

Housing LIN INFORMATION SHEET: MCA – no. 3

The Mental Capacity Act 2005: Paying for necessities and pledging credit

This information sheet is one of four that accompanies the Housing LIN factsheet Housing Provision and the Mental Capacity Act 2005

The Mental Capacity Act 2005 affords those acting ‘in connection with the care or treatment’ of someone who lacks capacity protection from legal liability or prosecution provided they have acted in a way consistent with the Act and Code of Practice. The Act has also made two further specific provisions to assist those caring for a person who lacks capacity where their care requires the purchase of goods or services.

Section 8 says that if an act to which section 5 applies involves expenditure, it is lawful for a person to **pledge the incapacitated person’s credit** for the purpose of the expenditure.

Section 7 imposes a liability to pay ‘a reasonable price’ on the incapacitated person in any event, when that person is *supplied with necessities*.

Pledging a person’s credit

Previously this term was used to describe the legal protection afforded to abandoned women who, in a less enlightened age, did not count as persons in their own right in the legal system so could not make contracts. A wife who was abandoned by her husband had a right to pledge the credit of her spouse, so that she and the children could survive. It meant that she could foist legal responsibility to pay for food and shelter onto her husband – promise *for* him, in effect - because she was not capacitated in her own right to make purchases.

It is therefore reasonable to assume that this section is intended to mean that a carer can make the incapacitated person legally liable for a purchase, by extending a promise that she or he (the incapacitated person) will pay, to the vendor.

The carer can only represent to a vendor that this pledging power is applicable, when purchasing something **in connection with the care or treatment** of the incapacitated person (this is the broadest ambit of the acts covered by s5). But since the word ‘care’ is not defined, there is a danger that the person may have some things bought for them that some think have nothing to do with their care at all, but

would be seen to be connected in the view of the *carer*, without the carer necessarily forfeiting a claim to having acted with a reasonable belief. An example might be highly popular items which many members of the public believe work to relieve pain because a celebrity has endorsed them, but as to which there is no established scientific evidence.

The Code recognises that this apparent promise may not be good enough for a supplier, in which case the Code recommends that formal steps will have to be taken to acquire legal control of the person's assets, and mentions getting a Single Order from the Court of Protection.

Supplying a person with necessities

Secondly, section 7 imposes a liability to pay a reasonable price on the incapacitated person in any event, when that person is supplied with necessities.

The law before the new Act formally becomes law is that when a person has something essential sold and delivered to him or her, with the vendor intending sale for payment, but the recipient is incapable of forming a contract because of a basic lack of understanding the pros and cons, the vendor has a right of action for payment of a **reasonable sum**, regardless of the enforceability of any *actual* contract between consenting parties.

This section goes wider than the current law, and makes the person pay, whenever such goods or services are supplied – potentially, it seems, without even any attempted involvement of the incapacitated person in the particular purchase.

“Necessary” is defined by the Act to mean ‘suitable to a person's condition in life’ (ie his normal lifestyle) and to the person's ‘actual requirements at the time when the goods or services are supplied’. Earlier case law interprets this generously – in one case about a person whose living came from letting properties out (although lacking mental capacity) the court held that the accountancy fees for dealing with the tax on the rental income, and the renovation fees of the properties were all ‘necessaries’.

The Code of Practice provides further guidance as to what would be considered necessities. At paragraph 5.54 it explains that “...*while food, drink and clothing are necessary for everyone, the actual requirements for the type of food or the style or amount of clothing will vary according to the person's individual circumstances or “condition in life” ... if a person who now lacks capacity had always bought expensive designer clothes, s/he should be able to have them replaced with similar quality clothes as necessary goods. However such clothes would not be necessary for a person who usually wore cheap jeans and T-shirts.*” And at para 5.55: “*Goods will not be necessary if the person's existing supply is sufficient. So, for instance, one pair of shoes (or possibly two pairs) bought for a person lacking capacity to buy them for him/herself would be considered necessary, but a dozen pairs would probably not be necessary.*” However, it may be that the statutorily required person-centred approach to the person's attitude to shoes, prior to losing capacity could suggest that numerous pairs of shoes were important to that person.

The goods and services limitation in s7 means that the duty to pay a reasonable sum can only apply to those types of things. Housing has been held to be neither goods

nor services, in the broader legal framework. So s7 does not provide an obvious legal route to recovery of a reasonable rent payment by a landlord against an incapacitated tenant, however necessary the accommodation might have been.

However, at common law, before the new Act, anyone occupying premises not owned by them, owes compensation to the landowner, for use and occupation. Tenancies could therefore be arranged without signature, and such compensation could continue to be claimed, so long as the landlord was

- a) happy to take on tenants who could not understand the covenants in the tenancies and would not be able to be made liable for breakages or other damage.
- b) happy to contemplate formal legal proceedings against an incapacitated person for recovery of the sum claimed, including use of a litigation friend under the Civil Procedure Rules.

Putting the effect of the new law as simply as possible, landlords may still choose to rely on this existing common law right to compensation for occupation of their premises. But there are other ways of ensuring payment of the rent. The occupant cannot acquire a legal liability to pay a reasonable rent under s7, because the shelter and housing is not able to count as necessary goods or services (whereas the charge for the support or care services could be legally due, despite the recipient's mental incapacity, under s7). If the person's carer 'pledges' the incapacitated person's 'credit' under s8, then **that promise to pay the rent will constitute a legal liability on the part of the incapacitated person** to pay whatever rent has been charged, and for breakages or other damage if included in that pledge (regardless of whether the accommodation is suited to the person's condition in life). Use of either route will still mean that actually getting the money or possession of the property back, will be subject to the rules on suing an incapacitated person in the courts.

Section 5 carers may think that they are able to sign tenancies and manage bank accounts under the doctrine of best interests. But there are some actions and decisions that are implicitly NOT able to be done by people whose **only** status is **as a person acting in connection with care or treatment**. This is implied by the existence of s18 of the Act, which lists things that the Court has jurisdiction to order in the realm of property and affairs. This includes:

- Control and management of the person's land or property
- Sale, exchange, mortgaging, gifting etc of the person's land or property
- Acquisition of property on the person's behalf

This list does not mean that the things on it could not be put in a **Lasting Power of Attorney** – or given to a deputy to do; most of those listed could legitimately be done by both sorts of agent. But if the person has already lost capacity to appoint someone with such a power, and there is no application for deputyship (even assuming that the thing authority is wanted for is something a deputy can in fact do), **ordinary carers must not think that s5 makes lawful literally anything that would be useful or convenient even assuming it to be in the person's best interests.**

Other Information sheets in this series include:

1. The Mental Capacity Act 2005: Substitute Decision-making and Agency
2. The Mental Capacity Act 2005: Lawful restraint or unlawful deprivation of liberty?
4. The Mental Capacity Act 2005: Statutory Duties to Accommodate