

Chapter 16: Guidance

Fiona Adair is 55, and has early onset Alzheimer's. She is living with her 19 year old son Bill, having divorced her husband several years ago. She receives a teachers' pension having retired early on health grounds, and the lowest rate of the care element of disability living allowance. She recently had a relationship with George, but ended that relationship about a year ago after allegations of domestic violence by George. Her sister Lilian, who does not live locally, has contacted social services because she is concerned that Mrs Adair is at risk of exploitation. There is evidence that Bill is using her credit card to make internet purchases, that George has started visiting her again and may have access to her bank account, and that she is becoming increasingly at risk (eg leaving things on the cooker, letting total strangers into the house). Mrs Adair, George and Bill all tell you and Lilian that Mrs Adair is coping fine and this is none of your business.

We will return to this case study at the end of the next chapter. Your present task is to consider in outline how the various people mentioned, including yourself, the Department of Work and Pensions, the Teachers' Pension Agency, are entitled to take decisions or actions on behalf of Mrs Adair. You should also take the opportunity to research on what basis DLA was awarded, to give you some experience of looking at welfare benefit entitlement.

We have created this problem because it is both horribly realistic, and because we ourselves are challenged in approaching it. It is not easy. Where should you start?

Perhaps you should start by stepping outside the legislation and asking in a broad sense 'What is right? What is best for Fiona? How is she best protected?' You may find that your instincts take you to where the Mental Capacity Act also takes you. There are basic principles to guide you. They are set out in the MCA at s.1: presume capacity not incapacity; help Fiona to make her own decisions; allow her, if she has capacity to make unwise decisions; act in her best interests; act in a way which minimises restrictions placed on Fiona.

Also bear in mind that you use the MCA on a decision by decision basis. Applying the above principles, Fiona herself will have capacity for some matters (at the easy end of the scale, whether she wants to talk to you or not, whether she needs food or sleep); but you may assess her as lacking capacity for making other decisions, either now or always – for example how to spend large sums of her money. You will need to check, when assessing her, whether – in relation to the particular decision – she understands the information, can retain it long enough, can use it to help her make a decision, and can communicate that decision. She must be helped in any way available to meet these tests. You should record the results of your assessment so that you are protected if you are criticized for making a wrong decision on capacity.

We say, here, 'you', but in fact each person playing any part in Fiona's life has to apply exactly the same legal framework. You, as a professional, must do so explicitly.

If you conclude with regard to any of the decisions Fiona is facing that she lacks the capacity to make it then you must decide whether this is a short term problem or whether

she may be able to make this decision later, without detriment to her best interests. If you end up making the decision for her, you must help her to participate in any way she can, take into account her present or previously expressed wishes, beliefs, values, and the views of other relevant people such as family, doctor, friends. Again, for any big decisions, record the steps you go through.

A trap you must recognize is not to permit relatives' views to be treated with disproportionate weight. They form one part, a very important part, of the information you use, but if they conflict with what Fiona would have wanted for herself, taking into account her previous and present wishes and her values, and if the relatives' wishes are not in Fiona's best interests, you cannot allow them to predominate. If there is conflict, it can only be resolved, at great expense and with delay, by an application to the Court of Protection, who may have to appoint a Deputy to make Fiona's decisions in certain defined circumstances.

Having explained the framework, we cannot provide the answer in definitive terms for Fiona. What are the decisions she can make, and what are the decisions she lacks capacity to make? Has she made a lasting power of attorney, which would give the decision-making power to an identified individual in relation to circumstances defined in that document?

Assuming there is no lasting power, has the time come to appoint a deputy? Or can matters be agreed between all parties likely to play a part in Fiona's life as to who will be able to decide what and when on her behalf? You will be aware that your own involvement cannot be full time? You can play a part in setting up the care and decision making arrangements, but you cannot be there to make the day to day decisions. The MCA gives you no greater powers, incidentally, than anyone else. Only attorneys or deputies have legal powers greater than others (unless of course the Mental Health Act is brought into play to detain Fiona or admit her to guardianship).

Bear in mind that if there is evidence of a criminal offence being committed, the police may have to be involved. Fiona is entitled to do unwise things with her money, but that does not mean she can be taken for a ride. If money is taken from her account, she either consents, because she has the capacity to make that decision, or someone acts in her best interests and not their own. Is Bill acting in with her consent, or is he acting without consent, in which case is what he is doing with her money in her best interests? The same applies to Bill?

Is Fiona safe in her home? Should she be admitted to residential care for her own safety? Can she consent to such a course of action? If she is capable of consenting she is also capable of refusing consent, and that is the end of the matter, unless things are so bad that compulsory powers should be used under s.47 NAA because she lives in unhygienic conditions.

What of the complaint that this is none of your business? Do you have a statutory power or duty to get involved? The answer depends on whether she falls within one of the groups of people defined in legislation listed in LASSA Schedule 1. She is not elderly. But does she fall within s.29 NAA? Apply the definition in that section and decide if she is disabled.