



PUMP COURT
CHAMBERS

Fluctuating and Borderline Capacity

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The ambit of this talk

1. Fluctuating and Borderline Capacity – general challenges.
2. Distorted Memories.
3. False Beliefs.
4. Personality Change.

- not addressed specifically in the MCA 2005
- brief guidance in the MCA Code of Practice

Code of Practice Para. 4.26

Some people have fluctuating capacity – they have a problem or condition that gets worse occasionally and affects their ability to make decisions. For example, someone who has manic depression may have a temporary manic phase which causes them to lack capacity to make financial decisions, leading them to get into debt even though at other times they are perfectly able to manage their money.

- *A person with a psychotic illness may have delusions that affect their capacity to make decisions at certain times but disappear at others.*
- *Temporary factors may also affect someone's ability to make decisions. Examples include acute illness, severe pain, the effect of medication, or distress after a death or shock.*

Clearly, if possible, support should be given to enable a party to exercise a capacitous decision.

Assistance is found in the Code of Practice at paras 3.12 -3.16 which consider the influence of:

- Location
- Timing
- Support (from an individual, printed resources, technology or otherwise).
- *Support might also involve the removal of a negative Influence, I shall return to this later.*

Where a capacitous decision cannot be procured with appropriate support it might be appropriate to consider whether capacity might be regained or developed in the future. See Code of Practice para. 5.28.

This addresses matters such as medical or pharmaceutical intervention, time to recover from the influence of alcohol or narcotics, the ability to learn new skills or means of communication and the ability to predict regular fluctuations in capacity.

Re DL (Vulnerable Adults with Capacity: Court's Jurisdiction) (No.2) [2012] EWCA Civ 253

The aggressive influence of their son was apt to deprive his parents of their capacity (which was prima facie established) in critical respects (he was seeking to persuade his father to transfer their house to him and his mother to move into care).

The Court was able to intervene with injunctive relief to protect their autonomy and afford protection to them in a 'jurisdictional hinterland' (the "SA jurisdiction") by invoking the inherent jurisdiction.

The precise ambit of this jurisdiction is somewhat unclear as the courts have been careful to extend it incrementally and on a case by case basis.

Sometimes referred to as “the SA jurisdiction” after the decision of Mumby J in ***Re SA (Vulnerable adult with capacity: marriage) [2005] EWHC 2943 (Fam) [2006] 1 FLR 867.***

Fluctuating capacity was addressed in ***A, B & C v X, Y & Z*** ***[2012] EWHC 2400 (COP)*** where the court “red flagged” that attempts to execute a will or power of attorney in respect of P without evidence of a contemporaneous assessment of capacity would be apt to invite a challenge.

A, B, C v X, Y and Z

Also makes clear the distinction between enjoying capacity to manage one's affairs generally and the capacity to execute a specific power of attorney (or will).

Counterintuitively, therefore, one might have capacity to execute an LPA despite lacking the broader capacity.

“...the general capacity of managing one's affairs is an ongoing act and therefore quite unlike the specific act of making a will or making an enduring power of attorney. The management of affairs relates to a continuous state of affairs whose demands may be unpredictable and may occasionally be urgent”.

Sir Mark Hedley in ***Cheshire West and Cheshire Council v PWK [2019] EWCOP 57*** offered no support for the idea of a declaration of a fluctuating capacity:

***In Royal Borough of Greenwich v CDM [2018] EWCOP 15**, Cohen J made a declaration of fluctuating capacity. There are, as it seems to me, two potential difficulties with that approach. The first is the question of whether the statute actually permits the making of a declaration in those terms. The second is that there is the practical problem of how those responsible for PWK's care could in fact operate such a declaration on the ground. It is not, of course, my place to say that this decision was wrong in the circumstances of that case, but I do believe that PWK's case requires a rather different perspective.*

Distorted memories and False Beliefs:

There is clearly an overlap here and it is important to remember that virtually all memories are distorted to some degree the crucial distinction to draw is when a distorted memory or false belief trespasses into the territory of delusion.

Gestmin SGPS S.A. v Credit Suisse (UK) Limited & anor [2013] EWHC 3560 (Comm) Legatt J (as he then was).

Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs

Gestmin:

“psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. ... External information can intrude into a witness’s memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else.”

NCC v PB and TB [2015] COPLR 119

“In determining whether the causative nexus between the individual’s mental impairment and an inability to make a decision was satisfied for the purposes of s2 of the Mental Capacity Act, the question was whether the impairment/disturbance of mind was an effective, material or operative cause of the incapacity even if other factors came into play”.

Clitheroe v Bond [2021] COPLR 380

False belief in context of ‘delusion’ per the common law
Banks v Goodfellow test of capacity.

- The false belief must not be a simple mistake which could be corrected.
- The belief be irrational and fixed in nature.
- It should be out of keeping with the person’s background.
- It is not necessary to show an attempt to shift P from the view.

Distorted Memories and False Beliefs

- Where the belief is obviously extreme and irrational it is unlikely to be difficult to demonstrate that it amounts to a delusion (Smith v Tebbitt 1867 1 P and D 398).
- Alternatively if P was clearly aware of evidence to the contrary.
- Alternatatively where P had no basis for having formed the belief.
- But these are evidential questions not diagnostic tools.

Dr. Series, one of the experts in Clitheroe, made the inconvenient but crucial point that there are delusional disorders for which the only evidence of mental disorder is the delusion itself.

***A Local Authority v AK and Others (Capacity to Marry) –
[2013] COPLR 163***

“AK’s thinking was distorted by false beliefs about marriage (for example about his getting ‘holiday pay’ and being ‘able to control’ his money) such that any weighing up by him of his wishes about marriage is likely to have been on false premises.

Personality Change

In and of itself not an impairment of capacity even if profound see e.g. ***Re Walker (Deceased); Walker and Another v Badmin and Others [2015] COPLR 348.***

Can occur after a profound life changing event (e.g. a severe accident) without necessarily being caused by it or part of the medical sequelae ***Loughlin v Singh & Others [2013] COPLR 371.***

Thank you.