



Introduction

1. This guidance note sits alongside our [guidance note](#) on carrying out and recording capacity assessments, and is designed to assist social workers and those working in front-line clinical settings when they are asked to consider a person's capacity to make a decision or decisions. As set out in our guidance note, the courts have now applied the MCA 2005 in respect of very many types of decision. In the course of doing so, they have given indications as to what they consider to be relevant (and sometimes irrelevant) information for purposes of those decisions – i.e. what the person must be able to understand, retain, use and weigh to be able to make the decision. This guidance note¹ pulls together the guidance given in relation to some of the most common decisions that are encountered in practice in the context of health and welfare matters.
2. We give references to cases in footnotes for those who want to read further: each reference contains a hyperlink to the case summary on our case-law database which forms part of our Mental Capacity Law Resources [page](#).
3. This document cannot take the place of legal advice. In any case of doubt as to what to do, it is always necessary to consult your legal department.

¹ Drawing on work originally done by Shereen Akhtar.

Editors

Alex Ruck Keene
Victoria Butler-Cole QC
Neil Allen
Annabel Lee
Nicola Kohn
Katie Scott
Katherine Barnes
Simon Edwards

Disclaimer: This document is based upon the law as it stands as at November 2021; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Using this guidance note

4. There are three key points that need to be emphasised here:
 - a. Starting with the information set out here means that it is not necessary to reinvent the wheel each time they come to consider whether a person can make one of the types of decision covered. If professionals start with the information as potentially relevant (or irrelevant) they will be doing so on the basis that they will be following a path adopted as appropriate by the courts;
 - b. However, because each situation is specific, the information set out must always be tailored to that situation;²
 - c. As emphasised in the guidance note on carrying out and recording capacity assessments, it is crucial to be clear before starting the process of considering the person’s capacity that all those who might be involved in the assessment process agree on what the information is that the person needs to be able to understand, retain, use and weigh. Not being clear about this is one of the single greatest causes of unnecessary complexity, difficulty and challenge.

Categories of decision

Care.....	2
Contact.....	4
Contraception	6
Conducting proceedings.....	7
Deprivation of liberty.....	8
Medical treatment.....	8
Education	9
Marriage	10
Residence	11
Social media.....	13
Sex.....	15

Care

5. Questions of care are often considered at the same time as questions of residence (addressed below). They need to be considered separately, but not at the expense of artificially assigning them to pigeonholes if the nature of the person’s needs mean that the questions are on the facts

² *A Local Authority v JB* [2021] UKSC 52 at paragraph 69.

of their case interrelated.³

6. In the context of decisions relating to care, each decision will be specific instead of general, and will have to be revisited should circumstances or the question posed to the person under assessment change. The following constitute relevant information to an assessment of whether a person has capacity to decide their own care:⁴
 - (a) **With what areas the person under assessment needs support;**
 - (b) **What sort of support they need;**
 - (c) **Who will provide such support;**
 - (d) **What would happen without support, or if support was refused.**
 - (e) **That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.**
7. The following are not relevant to any assessment of capacity as to care:⁵
 - (a) **How care is funded;**⁶
 - (b) **How overarching arrangements for monitoring and appointing care staff work;**⁷
 - (c) **why having a support worker is important to access the community;**⁸
 - (d) **the importance of structure and routine in a person's day;**⁹

³ *Liverpool City Council v CMW* [2021] EWCOP 50. On the facts of that case, Sir Mark Hedley observed (at paragraph 15) that "It would be artificial, and indeed wrong, in the case of CMW not consider residence and care together. It is her fundamental inability to grasp why she needs support and what would happen if she did not have it that underpins my finding that she lacks capacity in both these areas. She could not choose between packages of care because she seriously overestimates her ability to protect herself and seriously underestimates her own vulnerability."

⁴ Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

⁵ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

⁶ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

⁷ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

⁸ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

⁹ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

- (e) the importance of regular access to the local community to build and maintain confidence in daily life and independence and to avoid a deterioration in anxiety;¹⁰
- (f) the importance of developing relationships with others outside of close family to build and maintain his confidence in daily life and independence and to avoid a deterioration in anxiety, to avoid a dependency upon close family members and to develop the person's own interests and opportunities for a social life with peers;¹¹
- (g) the opportunities that may be available to engage in training, education, volunteering or employment.¹²

Contact

8. In the delicate task of assessing whether a protected person has the capacity to decide whether to maintain, reduce or eliminate entirely their contact with another person, the factors which constitute relevant information are:¹³
 - (a) **Whom the contact will be with.** The identity of the person in regards to whom the decision would be made is crucial. The decision must always be specific to a particular person or (where relevant) category of persons;¹⁴
 - (b) In broad terms, the nature of the relationship between the person under assessment and the contact in question;
 - (c) **What sort of contact the person under assessment could have with each of the individuals with whom they may have contact.** This must include an exploration of different locations in which contact could occur, including within a private home or in a community setting such as a cafe. It must also include an exploration of the duration of contact available to the person under assessment, from an hour to overnight stays. There should also be discussion and

¹⁰ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹¹ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹² *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 27 per HHJ Christopher Dodd.

¹³ Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam); endorsed most recently in *Re B* [2019] EWCOP 3 per Cobb J.

¹⁴ MacFarlane LJ in *PC (by her litigation friend the Official Solicitor), NC v City of York Council* [2013] EWCA Civ 478 at [38]. See also *Re EOA* [2021] EWCOP 20 for an example of differentiation between three different categories of person on the facts of the case.

understanding of the arrangements regarding the presence of a support worker;

- (d) **The positive or negative aspects of having contact with each person.** This will require a broad discussion which must be kept structured in the assessor's mind. Evaluations must only be disregarded as irrelevant if they are based on "demonstrably false beliefs".¹⁵ Furthermore, the discussion should include not only current experiences but also a discussion of past pleasant experiences with the contact, of which, in appropriate circumstances, the person under assessment should be reminded.
- (e) **What a family relationship is and that it is in a different category to other categories of contact.** However the assessor must take care not to impose their own values in this assessment;
- (f) **Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party.** If so, there must be a discussion of the potential risk that the person poses to the protected party, and if such a risk exists, whether the risk should be run. This may entail looking closely at the reasons for conviction and the protected party's ability to understand the danger posed to themselves or others around them.¹⁶

9. The following are not relevant to the assessment:¹⁷

- (a) **The nature of friendship and the importance of family ties.** Beyond the idea of a separate category for family relationships, any further exploration of this idea is irrelevant, especially where it may tend to become value laden or parochial;
- (b) **The long term possible effects of contact decisions.** As with residence decisions above, consideration of these would fall into assessment of consequences that are not "reasonably foreseeable" against the instruction of the Mental Capacity Act 2005;
- (c) **Risks which are not clearly in issue in the case.** Therefore a consideration of financial abuse or assault when there is no indication of its likelihood would be irrelevant.

10. It is important to recognise that a person may have capacity to consent to sex or marriage, but simultaneously lack capacity to maintain contact with a particular person.¹⁸ The former involves an understanding of "*matters of status, obligation and rights*" whilst the latter "*may well be grounded in a specific factual context.*" The process of evaluating these capacities must be the same but the

¹⁵ Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam) at para 45

¹⁶ Hedley J, approved in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 13.

¹⁷ These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

¹⁸ *A Local Authority v TZ (No. 2)* [2014] EWCOP 973.

factors to be taken in to account will differ. Indeed, it is not uncommon for the court to be asked (for example in dementia cases) to regulate the contact that one spouse may have with the other.¹⁹

Contraception

11. In deciding whether a person has capacity to make decisions about their own contraceptive regime, the information that will be seen as relevant is as follows:²⁰

- (a) **A rudimentary understanding of the reproductive process.** This would involve an understanding that pregnancy is a result of sexual intercourse and not other (non-sexual) activity such as eating or ingesting unfamiliar substances.²¹
- (b) **A basic understanding of the purpose of contraception.** This understanding would encompass both the reason for contraception and what it does. This would primarily include understanding that there is a likelihood of pregnancy if it is not in use during sexual intercourse;
- (c) **The types of contraception available and how each is used;**
- (d) **The advantages and disadvantages of each type;**
- (e) **The possible side-effects of each and how they can be dealt with;**
- (f) **How easily each type can be changed;**
- (g) **The generally accepted effectiveness of each;**
- (h) **If medically necessary, the important medical information associated with a pregnancy, delivery or future pregnancy.** This is highly specific to the person involved but could include the risk of development of specific medical conditions or complications due to pregnancy or childbirth. For those who suggest a preference for a home birth, the additional risk of a person of home birth must also be understood. The risk of premature birth, where it exists, must be understood, as well as the effects it may have on the child. This is all contingent on there being present one party for whom a further pregnancy could lead to serious health risks, whether

¹⁹ McFarlane LJ in in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 38.

²⁰ Save where otherwise indicated, these come from the decision of Bodey J in *A Local Authority v A* [2010] EWHC 1549 (Fam).

²¹ Cobb J in *The Mental Health Trust, The Acute Trust & The Council v DD & Ors* [2015] EWCOP 4 at para 67.

physical or mental.²²

12. The following factors are not relevant to this assessment:²³

- (a) The woman's understanding of what bringing up a child would be like in practice;
- (b) Any opinion of the woman or other expert or authority as to how she would be likely to get on with child rearing;
- (c) Whether any child would be likely to be removed from her care.

Conducting proceedings

13. The leading authority on capacity to conduct proceedings remains that of *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 (cited with approval by the Supreme Court in *Dunhill v Burgin (Nos 1 and 2)* [2014] 1 WLR 933). The test is whether the party is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. This requires the ability to recognise a problem, obtain and receive, understand relevant information, including advice, the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision.

14. The courts have emphasised that the nature of the dispute is not the only component of the relevant subject matter required to be considered in the context of determining whether a litigant has capacity to conduct proceedings. The nature of legal proceedings themselves, and in particular the specific demands they make on litigants, also fall to be considered. Legal proceedings are "*not being simply a question of providing instruction to a lawyer and then sitting back and observing the litigation, but rather a dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, potentially on a number of occasions over the span of the proceedings as they develop.*"²⁴

15. It is unusual, but not impossible, for a person to lack capacity to make a decision, but not lack capacity to conduct proceedings about that issue.²⁵ In some contexts, a person may well have capacity to make the application (or require it to be brought on their behalf) but not have capacity actually to conduct them. In the DOLS context, for instance, it has been held that the capacity to

²² *The Mental Health Trust, The Acute Trust & The Council v DD (By her litigation friend, the Official Solicitor)*, BC [2015] EWCOP 4 (Fam)

²³ Again, all of these come from *A Local Authority v A* [2010] EWHC 1549 (Fam).

²⁴ See MacDonald J in *TB v KB and LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14 at paragraph 29.

²⁵ See Munby J in *Sheffield City Council v (1) E (2) S* [2004] EWHC 2808 (Fam) at paragraph 49.

ask to issue proceedings simply “requires P to understand that the court has the power to decide that he/she should not be subject to his/her current care arrangements. It is a lower threshold than the capacity to conduct proceedings.”²⁶

16. It is extremely important that if a question of capacity to conduct proceedings arises, it is resolved as a matter of priority.²⁷

Deprivation of liberty

17. The question asked for purposes of DoLS is arguably rather an odd one: namely whether the person has capacity “*in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment*” (paragraph 15 of Schedule A1 to the MCA 2005). On one view, this ignores the fact that the key question for Article 5 ECHR purposes is whether the person can validly consent to the confinement to which they are subject. When the Liberty Protection Safeguards come into force in due course, the statutory test will be aligned with Article 5 because the question will be whether the person lacks capacity to consent to the arrangements giving rise to a deprivation of their liberty (paragraph 21(1)(a) of Schedule AA1). In the meantime, the gap between the DoLS test and Article 5 ECHR has been plugged by the decision in *A Primary Care Trust v LDV & Ors* [2013] EWHC 272 (Fam) in which Baker J indicated that the relevant information in answering the DoLS test (which would equally apply to decisions relating to community deprivation of liberty) includes – in essence – the core elements of the confinement to which the person is subject.²⁸

Medical treatment

18. The information that is relevant to the assessment of whether a person has the capacity to consent to a medical procedure is the information going to the nature, purpose and effects of the proposed treatment, the last of these entailing information as to the benefits and risks of deciding to have or not to have the operation, or of not making a decision at all.²⁹ It is important that the information as to risks is tailored to the risks particular to that particular individual.³⁰

19. The courts have emphasised that what is required is “*a broad, general understanding of the kind that is expected from the population at large,*” and that the person “*is not required to understand every last piece of information about her situation and her options: even her doctors would not make that claim. It*

²⁶ *Re RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS)* [2016] EWCOP 49 at paragraph 86(a).

²⁷ See for practical guidance, in particular as to steps **not** to take, *Z v Kent County Council (Revocation of placement order - Failure to assess Mother's capacity and Grandparents)* [2018] EWFC B65.

²⁸ See paragraph 38; although Baker J made clear that he was not seeking to set down a precedent in relation to the information that, on LDV's case went to her confinement at the hospital in question, the broader approach that he took has not been challenged subsequently.

²⁹ *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 25.

³⁰ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at para 87.

must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.”³¹

Education³²

20. The following is relevant information to a person’s ability to make decisions about their education:

- (a) The type of provision;
- (b) The type of qualifications, if any, on offer;
- (c) The cohort of pupils and whether the person would match the profile of other pupils at the provision;
- (d) That person with special educational needs will have additional rights up to the age of 25 because of those needs.

21. It is not necessary for the person to be able to understand all the details within a Statement of Special Educational Needs or the nature of social and personal development opportunities that would be supported by educational provision.³³

22. The following is relevant information to the decision to request an EHC needs assessment under s.36(1) of the Children and Families Act 2014:

- (a) An EHC plan is a document that says what support a child or young person who has special educational needs should have;
- (b) Other people will be consulted during the assessment process including parents, teachers and other professionals;
- (c) assessed as requiring an EHC the young person has enforceable right to the education set out within their plan;
- (d) An EHC plan is only available up to the age of 25 years.

23. The following is not relevant:

³¹ *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 26.

³² Save where this noted, the guidelines set down in this section comes from the decision of HHJ Christopher Dodd in *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56.

³³ See also here the decision of Macur J in *LBL v RYJ & VJ* [2010] EWCOP 2665 at para 37.

-
- (a) If assessed as requiring an EHC plan, social care and health needs may be included on the plan and this may be advantageous to the person in having their needs (this adds nothing to (a) above);
 - (b) If an EHC plan is lapsed it may be difficult to seek one.
 - (c) “The local authority would agree to ‘lapse’ GP’s EHC plan this year, and he may reconsider next year but it may be difficult to seek an EHC plan after that.” HHJ Dodd found that the possibility (of uncertain extent) that “it may be difficult to seek an EHC plan” is too nebulous to amount to relevant information.

Marriage

24. The test for capacity to marry is a simple one, and (to date³⁴) it has been identified as being issue is act- (or status-), rather than person-specific. The wisdom of the marriage is irrelevant,³⁵ and the courts have emphasised that the bar must not be set high so as to avoid discrimination.³⁶ The information relevant to the test is:³⁷

- (a) **The broad nature of the marriage contract;**
- (b) **The duties and responsibilities that normally attach to marriage**, including that there may be financial consequences and that spouses have a particular status and connection with regard to each other;
- (c) **That the essence of marriage is for two people to live together and to love one another.**
- (d) **That marriage will make any existing will invalid.**

25. It has also been held that the person must not lack capacity to enter into sexual relations,³⁸ although another judge has said that this rule is not an absolute rule.³⁹

26. Information that has been held to be irrelevant includes:⁴⁰

³⁴ In light of the decision of the Supreme Court in *A Local Authority v JB* [2021] UKSC 52, emphasising that there is no such concept as ‘act-specific’ tests of capacity, this may be revisited.

³⁵ Hedley J in *A, B and C v X and Z* [2012] EWHC 2400 (COP) at para 32.

³⁶ *Sheffield City Council v E* [2004] EWHC 2808 (Fam) at para 144.

³⁷ The first three come originally from the judgment of Munby J in *Sheffield City Council v E* [2004] EWHC 2808 (Fam), as applied subsequently by Court of Protection judges, most recently by Parker J in *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20. The last comes from the judgment of HHJ Marston QC in *Re DMM* [2017] EWCOP 32.

³⁸ See *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 76 (Parker J)

³⁹ *NB v MI* [2021] EWHC 224 (Fam) at para 17 (Mostyn J)/

⁴⁰ All of these come from *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at paras 78-79.

- (a) That in a family which facilitates arranged marriage the person is much more likely to find a spouse than if they were unaided;
- (b) How financial remedy law and procedure works and the principles are applied. A person who lacks capacity to conduct proceedings in relation to any financial aspects of divorce proceedings does not necessarily lack capacity to marry.
- (c) That (at least in the context of entry clearance) a spouse may require entry clearance.

Residence

27. Questions of residence are often considered at the same time as questions of care (addressed above). They need to be considered separately, but not at the expense of artificially assigning them to pigeonholes if the nature of the person's needs mean that the questions are on the facts of their case interrelated.⁴¹
28. The information relevant to an assessment as to person's capacity to make a decision as to their place of residence is:⁴²
- (a) **The two (or more) options for living.** This must include the type and nature of the living option, such as whether it amounts to supported living or not, and if so, in what way the protected person will be supported. The person being assessed must also understand what sort of property it is, and the facilities that would be available to them there;
 - (b) **Broad information about the area.** This would cover the notional 'sort' of area in which the property is located, and any known specific risks of living in that area beyond the usual risks faced by people living in any other given area;
 - (c) **The difference between living somewhere and just visiting it.** Pictorial methods of conducting this assessment may be useful. The courts have approved of a social worker's methodology of asking a person to describe what they understood to be the meaning of living, the meaning of visiting, and to draw the difference between the two, which happened to be a picture of a bed

⁴¹ *Liverpool City Council v CMW* [2021] EWCOP 50. On the facts of that case, Sir Mark Hedley observed (at paragraph 15) that "It would be artificial, and indeed wrong, in the case of CMW not consider residence and care together. It is her fundamental inability to grasp why she needs support and what would happen if she did not have it that underpins my finding that she lacks capacity in both these areas. She could not choose between packages of care because she seriously overestimates her ability to protect herself and seriously underestimates her own vulnerability."

⁴² This comes from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam), endorsed on numerous occasions subsequently.

and which held the meaning of overnight stays. This could also include a discussion of what it means to sleep somewhere, and an understanding of the days of the week;

- (d) **The activities that the person being assessed would be able to do if he lived in each place;**
- (e) **Whether and how the person being assessed would be able to see friends and family if he lived in each place;**
- (f) **The payment of rent and bills.** This is not required to be understood in any detail beyond the fact that there will have to be a payment made on their behalf, as for most cases concerning protected persons, the payments will be made by an appointee;
- (g) **Any rules of compliance and/or the general obligations of a tenancy.** Again, the rules are not required to be known in any great detail by the person under assessment but a basic understanding of the fact that there are restrictions, and the areas in which they would operate, will be necessary.
- (h) **Who they would be living with at each placement;**
- (i) **The sort of care they would receive in each placement;**
- (j) **The risk that a family member or other contact may not wish to see the person being assessed should they choose a particular placement against their family's wishes.** This is subject to the caveat below that this should not be presented as a long term and permanent risk with severe consequences on the longer term relationship between the person and the contact involved. To do so would veer towards both emotional manipulation and predicting the future. However, it is perfectly appropriate to warn the protected person of the risk that they may not get many, or any, visits from their contacts where this is born of impracticality, especially if there are long distances or restricted visiting hours involved with any particular residence.

29. The following information will not be relevant to a decision as to capacity concerning residence arrangements of the person being assessed:⁴³

- (a) **The cost of the placement and/or the value of money.** The details of the precise financial arrangements are not important to the question of capacity beyond a basic understanding of whether payment is required, as laid out above;

⁴³ These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

- (b) The legal nature of the tenancy agreement or licence;
- (c) The consequences on the nature of the relationship of the person under assessment with a contact or family member in the long term (10 to 20 years) should the former choose to live independently. Any long lasting social rejection or breakdown in relations would not count as a “reasonably foreseeable consequence” as required by the Mental Capacity Act 2005 in s3(4).

Social media

30. The issue of whether someone has capacity to engage in social media for the purposes of online ‘contact’ is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact. It has been held that “[t]here are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; [...] in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.”⁴⁴
31. The relevant information is (described in the terms that would be applicable in assessing a person with learning disability:⁴⁵
- (a) That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don’t know , without you knowing or being able to stop it;
 - (b) That It is possible to limit the sharing of personal information or images (and videos) by using ‘privacy and location settings’ on some internet and social media sites. The precise details or mechanisms of the privacy settings do not need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;
 - (c) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended. ‘Sharing’ in this context has the same meaning as in 2018 Government Guidance: ‘Indecent Images of Children:

⁴⁴ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at paras 25 and 26 per Cobb J.

⁴⁵ Taken from *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 28 per Cobb J.

Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribution. 'Rude or offensive' is used here as "these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;"⁴⁶

- (d) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
- (e) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;
- (f) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime. 'Sharing' has the same meaning as above; see above also in relation to 'rude or offensive.' This statement "*is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' [...] Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information [...] is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*"⁴⁷

32. Not relevant is the information that internet use may have a psychologically harmful impact on the user:

*It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005.*⁴⁸

⁴⁶ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 29(iii) per Cobb J.

⁴⁷ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 at para 29(iv) per Cobb J.

⁴⁸ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 at para 30 per Cobb J.

Sex

33. In *A Local Authority v JB*,⁴⁹ the Supreme Court held that, normally, the question in relation to sexual relations is whether the person has capacity to decide to engage in sexual relations. When considering that question, the information relevant to that decision **may** include:
- (a) **the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;**
 - (b) **the fact that the other person must have the ability to consent to the sexual activity and must in fact consent before and throughout the sexual activity;**
 - (c) **the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent.** The courts have held previously that person must understand that they can change their mind in relation to consent to sex at any time leading up to and during the sexual act.⁵⁰
 - (d) **that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;**
 - (e) **that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.** The courts have held previously that the knowledge required is fairly rudimentary. *"In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom."*⁵¹ Nothing more than this is required. There is thus no need to be able to name and describe each, or indeed any, potential infection, nor must a person specifically be able to understand condom use (this is an example of a precaution);⁵²
34. The Supreme Court in *JB* made clear that assessment will usually be on a 'generalised forward-looking basis,' i.e. without reference to a specific (actual or prospective) sexual partner. However, it also made clear that there situations where the question is person-specific, for instance:
- (a) sexual relations between a couple who have been in a long-standing relationship where one of them develops dementia or sustains a significant traumatic brain injury;
 - (b) in the case of sexual relations between two individuals who are mutually attracted to one another but who both have cognitive impairments.

⁴⁹ [2021] UKSC 52.

⁵⁰ *A Local Authority v H* [2012] EWHC 49 (COP) at para 25; *LB Tower Hamlets v TB & Ors* [2014] EWCOP 53 at para 41; *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 54.

⁵¹ *A Local Authority v H* [2012] EWHC 49 COP at para 23.

⁵² *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 72.

35. If the decision is can properly be described as person-specific, then there are four consequences:

- (a) **the information relevant to the decision may be different**, for instance depending on the characteristics of the other person (e.g. in same sex relations, the risk of pregnancy resulting from sexual intercourse will not be relevant), or because of the risks posed by a specific person;
- (b) **The practicable steps may also differ**: for instance, it might be possible to help P to understand the response of one potential sexual partner in circumstances where they will remain unable to understand the diverse responses of many hypothetical sexual partners;
- (c) **The reasonably foreseeable consequences of deciding one way or another** may differ. There may, for example, be no reasonably foreseeable consequence of a sexually transmitted disease in a long-standing monogamous relationship where one partner has developed dementia;
- (d) The potential for “serious grave consequences” may also differ.

36. Notwithstanding the reframing of the test in *JB*, it is suggested that the assessment must not however entail consideration of the following elements, should they be present in any particular case:

- (a) **An understanding of what is involved in caring for a child (should a protected person become pregnant)**. This comes close to crossing the line into a paternalist approach that would find incapacity on the basis that a decision is simply unwise.⁵³
- (b) **The risk that may be caused to P themselves through pregnancy, or the risk to future children**. The social, emotional and psychiatric consequences of falling pregnant or those attaching to the children arising from such a pregnancy cannot be part of the relevant information informing the decision of whether a protected party has the capacity to consent to sex or marriage.
- (c) **The fact that the opportunity for sexual relations with a specific partner will be limited for some time to come into the future**.⁵⁴
- (d) **The ability to understand or evaluate the characteristics of some particular partner or intended partner**.⁵⁵

⁵³ Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549 (Fam) at para 61.

⁵⁴ *IM v LM* [2014] EWCA 37 at para 89.

⁵⁵ Munby J in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at para 86.

Alastair Davidson

Senior Clerk

alastair.davidson@39essex.com

Sheraton Doyle

Senior Practice Manager

sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager

peter.campbell@39essex.com

clerks@39essex.com • [DX: London/Chancery Lane 298](#) • 39essex.com

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services.

39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.

[For all our mental capacity resources, click here](#)