

**Best Interests Decisions;**

**The Balance Sheet approach; supporting assessors with the process**

**This guidance is for all members of staff working with customers who have been assessed to lack mental capacity - including Children and Young People Services. Best interest decisions cannot be made on behalf of someone who is deemed to have capacity.**

**Members of staff are reminded that this guidance is not a substitute for reading the Code of Practice to which a link is included here;**

* **http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf**

The Mental Capacity Act clarifies within the 4th statutory principle; that any decision made, or any act performed on behalf of a person lacking the mental capacity to consent to the arrangements must be undertaken in that person’s “best interests.

Given the wide range of potential decisions covered by the Act, the term “best interests” is not defined in the legislation. However, the Code of Practice provides in Chapter 5 guidance on how to determine the best interests of a person who has been assessed to lack mental capacity to make the decision themselves.

Using the “best interests checklist” as provided in Chapter 5 of The Code; the following factors need to be taken into account in determining the best interests of a person lacking capacity:

* Do not make assumptions about someone’s best interests merely on the basis of the person’s age or appearance, condition or an aspect of their behaviour.
* Try to identify the issues and circumstances relating to the decision that are most relevant to the person lacking capacity and throughout make decisions which are as least restrictive and within the person’s best interests.
* Consider whether the person is likely to regain mental capacity and if so can the decision wait until such time that they can make it themselves?
* Do whatever is possible to enable and encourage the person to participate as fully as possible in making the decision.
* Try to find out the views of the person by reference to their past and present wishes and feelings, particularly any relevant written statements made when the person had capacity. Consideration should also be given to any beliefs and values (faith based, cultural or moral) that would be likely to influence the decision.
* Consult other people where it is practicable and appropriate in the light of the person’s right to confidentiality. In particular try to consult with anyone previously named by the person as someone to be consulted. In addition unpaid carers, close relatives and friends who take an interest in the person’s welfare including anyone holding Enduring or Lasting Power of Attorney or any Deputy appointed by the Court of Protection should be consulted.

**Determining what is in a person’s best interests**

Section 1(5) of the Act confirms that the best interest principle applies to any decision made, on behalf of someone where there is reasonable belief that the person lacks capacity under the Act. This includes informal day-to-day decisions and actions as well as decisions that are made by the courts. It is therefore important that members of staff record why they think a specific decision is in the person’s best interests. This is particularly important if the decision that is made is contrary to the views of somebody who has been consulted while working out the person’s best interests.

In many situations the best interests decision will be able to be made reasonably informally. However; where the risks are great, the decision that is required to be made is complex, there are many people involved or where significant disagreement is anticipated, then it may be more appropriate for the decision to be made within the framework of a best interests meeting.

Within more complex situations the adoption of a “balance sheet” approach for recording the context of best interests decisions is highly recommended as it provides a coherent format for considering the available options within a framework which is both robust and transparent.

**The Balance Sheet approach to making best interests decisions.**

The Balance Sheet approach enables the wishes or preferences of the person, and the views of family and carers to be considered and to decide what is, on balance, considered to be the decision that the incapacitated person would themselves have chosen from the available options. Where reaching a decision, regard must be had to any restriction that exists and the less restrictive option must always be considered.

This process is the approach that is considered and adopted by the judiciary when making decisions in the Courts and was first described in details by Lord Justice Thorpe in the early inherent jurisdiction case of Re A [2000]. The following extract describes the approach:

***“The benefits of the procedure should be entered, and then the disbenefits should be entered. The possible gains and losses should be considered, and the likelihood of them occurring. At the end of this 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. Only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.’***

***This makes clear that best interests decisions must be on the basis of weighing up the possible benefits against the possible disadvantages. Medical, emotional, social and welfare benefits and disadvantages should be considered and it is only if the benefits outweigh the disadvantages that the proposed action should be taken.”***

Following this judgment and post implementation of the Act, the courts frequently refer to adopting such an approach to decision-making. Locally members of staff are recommended to adopt this approach when setting out their reasoning when making best interests decisions, to demonstrate they have incorporated the “best interests checklist” as identified in Chapter 5 of the MCA Code.

**Included below is an actual example from local practice of a completed Balance Sheet, demonstrating the type of options which may need to be considered when determining what may be in a person’s best interests.**

# BALANCE SHEET FOR THE BEST INTERESTS MEETING TO BE HELD IN RESPECT OF;

* **The person’s name (referred to within this guidance as John Smith)**

 **on**

* **Date of the best interests Meeting**

 **at**

* **Location of the Best Interests Meeting**

# BACKGROUND

Summary of the details leading up to this best interests meeting including;

* Details of the care provision
* Clarification of the mental capacity assessment including, when and whom this was undertaken by, the specific nature of the question that the assessment was intending to determine and the outcome of that assessment.
* The risks and concerns that exist within the current arrangements

# John Smith’s wishes and feelings

Include a summary of the person’s wishes and feelings that have been able to be identified by those involved in the situation relating to the specific decision being considered.

# Points for Consideration

Include any additional points which need to be considered that may have a bearing on the decision to be reached; for example this may include the availability of specific resources, the location and involvement of family members, safeguarding concerns etc.

The purpose of the balance sheet approach is to consider and weigh up the pros and cons for the decision to be made, including for each individual option. This will need to consider the benefits and burdens including identified potential risks.

In John’s case the options available that need to be considered are:

OPTION 1: For John Smith to continue living in his own home, with domiciliary care visits during the day rather than a live in care package.

Option 2: For John Smith to remain living at home with a live in care package either through a commissioned service or a direct payment.

Option 3: For John Smith to live with his grandson David with additional support provided through a domiciliary care package.

Option 4: For John Smith to be provided with alternative accommodation, within a very sheltered housing scheme with a domiciliary care package.

Option 5: For John to move to a residential / nursing care home.

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| On Suffolk County Council’s LAS recording system the balance sheet is as below.**Balance Sheet** |

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| Provide a summary of the options available |

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| --- | --- | --- | --- |
| OptionList the options available, including the option of doing nothing | What would work well?Detail existing strengths, how this option supports the person's views etc | What would still be a worry?Who is worried? What are they worried about? Is this option more restrictive? | Actions that could help overcome any worriesWhat practical steps could be taken to mitigate the worries? |

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There are some specific decisions that cannot be made on behalf of someone who is deemed to lack capacity under the mental capacity act. These include:

Engaging in sex,

Marriage/civil partnership,

Divorce,

Adoption,

Voting.

This does not mean that a mental capacity assessment is not required in the first instance. For example if a concern is raised about a persons understanding of sexual relationships, a mental capacity assessment maybe required and may conclude the person lacks capacity to engage in sex. No one has the legal authority to consent on another persons behalf to engage in sex so therefore a best interest decision is not relevant, although safeguarding measures may still be required.