



Supporting people with social care needs who are experiencing coercive control

Guidance sheet two: Mental capacity and coercion – what does the law say?

Dr Lindsey Pike, RiPFA

With thanks to Rachel Griffiths, RiPFA Associate

December 2016

Overview:

Introduction

Situations where a person has an impairment of their mind or brain

The impact of coercion on decision making

Situations where a person has no impairment of their mind or brain, but is subject to coercion

Relevant case law

How can practitioners make decisions about capacity in the context of coercion?

Case example

References

Introduction

This briefing does not constitute legal advice. It should be used as a tool to support practice, in conjunction with reflection, supervision, and (where necessary) support and guidance from legal services.

This briefing addresses the following questions:

- What does the *Mental Capacity Act 2005* (MCA) and associated case law and judgements have to say about coercion and capacity?
- How can practitioners determine if someone experiencing coercion has the mental capacity to make decisions related to their living arrangements and contact with the alleged perpetrator?

The key message to take away is that the local authority, and the courts, must ensure that the person is empowered to make their own decision wherever possible, and where this is not possible, to use the least restrictive option.



For the purposes of this briefing, situations of coercive control of people with care and support needs have been divided into two types:

1. Those where the person has an impairment of their mind or brain, and there are questions over their capacity to make decisions relevant to their safety.
2. Those where the person has no impairment of their mind or brain, but where the levels of coercive control are so high that their decision-making may be affected.

There is a third situation, where someone with an impairment of their mind or brain is also experiencing coercive control. Where capacity is in doubt in these situations, it will be necessary to detail whether capacity may be impaired by the mental impairment, or the coercion, or both.

Situations where a person has an impairment of their mind or brain.

The *Mental Capacity Act 2005* (MCA) is an empowering piece of legislation which aims to ensure that people with social care needs who have an impairment of their mind or brain are supported to make their own decisions wherever possible. The principles of the Act (s1) state that:

- People should be assumed to have capacity unless it can be demonstrated otherwise.
- A person must be supported in whatever way is necessary to make their own decisions.
- People have the right to make unwise decisions (and unwise decisions do not demonstrate a lack of mental capacity).
- Any decisions made for someone who lacks capacity must be made in their best interests.
- Decisions made on behalf of people who lack capacity must reflect the option that is least restrictive of their rights and freedom of action.

The MCA only applies where a person lacks capacity as defined in the Act – i.e. 'if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (2.1).

The MCA gives further detail on undertaking assessments of mental capacity.

Guidance is available, both from the Code of Practice (Chapter 4) (Department for Constitutional Affairs, 2007) and, for example, guidance produced by 39 Essex Chambers (Ruck-Keene et al, 2014).

Where it appears, on the balance of probabilities, that a person lacks the mental capacity to decide whether to continue with their current living arrangements, or to maintain contact with a person who may be perpetrating domestic or other abuse, the best interests process should be followed.

See for example the MCA Code of Practice, Chapter 5 (Department for Constitutional Affairs, 2007).



It is important to note that the MCA (in s.44) introduced two offences of the neglect or abuse of a person lacking mental capacity.

<http://www.legislation.gov.uk/ukpga/2005/9/section/44>.

As explained in the MCA Code of Practice 14.23ff, these may apply to anyone caring for a person who lacks capacity – this includes family carers, healthcare and social care staff in hospital or care homes and those providing care in a person's home, an attorney appointed under an LPA or an EPA, or a deputy appointed for the person by the court.

The impact of coercion on decision making

Coercive and controlling behaviour can impact on decision making. The sociologist Gilbraith (1983) described coercive power as 'used to inflict unpleasant or painful consequences on a person acting on their own choices so that they "choose" to follow the preferences of the person inflicting harm rather than their own' (Ingram, 2016: 2). People experiencing coercive control live in fear of the consequences of going against the rules that the person perpetrating the abuse has set up for them to follow. The tactics used by perpetrators of coercive control include threats, intimidation, isolation, and control over aspects of everyday life, whereby the perpetrator may 'limit space for action' (Home Office, 2015: 4), including space to make independent decisions. This is now recognised in the statutory guidance, as demonstrated in the guidance to police to ask 'questions about rules, decision making, norms and fear in the relationship, rather than just what happened' (ibid: s2.27) when looking into identifying the offence.

The [evidence scope](#) on coercive control that accompanies this set of guidance (Ingram, 2016) discusses the impact of coercive control on decision making and behaviour in more detail.

Implications of this for practice include:

- Be aware that the person will be adapting their behaviour and decisions to minimise their risk. They may be fearful of the consequences of resisting, and fearful of the possible negative impact that outside intervention may have on them.
- Remember the person knows the situation best, and knows the level of risk they are facing. Do not try to impose or force a decision (e.g. to leave a relationship); instead, focus on building trust.

Situations where a person has no impairment of their mind or brain, but is subject to coercion.

Where a person does not have an impairment of their mind or brain, but it seems that they cannot make a decision freely because they are experiencing coercion, undue influence or constraint, their decision-making capability must be respected. An 'unwise' decision to have a relationship with someone who is abusive does not in itself mean that someone lacks mental capacity to make that decision. Cases relating to unwise decisions in relationships often make reference to *Sheffield City Council v E* [2004] EWHC 2808 (Fam) [2005] 1 FLR 965, which detailed a situation where a young woman with a learning disability wanted to marry a man with a history of serious sexual violence. The Judge, Munby J, explained:



'As we have seen, the question has always been formulated in a general and non-specific form: Is there capacity to understand the nature of the contract of marriage?' and in relation to her marriage the only question for the court is whether E has capacity to marry. The court is not concerned – has no jurisdiction – to consider whether it is in E's best interests to marry or to marry S. The court is concerned with her capacity to marry, not with the wisdom of her marriage in general or her marriage to S in particular.'

In extreme cases where there is a serious risk to life, and where all other legal and support avenues have been exhausted, an application can be made to invoke the inherent jurisdiction of the High Court. However, the courts will always strive not to undermine the principles in Section 1 of the *Mental Capacity Act*, especially in relation to unwise decisions.

A briefing by SCIE (2014:12) gives further detail of the circumstances in which the inherent jurisdiction could be accessed. It highlights an important consideration; that the purpose of the inherent jurisdiction is not to overrule the wishes of an adult with capacity, but to ensure that decisions are being made freely. The Court's jurisdiction may be used to help professionals gain access to an adult.

A note by Ruck-Keene (2013) further clarifies when the inherent jurisdiction can be used:

- It can only be used by High Court judges.
- The test for engaging the inherent jurisdiction is whether the proposed intervention is necessary and proportionate.
- In the first instance, the court will seek to facilitate the unencumbered decision-making of the person; though it is not limited to doing this.

Relevant legal judgments

[2011] EWHC 1022 (Fam)

Bailii: <http://www.bailii.org/ew/cases/EWHC/Fam/2011/1022.html>

Summary: [Mental Health Law](#)

Date: 19 April 2011

This case looked at questions over the extent of the court's inherent jurisdiction following the implementation of the *Mental Capacity Act 2005*.

The case concerned a man in his fifties (DL) who lived with his parents (Mr and Mrs L, aged 85 and 90). Mr L had been found to no longer have capacity to make decisions about his future care, and relocated to a care home. Mrs L and DL continued to share a home; Mrs L had a physical disability and received social care support through direct payments and visits from support staff twice a day. The Local Authority was worried about DL's behaviour towards his parents, which was stated (though disputed by DL) as being aggressive, and had resulted in physical violence on some occasions. The LA had documented behaviour including:



- physical assaults
- verbal threats
- controlling where and when his parents could move in the house
- preventing them from leaving the house
- controlling who visited them, and the terms of visits, including health and social care professionals providing care to Mrs L
- attempts to coerce Mr L into transferring the ownership of the house into DL's name
- pressure on both parents to have Mrs L moved into a care home against her wishes.

The LA had considered and rejected alternative courses of action to protect Mr and Mrs L including:

- an application to the Court of Protection under the MCA 2005
- an application for an ASBO (anti-social behaviour order) under the Crime and Disorder Act 1998
- an application under section 153A of the Housing Act 1996.

Mr and Mrs L were both accepted by the LA as being capable of making decisions about residence and contact with DL. The LA also accepted that Mrs L especially wanted to preserve her relationship with DL, and did not want to initiate proceedings against him. The court approved interim injunctions which restrained DL from numerous behaviours, including threatening to assault or assaulting his parents; preventing his parents from having contact with friends and family; coercing them into transferring ownership of the family home; coercing Mrs L into living in a care home; and interfering with Mrs L's care provision. The judgement also requested that the Official Solicitor investigate Mr and Mrs L's true wishes, and to ascertain whether they were being influenced by DL. An Independent Social Work Expert was appointed to carry out this work, and concluded that they were unduly influenced by DL 'to an extent that their capacity (in the SA¹ sense) to make balanced and considered decisions is compromised or prevented' – but that a cessation of DL's abusive behaviour would lead to them regaining capacity.

[2016] EWHC 2358 (Fam)

Bailii: www.bailii.org/ew/cases/EWHC/Fam/2016/2358.html

Summary in [Family law week](#)

Summary in [Mental Health Law](#)

Date: 28 September 2016

¹ 'the SA sense' refers to the case of SA, a young woman from a Pakistani Muslim family who was deaf, had no oral communication, and communicated using BSL which is based on English. The LA was concerned that she may enter into an unsuitable arranged marriage, and Munby's ruling determined that the court could exercise its inherent jurisdiction to protect her from the risks of such a marriage, even though she was an adult with capacity to marry. Read more in *A Local Authority v MA, NA and SA (by her children's guardian LJ)*, [2005] EWHC 2942 (Fam).



The facts

FD (18) is a young woman with a history of psychiatric problems and a borderline learning disability. The local authority wanted to stop her much older male friend, a known criminal and drug user DH, and her father, AD, from having contact with her or going to her home: this was because of a history of them abusing her, for example by encouraging her to take drugs, including heroin. That Court had instructed expert psychiatric evidence, and found that she was an extremely vulnerable person, who lacked the capacity to manage her finances, but who had capacity to decide who to have contact with.

The question of her contact with these two men was then heard by the High Court. It was decided that she was indeed at significant risk of harm from contact with them, and a non-molestation order was placed on both men due to her extreme vulnerability. The Court however decided that neither the High Court nor the Court of Protection has the power to order the arrest of anyone breaching a non-molestation order.

Implications for practice

This highlights the obvious point that the Court of Protection can only rule on cases where someone may lack mental capacity and is aged 16 or older. Situations concerning vulnerable adults who have capacity for a decision which is relevant to the case are heard in the High Court.

Capacity is decision and time specific: social workers must take care not to assume that lack of capacity to make financial decisions, for example, means someone lacks capacity to make decisions about social contact. This situation is a good example of a vulnerable young person making an unwise decision with capacity.

Social workers should be aware that a non-molestation order cannot currently be enforced.

This has been thought by legal experts to have uncovered an area of law that needs amending, so that the protection of vulnerable adults can be strengthened by the power to order an arrest of someone who ignores an order of the Court.

How can practitioners make decisions about capacity in the context of coercion?

Below are some key considerations to take into account.

- The local authority, and the Court, are the person's 'servant, not their master'. They must ensure the person is empowered to make their own decision wherever possible, and where this is not possible, use the least restrictive option.
- Remember the presumption of capacity: the person does not have to prove to a professional that they have capacity.
- Remember the 'causal nexus': the inability to carry out the four steps necessary to make a decision must be clearly demonstrated as being because of the impairment or disturbance of mind or brain.
- Remember that the first three principles make it mandatory to do everything practicable to empower someone to make their own decision.
- The courts are there to help.



Safeguarding adults is about striking a balance between empowerment and protection, and this inevitably raises difficult practice dilemmas. Court rulings have regularly highlighted the importance of not allowing 'the tail of welfare to wag the dog of capacity' (Ruck-Keene, Stricklin-Coutinho and Gilfillan, 2015); i.e. the importance of respecting an individual's right to make unwise decisions. Practitioners are obliged by law to respect the first principle of the MCA, the presumption of capacity, as well as the right to make unwise decisions– even where the decision may be putting someone at serious risk of harm. The question is how to determine in the context of coercive control whether the decision is a capacitated one or not.

The Court of Protection is a useful resource to draw on where there are questions about a person's capacity to make a decision related to key issues such as where they live, who they have contact with, or the maintenance of hygiene or their environment (Ruck-Keene, Stricklin-Coutinho and Gilfillan, 2015). Where someone does have the capacity to make a decision, but is experiencing factors such as coercion which may impair their decision making abilities, the High Court can exercise its inherent jurisdiction to make an order in respect of that person.

Professional skills are critical in enabling survivors to create the space to make their own decisions. These include:

- making safe enquiries
- building up a trusted relationship
- safety planning
- using the relevant legal tools (such as Domestic Violence Protection Orders and Notices) to give survivors 'space for action'
- signposting to specialist support from domestic violence organisations.

Case example

The case example below highlights the importance of proportionality and necessity to be weighed if a person's ECHR Article 8 rights are to be breached. This parallels the fifth principle of the MCA, that any intervention must be the least restrictive that can be identified.

In [local authority] we have had three cases in the past couple of years (two in the past six months) that we have taken to the High Court for its inherent jurisdiction. In all of the cases there was a genuine belief that a person would be killed if no intervention was sought. In two cases this involved adult offspring with some level of mental disorder who were living with their parents and frequently assaulting them. In the recent two of our three cases there has been a DVPO in place and it was about to expire after 28 days leaving no injunctive protection in place.

In all three cases the people concerned had mental capacity to make decisions on their protection and on other matters but were prevented primarily by their emotional bonds to the perpetrators from seeking any sort of injunction themselves. In two cases we obtained an order to prevent the perpetrator from living with the victim and this successfully managed the risk of serious harm.

In a recent case we obtained an interim order but have now decided not to proceed further in view of the stated views of the victim and the legal advisor that we obtained for her.



In all the cases we have had to demonstrate what the nature of the coercive behaviour is and why the victim may not be able to act to protect herself. We have also had to demonstrate that the application is proportionate to the risks and compatible with Human Rights legislation. Also that other relevant legislation (e.g. Mental Health Act) has been considered.

Based on our experience we see this as a 'last resort' intervention that should be used with great caution but which is a reasonable response to situations where there is a genuine risk to life and where the potential victim is in some way prevented from taking protective action themselves - in two cases this was due to their view of the perpetrator's mental disorder and their need for care and support allied to a wish not to get them into further trouble leading to custodial care. We have also ensured that this has been part of a multi-agency response and obtained supporting evidence from Police, NHS and Housing colleagues.



References

Department for Constitutional Affairs (2007) *Mental Capacity Act 2005: Code of Practice*. London: TSO. Available online:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf

Gilbraith J K (1983) *The anatomy of power*. Boston: Houghton Mifflin

Research in Practice for Adults (2017) *Case Law and Legal Summaries*. Dartington: Research in Practice for Adults. Available online:

<https://www.ripfa.org.uk/resources/case-law-summaries/>

Ruck-Keene A (2013) *The inherent jurisdiction: Where are we now?* London and Manchester: 39 Essex Chambers. Available online:

<http://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2016/02/Inherent-Jurisdiction-Note.pdf>

Ruck-Keene A, Butler-Cole V, Allen N, Bicarregui A and Kohn N (2014) *Mental Capacity Law Guidance Note: A brief guide to carrying out capacity assessments*. London and Manchester: 39 Essex Chambers. Available online:

www.39essex.com/docs/newsletters/capacityassessmentsguide31mar14.pdf

Ruck-Keene A, Stricklin-Coutinho K and Gilfillan H (2015) 'The role of the Court of Protection in safeguarding.' *The Journal of Adult Protection* 17 (6) 380-390.

SCIE (2014) *Gaining access to an adult suspected to be at risk of neglect or abuse: A guide for social workers and their managers in England*. London: Social Care Institute for Excellence.