

Homefinder Somerset Mental Capacity and Housing

What is Mental Capacity?

Mental capacity refers to the ability to make decisions. If you have the mental capacity to make a decision it means that you are able to make a choice for yourself and that people should respect that choice.

Sometimes people are not able to make decisions for themselves. This could be for a variety of reasons:

- Mental health issues
- Dementia
- Autism
- Learning disabilities
- A brain injury
- They are unwell due to medication or illness
- They are under the influence of drugs or alcohol

People make decisions about many different things, which vary in how important they are. For example, deciding to buy a bag of crisps and deciding to rent a house are both decisions, but very different choices. Someone might be able to decide about buying crisps, but not about renting a house.

Mental Capacity Act 2005

The law that deals with people making decisions is the Mental Capacity Act 2005. The Act sets out how we test if somebody can make a decision, and what to do if they can't. Just because somebody can't make the decision themselves doesn't always mean that the decision shouldn't be made at all.

The law says that we should always presume that somebody has capacity and is able to make their own decisions, so we need to have a reason to think that they might not be able to.

The law also says that we must help people to make their own decisions. This might mean that we give people plenty of time to think things over, or that we make sure people can understand the information. We might take time to explain things, use sign language or use an interpreter.

Just because somebody makes a choice that we don't think is sensible or that we don't like doesn't mean that we should assume that they don't have capacity. People can make unwise choices as well as wise ones.

If somebody can't make a decision for themselves then the law says that we should always act in their best interests and that we should restrict them as little as possible.

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How we assess capacity

1. We need to know what decision it is we are looking at. You cannot assess capacity in general it has to be decision specific.
2. We then need to look at whether the person making the decision has 'an impairment of the mind or brain' or if there is some disturbance affecting the way their brain works. For example, that they are very drunk, have a brain injury, or are mentally unwell. If they do not have any impairment, then they have capacity and can make the decision.
3. If a person is found to have an impairment of the mind or brain or has some disturbance affecting the way their brain works, we start assessing their ability to make the decision.
4. We need to assess whether the person understands the information needed to make the decision. For example, if I want to make a decision about renting a house then I need to understand about the financial implications, my responsibilities as a tenant, what happens if I don't pay my rent etc. It is important that we help people make decisions by providing information in a way they can understand it.
5. We need to assess whether the person can keep the information in their mind long enough to make a decision. This doesn't mean that they must remember every single detail forever, just long enough to make the decision.
6. Next, we assess whether they can weigh up the information, think about the pros and cons and arrive at a decision. If I want to rent a house this might mean thinking about the fact that I will have to pay the rent and have responsibilities as a tenant but will have the advantage that the landlord is responsible for maintenance.
7. Finally, the person must be able to communicate their decision, but this can be by any means. It doesn't have to be spoken or written, it could be using a sign.

At the end of this assessment we will know if somebody has the capacity to make the decision or not.

If they do have capacity, then they must be allowed to make their own decision.

What happens if somebody doesn't have capacity?

If the assessment shows someone is not able to make the decision themselves then we look at whether they have appointed somebody with Lasting Power of Attorney or a Property and Affairs Deputy. This is where you give somebody the ability to act on your behalf if you are ever unable to make decisions.

Without the Power of Attorney or Deputy Order a family member or relative cannot make decisions for somebody. If there is nobody with the Power of Attorney or Deputy, then we would have to look at a Best Interests Decision.

A best interest decision should take into account the views of the person themselves, their friends and family, any professionals working with them and should try and work out what the person themselves would take into account if they were able to make the decision.

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Sometimes a Best Interest Decision is all that is needed to do something when a person lacks capacity to decide for themselves, but major decisions, especially those that are legally binding, must be made by someone with a Power of Attorney or a Deputy Order or be made by the Court of Protection.

Applying for housing through Homefinder Somerset

To apply to the Homefinder Somerset register you need to complete an application form and to sign a declaration. We should always assume that people have capacity and that they are able to make that decision themselves. If we have reason to think that they may not be able to, then we carry out the assessment set out above.

If someone has capacity, they can make their own decision and apply.

If they do not have capacity, then we look at if somebody has Lasting Power of Attorney or a Deputyship order that can make the decision and sign the application form for them.

If they do not have an Attorney or Deputy, then a Best Interests decision will need to be made.

As applying for housing is a significant but not a major decision, the Best Interests meeting can appoint somebody to sign the application form on the person's behalf and they can join the Homefinder Somerset register.

Signing a tenancy agreement

This is a very important decision as it is a legally binding contract and has rights and responsibilities attached to it.

If somebody wants to sign a tenancy, we should always assume they have capacity and that they are able to make that choice themselves. If we have reason to think that they may not be able to, then we carry out the assessment set out above.

If they have capacity, they can make their own decision, and sign a tenancy agreement.

If they do not have capacity, then we look at whether they have an Attorney or Deputy who can make the decision for them and sign the tenancy on the person's behalf.

If they do not have an Attorney or a Property and affairs Deputy, then an application will need to be made to the Court of Protection to authorise the tenancy. To sign a tenancy, you either have to have capacity or authority. The person either signs it themselves or it is signed by a person with the legally appointed authority to do so.

Frequently Asked Questions

Q. My wife has dementia and has been assessed as not having capacity to sign a tenancy. Can I sign it on her behalf?

A. Unless you have Lasting Power of Attorney or have been appointed Property and affairs Deputy you cannot sign it. Being a family member or spouse does not give you the right to do this.

Q. My husband has had a stroke and can't speak. Does that mean he doesn't have capacity to apply for housing or sign a tenancy?

A. No, we always assume somebody has capacity and would look at how his stroke has affected his ability to make a choice. It might be that there is no 'impairment of the mind or brain' and he can make his own decisions. Someone can communicate their decision in any way.

Q. My Dad keeps making stupid decisions. Last week he bought an expensive coat when I had told him not to. Can I say he hasn't got capacity and stop him signing a tenancy?

A. No, first of all we have to assume he has capacity and people are allowed to make decisions that we may not agree with. To assess capacity we would have to have reason to think he may not, then we would need to see if he has an 'impairment of the mind or brain' and only if he has could we carry out the assessment.

Q. Does it have to be a doctor who carries out a capacity assessment?

A. No, the assessment should be carried out by somebody who understands the Mental Capacity Act and the decision to be made.

Q. I have autism and my parents say this means that they have to sign all my forms for me. Is this right?

A. No, just because somebody has a condition or a diagnosis does not mean they automatically lack capacity. We must follow the process set about above and do all we can to help people be able to make their own decisions. If somebody doesn't have capacity then we look at who has authority to act on their behalf, and this is not automatically somebody's parents.