

# Care Homes Briefing

Solicitors

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## The Impact Of The Mental Capacity Act On End Of Life Care

Dealing with people who are facing the end of their lives can raise some of the most difficult ethical issues for those involved in healthcare and, in particular, the care home sector. In recent years, the media have publicised several cases in which decisions not to resuscitate patients had been made in an insensitive manner and without proper consultation with the individuals concerned. It is hoped that the clarification of the law on mental capacity and the emphasis on the right of individuals to make decisions about matters such as their healthcare that the Mental Capacity Act 2005 (the Act) made will have a positive impact upon the approach to end of life care.

The Mental Capacity Act focuses on the legal requirements to involve a person in decisions about their healthcare and all other decisions of a personal nature. This is seen, for example, in the Act's emphasis on providing information to individuals in a manner appropriate to their circumstances, whether by using simple language, visual aids or other means. The Act also makes it clear that before a decision can be made on behalf of an incompetent person, consideration must first be given to whether that person is likely to regain capacity to enable him to make the relevant decision some time in the future.

In the case of care home residents who are elderly and/or suffering from a terminal illness, discussion with such

residents about their wishes regarding future treatment now has a greater significance in the light of the enactment of the Mental Capacity Act with the importance it places on enabling people to make decisions for themselves. It is important that care homes ensure that their staff make good records of any expressions of a resident's views and wishes that may be relevant to decisions impacting upon their treatment at the end of their life. Such records will be particularly helpful in the event that the resident later loses capacity to make such decisions and the issue of what steps to take at the end of that person's life have to be determined in accordance with the best interests of the resident. This will have implications for the registered person in a care home who has an obligation to enable service users to make decisions about their care, health and welfare, as far as practicable, in accordance with The Care Homes Regulations 2001.

Where a resident who lacks mental capacity has been admitted to a care home and it is clear that the resident will not regain capacity to make decisions regarding his/her treatment at the end of life, it will be important for care staff to approach the relatives of the resident and, if applicable, the resident's previous carer and any person appointed with a Lasting Power of Attorney by the resident when competent to do so. All such people should be consulted to ascertain information relevant to the person's feelings, past wishes and beliefs and these

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details should be recorded in the records of the resident given they will need to be taken into account in making future decisions regarding the resident. Such information must be considered in determining what is in the best interests of a resident who lacks mental capacity.

Aside from advance decisions (discussed below), the Act states that when determining a person's best interests consideration must be given to any relevant written statement made by the person who now lacks capacity when he still has capacity to do so. Such a statement may include a range of expressions of the person's past wishes and feelings, including any concerns about death and dying. Accordingly, if a resident has written a letter of wishes or has communicated his views to a member of staff who has then recorded these in the resident's records, consideration must be given to such documentation.

## Advance Decisions

The Act has also codified the law on advance decisions (frequently referred to as "living wills"). Advance decisions, which are refusals of treatment that must be followed in circumstances where the person who has made the advance decision later loses capacity, can be made either orally or in writing as a general rule. However, if the maker of an advance decision intends to refuse life sustaining treatment then in order for it to be valid and legally enforceable the person making the advance decision must verify it by a statement to the effect that it is to apply to that treatment even if his/her life is at risk. It may be important for care home staff to give an explanation of the consequences of refusal to a resident proposing to make an advance decision of this sort. The Act also sets out several formalities including that the decision to refuse life sustaining treatment is made in writing and is signed by the person making it or by another person in his/her presence and at the maker's direction. Perhaps rather surprisingly, even where an advance decision is made in writing in the event that the maker of the decision decides to revoke it, he/she does not have to do so in writing. It will therefore be important for care homes to regularly review advance decisions with their residents to make sure that the decision recorded remains that of the resident and they have not changed their mind.

In view of the fact that the Act may have a consequence of making advance decisions more commonplace, it is good practice for residents to be asked whether they have made an advance decision on their admission to a care home.

## Lasting Powers of Attorney

One of the new legal concepts that the Act introduces is the Lasting Power of Attorney. A person can appoint someone as their Attorney to make decisions concerning their property and affairs and/or their health and welfare in the event that they later lose capacity. Until the introduction of the Act no-one was able to make a treatment decision about another adult person. In view of this change, it will be good practice for care homes to enquire at the time of a resident's admission whether the resident has made a Lasting Power of Attorney and, if so, whether that grants decision making powers regarding healthcare matters to the Attorney. It is important to note that in order for it to be valid, the document appointing the Attorney must be registered with the Public Guardian.

If a resident has appointed an Attorney to make decisions about his/her health and welfare it will be important to ascertain the terms of the appointment, i.e. what sort of decisions the resident has agreed that the Attorney should make on his/her behalf in the event that he/she loses capacity. If such a resident has lost capacity at the time of admission to the home or loses capacity whilst in a care home, consultation will then have to be made with the person granted Lasting Power of Attorney provided he has decision making rights in relation to health and welfare matters. The Attorney must make such decisions taking into account the best interests of the resident, having regard to the criteria set out in the statutory best interests checklist. Furthermore, even if the Attorney only has rights concerning the resident's property and affairs, he must still be consulted, if practicable to do so, as one of the statutory consultees set out in the Act as he may have some knowledge relevant to the resident's wishes that might impact upon the issue of the resident's best interests. It will therefore be important for care homes to have a record of the contact details of a person granted Lasting Power of Attorney on the resident's file, even where the resident has capacity but in preparation for a situation where the resident may lose capacity either on a temporary or permanent basis some time in the future.

If a person has made an advance decision that touches upon end of life issues but has subsequently appointed a person with a Lasting Power of Attorney to make decisions regarding the same issues, then those treating the resident are not required to follow the advance decision but must follow the views expressed by the person with Lasting Power of Attorney.

The scope of this note does not allow a full discussion of all aspects of end of life care in the light of the Mental Capacity Act, but simply highlights some of the issues

that care homes need to have regard to. It is also advisable that care homes review their existing policies regarding end of life care to ensure that they comply with the new legislation. Managers of care homes must be aware of their responsibilities under the National Minimum Standards\* applicable to care homes to ensure that policies and procedures regarding the handling of dying and death of residents are in place in the care home

and are observed by staff.

RadcliffesLeBrasseur has been involved in advising upon issues arising from the Mental Capacity Act including redrafting policies that are affected by the Act. If you consider that we can provide you with any useful information in this area, including advising you on policy documentation, please do not hesitate to contact Andrew Parsons or Alexandra Johnstone.

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7222 7040, or email: [andrew.parsons@rlb-law.com](mailto:andrew.parsons@rlb-law.com).

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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