



Introduction

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

¹Drawing on work originally done by Shereen Akhtar.

² See *B v A Local Authority* [2019] EWCA Civ 913.

Editors

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

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

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

Using this guidance note

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

Medical treatment

2. The information that is relevant to the assessment of whether a person has the capacity to consent to a medical procedure is the information going to the nature, purpose and effects of the proposed treatment, the last of these entailing information as to the benefits and risks of deciding to have or not to have the operation, or of not making a decision at all.³ It is important that the information as to risks is tailored to the risks particular to that particular individual.⁴
3. The courts have emphasised that what is required is "*a broad, general understanding of the kind that is expected from the population at large,*" and that the person "*is not required to understand every last piece of information about her situation and her options: even her doctors would not make that claim. It must also be remembered that common strategies for dealing with unpalatable dilemmas – for example indecision, avoidance or vacillation – are not to be confused with incapacity. We should not ask more of people whose capacity is questioned than of those whose capacity is undoubted.*"⁵

Residence

4. The information relevant to an assessment as to person's capacity to make a decision as to their

³ *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 25.

⁴ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 at para 87.

⁵ *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at para 26.

place of residence is:⁶

- (a) **The two (or more) options for living.** This must include the type and nature of the living option, such as whether it amounts to supported living or not, and if so, in what way the protected person will be supported. The person being assessed must also understand what sort of property it is, and the facilities that would be available to them there;
- (b) **Broad information about the area.** This would cover the notional 'sort' of area in which the property is located, and any known specific risks of living in that area beyond the usual risks faced by people living in any other given area;
- (c) **The difference between living somewhere and just visiting it.** Pictorial methods of conducting this assessment may be useful. The courts have approved of a social worker's methodology of asking a person to describe what they understood to be the meaning of living, the meaning of visiting, and to draw the difference between the two, which happened to be a picture of a bed and which held the meaning of overnight stays. This could also include a discussion of what it means to sleep somewhere, and an understanding of the days of the week;
- (d) **The activities that the person being assessed would be able to do if he lived in each place;**
- (e) **Whether and how the person being assessed would be able to see friends and family if he lived in each place;**
- (f) **The payment of rent and bills.** This is not required to be understood in any detail beyond the fact that there will have to be a payment made on their behalf, as for most cases concerning protected persons, the payments will be made by an appointee;
- (g) **Any rules of compliance and/or the general obligations of a tenancy.** Again, the rules are not required to be known in any great detail by the person under assessment but a basic understanding of the fact that there are restrictions, and the areas in which they would operate, will be necessary.
- (h) **Who they would be living with at each placement;**
- (i) **The sort of care they would receive in each placement;**

⁶ This comes from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam), endorsed on numerous occasions subsequently.

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- (j) **The risk that a family member or other contact may not wish to see the person being assessed should they choose a particular placement against their family's wishes.** This is subject to the caveat below that this should not be presented as a long term and permanent risk with severe consequences on the longer term relationship between the person and the contact involved. To do so would veer towards both emotional manipulation and predicting the future. However, it is perfectly appropriate to warn the protected person of the risk that they may not get many, or any, visits from their contacts where this is born of impracticality, especially if there are long distances or restricted visiting hours involved with any particular residence.
5. The following information will not be relevant to a decision as to capacity concerning residence arrangements of the person being assessed:⁷
- (a) **The cost of the placement and/or the value of money.** The details of the precise financial arrangements are not important to the question of capacity beyond a basic understanding of whether payment is required, as laid out above;
- (b) **The legal nature of the tenancy agreement or licence;**
- (c) **The consequences on the nature of the relationship of the person under assessment with a contact or family member in the long term (10 to 20 years) should the former choose to live independently.** Any long lasting social rejection or breakdown in relations would not count as a "reasonably foreseeable consequence" as required by the Mental Capacity Act 2005 in s3(4).

Care

6. In the context of decisions relating to care, each decision will be specific instead of general, and will have to be revisited should circumstances or the question posed to the person under assessment change. The following constitute relevant information to an assessment of whether a person has capacity to decide their own care:⁸
- (a) **With what areas the person under assessment needs support;**
- (b) **What sort of support they need;**
- (c) **Who will provide such support;**

⁷ These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

⁸ Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

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- (d) What would happen without support, or if support was refused.
 - (e) That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

7. The following are not relevant to any assessment of capacity as to care:⁹

- (a) How care is funded;¹⁰
- (b) How overarching arrangements for monitoring and appointing care staff work;¹¹
- (c) why having a support worker is important to access the community;¹²
- (d) the importance of structure and routine in a person's day;¹³
- (e) the importance of regular access to the local community to build and maintain confidence in daily life and independence and to avoid a deterioration in anxiety;¹⁴
- (f) the importance of developing relationships with others outside of close family to build and maintain his confidence in daily life and independence and to avoid a deterioration in anxiety, to avoid a dependency upon close family members and to develop the person's own interests and opportunities for a social life with peers;¹⁵
- (g) the opportunities that may be available to engage in training, education, volunteering or employment.¹⁶

Contact

⁹ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

¹⁰ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

¹¹ *LBX v K, L and M* [2013] EWHC 3230 (Fam), per Theis J.

¹² *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹³ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹⁴ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹⁵ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 26 per HHJ Christopher Dodd.

¹⁶ *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56, at para 27 per HHJ Christopher Dodd.

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8. In the delicate task of assessing whether a protected person has the capacity to decide whether to maintain, reduce or eliminate entirely their contact with another person, the factors which constitute relevant information are:¹⁷
- (a) **Whom the contact will be with.** Unlike in sex and marriage cases, the identity of the person in regards to whom the decision would be made is crucial. The decision must always be specific to a particular person.¹⁸ We are aware that this view is not shared by the Official Solicitor, but in our view the case-law is clear upon the matter;
 - (b) **In broad terms, the nature of the relationship between the person under assessment and the contact in question;**
 - (c) **What sort of contact the person under assessment could have with each of the individuals with whom they may have contact.** This must include an exploration of different locations in which contact could occur, including within a private home or in a community setting such as a cafe. It must also include an exploration of the duration of contact available to the person under assessment, from an hour to overnight stays. There should also be discussion and understanding of the arrangements regarding the presence of a support worker;
 - (d) **The positive or negative aspects of having contact with each person.** This will require a broad discussion which must be kept structured in the assessor's mind. Evaluations must only be disregarded as irrelevant if they are based on "demonstrably false beliefs".¹⁹ Furthermore, the discussion should include not only current experiences but also a discussion of past pleasant experiences with the contact, of which, in appropriate circumstances, the person under assessment should be reminded.
 - (e) **What a family relationship is and that it is in a different category to other categories of contact.** However the assessor must take care not to impose their own values in this assessment;
 - (f) **Whether the person with whom contact is being considered has previous criminal convictions or poses a risk to the protected party.** If so, there must be a discussion of the potential risk that the person poses to the protected party, and if such a risk exists, whether the risk should be run. This may entail looking closely at the reasons for conviction and the protected party's ability

¹⁷ Save where otherwise stated, these come from the judgment of Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam); endorsed most recently in *Re B* [2019] EWCOP 3 per Cobb J.

¹⁸ MacFarlane LJ in *PC (by her litigation friend the Official Solicitor), NC v City of York Council* [2013] EWCA Civ 478 at [38]

¹⁹ Theis J in *LBX v K, L and M* [2013] EWHC 3230 (Fam) at para 45

to understand the danger posed to themselves or others around them.²⁰

9. The following are not relevant to the assessment:²¹

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

10. It is important to recognise that a person may have capacity to consent to sex or marriage, but simultaneously lack capacity to maintain contact with a particular person.²² The former involves an understanding of “*matters of status, obligation and rights*” whilst the latter “*may well be grounded in a specific factual context.*” The process of evaluating these capacities must be the same but the factors to be taken in to account will differ. Indeed, it is not uncommon for the court to be asked (for example in dementia cases) to regulate the contact that one spouse may have with the other.²³

Deprivation of liberty

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

²⁰ Hedley J, approved in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 13.

²¹ These come from in *LBX v K, L and M* [2013] EWHC 3230 (Fam).

²² *A Local Authority v TZ (No. 2)* [2014] EWCOP 973.

²³ McFarlane LJ in in *PC and NC v City of York Council* [2013] EWCA Civ 478 at para 38.

core elements of the confinement to which the person is subject.²⁴

Social media

12. The issue of whether someone has capacity to engage in social media for the purposes of online 'contact' is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact. It has been held that "[t]here are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; [...] in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information."²⁵
13. The relevant information is (described in the terms that would be applicable in assessing a person with learning disability:²⁶
- (a) **That information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don't know, without you knowing or being able to stop it;**
 - (b) **That it is possible to limit the sharing of personal information or images (and videos) by using 'privacy and location settings' on some internet and social media sites.** The precise details or mechanisms of the privacy settings do not need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;
 - (c) **If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended.** 'Sharing' in this context has the same meaning as in 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribution. 'Rude or offensive' is used here as "these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually

²⁴ See paragraph 38; although Baker J made clear that he was not seeking to set down a precedent in relation to the information that, on LDV's case went to her confinement at the hospital in question, the broader approach that he took has not been challenged subsequently.

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

²⁶ Taken from *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 28 per Cobb J.

explicit, indecent or pornographic;"²⁷

- (d) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
- (e) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;
- (f) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime. 'Sharing' has the same meaning as above; see above also in relation to 'rude or offensive.' This statement "*is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material, as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on 'Indecent Images of Children' [...] Whilst the Guidance does not refer to 'looking at' illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information [...] is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.*"²⁸

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

*It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacitous internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under section 3 MCA 2005.*²⁹

Sex

15. In *A Local Authority v JB*,³⁰ the Court of Appeal held that, normally, the question in relation to sexual relations is not whether the person has capacity to consent (as had been previously understood) but whether the person has capacity to decide to engage in sexual relations. When considering

²⁷ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 per Cobb J at para 29(iii) per Cobb J.

²⁸ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 at para 29(iv) per Cobb J.

²⁹ *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 at para 30 per Cobb J.

³⁰ [2020] EWCA Civ 735.

that question, the information relevant to that decision may include:

- (a) **the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;**
- (b) **the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;**
- (c) **the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent.** The courts have held previously that person must understand that they can change their mind in relation to consent to sex at any time leading up to and during the sexual act.³¹
- (d) **that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;**
- (e) **that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.** The courts have held previously that the knowledge required is fairly rudimentary. *"In my view it should suffice if a person understands that sexual relations may lead to significant ill-health and that those risks can be reduced by precautions like a condom."*³² Nothing more than this is required. There is thus no need to be able to name and describe each, or indeed any, potential infection, nor must a person specifically be able to understand condom use (this is an example of a precaution);³³

16. The Court of Appeal in *JB* expressly declined to decide whether **all** the information set out above will be relevant in each case, it is suggested that as a matter of logic there will be some situations where all the information cannot be relevant. As Baker J had noted in *Re TZ*,³⁴ the relevant information included the risks of pregnancy only "if the relations are heterosexual".

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

- (a) **The identity of the sexual or marriage partner.** In other words, capacity to consent to sexual relations is act-specific, rather than person-specific.³⁵
- (b) **An understanding of what is involved in caring for a child (should a protected person become**

³¹ *A Local Authority v H* [2012] EWHC 49 (COP) at para 25; *LB Tower Hamlets v TB & Ors* [2014] EWCOP 53 at para 41; *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 54.

³² *A Local Authority v H* [2012] EWHC 49 COP at para 23.

³³ *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 72.

³⁴ *Re TZ* [2013] EWHC 2322 (COP) at paras 31-3.

³⁵ *IM* at para 77.

pregnant). This comes close to crossing the line into a paternalist approach that would find incapacity on the basis that a decision is simply unwise.³⁶

- (c) **The risk that may be caused to herself through pregnancy, or the risk to future children.** The social, emotional and psychiatric consequences of falling pregnant or those attaching to the children arising from such a pregnancy cannot be part of the relevant information informing the decision of whether a protected party has the capacity to consent to sex or marriage.
- (d) **The fact that the opportunity for sexual relations with a specific partner will be limited for some time to come into the future.**³⁷
- (e) **The ability to understand or evaluate the characteristics of some particular partner or intended partner.**³⁸

18. Note that the decision in *JB* is under appeal to the Supreme Court at the time of writing (May 2021). The Vice-President of the Court of Protection has also emphasised that that the test should be deployed in a way in a way which promotes P's opportunity to achieve capacity.³⁹

Contraception

19. In deciding whether a person has capacity to make decisions about their own contraceptive regime, the information that will be seen as relevant is as follows:⁴⁰

- (a) **A rudimentary understanding of the reproductive process.** This would involve an understanding that pregnancy is a result of sexual intercourse and not other (non-sexual) activity such as eating or ingesting unfamiliar substances.⁴¹
- (b) **A basic understanding of the purpose of contraception.** This understanding would encompass both the reason for contraception and what it does. This would primarily include understanding that there is a likelihood of pregnancy if it is not in use during sexual intercourse;
- (c) **The types of contraception available and how each is used;**
- (d) **The advantages and disadvantages of each type;**

³⁶ Bodey J in *Re A (Capacity: Refusal of Contraception)* [2010] EWHC 1549, (Fam) at para 61.

³⁷ *IM*.

³⁸ Munby J in *X City Council v MB, NB and MAB* [2006] EWHC 168 (Fam) at para 86.

³⁹ *London Borough of Tower Hamlets v NB (consent to sex)* [2019] EWCOP 27 at para 60.

⁴⁰ Save where otherwise indicated, these come from the decision of Bodey J in *A Local Authority v A* [2010] EWHC 1549 (Fam).

⁴¹ Cobb J in *The Mental Health Trust, The Acute Trust & The Council v DD & Ors* [2015] EWCOP 4 at para 67.

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- (e) The possible side-effects of each and how they can be dealt with;
 - (f) How easily each type can be changed;
 - (g) The generally accepted effectiveness of each;
 - (h) **If medically necessary, the important medical information associated with a pregnancy, delivery or future pregnancy.** This is highly specific to the person involved but could include the risk of development of specific medical conditions or complications due to pregnancy or childbirth. For those who suggest a preference for a home birth, the additional risk of a person of home birth must also be understood. The risk of premature birth, where it exists, must be understood, as well as the effects it may have on the child. This is all contingent on there being present one party for whom a further pregnancy could lead to serious health risks, whether physical or mental.⁴²

20. The following factors are not relevant to this assessment:⁴³

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

Marriage

21. The test for capacity to marry is a simple one, and the issue is act- (or status-), rather than person-specific. The wisdom of the marriage is irrelevant,⁴⁴ and the courts have emphasised that the bar must not be set high so as to avoid discrimination.⁴⁵ The information relevant to the test is:⁴⁶

- (a) **The broad nature of the marriage contract;**
- (b) **The duties and responsibilities that normally attach to marriage,** including that there may be

⁴² *The Mental Health Trust, The Acute Trust & The Council v DD (By her litigation friend, the Official Solicitor), BC* [2015] EWCOP 4 (Fam)

⁴³ Again, all of these come from *A Local Authority v A* [2010] EWHC 1549 (Fam).

⁴⁴ Hedley J in *A, B and C v X and Z* [2012] EWHC 2400 (COP) at para 32.

⁴⁵ *Sheffield City Council v E* [2004] EWHC 2808 (Fam) at para 144.

⁴⁶ The first three come originally from the judgment of Munby J in *Sheffield City Council v E* [2004] EWHC 2808 (Fam), as applied subsequently by Court of Protection judges, most recently by Parker J in *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20. The last comes from the judgment of HHJ Marston QC in *Re DMM* [2017] EWCOP 32.

financial consequences and that spouses have a particular status and connection with regard to each other;

- (c) That the essence of marriage is for two people to live together and to love one another.
- (d) That marriage will make any existing will invalid.

22. It has also been held that the person must not lack capacity to enter into sexual relations,⁴⁷ although another judge has said that this rule is not an absolute rule.⁴⁸

23. Information that has been held to be irrelevant includes:⁴⁹

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

Education⁵⁰

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

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

25. It is not necessary for the person to be able to understand all the details within a Statement of Special Educational Needs or the nature of social and personal development opportunities that

⁴⁷ See *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at para 76 (Parker J)

⁴⁸ *NB v MJ* [2021] EWHC 224 (Fam) at para 17 (Mostyn J)/

⁴⁹ All of these come from *LB Southwark v KA (Capacity to Marry)* [2016] EWCOP 20 at paras 78-79.

⁵⁰ Save where this noted, the guidelines set down in this section comes from the decision of HHJ Christopher Dodd in *A Local Authority v GP (Capacity - Care, Support and Education)* [2020] EWCOP 56.

would be supported by educational provision.⁵¹

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

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

27. The following is not relevant:

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

⁵¹ See also here the decision of Macur J in *LBL v RYJ & VJ* [2010] EWCOP 2665 at para 37.

Alastair Davidson

Senior Clerk

alastair.davidson@39essex.com

Sheraton Doyle

Senior Practice Manager

sheraton.doyle@39essex.com

Peter Campbell

Senior Practice Manager

peter.campbell@39essex.com

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

LONDON

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

MANCHESTER

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

SINGAPORE

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

KUALA LUMPUR

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

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