

## Wishes, Advance Decisions and Wills



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## Objectives

- What is Valid Advance decision
- Everything else is a wish – how do you treat this?

## MCA 2005

- As a piece of legislation, the MCA sets out the statutory tests to be applied to decide firstly if someone has capacity, and if they do not, various factors to be taken into account by those making decisions on their behalf.
- The factors to be taken into account are all designed to come to a view as to what is in a person's "best interests" .
- These tests apply both to decisions made in respect of someone's personal welfare and in respect of their property and affairs.
- But there are some circumstances in respect of medical treatment and property and affairs where someone's views have to be followed: that is when an advance decision has been made or when a valid will has been created (for how to dispose of property and chattels after someone's passing)

## 1. Wishes

- S4(6) of the MCA 2005 requires anyone making decisions to someone who lacks capacity to consider “as far as is reasonably ascertainable” , their past and present wishes and feelings, including any written statement made when he had capacity.
- Also take account of the person’s beliefs and values which would be likely to influence his decision.
- And other factors which he would consider.
- As the person is lacking capacity, understanding those wishes , feelings, beliefs and values almost always includes taking account of what friends, family and those who care for the person know or can provide – one of the reasons that s4(7) of the MCA determines that they should be consulted, where practicable and appropriate.

## 2. What is the weight given to wishes?

- Someone's wishes and feelings are not automatically given precedence over other factors.
- It depends upon the circumstances – with some features having “magnetic importance” in some cases.
- The test of best interests is not solely a test of substituted judgement : i.e. what someone would do if they still had capacity. It is about taking account of the past wishes and the present wishes and feelings and what they now view as important.
- If the decision concerns care and treatment – physical safety is not always the important consideration: the competing factors, such as their attachment to their home, their privacy and sense of security at home, their attitude towards institutional life and the importance to them of their freedom.

## 4. Wishes, feelings and objectivity

- The test is not trying to decide what some hypothetical rational person would decide: not is it the case of trying to impose an analysis based upon professional expertise of what should sensibly be done. The best summary of how to act is set out by Baroness Hale in *Aintree* [2013] UKSC 67 at 45 where she says:

*”The purpose of the best interests test is to consider matters from the patient’s point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Not will it always be possible to ascertain what an incapable person’s wishes are.....insofar as it is possible to ascertain the patient’s wishes and feelings , his beliefs and values or the things that were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as a human being.”*

## What weight to give to present wishes and feelings

- The degree of incapacity
- The strength and consistency of views
- The possible impact of knowing that their wishes/feelings are not being .
- Whether their wishes and feelings are rational, sensible, responsible and capable of being implemented.
- How much their wishes and feelings can accommodate within their overall assessment of best interests
- Always a significant factor, but not the determining factor in all cases.
- The touch point, however, it not to reformulate wishes as to claim to know better than them what they really wish, feel or want to happen.

## Decision making by way of advance decisions

- S24(1) of the MCA 2005 defines an “advance decision”
  - Must be made when someone has capacity
  - Only applies to the provision of healthcare, as it relates to a diagnostic or other procedure: not personal care e.g., cannot refuse shelter, clothing etc.
  - They can specify the circumstances that treatment can be refused on their behalf if they lack capacity at the time of the treatment
  - But one cannot decide what treatment to receive – as that is a clinical decision.
  - The right is to refuse the treatment, not the place of the treatment or a specific health care provider.

## What is the impact of a validly made advance decision

- It operates as a valid and binding refusal of the treatment.

## Formalities for an advance decision

- Can be expressed in layman's terms but needs to be sufficiently clear what treatment is being ruled out and the circumstances in which it is not to be given.
- It need not be in writing unless it relates to life sustaining treatment. If it relates to life sustaining treatment it must be in writing and include a statement that it is to apply to that treatment even if life is at risk.
- It must be signed by the person, or by someone in their presence at their direction.
- It must be witnessed by someone who then signs as a witness.
- This document can be withdrawn at any time if someone has capacity.
- The withdrawal of a decision relating to life sustaining treatment need not be in writing.

## Applicability of advance decisions

- No liability can occur to the clinician or other healthcare professional for withholding treatment if they reasonably believed that an advance decision exists which is “valid and applicable” to the treatment.
- But are liable in law to the incapacitated person if they carry out a treatment when they know that there is an advance decision refusing treatment which is “valid and applicable”.
- The Court can make decisions as to the legality and effect of an advance decision.
- If a dispute is ongoing in the court, nothing will stop someone providing life sustaining treatment or any act necessary to prevent deterioration in someone’s condition if court action is on foot.
- Not valid if an LPA is later made authorizing the attorney to consent to the particular treatment if they lack capacity.

## LPA – Health and Welfare

- Where a registered LPA is in place, that must be looked to and consent given to those nominated to make decisions on behalf of the person lacking capacity – known as the donee.
- This can include consenting to or refusing medical treatments and other aspects of care , social life, save for life sustaining treatment (which can only be authorized if the LPA expressly permits this).
- An LPA can be revoked by the court if a donee has contravened their authority or acted contrary to their best interests.
- The existence of an LPA, unless it expressly deals with the treatment, does not prevent an advance decision being applicable and valid.

## Deputy and advance decisions

- The court can appoint a Deputy in respect of both Financial Matters but also health and Welfare.
- They cannot consent to treatment which is prohibited by an advance decision because the authority of the Deputy is subject to the provisions of the Act
- A deputy also does not have power to decide for the person if he or she knows or has reasonable grounds to believe that someone has capacity to decide the matter, and the advance decision has effect as if the refusal was made with capacity at the time that the treatment is proposed.
- Cannot prevent contact with people.
- Cannot direct healthcare professionals to say that someone else should have responsibility.
- No power to refuse life sustaining treatment.

## Valid will

- A will and testament is a formal legal document made to identify how monies and other form of possessions and property are to be distributed upon death.
- It must be in writing.
- It must be signed by the person who owns the property to be distributed on death (or has an interest in it) and that person must have capacity to make the will.
- It must be witnessed by two people, who are independent, and who must sign it in the presence of each other : so, the will writer and two other people must be in the room together when they all sign.
- If it is not signed correctly, it is invalid.
- The will must have been made voluntarily and not under any pressure from others.

## Beneficiaries

- Those who may obtain monies/possessions in the will, ,their spouses or civil partners should not be witnesses, as they lose their right to an inheritance, and shouldn't be in the room when the will is signed.
- It's best not to ask an executor to be a witness.
- During Covid, wills have been able to be witnessed and signed by looking through a window or open door of a house or vehicle:
  - From a corridor or adjacent room with the door open
  - Outdoors from a short distance e.g., in a garden.
  - Over a video call.
- If a will is valid, it must be followed.

# Thank you for listening

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