

## Countdown to the Mental Capacity Act 8 – Advance Decisions

The Mental Capacity Act 2005 (MCA) codifies the law on advance decisions (often referred to as “advance directives” or “living wills”). Advance decisions had been, contrary to a widely held misconception, lawful under the common law, but the Act now provides (together with the MCA Code of Practice) greater guidance.

Advance decisions enable people to make their views known about treatment that they do not want to receive in the future in the event that they lose capacity to make treatment decisions. It should be noted that an advance decision only permits a person to *refuse* treatment and does not entitle a person to demand treatment.

If an advance decision is valid and applicable, then it has the same effect as a contemporaneous refusal of treatment by a competent patient and thus the relevant treatment cannot be given to the patient.

Where it is known that a person has made an advance decision then this should clearly be recorded in the notes of a patient or resident in a care home and, if at all possible, a copy of the advance decision, if in writing, should be kept with that person’s notes.

An advance decision will be valid if it was made at the time that the maker of the decision was capable of making that decision. The maker of an advance decision

can withdraw the decision at any time when he has capacity to do so, in which case it would no longer be valid. Consideration must also be given to whether the maker of the advance decision has done anything clearly inconsistent with the advance decision since he made it; this again would make the advance decision invalid. Furthermore, the advance decision must be expressed in such a way as to be applicable to the treatment that it is proposed that would otherwise be administered.

An advance decision will not be valid if the maker of the decision has, after having made an advance decision, appointed a person with a Lasting Power of Attorney which provides authority for the donee of the LPA to make treatment decisions that are the same as those covered by the advance decision.

An advance decision will not be applicable to the treatment if the treatment is not specified in the advance decision; this is the basis on which a number of advance decisions made prior to the coming into force of the Act had been overturned by the Court. If there are reasonable grounds for believing that circumstances exist which a person lacking capacity did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them, then the advance decision will also not be applicable. If the healthcare professionals responsible for the treatment of the patient consider that an advance decision is invalid or

inapplicable such that they will not follow it and will administer treatment to the patient then the reasons why they have come to this decision should be recorded in the patient's records. This is important to demonstrate that the decision was taken on reasonable grounds, in order to enable the healthcare professionals to benefit from the protection given by the Act (section 26(2)).

An advance decision can only be made by a person aged 18 years or over. The decision does not have to be in writing or comply with any specific formalities, except where the decision refuses life sustaining treatment. In such circumstances, the advance decision must include a clear, specific written statement from the person making the advance decision that the advance decision is to apply to the specific treatment even if the life of the maker of the decision is at risk. The maker of the statement must sign the advance decision where it refuses life sustaining treatment or, if unable to sign, they can direct someone to sign on their behalf in their presence. The making of a statement should also be signed by a witness.

An advance decision cannot refuse basic or essential care, such as actions to keep a person clean and the offer of food and water by mouth. The Act allows healthcare

professionals to carry out these actions in the best interests of a person who lacks capacity to consent (section 5).

Advance decisions will generally not apply to proposed treatment for a mental disorder where the patient is detained under the Mental Health Act 1983 (MHA). However, the fact that the patient is detained under the MHA will not prevent any provisions in an advance decision made by that patient relating to treatment of a physical nature being followed if they are otherwise valid and applicable. It should also be noted that the Code of Practice to the MCA states that even if a patient is being treated under the MHA for a mental disorder, healthcare staff must treat a valid and applicable advance decision as they would a decision made by a person with capacity at the time they are asked to consent to treatment. For example, they should consider whether they could use a different type of treatment which the patient has not refused in advance.

Although advance decisions are not new legal concepts, it is likely that the MCA will raise their profile with the consequence that more people will consider having advance decisions. It will therefore become good practice for healthcare professionals to check with patients and residents of care homes when admitted to ascertain whether they have made an advance decision either in oral or written form.