

SUPPORTING CHOICE, HOUSING AND THE MENTAL CAPACITY ACT 2005

*Housing and support decisions
for people who may lack
capacity.*

A practical guide



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PART 1 CHOICE, CONTRACTS AND MANAGING IN YOUR HOME

Introduction

1.1 Choices, contracts and managing in your home

More and more people who may lack capacity are living in their own home. Local authority social care and housing staff, housing and support providers, and families are often faced with practical issues concerning decisions around capacity. The Guide looks at three areas of understanding for the person who may lack capacity.

- ❑ Choice: how to encourage informed choice (and provide evidence) when supporting a person who may lack capacity with their housing and support choices, both before they move in, and throughout their tenancy or home ownership
- ❑ Contracts and agreements: how best to support someone when they are entering into a contract for their tenancy/ownership, and for their support;
- ❑ Support for the owner or tenant in managing in their own home, help with understanding and keeping formal agreements and managing money.

This Guide is written primarily for staff working with people who may lack capacity and with their families and support networks. It assumes some knowledge of the Mental Capacity Act 2005 (MCA). It also refers to a wide range of material on housing and support.

The Guide:

- ❑ Gives advice and information of the Act's impact on housing decisions
- ❑ Shows how barriers can be overcome
- ❑ Gives examples and materials

The Mental Capacity Act provides a statutory framework to help people to understand and make choices, including about where and how they live. [The MCA Code of Practice](#) gives guidance on good practice and case studies.

In addition a practical guide for staff on how to use the Mental Capacity Act can be found at the Coventry City Council understanding mental capacity website. www.umccoventry.co.uk

1.2 Decision-making

The Mental Capacity Act provides advice and practical ways of enabling decision-making at all three stages: housing choices, entering into a contract, and what happens once the person has moved into their own place of residence: helping someone manage in their home, support with their tenancy and keeping the rules.

Sometimes a person's capacity for decision-making is underestimated. This is because planning, choosing and buying or contracting through a formal agreement is quite complicated for any of us, not just someone who may lack capacity. Think of the forms and the small print. Do you really understand what Annual Percentage Rate means or how it is calculated? What is the difference between a covenant and an easement?

Although transactions can be complicated financially or legally, most of us do know what we do and do not want but will need help or advice with the best way to go about it and someone to check the details for us.

1.3 Five principles of the Mental Capacity Act 2005

Section 1 of the Act sets out the five 'statutory principles' – the values that underpin the Act. The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so. The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

5. Before the act is done, or the decision is made, consideration should be given to what is least restrictive of the person's rights and freedom of action.

The kind of support people might need to help them make a decision varies. It depends on personal circumstances, the kind of decision that has to be made and the time available to make the decision. It might include:

- ☐ Using a different form of communication (for example, non-verbal)
- ☐ Providing information in a more accessible form (for example, photographs, drawings, or tapes)
- ☐ Treating a medical condition which may affect the person's capacity or
- ☐ A programme to improve a person's capacity to make particular decisions (for example, learning new skills).

The Guide is in two parts: Part One has three further sections: on making housing choices, on tenancy and mortgages agreements, on managing in your home. Part Two provides practical examples, materials and links to provide evidence that you have done so.

A guide to the legal aspects of Housing and the Mental Capacity Act can be found on the [39 Essex Street website](#). As well as other very useful MCA articles.

2. Housing choices

2.1 *The planning stage*

Questions may be raised about the person's capacity to decide between different options, even before the question of whether they have capacity to enter into a contract (tenancy or mortgage agreement or shared ownership lease).

Making a choice about where and how you live, for any of us, will usually be quite complex. What you want, what you can afford, what is realistic and 'do-able' are all considerations we need to make. If you are on benefits and need care or support in your home, the range of choices might seem quite limited and making decisions tough.

On the following page there is an illustration of the decision making process. It is tempting to think there should be a simple step by step logic – the so called 'customer journey map' but in reality it is more complex. Imagine that for a financial decision you pick up the telephone to seek help, you face a sequence of ordered steps with an automated response, which wants you to select from the following options but does not have the option you want. If lucky, you get to 'speak to an advisor'. Someone who can understand your circumstances, wishes, needs and can begin to frame the possible choices.

It's like shopping:

- ☐ Do you know exactly or vaguely what you want?
- ☐ Does it exist?
- ☐ Where do you go to get it?
- ☐ Do you just need to have a look round at things first?
- ☐ Do you need to do some research about what's best for you?
- ☐ Do you need friendly help?
- ☐ What is available and affordable?

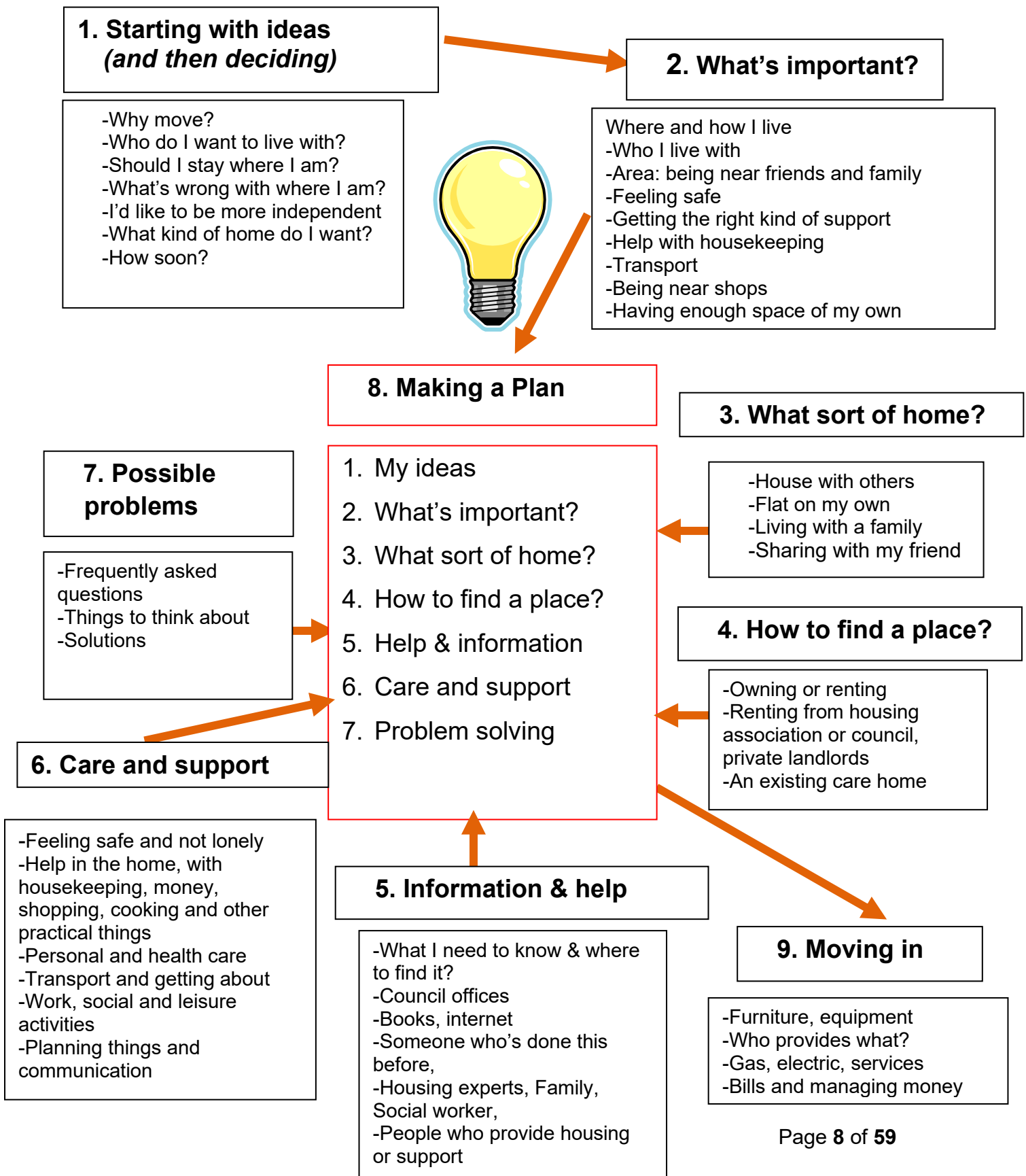
But because housing is a complex matter it begins to look as if it needs a plan.

- ☐ Make a list, where to start?
- ☐ Who can help?
- ☐ How long will it take?
- ☐ What order to do things in?
- ☐ What other risks and contingencies?
- ☐ What's most important – timing, quality, security?
- ☐ How to get the right housing.

The figure below shows the possible contents of someone's plan and what goes into it. It needs to begin with what the person wants and then map out a way to a best result. That's something that fits the bill and is 'do-able'. Help

with planning for where and how you live should be done on the Mental Capacity Act principle of best interests but in the case of disagreements about the recommended best options, a 'Best Interests meeting' may need to be held to seek an agreement.

2.2 Making a plan (using principle of best interests)



2.3 Best Interests

For any staff involved in the care of a person who lacks capacity it is critical that a record is kept of the process of working out the best interests of that person for each relevant decision. The record must contain :

- ☐ How the decision about the person's best interests was reached
 - ☐ What the reasons for reaching the decision were
 - ☐ Who was consulted to help work out best interests, and
 - ☐ What particular factors were taken into account.
-
- ☐ Good practice would also suggest involving an advocate to support the person at this stage

This record must remain on the person's file alongside the record of assessment of capacity.

If someone wants to challenge a decision-makers conclusion, there are several options:

- ☐ Get a second opinion.
- ☐ Hold a formal best interests' case conference.
- ☐ Attempt some form of mediation
- ☐ Pursue a complaint through the organisation's formal procedures.

Ultimately, if all other attempts to resolve the dispute have failed, the Court of Protection might need to decide what is in the person's best interests.

2.4 Independent Mental Capacity Advocate (IMCA)

The Independent Mental Capacity Advocate service was created under the Act. The purpose of the IMCA service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. The IMCA service will work with and support people who lack capacity and represent their views to those who are working out their best interests.

An IMCA **must** be instructed, and then consulted, for people lacking capacity who have **no-one else to support them** (other than paid staff), for decisions about moves into long-term accommodation for more than 8 weeks, or about a change of accommodation. The advocacy service in Coventry is [VoiceAbility](#). The social worker responsible for making the best interests decision is responsible for instructing VoiceAbility. For information on the role of the IMCA see Coventry Understanding Mental capacity website at www.umccoventry.co.uk

2.5 Creating a Housing Options Plan

[In Part 2](#) there are some examples of the steps to be taken when considering different housing options, including sharing or living alone, and renting or buying. If you have supported someone by going through the Housing Options Plan process and evidencing the steps, then you will have complied with the first points in the Mental Capacity Act Code of Practice:

- ☐ By providing all the relevant information
- ☐ On all the options
- ☐ In a way that takes into account their communication needs
- ☐ In consultation with those who know them best (including family members/circle of support).

If it is agreed that the person does not have capacity to make a decision despite the steps taken in the Housing Options Plan process, then you will need to show how you have involved others and held a formal 'best interests' meeting to ensure proper consultation and agreement.

2.6 Sources of information to help with plans

You can investigate locally:

- ☐ Get brochures and application forms from housing providers
- ☐ Visit lettings agents (for private rented housing) and look at web-based or printed materials (for choice-based lettings of social rented housing)
- ☐ Arrange virtual tours of different types of housing
- ☐ Arrange visits to different types of housing
- ☐ Learn from others who have moved home or from other families
- ☐ Contact housing or support providers direct

Keep records as evidence of what help you provided with decision-making

- ☐ Keep a copy of any checklists you have filled in, with dates.
- ☐ Keep a note of materials and contacts used to help someone in making choices, with dates.
- ☐ Use appropriate communications for the person concerned and record the methods used.

3. The Mental Capacity Act and Housing

3.1 *An assumption of capacity*

By law you must start from the assumption that people have the capacity to make their own decisions. This goes for considering different housing options, and then deciding to rent or buy a property and taking on the rights and responsibilities that go with this. Making blanket assumptions about someone's capacity because they have a disability, or making hasty judgements based on superficial knowledge of someone, are both unlawful and must be avoided.

The processes involved in any question about peoples' capacity are similar whether tenancies or house purchase are concerned, although there may be different criteria about exactly what information needs to be understood about these different transactions when thinking about someone's capacity to enter into agreements.

Where capacity is assumed and no-one involved in setting up the tenancy or purchase has raised concerns about someone's understanding, then the grant of the tenancy, mortgage and/or lease etc can go ahead. If the persons capacity is questioned by someone involved with their plans when they are looking to take on new accommodation, then the person's ability to make the necessary decisions has to be assessed and then facilitated as much as is practicable and appropriate.

There are a variety of reasons why someone's capacity may be questioned; - their behaviour may cast doubt on whether they have capacity to make the decision, somebody else says they are concerned about the person's capacity, or they may have already been diagnosed as having an impairment or disturbance in the way their mind or brain works and it has already been shown that they lack capacity to make other decisions.

3.2 *If it is thought someone lacks capacity*

[The MCA Code of Practice](#) advises that if anyone thinks that someone lacks capacity, these questions have to be asked and then worked through:

- Does the person understand information given to them.
- Can the person retain that information long enough to be able to make the decision.
- Can the person weigh up the information available to make the decision.

- Can the person communicate their decision - this could be by talking, using sign-language, using pictures and symbols or Makaton, even simple muscle movements such as blinking an eye or squeezing a hand.

In addition you need to consider:

- ☐ Does the person have all the relevant information?
- ☐ If they are choosing between alternatives, do they have information on all the options?
- ☐ Would the person have a better understanding if things were presented in a different way?
- ☐ Are there times of day or locations that will be easier for the person?
- ☐ Can anyone else who knows the person well help them to make choices or express a view?

The onus of proof here is on the person who believes that the individual lacks capacity. The person who is of the opinion that someone lacks capacity has to be able to prove their case and has to show that all practicable steps have been taken to help someone make their own decision.

This facilitation can only happen lawfully and properly where you know the individual concerned well enough to communicate with them effectively. Useful here is a [Communication Skills Pre-interview assessment](#) (see Part 2) which can be a part of what the Mental Capacity Act calls “all practicable means” to help people formulate and communicate their decisions. Regard also must be had to the guidance in Chapter 3 of [The MCA Code of Practice](#) especially pp 31 – 39.

3.3 *What counts as understanding a tenancy?*

Capacity is decision-specific, and so another point around which there needs to be clarity and agreement is not just of someone’s understanding in general, but also what the basic points are that the person needs to understand about the transaction involved. These will vary from decision to decision.

Tenancies – The essential points here are that it relates to where the person will live, that they agree to pay their rent and to look after their home, while the landlord agrees to see to repairs. Some people who may not be able to make some other decisions may be helped to understand this and will then be able to sign their own tenancy agreement

This is a relatively modest level of understanding. Insisting on a deeper understanding - that you have to understand all 15 pages of small print - may mean that the person taking this view may be acting unlawfully under the

Equality Act 2010 by not making reasonable adjustments for the effects of someone's disability.

As the first part of the mental capacity assessment requires the individual to understand information relevant to the decision, it is important to be clear on what information is relevant to the decision to sign a tenancy agreement. This was considered by a judge in the case [of LB Islington v QR \[2014\] EWCOP 26](#). This case was decided on specific facts and not all the information may be of relevance in other cases. However, as there are very few reported cases on this specific issue, it offers some important general guidance. The judge had to consider which information a woman (known as QR) had to understand, retain and use or weigh up to sign a tenancy agreement for supported living. The judge said as follows: 'In relation to the decision to sign a tenancy agreement for supported living accommodation, in my judgment the relevant information that QR needs to understand use and weigh is:

- i. Her obligations as tenant to pay rent, occupy and maintain the flat
- ii. The landlord's obligations to her under the contract
- iii. The risk of eviction if she does not comply with her obligations
- iv. The purpose of and terms of the tenancy which is to provide her with 24 hour support so that she takes her medication and can maintain her mental health
- v. The landlord/support staff's right to enter her flat without her permission in an emergency if there is serious physical danger or risk to her
- vi. If she moves to supported living accommodation the CTO will be changed to require her to live there.'

The guidance from the judge was fact specific and related to the details of this particular case. However, some common or general points may be drawn from it. In particular, points i, ii, iii and v above are likely to be relevant when signing any tenancy agreement. This means that in order to assess mental capacity in relation to a tenancy agreement, the person assessing mental capacity would have to talk to the person about the obligations on both the landlord and the person themselves; that if they do not comply there is a risk of eviction and that if there was an emergency, the landlord (or staff) could enter.

The person would have to understand what was being described (i.e. the concepts). If they could understand this information, they would then have to be able to remember (retain) it long enough to think about it and accept it could apply to them. For example, if a person had a mental disorder and the delusional belief that they owned the property outright, although they would understand what was being described by the word 'eviction', they would not accept that there was any risk of eviction to them. If, even after using support, perhaps using a person they trusted like a support worker to explain it to them again or giving the person more time, they did not accept there was a risk of eviction (because of their delusion), they would lack the mental capacity to sign the agreement. This

is because they cannot use or weigh up information (because of their mental disorder) relevant to this particular decision.

With treatment for their mental disorder, it may be possible that in future, they no longer have this delusional belief and regain their mental capacity in relation to this decision.

A person with an impairment or disturbance in the functioning of the mind or brain may just need some practical support to pass the mental capacity assessment. For example, someone with a learning disability should not be judged to lack mental capacity just because they need an easy read tenancy agreement to assist their understanding.

Richards, Steven. Working With the Mental Capacity Act 2005 . BookBaby. Kindle Edition.

Once the specifics that need to be understood are agreed, there are useful tools for supporters or housing staff to use. [\(See Part 2\)](#)

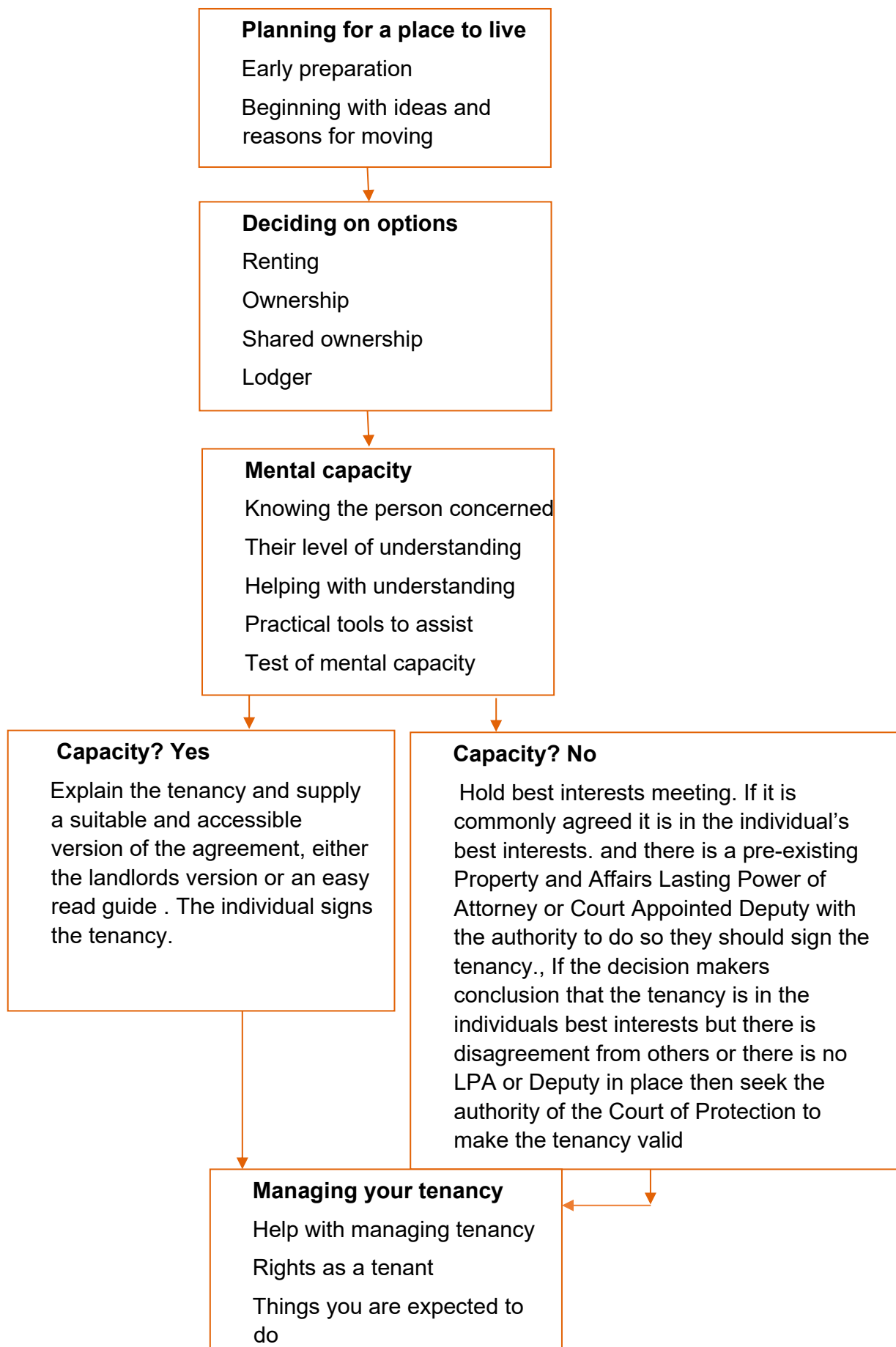
3.4 Buying your own home

Buying property, either outright or on a shared ownership lease, requires extra understanding around the mortgage loan and the ability to instruct a solicitor and possibly a broker to act on your behalf.

- ☐ You are buying your own home
- ☐ You do not have the money to do this
- ☐ You need to borrow the money from the bank
- ☐ The mortgage requires regular payment how you are going to pay this (e.g. via a Trust)
- ☐ You need to be able to sign to say you understand.

As with tenancies, this is a pragmatic approach to make sure that the whole question of capacity is kept specific to the decision at hand so that people can be helped as much as possible to make their own valid decisions consistent with the law and guidance under the Mental Capacity Act.

3.5 Home in five moves



3.6 If someone has capacity

If there is an assumption that someone is capable then they sign the necessary paperwork and enter into the tenancy agreement or shared ownership lease, becoming bound by the terms of these contracts.

If there is an irresolvable disagreement between any parties concerned, e.g. the parents believe their son or daughter does understand the nature of the agreement and a solicitor doesn't accept they have capacity, then the Court of Protection is the final judge of whether the person has capacity to take the decision.

These types of transactions very rarely get as far as the Court for a declaration on capacity. In nearly all cases, it will be agreed that someone does or does not have the necessary capacity.

The Volunteer Advocate

You are a community care worker and are asked to work with Frank, who lives in a residential care home. The local authority wants to close the home and move the occupants out to their own tenancies into a new supported housing scheme. You are not sure that Frank understands what these plans involve and are uncertain whether he understands what a tenancy is all about.

What steps would you take?:

You would have to get to know Frank and assess the best ways and times in which he communicates and understands. You would present the information about the basics of a tenancy and check his understanding, getting him to reflect back to you the questions and concepts. If he can retain and use the information to make an informed choice which he can communicate to you, then you may be happy he has capacity to make a decision on this. If you have reason to doubt Frank's understanding you would want to see that a "best interests" meeting is called. And if Frank has no-one to support him then you would also want to see IMCA involvement.

3.7 If someone does not have capacity: 'best interests'

If there is an agreement that the person doesn't understand the basics of the contract, or if the person can't communicate their decision, then there should be a meeting of the interested parties to decide what, in the circumstances, it is best to do for that person in their best interests – a best interests meeting. See Coventry Understanding Mental capacity website www.umccoventry.co.uk

It should be remembered that a “best interests” decision does not give the decision maker the right to sign a tenancy for someone else, nor take on a mortgage. (See section 3.9 of this guide)

Decisions reached through the best interests’ process, coupled with a reasonable belief that you are acting properly for someone who lacks capacity, protect those taking the decision from allegations of unreasonable or improper conduct.

Who is best able to help with housing choices and tenancy agreements?

The case study below gives an example how different parties may contribute to the decision making process. The roles and interests of these parties must be understood: family member, advocate, care manager, support provider and housing provider. For example as one of the parties to a tenancy the landlord is clearly an interested party and may be well placed to help explain its terms. Support with managing a tenancy may well need to be included in someone's support or care plan and would be a job for the support provider. The care manager has carried out an assessment of need so has a role in advising what sort of place to live is suitable.

Whoever is involved in the process, someone will need to act as the final ‘decision maker’,. the final decision about a person’s capacity must be made by the person intending to make the decision or carry out the action on behalf of the person who lacks capacity –. The ‘decision maker’ would need the cloak of legal protection provided by the Act, to protect them from liability for doing what they propose doing, without the consent of the person in question.

In most Social Care situations the decision maker will be the case manager for the person concerned.

The decision maker will need to consider all relevant factors, having taken into account the incapacitated person’s own tastes, beliefs and values and consulted with all relevant parties and come to a view on whether or not it is in their best interests to take on a particular tenancy offer. Identifying where this authority lies in a situation with many people involved in a person’s care is critical.

It might be helpful to answer the following questions to get an idea of best interests that genuinely delivers on one of the Mental Capacity Act’s principles of sourcing the least restrictive option. If the answer to any of these questions is “no” careful consideration will need to be given to whether or not a tenancy at an alternative address may need to be considered

1. Getting Somewhere to Live

Is it a good place to live?

- Is it the right location
- Is it near social networks that are important to me?
- Is it near facilities and services that are important to me?
- Is it near to transport links that I need?
- Is there enough personal space?
- Will I be safe?
- Are there any better options available in the timescales that I need to move by?

Am I going to be supported to manage my tenancy properly?

- Reporting repairs, looking after the property, being a good neighbour?
- Reminders, practical help to contact Landlord or get decorations done, getting equipment and looking after it?
- Learning about my tenancy responsibilities and rights?
- Managing and making decisions about the tenancy – agreeing any changes, dealings with the Landlord, notifying repairs, making a complaint?

Am I going to get the General Social Care and Support I need?

- Shopping
- Planning & preparing food
- Housework (cleaning, laundry)
- Health care, taking medication
- Personal care (getting up, bathing, dressing)
- Managing day to day money & paying bills
- Making financial decisions
- Arranging transport
- Relationships & communication
- Daytime activities (paid or unpaid work, college)

2. Paying Rent

What is my rent? What services are included in this rent?

- White Goods
- Communal areas furniture
- Fire Safety equipment
- Communal Interior decor
- Refuse disposal
- Pest Control
- Door entry and security systems
- PAT and Gas testing
- External Lighting
- Gardening
- Communal window cleaning
- Communal heating and lighting
- Council Tax
- Lifts
- Communal area cleaning

Are there any services I need that are not included and how much do they cost?

What else do I need to pay for and how much will it cost?

- Food
- Clothing
- Personal utility bills
- Personal Furniture
- TV License
- Entertainment
- Holidays
- Anything else

- How much will these cost if I have to pay for them myself?
- Have I maximised my income to pay for my rent and other essential expenses as much as possible?
- Can I afford everything I need to pay out for?
- Are my circumstances or income likely to change?
- If they do, will I still be able to afford everything I need to pay out for?

3. Being a good neighbour

- After I've moved in, am I going to be a good neighbour to people I live with and/or people in my immediate community?
- If not, can I be helped to make sure my tenancy is not put at risk?
- Sound Proofing
- Changing building design
- Adequate on-going support
- Anything else?

4. Not damaging property

- Am I likely to damage property that does not belong to me?
- If so, can arrangements be put in place to make sure my tenancy is not put at risk?
- Reducing risk of damage
- Ensuring people know about the risk of damage and putting arrangements for replacement in place through rental service charge, personal contribution, third party underwrite or other appropriate method
- Anything else?

If, following completion of this process, the decision maker believes the arrangement is in the person's best interests but others do not, it may be necessary to apply for the appropriate authority from the Court of Protection

Help with choosing a property for someone lacking capacity

John lived in a shared supported living house where he had been for all of his adult life. At the age of 32 John was assessed as not having capacity to make a decision about moving. John is severely autistic and has no verbal communication. It is hard for the people supporting John to know how much understanding he has of what is said to him.

It was decided that he would benefit from living on his own with one to one support. As John had no next of kin and no unpaid friends a referral was made to the Independent Mental Capacity Advocate service (IMCA).

The decision making process involved several people in different roles: The social worker, the support provider, the Speech and Language Therapist, the Occupational Therapist, an Advocate and the IMCA. To make the decision about a property to buy, a housing specification was agreed with all involved. Properties were visited and John was involved in each viewing and his reactions to each property were noted. Eventually an ideal bungalow was found. It matched all the main points people felt were important for him. It was in a quiet village location, in a cul-de-sac, it had a large open plan lounge/diner and a secluded garden. The property was purchased and John has been very happy and settled in his new home.

In this situation the Social Worker as John's case manager was the decision maker under the MCA as they were responsible for arranging and funding the housing package. The Social worker and support provider worked jointly to ensure the housing specification was right for John. The Speech and Language Therapist was able to inform supporters of the best way to inform him about the move and devised a pictorial system to help him understand this. The Occupational Therapist was able to assess the property for adaptations needed and make suggestions on the layout. The IMCA advised on John's behalf to see that John was as involved as much as possible and that the correct procedures had been followed.

3.8 Someone lacking capacity

In order for a person to have contractual capacity, the person must be able to understand the nature of the agreement in question. A long time ago, the law took the view that a 'contract' entered into by a person of 'unsound mind' was void (totally invalid). Over time, however, the law changed. The present position is that an agreement entered into with a person (Person A) lacking contractual capacity is not void. However, Person A is entitled to disclaim a contract made with Person B if they show that Person B either (a) knew

Person A lacked contractual capacity when the agreement was made, or (b) a reasonable person would have realised that Person A lacked capacity (*York Glass Co Ltd v Jubb* (1925)). This is why the law refers to such contracts as voidable rather than void

In law, a tenancy taken on by someone whose lack of capacity is known by the landlord is 'voidable'. The person has the same rights as any other tenant and the same obligations unless the tenancy is voided (cancelled). Only the tenant or someone acting on behalf of the tenant with the legal authority to do so (an attorney or a signatory / deputy appointed by the Court of Protection) can void a tenancy by showing that at the time the tenancy was taken on, the tenant did not have the capacity to make the decision and the arrangement was not in their best interests. When the tenancy is voided the tenant is no longer bound by the terms of the contract. Voiding a tenancy for lack of capacity is therefore possible at law, but it is rare that a tenant or their attorney, signatory / deputy appointed by the Court will decide to do this unless they wanted to stop the arrangement because if they did they would not have any right to remain in the property and would in practice simply be giving notice in the normal way. Therefore, the fact that the tenancy is voidable is unlikely to have any practical impact if the tenant is receiving proper support to manage their tenancy. They are entitled to Housing Benefit to pay their rent in the usual way regardless of their capacity.

3.9 Can a third-party sign for someone?

In most cases, a tenancy agreement does not have to be in writing and signed to be valid. The main exception concerns tenancies for a term of more than three years (section 54, Law of Property Act 1925). This does not mean that a tenant who has occupied accommodation for more than three years requires a written agreement. Most tenancies are for a term of six or 12 months and are automatically renewed if the tenant remains in occupation. Since the term of the tenancy is for less than three years (six or 12 months), section 54 of the Law of Property Act 1925 does not apply. We can, for example, enter into agreements through a conversation (an oral agreement).

However, a written, signed agreement is crucial evidence and sets out the detailed terms clearly. So, what can you do if a person needs to be placed and they do not have the mental capacity to sign a tenancy agreement and no one has authority to sign for them? It can take some time to get authority from the Court of Protection, so in their best interests they may be placed before the tenancy agreement is signed if, that is, they do not resist the placement. The best interests decision itself does not give authority to enter into a tenancy or licence agreement on behalf of a person lacking mental capacity. However, following the MCA properly would provide a defence for the decision maker(s) and allow them to place the person lacking mental capacity in their best interests.

If there is a significant welfare dispute that cannot be resolved informally in relation to the move with either the person themselves or those close to them such as family, an application must be made to a judge in the Court of Protection to obtain authority to move the person (if the judge agrees the move is in their best interests).

For examples of judicial criticism of local authorities moving people without such authority from the court, please see the cases of [LB Hillingdon v Steven Neary \[2011\] EWHC 1377](#); [Milton Keynes Council v RR \[2014\] EWCOP B19](#); and [Re: AG \[2015\] EWCOP 78](#)

The only lawful way in which a third party can sign a tenancy for someone without capacity is either

- a) A lasting power of attorney (LPA) for property and affairs that confers sufficient authority
- b) Enduring power of attorney (EPA) that confers sufficient authority.
- c) Deputyship (property and affairs) that confers sufficient authority.
- d) A Court of Protection order authorising them to sign the tenancy.

Applying to be a signatory simply to sign a tenancy does not make the signatory the tenant, nor does the signatory become liable for anything in the tenancy. The signatory acts merely as the agent for the tenant; all the tenancy obligations remain with the named tenant.

Signing for someone else

You are Samantha's care manager. Samantha lives with her parents and her person centred planning has produced an agreed objective that she move into her own flat. However, she's been waiting for over three years and nothing has become available. Her parents have arranged the rental of a 2 bed flat in the part of town that Samantha wants, and tell you that they will call into the office later today so that you can sign the lease for her. What do you do?

You would not sign the tenancy, as you have no power to do so and would be acting "ultra vires" with the risk of becoming the tenant yourself or letting your employer into becoming the tenant., You would need to see whether the flat would be a feasible option, what she thinks of the idea and whether she has the capacity to understand what it would mean to be a tenant.

If Samantha does not have the capacity to sign the tenancy the case manager would need to:

- ❑ *Check if any one held legal authority to sign on behalf of Samantha for example holds a Property and Affairs Lasting Power of Attorney*
- ❑ *Holds a Court order allowing them to enter the contract*
- ❑ *Is acting as a Deputy on behalf of the Court of Protection with permission to sign the tenancy*

If no-one with this authority is in place then the Case Manager would need to arrange for the Court of Protection to approve someone to sign the tenancy. In Coventry the case manager would need to initially approach their manager to discuss the position, ensure a formal capacity assessment and best interests decision has been recorded, and then make a request to attend the Adult Services Legal Panel.

The function of the Adult Legal Panel process is to provide legal oversight of a wide variety of cases including applications to the Court of Protection for the signing of tenancies. The panel considers whether court proceedings are the appropriate course of action in any given case and if so, ensuring, so far as possible, that all preparatory work is done and evidence is available and of a good quality before any application is made.

3.10 *Court of Protection*

Applying to the Court takes time and involves filling out the required paperwork properly. Copies of forms are available from the [Court](#). A Deputy may be a friend, family member, paid professional or an official appointed by the Court. For finances the Deputy has to get approval for large items and submit annual accounts to the Court. There are annual fees payable as well to the Trust Division of the Court.

For one off decisions such as tenancy or loan agreement only a single order may be needed. A Court decision can take up to 20 weeks, and cost in (2023) £371, if there are no remissions on grounds of low income. If the Court decides a hearing is required to approve the application then an additional fee will need to be paid currently of £494.

Families should be able to get advice on form filling from the local authority, the housing or support provider. If not law firms will usually have someone who specialises in Court of Protection work to help with paperwork for a fee.

3.11 *Deprivation of Liberty*

There are provisions in the Mental Capacity Act in relation to depriving a person of their liberty if they lack the capacity to consent to being in a care home or hospital. The definition of Deprivation of Liberty [comes from a Court case](#) and is described as: 'The person is under continuous supervision and

control and is not free to leave, and the person lacks capacity to consent to these arrangements.'

The following factors amongst others, need to be considered when assessing if any deprivation might be taking place

- Whether professionals have complete and effective control over assessment, care, treatment, contacts, movement and residence
- Whether the person will be under constant supervision and control and not free to leave
- Whether restraint is used including sedation
- Whether the person would be prevented from leaving if they attempted to do so
- Whether a request from carers for the person to be discharged into their care is likely to be refused
- Whether the person can maintain social contacts
- Whether the person has choice about their life within their home

The Mental Capacity Act provides for the deprivation of liberty of people in care homes or hospitals following the application of [a local but statutory process](#).

The local process does not apply to people in their own homes including supported living arrangements. In these cases an application must be made to the [Court of Protection](#) to authorise the deprivation of liberty.

A common example of restriction in supported living would be locked doors specifically to prevent people leaving and/or high staffing ratios relying on staff to prevent the person leaving in order to keep them safe. Situations where people do not have door keys are clearly indicative of restrictions but if a tenant does not have a door key because they are unable to use one, good person centred planning and approaches can determine how best the person would manage getting in and out of their home and who can hold keys on their behalf, without that necessarily amounting to a deprivation of liberty.

Where this approach has been taken and there are any concerns raised by the case manager or anyone involved in the assessment and/or any best interests' decision that a deprivation of liberty is occurring, In Coventry the matter should be referred to the City Councils Adult Social Care Legal Panel who may need to refer the matter to the Court of Protection.

3.12 *Purchase*

Ownership has now become an increasingly significant option, outright ownership less commonly but shared ownership and family funded trust

ownership much more prominent. There are specialist schemes and brokers across the country such as

[The UK Governments HOLD scheme](#)

[Help to buy](#)

[My Safe Home](#) ,

[Dimensions](#),

who have been helping people with disabilities to access housing for many years.

Because of the extra legal work around the mortgage, there may be a greater need for deputyship when someone with limited capacity goes in for purchase or shared ownership. However, the mortgage will be a binding charge on the property whatever the level of the owner's capacity.

Where an application is being made to the [Court of Protection](#) you need to be specific about what the purpose of the application is and what powers you are asking for; e.g. a person or Deputy is authorised in the name of (the name of applicant) to purchase a property under shared ownership with XYZ Housing Association and to secure a mortgage thereon.

We go on in the next section to look at help in the persons home and it is worth underlining the importance of clarity between housing and support organisations just what their respective responsibilities are - for tenant selection, problem solving, getting rent and bills paid, repairs reported and carried out, ending a tenancy or eviction proceedings. Lack of a mutually understood approach on this may allow gaps to appear with serious consequences for a tenant.

4. Help with managing in your home

4.1 Help moving in and managing your home

Supporting someone to make decisions and manage their tenancy or home ownership is in three stages:

- ☐ Preparation for moving in, and the move itself
- ☐ Managing throughout the period of occupation
- ☐ Ending the tenancy or ownership.

As we have seen, the Mental Capacity Act says that any judgement about someone's capacity has to be decision-specific. The help needed will depend on what sort of issue or problem arises. Help may come from:

- ❑ The support provider
- ❑ The housing provider
- ❑ Other professionals involved (such as an occupational therapist or psychologist)
- ❑ People in their circle of support (family, friends)
- ❑ The Deputy or Attorney or anybody else appointed by the Court for that purpose.

The people who support someone who may lack capacity will need to work together. Everyone needs to know who will take the lead and the responsibility for helping with different issues. In many cases there will need to be effective multi-agency working to tackle issues that are more complex.

Usually support with the tenancy would be expected to be a part of the tenant's support plan and the support provider, through the support workers, a key worker or service manager would be responsible for *help managing the person's tenancy*. The Mental Capacity Act would say you could do this as long as you followed their guidance – presuming capacity and acting in the person's best interests.

4.2 If someone has capacity

If someone has capacity to hold a tenancy or shared ownership lease then it is likely that (with appropriate support if needed) they will also have capacity for the other decisions such as choosing and buying furniture or deciding who comes into their home. In principle they should also be able to choose to move elsewhere, e.g. to relinquish their tenancy or sell their owner-occupied home, or to choose to change their day activity or their support provider but it would be advisable for this to be also agreed with the local authority funding the tenant's support package.

However, over time someone who had capacity at the outset may lack capacity for later decisions. If they have already made a Lasting Power of Attorney for property and finance and/or for health and welfare, then their appointed Attorney could make such decisions on their behalf.

Someone who has capacity to make decisions

Pat wanted to live alone. He lived in a supported living house with 3 other people and had been unhappy for a long time. Pat felt he had no control over his life, from when he could go out, to when he had dinner. He was always dependent on others and did not like sharing staff and transport with the other tenants.

Although Pat did not manage his own money and had an appointee, a formal capacity assessment had never been carried out. An assessment showed that with the right information, Pat did have capacity to understand the consequences of managing his own money. The Appointeeship was relinquished and Pat managed his own bank account with support.

Pat decided to move out and contacted a local housing provider who dealt with shared ownership. Pat was able to choose and rent a house through this scheme.

Pat continues to learn about managing money and the responsibility of being a tenant. This sometimes means making mistakes. His support is tailored to his learning and education. Pat is encouraged to make his own decisions and his team respect his right to make choices that enable him to learn.

4.3 Rights and responsibilities as a tenant or homeowner

Anyone who is a tenant or homeowner has legally enforceable housing rights as well as responsibilities. Many people who lack capacity will need support to help them enforce their rights as well as to fulfil their responsibilities.

The rights will depend on what sort of tenancy or ownership they have, so staff supporting someone will need to know the details of the tenancy or ownership title. In principle they include

- ☐ Being able to stay in the housing, for the period set out in the tenancy
- ☐ Not being evicted (unless the landlord or mortgage lender has followed the steps required by law)
- ☐ Deciding who comes into their house or flat (or room in shared housing).

An easy read guide produced by the Equality and Human Rights Commission [Social Housing and your rights disabled people](#) provides information about access, rights and complaints.

4.4 Support to keep to the terms of the tenancy/mortgage agreement

There are things that a tenant or owner is expected to do. Breaking the terms of the agreement will put someone at risk of losing their home and being evicted. The details will vary so it is important that they get help to understand their tenancy agreement/shared ownership lease/mortgage agreement. They may need someone to help, advise or act for them (this could be an Attorney or Deputy) if they cannot understand (even with help).

The things that are covered in the tenancy agreement/shared ownership lease/mortgage agreement usually include:

- ☐ Paying for housing costs (rent, mortgage, council tax – with money from benefits if necessary)
- ☐ Paying bills (electricity, gas, water)
- ☐ Living in the property themselves (not sub-letting without agreement, or living elsewhere)
- ☐ Not causing damage to the property
- ☐ Keeping the property in good condition and reporting repairs that are needed
- ☐ Letting staff in to carry out repairs and safety checks (but with prior notification except for emergencies)
- ☐ Keeping to any rules
- ☐ Not being a nuisance to other tenants or neighbours.

4.5 *Security of tenure*

In most cases, social housing tenants cannot be evicted unless they have broken the tenancy agreement (for example rent arrears, serious nuisance to other tenants or neighbours), *and* the landlord has applied to the Court, *and* the Court has agreed. There are exceptions to this particularly around private landlords and shorter tenancy agreements, the Government website gives more detail of when and [how a landlord can terminate a tenancy](#).

However, there can be difficulties where someone is not keeping to their tenancy agreement and is at risk of eviction, especially if there are questions about their mental capacity. In many cases, they may need support to help them keep to their tenancy agreement. If this does not work then there will need to be effective multi-agency working between social services, the landlord, the support provider and others (advocate or family, circle of support), perhaps to find alternative housing and care provision.

Avoiding evictions

After 2 years in a home shared with two other tenants Sam's keyworker left and he became unsettled and erratic. Any stress could tip him over into bad behaviour and one of the other tenant's family members complained to the housing association landlord. There was a potential case for serious breach of tenancy. Meetings were held with the housing manager, the family and support service manager. The local care manager and support services discussed the case and what to do. The option for arranging moves was considered but it was agreed for the time being that special attention be given to support for Sam and work to improve relationships and behaviour

between tenants. Eviction was not openly considered and better management and support in the home achieved results.

4.6 Complaints procedure

Social housing providers must have a complaints procedure. This should be accessible to people with disabilities. If someone has been through the complaints procedure and they are not satisfied, they can take the complaint further. Complaints can be a useful method to challenge poor practice (e.g. delays in carrying out repairs; nuisance from other tenants).

Private landlords are not obliged to have a complaints procedure. Most not-for-profit providers have a complaints procedure as good practice. If a private landlord uses a managing agent and the agent is a member of ARMA (the Association of Residential Managing Agents) then the agent must have a complaints procedure, and in theory there is a right of appeal to [ARMA](#).

If someone needs support to make a complaint, it is important to follow the stages of the complaint procedure. Someone who lacks capacity may need help, usually from their support provider or someone in their circle of support, or perhaps from their social landlord.

Housing providers must comply with the [Equality Act 2010](#), The charity [Shelter](#) provides useful information about all aspects of Housing and the Law.

4.7 Mental capacity and money

If someone lacks capacity for tenancy or ownership this does not automatically mean they lack capacity for other decisions: this will have to be decided based on the decision in question.

In the case of someone having an Appointee for work and welfare benefits, (e.g. Income Support, Personal Independence Payment) then the DWP has determined that they are not capable of managing their benefits. The Appointee is permitted to spend money to meet the person's needs without the need of a Power of Attorney or Deputyship. The Appointee can spend money on the person's behalf from regular income and savings that have built up from these benefits, and Social Fund loan. For example, an Appointee could spend money on furnishing and equipping a house or flat (rented or purchased) or choosing a fuel supplier and setting up the contract.

However, the Appointeeship only covers DWP state benefits. If the person has other savings (e.g. inheritance or compensation) or other income (including Direct Payments or Personal Budget from the local authority) then if the person lacks capacity, there needs to be a legal basis for spending the person's money (an Attorney or Deputy or other authority from the Court). Coventry practitioners should look at the Coventry City Council Adult Social Care policies and procedures site and the related Mental Capacity Act and Financial Decision Making guide.

An appointee for benefits

You are Mohammed's appointee for his benefits. He gets Local Housing Allowance but this only covers £120 per week of his rent which is £150 per week. The landlord has said he is now owed £300 and will take legal action if he's not paid. Mohammed has a bank account of his own with £5,600 in it but he does not see the need to give any of this to the landlord. It becomes clear that Mohammed does not understand he has to pay rent at all. What do you do?

Mohammed may have a voidable tenancy if he doesn't understand the essentials (e.g. he has to pay rent) but the landlord can still expect remuneration from M for his occupation. The fact that HB is only paying a proportion of the rent doesn't prevent arrears increasing. As M's appointee you have to pay over the Housing Benefit. You may also be legally protected if you use some of M's savings to pay the arrears, under the rules about pledging other peoples' credit.

For further information and materials for working with potential tenants/owners, see Part 2 and:

□ United Response & ARC [Making Money Easier](#)

4.8 Coventry City Council Contracts for Appointees and Money Management

Coventry City Council contracts with Age UK for Money Management Support Services – Appointeeship and Cash Collection, and with Penderels for Direct Payment Support Services.

Accessibility/Eligibility

The commissioned service (**Appointeeship**) is available to adults and older people who have been identified by both the Local Authority and the Department of Works and Pensions as not having the capacity to manage their personal monies (this may include care and support money) and have no responsible person to assist them.

Coventry City Council does not have a statutory duty to provide this service.

In order to be considered for this service citizens must live within the CV1 to CV6 postcode area.

Citizens must have savings of **less than** £10,000. Funding will vary according to individual's personal savings and assets through the duration of the contract period and based on following levels:

Savings	Local Authority Funding
< £3k	LA Fund 100%
>£3k <£5k	LA Fund 75%
>£5k < £10k	LA Fund 50%
>£10k	LA Fund 0%

There is a separate form for private referrals and these are sent directly to Age UK.

If the citizen has property then a deputyship would be required as this is not covered under the remit of an Appointee. If the citizen owns property then it is assumed the value of the property is over £10,000 and therefore not applicable to

this scheme. Applications for Court Appointed Deputies are normally undertaken by the family member, friend, the solicitor or accountant who will act as the deputy.

In cases where the person has no-one who can make an application then for Coventry City Council staff, these cases can be considered by the Adult Social Care Legal Panel.

Cash Collection

The commissioned service (**Cash Collection**) is available to adults and older people with savings less than £10,000 who, although they may have mental capacity, have been identified by the Local Authority as needing support to manage their finances and are unable to access their monies. If a citizen subsequently accrues savings over this amount then they will be given the opportunity of remaining with Age UK Coventry (AUKC), under a private arrangement if they chose.

Direct Payment Support Services

Coventry City Council contracts with Penderels for **Direct Payment Support Services** which includes:

- Authorised Person
- Direct Payment Support Services including Managed Accounts and support to manage the financial aspects of direct payments
- Payroll
- Audit
- Promoting Financial Independence
- Personal Assistant register and support with recruitment
- Information and advice regarding Direct Payments

Referrals for Coventry City Council funded Appointeeship scheme with Age UK must come through Commissioning as the gatekeeper. Practitioners refer directly to Penderels Trust for support to manage the direct payment. Managed accounts must be approved by the allocated worker's line manager.

When undertaking a capacity assessment related to Direct Payments the key is:

- Does someone know what they can spend the DP on and what they shouldn't?
- Does someone understand the function of a bank account and bank card?
- Do they understand that they have to evidence how they use the funding by providing statements and other evidence such as receipts?
- Are they able to send in the evidence on the specified date?
- Do they understand that they have to evidence how they use the funding by providing statements and other evidence such as receipts?
- Are they able to send in the evidence on the specified date?

These key areas are separate to their understanding and decision making about arranging care and being an employer.

Further guidance and advice for Coventry City Council staff can be obtained by contacting the Direct Payment Lead (Independent Living, Practice Development & Safeguarding)

4.9 Other housing-related decisions

In addition to the provisions of the tenancy agreement or lease, there are other aspects to be addressed for someone to live in their own place. They may need help to:

- ☐ Choose and buy anything not provided by the landlord (for example carpets, curtains, furniture, kitchen appliances, utensils, household linen, TV)
- ☐ Repair or replace these items
- ☐ Arrange improvements, adaptations or interior decorations before they move in, or later
- ☐ Choose suppliers for heat, light and phone/broadband, set up payment systems and get connected
- ☐ Plan a budget and manage money

The costs and the choices will depend on the type of housing. In a shared house, most or all furniture and equipment is usually provided, and there will be shared services some of which will be met from housing benefit, so there is little or no cost to the tenant. Utility suppliers are decided by the landlord.

Moving into a self-contained, unfurnished rented or shared ownership property may involve more choices and higher costs (up to hundreds or even thousands of pounds to equip the property) to be paid for from:

- ☐ Social Services Direct Payments or Personal Budget for support and activities
- ☐ Grants (Social Fund Community Care Grant, Disabled Facilities Grant, charities)
- ☐ Loans (Social Fund loan, other)
- ☐ Savings (from benefits income or other sources)
- ☐ Family or Trust money.

As discussed above, someone without mental capacity to take decisions on choosing and paying for support, activities and to equip their new home may need to be supported through a formal route:

- ☐ Appointee (if spending income or savings from benefits)
- ☐ Attorney if there is an Enduring or Lasting Power of Attorney
- ☐ Deputy or single order through the Court of Protection.

Materials in Part 2 can be adapted to record how someone has been supported to make the choices and decisions in this section.

Help with moving in

For Sally, there was a three month period between finding her newly built shared ownership flat and completing the purchase. A support provider started to work with Sally before she moved in. They drew up a budget and Sally decided to spend less on clothes to save up for equipping her new flat. Sally and her support worker looked at catalogues and visited furniture shops. Before moving in, Sally chose furniture, floor coverings, equipment and fuel supplier. The Occupational Therapist applied for a Disabled Facilities Grant to adapt the shower to a wet room suitable for Sally to use with her special wheelchair.

Sally had chosen furniture in advance, and kitchen appliances were included in the price of the flat. The new-build flat had bare concrete floors and large windows overlooked by neighbours. The housing association agreed to supply floor coverings, curtains and blinds, to be paid for through the service charge and covered by Housing Benefit. The developer gave permission to fit in the week before purchase completion so Sally could move in straight away.

BT did not connect the phone immediately, so the Lifeline community alarm did not work, but Sally was confident about using her mobile phone in the meantime. Otherwise a family member could have stayed overnight in the flat, or the local authority could have considered paying the support provider for sleep-in until the Lifeline was working.

4.10 *time for moving in Making things happen in*

If the individual needs benefits such as [Housing Benefit](#) or Support for Mortgage Interest ([SMI](#)) to rent or buy their own housing. The problem is that to get the benefits, you need to move in as soon as the tenancy or ownership starts. But you can't move in without carpets, curtains, furniture and so on. You may not be able to move in until adaptations have been completed (for example a wet room), or the landline telephone connected (especially if the person needs a community alarm).

There should be some flexibility over paying Housing Benefit for up to 28 days after the tenancy starts whilst waiting to move in, but this *must* be clarified in advance with the local council and the housing provider. If there is a question about mental capacity, this can cause even more delays. You need to start any process (such as appointing a Deputy) well before someone wants to move, not just for signing the tenancy and perhaps the mortgage agreement, but also to start planning, ordering and buying what is needed.

PART 2 MATERIALS TO HELP PLANNING AND RECORD-KEEPING

Introduction

Thinking about the impact of the Mental Capacity Act 2005 and a place to live there seems to be three types of understanding to consider.

- ☐ Choosing where and how you live
- ☐ Making a contract granting rights of ownership or occupation
- ☐ How to manage in your home and keep to an agreement

If you are supporting someone to make housing choices you can:

- ☐ Get brochures and application forms from housing providers
- ☐ Visit lettings agents (for private rented housing) and look at web-based or printed materials (for choice-based lettings of social rented housing)
- ☐ Arrange visits to different types of housing, this could include virtual tours
- ☐ Learn from others who have moved home

As well as helping people with their understanding the Mental Capacity Act guidance requires recording how such help is provided and decisions reached.

- ☐ Keep a copy of any checklists you have filled in, with dates.
- ☐ Keep a note of materials and contacts used to help someone in making choices, with dates.
- ☐ Use appropriate communications for the person concerned and record the methods used.

As well as making choices and understanding agreements, helping the person manage in their home is the vital long term priority. This should be part of someone's support agreement, or support plan.

- ☐ Support plans and agreements need to set out what help someone may need with maintaining their home or tenancy
- ☐ Landlords and support providers need to be aware of each other's requirements and responsibilities e.g. in case of breach of tenancy or new lettings in a shared home

At the beginning of the process it may be useful to look at how people communicate and understand.

1. Communication Assessment

(Should form part of Support Plan)

What is the persons key language/communication method?	
Does the person have a key individual who helps them communicate and express their opinions?	
How many key words in a sentence does the person understand?	
Can the person indicate Yes and No? If so, how?	
Can the person indicate Not sure or Don't know? If so, how?	
Does the person use a symbol communications? Which one? (For example Widgit , Change People)	
Does the person use objects of reference? (For example a coffee cup to prompt for a drink.)	
Does the person use signing? Which system? (For example Makaton) Or does the person have their own signs that we should be aware of? What are these?	
How does the person show you s/he has had enough of an activity?	
Does the person have short term memory problems – if so what is the maximum length of time the person can retain information for?	
Does the person have any hearing problems? If yes is there anything we need to do to aid understanding?	
Does the person have any sight problems? If yes is there anything we need to do to aid understanding?	
Is there anything else we should know that would aid communication with the person?	

Communication record completed by:

.....

Others involved:

.....

.....

.....

.....

Date:.....

2 Thinking about a move

The Case Manager should consider a number of things in this section and record them including:

The values and beliefs of the person
What they have stated now and previously about where they want to live
What they have stated now and previously about how they want to live
What they have stated now and previously about the support they may need in their home.*

**In Coventry, tenants in supported living accommodation would be helped to find the best mix of support that suited them.*

3 Help to understand a tenancy

Tenancy or ownership should be the foundation for security in the persons home they convey rights of occupation; some people who lack capacity, who rent or own their home, will need support to understand and agree to the legal rights and responsibilities.

Others will not have the capacity at all to understand their tenancy and will require someone acting for them to agree the tenancy on their behalf such as a Court of Protection appointed Deputy. This guidance has been produced to enable as many people who may lack capacity as possible to be able to understand and agree to their tenancies without the aid of the Court of Protection.

It shows the steps that should be taken to enable someone to understand and agree/disagree with their tenancy and provides evidence of this involvement that can be stored with the person's tenancy agreement. The Mental Capacity Act says that we should presume capacity to make decisions unless it can be shown that someone lacks capacity to make a decision for themselves.

4 Application to the Court for signing a tenancy

Before making an application – (Coventry City Council Staff) the Case Manager must discuss this with their manager and then contact the Council's Adult Social Care legal panel.

If the sole purpose of the application is to sign or end a tenancy agreement, then the application should be for an order that specifically deals with the tenancy matter (one-off decision for the court).

The application form should request the court to make a single order or declaration that it is in the persons best interests for the tenancy agreement to be signed or end on their behalf.

A deputy does not need to be appointed if the only issue is the tenancy agreement.

The court will require:

- A COP 1 Application Form setting out what order or declaration require (including a one-off decision);
- A COP1 A -Supporting information for property and finance applications when submitting COP1;
- A COP 3 Assessment of capacity form. The assessment should deal with the persons capacity to sign or end the agreement;

- A COP 24 witness statement setting out the circumstances and confirming that the best interest's decision-making process has been followed including consultation with close family members, or people in close contact with the person, where applicable;
- COP 44 the court fee; or
- COP 44A for help with fees
- If the case requires a more urgent decision, then form COP 9 needs to be submitted as set out above. COP 9 'application notice' tells the court that you're going to apply for a court order.

These forms are available at the following [.gov link](#)

5 Tenancy made easy capacity assessment

People should receive support to help them make their own decisions about their tenancy. Before concluding that individuals lack capacity to make a particular decision, it is important to take all practicable steps to try to help them reach a decision themselves. Here are some ideas to make the person's tenancy more understandable:

- ☐ Use pictures, photos, makaton, or any other communication tool.
- ☐ Give information with someone present who knows the person well.
- ☐ Use somewhere the person feels comfortable and able to concentrate.
- ☐ Give time for them to absorb, discuss and reflect on the information
- ☐ Give information in manageable 'chunks'.
- ☐ Give information separately on each different topic.
- ☐ Ask another tenant to explain to the person.

Part I Help with the landlord's tenancy agreement

They should be supported to understand and agree the original version of the tenancy agreement.

It is recommended that if a Landlord's tenancy is not easy to understand they are given feedback to this effect so that they can make efforts to make the tenancy more accessible.

Part II Help with an Easy Read Tenancy

If the Landlord's tenancy agreement is not understood by the person, after every effort is made to support them, then agreement should be reached with the Landlord that if the tenant understands an Easy Read Tenancy the Landlord would agree to this demonstrating an understanding of the essentials of a tenancy.

If this is agreed then the person should be supported to understand and agree/disagree to an Easy Read Tenancy version.

If a tenant has the capacity to understand and agree their tenancy but cannot physically sign it, no one should do so on their behalf. Instead evidence should be kept of any tools used to make the tenancy understood, and a statement from the person witnessing that the tenancy is understood but cannot be signed and for what reasons should be recorded. An unsigned tenancy is a fully enforceable contract for both parties in law

Part III Assessment for lack of capacity

If after using some of the above ideas, or any other tools that may be of use, or one of the following has occurred:

- ❑ The person's behaviour or circumstances cause doubt as to whether they have the capacity to make a decision about their tenancy
- ❑ Someone else says they are concerned about the person's capacity
- ❑ The person has previously been diagnosed with an impairment or disturbance that affects the way their mind or brain works and it has already been shown that they lack capacity to make other decisions in their life, and this impairment means that the person is unable to make the decision in question at the time it is needed.

Then you should assess the capacity of the person to make the decision being asked about their tenancy.

It is important to spend time and energy in developing a person's skills and understanding of tenancy rights and responsibilities wherever possible as once a Deputy is appointed it is harder to gain decision-making power back.

If the person cannot complete all the following steps in making a decision about their tenancy then a "Best Interests decision should be made

1. Has a general understanding of the decision
 2. Has a general understanding of the likely consequences of being a tenant
 3. Is able to understand, retain, use and weigh up the information relevant to making the decision
 4. Can communicate their decision (verbally or by other means)
- Understands their obligations as a tenant to pay rent, occupy and maintain the property
 - The landlords obligations to the tenant under the contract
 - The risk of eviction if they do not comply with their obligations
 - The landlords right to enter the property without their permission in the case of an emergency

5.1 Tenancy made easy capacity assessment record

This questions below can be used to guide your assessment if you are involved in helping the person to understand their tenancy agreement. If you are a member of Coventry City Council staff, you should then record your assessment using Coventry City Councils Capacity Assessment Form which can be found [here](#) or on Care Director

Part I Help with the Landlord's tenancy agreement

What steps did you take to enable the tenant to understand the Landlord's **original** tenancy agreement? (Include the tools you used)

Is the tenant able to understand and agree/disagree to their tenancy agreement?

Is the tenant able to sign their agreement?

Yes: No (with reasons):

Part II Help with an Easy Read Tenancy

(A copy can be found at the end of this Section)

What steps did you take to enable the tenant to understand the '*Tenancy made easy!*' version of a tenancy agreement? (Include the tools you used)

Is the tenant able to understand and agree/disagree to the '*Tenancy made Easy!*' version of a tenancy agreement?

Is the tenant able to sign their agreement?

Yes: No (record reasons):

Part III Evidence of lack of capacity

Can the person make the decision to sign the tenancy agreement

Does the person have impairment or disturbance in the function of the mind or brain,

Is there a direct link between the impairment or disturbance of the mind or brain and the persons inability to make the decision

If there is a direct link then what does the impairment or disturbance of the mind or brain make them unable to do

Who else have you consulted (those people that know the person best) in making a judgement about the person's capacity to agree/disagree to their tenancy?

Does the person have a general understanding of their obligations as a tenant to pay rent, occupy and maintain the property

Does the person have a general understanding of the landlords obligations to them as the tenant under the contract

Does the person have a general understanding of the risk of eviction if they do not comply with their obligations

Does the person have a general understanding of the landlords right to enter the property without their permission in the case of an emergency

Is the person able to understand, retain, use and weigh up the information relevant to making a decision about becoming a tenant?

Can the person communicate their understanding (by speech or any other means) of the decision to be made?

What steps will be taken before the review date to develop the person's skills to be able to gain the capacity to agree/disagree to their tenancy in the future?

This assessment should inform the person's support plan. The support plan should detail the decision outcome, who is acting on behalf of the person, in what capacity and what, if any aspects of the tenancy rights and responsibilities the person can do for themselves.

Part IV Action for those lacking capacity

If it is agreed that the person lacks capacity to understand the essentials of a tenancy and that an application will be made to the Court of Protection for a deputy appointment this and any other action points should be recorded.

Action to complete tenancy agreement

Responsible:.....

6. Convening a Best Interests decision meeting

Before the meeting

Confirm that a capacity assessment has been carried out and the person does lack the capacity to make the relevant decision.

Be clear what decision or decisions need to be made and when.

Ensure that all the relevant people are invited to the meeting, and if they cannot attend, they are asked to provide information to be shared at the meeting. Relevant people include the person responsible for implementing the decision, key staff who currently care for the person, any involved family members or friends and (if they have been appointed) anyone named by the person as someone to be consulted and any donee or deputy. (the donee or deputy may or may not always be the decision-maker for specific decisions).

Ensure that there is someone available to take notes of the meeting, who is different from the chair. Ideally a minute-taker, who is not involved in providing information at the meeting, should attend.

During the meeting – agenda template

Introductions, including ground rules.

Purpose of the meeting. The chair will need to outline the decision or decisions to be made. The chair should set out the aim of the meeting, i.e. to reach a shared decision as to what is in the person's Best Interests .

Review of the requirements of the [Mental Capacity Act Code of Practice](#) statutory checklist.

- Working out what is in someone's best interests cannot be based simply on someone's age, appearance, condition or behaviour.
- All relevant circumstances should be considered when working out someone's best interests

- Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision
- If there is a chance that the person will regain the capacity to make a particular decision, then it may be possible to put off the decision until later if it is not urgent
- Special considerations apply to decisions about life-sustaining treatment
- The person's past and present wishes and feelings, beliefs and values should be taken into account
- The views of other people who are close to the person who lacks capacity should be considered, as well as the views of an attorney or deputy

Invitation to the participants to share information about the relevant factors. These could be recorded on a flip chart as risks and benefits of the alternatives under the headings of emotional, medical, social and welfare.

Discussion to enable the participants to pull the information together and weigh it up.

Summary of information and factors to be considered.

Best interests decision. It may be appropriate at this point to ask each participant what they consider, on the balance of probability, the best interests decision should be and why. Aim to reach agreement. If the decision-maker cannot reach an agreement with the other participants, the reasons for this should be explained and recorded at the meeting and the chair should make the participants aware of the means they have to challenge the decision.

After the meeting the chair will review and distribute the minutes.

For further information and guidance see Coventry Understanding Mental Capacity website at www.umccoventry.co.uk or Coventry City Council Mental Capacity SharePoint site.

6.1 Best Interests Meeting Template

BEST INTERESTS MEETING TEMPLATE

Reference:

DOB:

Confidential

A Best Interests Meeting in regards to (add reason). Information obtained at the meeting or contained in these notes is classified as RESTRICTED and must be REGARDED IN THE STRICTEST CONFIDENCE. The decision will be made in accordance with the Mental Capacity Act. The best interest principle underpins the Mental Capacity Act. It is set out in section 1(5) of the Act. 'An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.'

Date:

Location:

Present:

Chair:

Minute Taker:

Apologies:

Decision Maker:

Has the capacity assessment been undertaken

Results of capacity assessment:

Is the citizen likely to regain capacity?

Is there a Lasting Power of Attorney?

Is there an IMCA/ Advocate involved?

Citizen's views and desired outcomes:

Desired outcomes of:

- *Person's the citizen has identified to answer on their behalf*
- *Person's engaged with caring for the citizen*
- *Person's with an interest in protecting the welfare of the citizen.*

Discussion:

Balanced Assessment

OPTION ONE:.....

	Benefits of	Disadvantages of
Medical		
Emotional		
Welfare/ Social		

OPTION TWO:

	Benefits of	Disadvantages of
Medical		
Emotional		
Welfare/ Social		

OPTION THREE:

	Benefits of	Disadvantages of
Medical		
Emotional		
Welfare/ Social		

Outcomes of discussion:

Identified Actions: *(including person's responsible and time scales)*

Date of Review of implementation of Best Interests Decision:

Decision makers should specify a timely review of the implementation of the actions resulting from the best interests decision. If the review establishes that the best interests decision was not successfully actioned, the decision maker should take suitable steps such as:

- Convening a multi-agency meeting to resolve issues leading to the best interests decision not being successfully implemented
- or
- Reassessing and making a new best interests decision that is more achievable
- or
- Taking steps to refer to the Adult Social Care Legal Panel (Coventry City Council staff only) for decision about referral to the Court of Protection
- or
- Re-considering whether any further action is appropriate.

6.2 Best Interests Checklist

Best Interests Checklist All steps and decisions taken for someone who lacks capacity must be taken in their best interests.			
	RESPONSE		COMMENTS
	YES	NO	
Q1 Options Identified – Have you already undertaken your needs assessment and identified the options that can be considered at the best interests meeting?			
Q1. Avoid Discrimination – Guidance Have you avoided making assumptions merely on the basis of the Individuals age, appearance, diagnosis /condition or behaviour?			
Q2. Relevant Circumstances – Guidance: Have you identified all the things the Individual would have taken into account when making the decision for themselves?			
Q3. Regaining Capacity – Guidance: Have you considered if the Individual is likely to have capacity at some date in the future and if the decision can be delayed until that time?			
Q4. Encourage Participation – Guidance: Have you done whatever is possible to permit and encourage the Individual to take part in making the decision?			

<p>Q5. Special Considerations – Guidance: Where the decision relates to life sustaining treatment, have you ensured that the decision has not been motivated in any way, by a desire to bring about their death?</p>			
<p>Q6. The Persons Wishes – Guidance: Has consideration been given to the Individuals past and present wishes and feelings, beliefs and values, that would be likely to influence this decision?</p>			
<p>Q7. Written statements – Guidance: Have you considered any written statement made by the person when they had capacity</p>			
<p>Q8. Consult Others – Guidance: Have you where practicable and appropriate, consulted and taken into account the views of others including those engaged in caring for the Individual, relatives and friends, persons previously named by the Individual, Attorney under a Lasting or Enduring Power of Attorney or Deputy of the Court of Protection?</p>			

<p>Q9. IMCA –</p> <p>Guidance: If the decision relates to serious medical treatment or changes to accommodation and there is no one identified in Q8, have you instructed an Independent Mental Capacity Advocate and received a report from an IMCA.</p>			
<p>Q10. Avoid Restricting Rights – Guidance: How have you given consideration to the least restrictive option for the individual?</p>			
<p>Q11. Other Considerations –</p> <p>Guidance: What other factors have you considered such as emotional bonds, family obligations that the person would be likely to consider if they were making the decision?</p>			

7 Easy Read Tenancy Agreement



Information about my tenancy

IMPORTANT

This book gives information about my tenancy. It is not a tenancy agreement.

8 Tenancy Passport

*A **Tenancy Passport** may be a good idea and should be completed by the support worker or care manager and will form the basis of the person's support plan for tenancy support. This passport should be regularly reviewed as the person gains skills enabling them to manage more of their tenancy tasks. It should be regularly reviewed and updated not something only carried out once.*

What the person understands about their tenancy and what help they may need with managing in their home and keeping to their agreement.

8.1 Tenancy Passport Record

Tenant name:.....Date:.....

Person completing tenancy passport

Review date.....

What I understand about my tenancy rights and responsibilities

What does the person know about their tenancy rights and responsibilities?

What the landlord must do

- ✓ Keep the house or flat in good repair - heating, plumbing and electrics
- ✓ Tell you how they do repair work
- ✓ Tell you how to make a complaint
- ✓ And any other rules they follow

What you must do as the tenant

- ✓ To live in your home and keep clean and tidy
- ✓ Tell your landlord if repairs are needed
- ✓ Let the landlord in to do repairs or decorate
- ✓ To ask if you want to keep any pets
- ✓ To keep any house rules that go with this Agreement especially about health, fire and safety

What you must not do

- X** You must not damage your home, or fittings
- X** You must not be a nuisance to others
- X** You must not be too noisy

Other housing-related decisions

As well as any terms of agreement there may be other things where help may be needed:

- ☐ Getting furniture and equipment
- ☐ Doing decorations or minor improvements
- ☐ Getting supplies for heat, light and phone and a payment system
- ☐ Plan for a budget and managing money

What I can do, and the decisions I can make about my tenancy independently or with some support.

Reporting repairs, looking after the property, being a good neighbour?

What support do they need - reminders, practical help to contact Landlord or get decorations done, getting equipment and looking after it?

What help I am getting to learn more about my tenancy

What help is the person getting to learn more about their tenancy responsibilities and rights?

Decisions I need someone else to make for me about my tenancy

What help managing and decisions about the tenancy – agreeing any changes, dealings with the Landlord, notifying repairs, making a complaint?

Those who help me with my tenancy

The names and roles (including their legal standing with regard to decision-making) of people who provide the above support.

Checking to make sure my tenancy is looked after properly

What is needed to ensure the tenancy conditions are met, avoiding breach of tenure? This could include a review of performance, work with person to gain skills and understanding about their rights and responsibilities)