

The process for making Best Interest decisions in serious medical conditions

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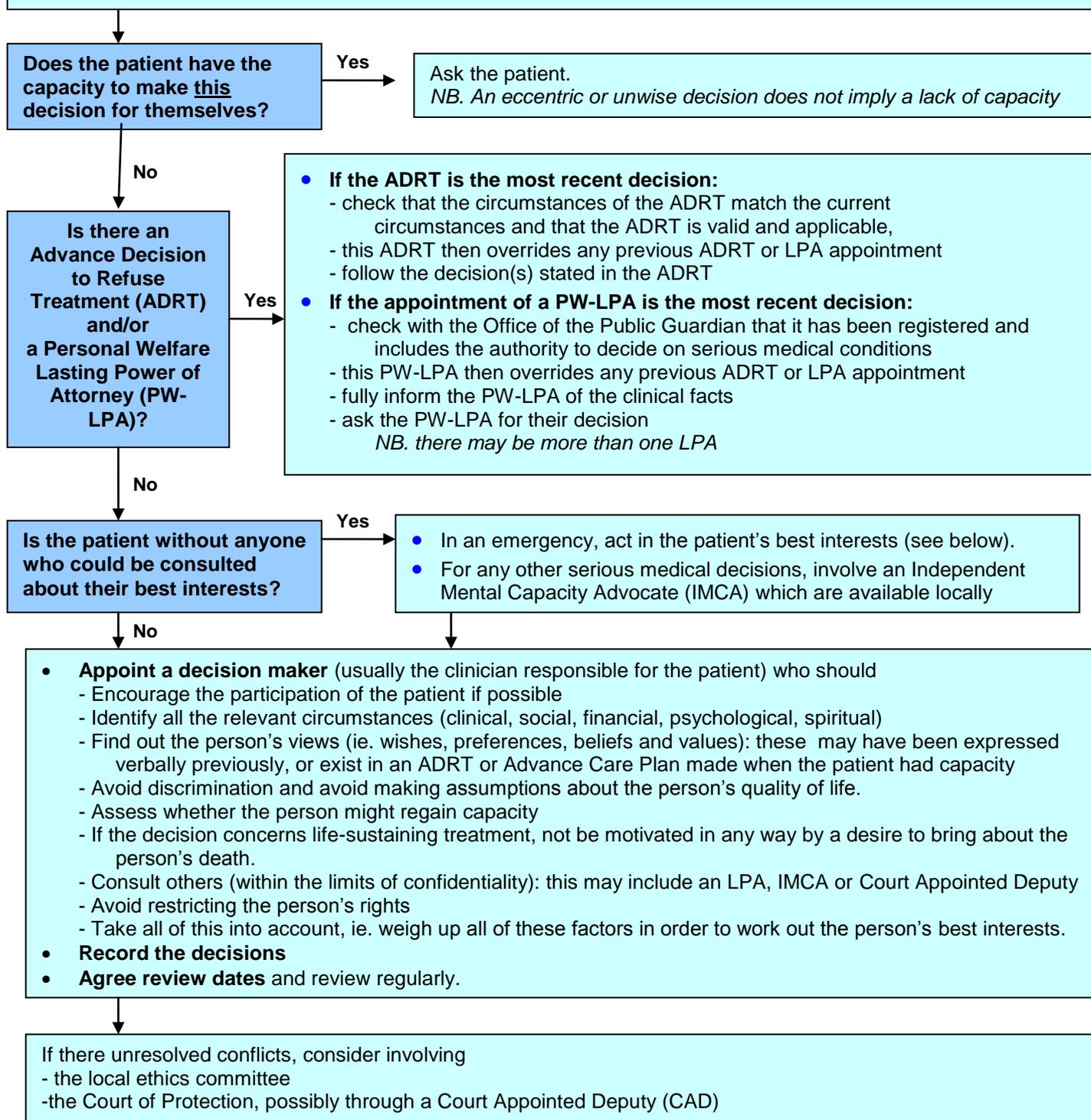
Start by assuming that the patient has capacity. If there is doubt, proceed to the two stage test of capacity:

Stage 1: Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?

Stage 2: Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to? Their capacity for this decision can be assessed by four functional tests:

1. Can they understand the information?
NB. this must be imparted in a way the patient can understand
2. Can they retain the information?
NB. This only needs to be long enough to use and weigh the information
3. Can they use or weigh up that information?
NB. They must be able to show that they are able to consider the benefits and burdens of the alternatives to the proposed treatment
4. Can they communicate their decision?
NB. The carers must try every method possible to enable this

The result of each step of this assessment should be documented, ideally by quoting the patient.



The process for making clinical decisions in serious medical conditions

An Advance Refusal of Treatment (ADRT) – see section 9.40 & 9.41 of the MCA Code of Practice

- Can be made only by a patient while they still have capacity, but becomes active only when they lose capacity
- Applies only to a refusal of treatment
- Is invalid if any of the following apply:
 - the person withdrew the decision while they still had capacity to do so
 - after making the advance decision, the person made a Lasting Power of Attorney (LPA) giving an attorney authority to make treatment decisions that are the same as those covered by the advance decision
 - the person has done something that clearly goes against the advance decision which suggests that they have changed their mind
- Is only applicable if it applies to the situation in question and in the current circumstances. An ADRT is not applicable if any of the following apply:
 - the proposed treatment is not the treatment specified in the advance decision
 - the circumstances are different from those that may have been set out in the advance decision
 - there are reasonable grounds for believing that there have been changes in circumstance, which would have affected the decision if the person had known about them at the time they made the advance decision.

If an advance decision is not valid or applicable to current circumstances, the healthcare professionals must consider the ADRT as part of their assessment of the person's best interests if they have reasonable grounds to think it is a true expression of the person's wishes, and they must not assume that because an advance decision is either invalid or not applicable, they should always provide the specified treatment (including life-sustaining treatment) – they must base this decision on what is in the person's best interests.

Capacity

- Is assumed to be present, unless the two stage test shows otherwise
- Is assessed by applying the two stage test (see algorithm)
- The ability to make a decision is assessed by four functional tests (see algorithm)
- Depends on the decision being made, eg. a patient may have capacity for simpler decisions, but not complex issues.
- Can change with time and needs to be monitored

Communication

- Carers have to take all practicable steps to help a patient understand the information and communicate their decision
- Professionals should take all practicable steps to include the patient in the decision

Liability

The MCA does not have any impact on a professional's liability should something go wrong, but a professional will not be liable for an adverse treatment effect if:

- Reasonable steps were taken to establish capacity

- There was a reasonable belief that the patient lacked capacity
- The decision was made in the patient's best interests
- The treatment was one to which the patient would have given consent if they had capacity

Personal Welfare Lasting Power of Attorney (LPA)

- Replaces the previous Enduring Power of Attorney
- Must be chosen while the patient has capacity, but can only act when the patient lacks capacity to make the required decision
- Must act according to the principles of best interests (see algorithm)
- Can be extended to life-sustaining treatment decisions (Personal Welfare LPA including health), but this must be expressly contained in the original application
- Only supersedes an advance decision if the LPA was appointed after the advance decisions, and if the conditions of the LPA cover the same treatment as in the ADRT

NB. Holders of LPA for Property and Affairs have no authority to make health and welfare decisions

Court of Protection and Court Appointed Welfare Deputies (CADs)

- The Court of Protection makes single decisions itself, but deputies may be appointed where a series of decisions are required.
- CADs are helpful when a patient's best interests require a deputy consulting with everyone
- CADs can make decisions on the patient's behalf, but cannot refuse or consent to life-sustaining treatments.
- Are subject to the principles of best interests (see algorithm)

Independent Mental Capacity Advocates (IMCAs)

- Are part of a new statutory consultation service
- Must be involved in specific circumstances when a patient without capacity has no relative or partner who can be consulted
- Are advocates for the patient and not decision makers, so they cannot refuse or consent to life-sustaining treatments.
- Can be bypassed if an urgent clinical decision is needed

Resources

- Any professional making decisions on behalf of a person without capacity is required by law to have regard to the Mental Capacity Act Code of Practice: www.publicguardian.gov.uk/docs/code-of-practice-041007.pdf
- Office of Public Guardian: www.publicguardian.gov.uk
- Court of Protection: www.publicguardian.gov.uk/about/court-of-protection.htm
- IMCA service: www.dca.gov.uk/legal-policy/mental-capacity/mibooklets/booklet06.pdf
- ADRT training programme: www.adrtnhs.co.uk

