this support. She is aware this includes close monitoring and reliance on paid carers or family to support community access. I recognise the burden of proof is on me to demonstrate a lack of ability to communicate information relevant to the decision and I was unable to do so. **I conclude Mrs X is able to communicate her decision verbally.**
Mental Capacity Assessment Conclusion (including any further input needed).	I am aware at the time of Dr X's assessment Mrs X was very confused he commented *She does not retain any degree of insight into her current circumstances. She is*

	unable to weigh risk in my professional opinion and how she would mitigate against the risks, especially of falls ,if she was to live independently and outside the confines of her 24 hour care home environment. Mrs X was on X medication twice daily at this time and shortly after it was reduced to once daily as it was acknowledged this was making her very lethargic. At a similar time Dr X2 Consultant psychiatrist recorded in clinical notes to the GP. 1. My impression is that X does not have a dementia syndrome. 2. She probably had a delirium or acute confusional state that would explain the previous hallucinations. 3. I have spoken with the staff who have confirmed she is back to her usual normal self, they do not have any concerns with regards to the hallucinations that prompted the referral in the first place. 4. She is now being discharged back to your care. My findings on X date and X date are more consistent with the views of Dr X2. From the evidence, I gathered it is my view that there is reasonable belief that Mrs X was able to grasp the salient points about her accommodation, care and treatment and thus I believe has capacity to validly consent to her care arrangements