

The Advocate's Gateway

**Court of Protection:
Eliciting, Understanding, and Applying a
Person's Values in Best Interests
Decision-Making**

Toolkit 20

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The Advocate's Gateway toolkits aim to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process.

'Advocates must adapt to the witness, not the other way round.' Lady Justice Hallett in [R v Lubemba; R v JP](#) [2014] EWCA Crim 2064, para 45.

The handling and questioning of vulnerable witnesses and defendants is a specialist skill. Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

'We confirm, if confirmation is needed, that the principles in Lubemba apply to child defendants as witnesses in the same way as they apply to any other vulnerable witness. We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in R v Rashid (Yahya) (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training.' Lord Thomas of Cwmgiedd, CJ in [R v Grant-Murray & Anor](#) [2017] EWCA Crim 1228, para 226.

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Introduction

This toolkit draws on the *Judging Values and Participation in Mental Capacity Law* research undertaken between 2018 and 2022, funded by the Arts and Humanities and Research Council. As part of the project, empirical research was conducted involving qualitative interviews with 56 legal professionals: legal practitioners specialising in Court of Protection (‘CoP’) work and retired judges with specialist expertise in mental capacity law. Data generated from the project indicated confusion about what values mean in the context of the Mental Capacity Act 2005 (MCA) s.4(6). This toolkit aims to address that confusion and makes suggestions to improve practice by drawing on additional philosophical analysis that clarifies more precisely the appropriate place of values in mental capacity law practice, and how values of different kinds can constructively shape the process of thinking through, and presenting arguments about, P’s best interests.

The toolkit explores the role of values in judicial decision-making about P’s health, welfare, property, and affairs and supports the participation of the person who is the subject of proceedings (‘P’) in the Court of Protection. In so doing, the toolkit is specifically designed to support legal practice, providing additional guidance about how legal practitioners can identify, consider and reflect on different values as part of approaching and preparing materials for a case, over and above their established requirement to attend to the relevant case law.

1. KEY MESSAGES

1.1 Values are unavoidable and important parts of what make us human.

Understanding what values you have and how they shape your work is an important first step to understanding what s.4(6) means. Discharging the legal obligation to elicit and understand P's values requires legal professionals to first understand the significance of values in their own personal and professional life.

1.2 The goal of self-reflection

The aim for legal professionals in this area of law is not to aspire towards an unrealistic (and unachievable) goal of complete impartiality or neutrality, but rather self-reflection to become more adept at appreciating how the values of P might orient their decisions, even if they depart radically from the legal professional's own values.

1.3 Beyond autonomy vs welfare.

Decision-making under the MCA is often presented as binary: either respect the person's wishes (autonomy) or paternalistically imposing a welfare-protecting outcome (paternalism). However, consideration of values allows us to focus on what matters to P in a way that takes us beyond an autonomy/paternalism divide. For instance, the value that P might place on relationships may lead to a best interests decision that appears to override their wishes, whilst honouring what matters to them.

2. SUMMARY OF THE LEGAL FRAMEWORK

For the purposes of the MCA, a person lacks capacity in relation to a matter if at the material time they are unable to decide for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of their mind or brain. (s.2(1) MCA). The CoP has the power to make decisions about the health, welfare, and property and affairs of a person who lacks decision-making capacity.

Any decisions made on that person's behalf must be in their 'best interests' (s.1 (5) MCA). The MCA includes a requirement that a decision-maker 'so far as reasonably practicable' must 'permit and encourage the person to participate,' which includes making reasonable adjustments to 'improve his ability to participate.' (s. 4(4) MCA).

When deciding what is in the person's best interests, the CoP must consider the past and present wishes and feelings, beliefs and values and other factors the person who lacks capacity would be likely to consider. (s. 4(6) MCA).

It is essential to approach decision-making under the MCA in accordance with the core principles listed in s.1 MCA:

- A person must be assumed to have capacity unless it is established that they lack capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

A person may be found to lack capacity through the application of a two-part test. The first part, provided in s.3 MCA, is a 'functional' test, and asks if the person can:

- understand the information relevant to the decision,
- retain that information,
- use or weigh that information as part of the process of making the decision, or
- communicate his decision (whether by talking, using sign language or any other means).

If the person is shown not to meet the functional test, it must then be shown, as per s.2 MCA, that that is 'because of an impairment of, or a disturbance in the functioning of, the mind or brain': this the so-called 'diagnostic' part of the test.

If P lacks capacity, decisions made on their behalf must be in their 'best interests'. And s.4 MCA provides the best interests standard, which includes consideration of:

- the person's past and present wishes and feelings (and, in particular, any relevant written statement made by them when he had capacity);
- the beliefs and values that would be likely to influence their decision if they had capacity,
- other factors that they would be likely to consider if they were able to do so; and
- the views of other persons who should be consulted in the matter, such as anyone engaged in caring for the person or interested in his welfare, anyone of a lasting power of attorney granted by the person, and any deputy appointed for the person by the court.

The MCA Code of Practice ('Code') gives examples of where a person's beliefs and values might be evidenced, such as by reference to their cultural background, religious commitments, political convictions, past behaviours or habits, or written statements prior to losing capacity. Whilst such things 'should be taken fully into account – whether expressed in the past or now' they 'will not necessarily be the deciding factor in working out their best interests' (Code, 5.38). Section 4 of the MCA sets out some common factors that must always be considered when trying to work out

someone's best interests.' Other factors might, intentionally or otherwise, include a range of diverse values that can shape and impact the decision, including the values of lawyers and judges themselves.

It is essential to understand what values are and how they might impact legal professionals' work as an important first step towards showing respect to persons who might lack capacity, and the proper place of their values.

3. GRAPPLING WITH VALUES (AS DISTINCT FROM WISHES, FEELINGS AND BELIEFS)

In empirical research CoP legal professionals have defined values as:

- ‘the largely unspoken, largely unthought of, rarely articulated, often internalised rather than externalised views, feelings, thinking about the world which form part of one’s approach to life in all its aspects.... They’re often intuitive, they’re just part of your mental furniture, part of your baggage, a part of your intellectual baggage.’ ([Making Values Matter in the Court of Protection, 2022](#))
- ‘adherence to a system of beliefs that is sort of quite ingrained within you. That whether consciously or subconsciously sort of guides you really in what actions you take, and your reactions to people and your decision-making. Personally and professionally’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview No 4, unpublished](#))
- ‘what each individual holds closely to themselves as being something that’s important, and it’s the elements of their life or a life that they would assess decisions against... or make decisions against, so a set of criteria or a set of principles... that you would then look at as an individual, decide what was important to you and then make your decisions around what, of those you do hold, are important’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview No 2, unpublished](#))

This toolkit defines values as non-trivial commitments around what matters to the individual. As such, values:

- relate to evaluations of worth, such as higher and lower, noble or ignoble, good or bad;
- are often intrinsic to the person’s worldview and intuitive;
- function as a background orientation or compass by which a person acts, decides, or lives their life.

Values are formed through various sources, for example, family context, school, socio-cultural background, and religious faith. They might be internalised subconsciously, or they might be adopted self-consciously through careful reflection.

Values reflect a person's orientation towards the things that matter in their life, in our society, and social relationships. They are definitionally distinct from wishes and feelings, and the related (albeit not mentioned in s.4 MCA) concept of preferences. Our values may or may not be expressed in our personal wishes, and it is therefore necessary to keep in mind how these two might be distinguished.

Wishes and feelings might reflect a momentary inclination – for example, one might wish to have a coffee or a nap; one might feel uncomfortable about going to the dentist. These are relatively inconsequential, ephemeral decisions that do not necessarily have any connection to one's values. Equally, our wishes, feelings, and preferences can also express our values in particular contexts. For example, one's wish to give to an environmental charity might reflect the value one places on nature and caring for the environment.

Wishes, feelings, and preferences can also be at odds with our values in discrete circumstances – they may not reflect our values accurately or are inconsistent with what we want to do in a particular situation, even consciously recognising that our wants in this instance are contrary to what one values. For example, we might value our health but forego exercise or eat unhealthy foods given the chance.

Section 4(6) MCA also mentions 'beliefs' alongside values. *Beliefs* can intersect closely with values but are not always equivalent to them. Beliefs are convictions about what we know or understand about the world – these could be related to religious faith, but they also could be about matters about the world around us and our lives. For example, one could have belief in a higher being. Beliefs have a connection with what we think is real and true. Beliefs could therefore connect with our values in the sense that thinking something is true is connected to a particular evaluative commitment: for example, a woman's pro-choice stance might be connected to her belief in women's bodily integrity. Equally, our beliefs can be challenged by others because they may not reflect what others perceive to be reality and may conflict with our values.

A further complication is that a person's concurrently held values can sometimes conflict. For example, a tension might arise between a commitment to family and to work, where attending a child's recital might mean missing an important work meeting. Conflicts between values highlight their incommensurable quality, in the sense that we cannot apply a uniform metric or

measurement to arbitrate which value is more important ([Chang, 1997](#)). A further example could be the value one places on preserving nature – which means avoiding long-haul flights – cannot be measured against the value of seeing family who live abroad. We cannot quantify both of these values in order to decide between them, but rather, must engage in some evaluative judgement that helps us prioritise which is more worthy, important, or significant in the context of our lives ([Taylor, 1985](#)).

4. BEING SELF-REFLECTIVE

‘[One] must recognise your values play a significant part in your thinking, and then you have to make allowances. There will be times you consciously have to say, “my values must now give place to the values of the family with whom I am dealing”’. ([Sir Mark Hedley, qtd. in Cooper, March 2021](#)).

A legal professional will encounter all sorts of values and ways of living that may depart profoundly from their own commitments. Without the self-awareness that comes through reflexivity, they could mistakenly impose or project these values onto P. In this way values can be unproductive, in the sense that they function as a barrier to making genuine efforts to understand P and P’s way of life.

If values are embedded within our identity and sense of who we are, how are values to be negotiated while going about one’s professional work in the CoP? Empirical data ([Kong et al, 2022](#)) suggests that when legal professionals in mental capacity law reflect on their own values, these values can be important in orienting their professional work. Professional self-reflection can be important in the skilful negotiation of values in two ways.

First, professionals must critically reflect on whether P’s values are being neglected with a focus on wishes and feelings. Whilst the MCA states the importance of considering the beliefs and values of the individual if the person had capacity, these are often be omitted in favour of the more easily understood clause looking at wishes and feelings.

‘I am being really honest here, I can’t remember the last time I wrote down what were P’s values. I think we so focus on wishes and feelings we forget about the values bit sometimes. You know, and sometimes there is a risk that when you are kind of following this analysis of the best interest checklist, there is potential to kind of dehumanise the person a little bit, in terms of these are all the factors that you’ve got to gather, and I think there is a risk of forgetting, you know, about the kind of core unwritten things about somebody that values are.’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview LP17, unpublished](#))

‘I can’t immediately think of a single case, actually, in the last 13, 14 years, where someone has clearly set out a person’s values and beliefs. I don’t think we really – and by ‘we’ I’m mainly referring to, like, the assessors and so on, but perhaps lawyers as well – I don’t think

we really know the difference between values and beliefs. I would guess practitioners – health and social care practitioners – find it very difficult to document what the person's values and beliefs are, in the same way as I struggle when you ask me what my values are.’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview LP35, unpublished](#))

Second, exercising reflexivity requires legal practitioners and judges to identify and engage with the deeper commitments that can inform their practice and approach, as well as their interpretation of substantive matters of a case.

Professional reflexivity is exercised through the following steps:

- Recognise that you are embedded within your own values and judgements; this framework is part of being human and are important aspects to your personal and professional identity. Complete objectivity or neutrality is not possible or the aim. The goal, rather, is to have a better understanding of your own values in order to become more open and receptive towards values and ways of living that differ from your own.
- Ask yourself how your values may aid or impede your own understanding of another: Are there certain values that you think help in your work within the CoP? Are there certain values that you disagree with profoundly and what responses do they trigger in you?
- Engage in open dialogue and communication through:
 1. Maintaining a commitment to practicing effective communication and participatory strategies through open questioning, empathy, and accommodating the unique needs of P – see the training film [Communication and Participation in the Court of Protection](#).
 2. Adopting a curious, open-minded, and empathetic attitude towards the possibility of divergent values – understanding the complexity of how your values have come about can help see the significance of another’s values (despite how they may differ from yours).
 3. Testing your own values and judgements when faced with those that differ from yours: How might an alternative way of valuing and seeing

the world enrich your perspective and is there something you might learn?

4. Challenging fundamentally harmful assumptions related to a person having certain diagnoses, such as: ‘persons with lifelong cognitive impairment or incapacity do not have values’, ‘the lack of verbal language means this person cannot have or communicate values’, ‘this person has dementia and therefore does not value anymore’. These very powerful assumptions disregard how persons with diverse communication and cognitive abilities can still have a rich interior life grounded in what matters to them, e.g. family belonging, emotional intimacy.
- Acknowledge and learn from your limitations. Sometimes you will go through all these steps and still struggle to understand or have empathy for P’s values.
 - Ask for feedback throughout the entire process where appropriate – from checking in on how P felt after meetings, to asking family members about how they felt P’s values were represented in a hearing. Exercising reflexivity in practice is an open-ended process that requires ongoing reflection, self-awareness, and feedback.

Reflective questions for legal professionals:

- What values matter to you in your personal life? In your professional life?
- What sources and influences have shaped those values?
- Can you identify examples of where your wishes and feelings diverged from your values? How did you negotiate this conflict in those instances?

‘Nobody is objective ... I think the best that you can say is that you try to be aware of your own prejudices and try not to let those suddenly become as if that's a given. If somebody says they're completely objective, I think they're fooling themselves.’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview RJ4, unpublished](#))

5. ELICITING AND UNDERSTANDING P'S VALUES

‘Without wishing to do myself out of a job, the problem is that we spend far too long listening to what barristers are talking about rather than listening to what the professionals are talking about, what family members are talking about or what P themselves is talking about.’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview No 17, unpublished](#))

It is a legal obligation to try and understand what is meaningful to P, beyond their expressed wishes and feelings (s.4(6) of the MCA). This includes trying to find out what values matter to persons who may have lacked capacity all their lives or communicate through non-verbal means.

- A commitment to supporting effective communication and participation is the foundation to the obligation to explore P’s values in s.4(6) in the MCA.
- Wishes and feelings are not necessarily the same as values; the former may or may not accurately reflect P’s values.
- P being non-verbal does not mean they lack values – what matters in their life may be expressed through the way they move their body and respond to their environment and people around them.
- Exploring what P’s values will often highlight uncertainty and conflicting values – within P, between P and others, etc. In negotiating these conflicts, sometimes the answer will not always be entirely clear for practitioners or judges.

The process of discovering the values of P is a holistic task and often involves pursuing multiple avenues.

(i) Conversations and meetings with Ps themselves

Communicating with P should be the first step in this process. It is important to keep in mind the distinction between values as opposed to wishes and feelings. How you meet and communicate effectively with the individual is also critical – i.e. how you foster the right conditions in which you might elicit clear information about P’s values. The training video Communication and Participation in the Court of Protection outlines key strategies to help practitioners establish trust and rapport with individuals (in this case, with learning disabilities and/or autism). Many of these strategies are important, including:

- Providing advance information about yourself, your role, and what the meeting is about;
- Planning how to establish and maintaining rapport;
- Meeting as many times as necessary;
- Checking assumptions about lack of understanding, which result in barriers to communication and trust with the individual (for example, talking very slowly and loudly unnecessarily);
- Using open questions and talking about P's interests to help build rapport and gather information from P and avoiding leading questions/ directing the person to a particular answer;
- Being constantly mindful of the deeply personal nature of P's values and the intrusiveness of this process;
- Approaching interactions with sensitivity and empathy;
- Enlisting specialist communication support (for example, from a speech and language specialist) to accommodate diverse communication needs.

(ii) Conversations with those who are around and know P

Communication with those who know P, such as family members, social care workers, nursing staff, etc., is also an important strategy to achieving a more holistic sense of P's values.

Particularly in the context of persons who might have a disability from birth, the relationship between P and family members can be a key resource to understanding what matters to P.

'If that person has been close to the family, and that family has known 'P' for a very long time and knows the ins and outs of 'P', then I think the family can be a very helpful and useful source. Again, occasionally we've had cases where you go right the way through Court of Protection proceedings without the family having ever really been involved or consulted when they might have a very helpful source of information and giving an understanding of the values of the family, for example. I think the family values in certain circumstances are important, as well.' ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview No 2, unpublished](#))

Some professional judgement is nonetheless required to evaluate the complex interplay of values between the family and P. Some overlap is inevitable – as noted earlier, values are often inherited and fostered by our familial context. However, the values of parents, family members, can also be projected onto P, meaning that some caution may be needed to determine to what extent they represent those of the individual, where at times, it may be important to help distinguish the values of the family and those that are P’s.

‘I can actually think of an example where somebody wanted, very much, her own identity. She was from a strict [religious] background and had always been brought up by her family, but as a young adult, she now wanted to be called by a different name, not the name she was given... and to wear jeans, not necessarily to eat [certain] food. There was a clear conflict within the values that I would say were hers. They were her cultural background. They were important. I'm not sure she was turning her back on it completely; she just liked to have a choice and wanted to experience things.’ ([Kong et al., 2022, Judging Values and Participation in Mental Capacity Law, interview No 15, unpublished](#))

The training film [Making Values Matter in the Court of Protection](#) demonstrates the subtle complexities of building rapport with a person and then with their family member to explore that person’s values and what the family believes to be their values.

Reflective questions for legal professionals:

- (1) How would you negotiate between a conflict between the values of P and the values that P’s family attribute to them?
- (2) What makes evidence compelling and convincing?
- (3) How might persons who are non-verbal and/or have severe cognitive impairment still express their values?

6. CONSIDERING VALUES AS PART OF A BEST INTERESTS ASSESSMENT

- 6.1 By its very nature, the best interests framework is value-laden and context-specific.
- 6.2 Negotiating conflicting values will require working dialectically between different perspectives and ultimately coming to an evaluative judgement to decide between them.
- 6.3 Articulating your values, reasons, and deliberation in an explicit, transparent manner is key to the skilfully working through the indeterminacy and plurality of values within the best interests framework.

The best interests framework is inevitably context-, person-, and decision-specific which requires a holistic evaluation of all the considerations as set out in s.4 MCA. Research indicates (Kong et al, 2022) that there is a nonetheless tendency to focus mainly on P's wishes and feelings as opposed to values. '[T]he flexibility inherent to the MCA appears to permit considerable scope for the discretionary opinions on the identification and weighting of pertinent extra-legal values in capacity and best interests cases, whereby judicial discretion can determine how much weight should be accorded to P's values.' (Kong et al. 2019). The discretion and judgement of legal practitioners, too, can shape the narrative of a case that is presented to the judge as ultimate decision-maker.

As discussed above, the goal of engaging with values in the course of best interests decision-making will not be complete objectivity but rather reflexivity. This means that the values that you think are important – whether these stem from your own background, or are acquired from your professional life, or emerge from your holistic investigation into P's values – are part of the 'mix' that comes into the assessment of best interests. These conflicting values might manifest themselves at multiple levels:

- Between professional orientations (e.g., the risk-aversion of social work vs. the more rights-based focus of lawyers);
- Between different socio-cultural commitments (see example below);
- Between ethical standpoints (e.g., the value of preserving and sanctity of life vs. the value of having a 'good' death);

- Between competing notions of a flourishing life (e.g., one that prioritises physical health vs. one of emotional or cultural connection).

Reflective questions for legal professionals:

- (1) Other than autonomy and welfare, what other values do you think are important in the context of best interests decision-making? Consider this in the context of your own life and how the things you would like someone to consider in making a decision on your behalf.
- (2) Why is making your values and reasons transparent matters in the context of the best interests framework? How could it make decision-making better?

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The toolkit summarises key points from law, policy, research and guidance including:

Law

- Mental Capacity Act 2005
- Mental Capacity Act Code of Practice 2005

Practice Direction

- Practice Direction 1A: Participation of P

Guidance

- Charles, Mr Justice (2016) Facilitating participation of 'P' and vulnerable persons in Court of Protection proceedings.

Training Films

- [*Communication and Participation in the Court of Protection*](#), YouTube, November 15, 2021
- [*Making Values Matter in the Court of Protection*](#), YouTube, June 20, 2022

Journal Articles and books

- Chang, R. (1997) *Incommensurability, Incomparability, and Practical Reason*. Cambridge, Mass.: Harvard UP.
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- Kong, C., Stickler, R., Cooper, P., Watkins, M., Dunn, M. (2022) "The 'human element' in the social space of the courtroom: framing and shaping the deliberative process in mental capacity law" *Legal Studies*. Published Online First: <https://doi.org/10.1017/lst.2022.19>
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