

Advance Decisions and Advance Statements

What is an Advance Decision?

A decision by an adult with capacity (aged 18+) which specifies how proposed medical treatment is to be carried out, continued or discontinued by a healthcare professional in the future, should the adult lack capacity at the time a decision is required. Often an Advance Decision is referred to as a Living Will.

What is the effect of an Advance Decision?

The effect of a valid Advance Decision is that the incapacitated person is treated as having effectively made the decision at a future date when the person would otherwise be given treatment. If an Advance Decision complies with certain formalities it is legally binding. The adult's instructions must therefore be followed.

Are there any formalities to be complied with?

The following should be included:

- The person's full name, date of birth and address.
- Name, address and phone number of the person's GP.
- A statement that the document should be used if the person ever lacks the capacity to make treatment decisions for themselves.
- A clear statement of the decision, stating precisely what treatment(s) is to be refused and the circumstances in which the decision is to apply. The more detail the better to avoid any future difficulties interpreting the decision.
- The date the document was written.
- The person's signature and the date.
- Dated signature of the person who witnessed the decision maker's signature. If the decision maker is unable to sign the document, a second witness should sign to say that they witnessed the decision maker asking someone else to sign and that they saw this person sign the document in front of the decision maker.
- A statement and dated signature from the person's GP or a health professional to the effect that in their opinion, the decision maker has the required mental capacity to make the decision and that the decision was not made under duress.
- If the Advance Decision relates to life-sustaining treatment, include a clear, specific written statement that the advance decision is to apply to specific treatment, for example clinically assisted nutrition and hydration, even if life is at risk. This must be also be signed, dated, and witnessed.

A copy of the Advance Decision should be provided to the person's GP, any relevant health and social care professionals, family and friends.

Can an Advance Decision be withdrawn or altered?

Yes. If the person has capacity to withdraw or alter the Advance Decision. It is good practice to ensure that any withdrawal or amendment is documented to ensure there is clarity for those interpreting the decision. Any previous Advance Decisions may need to be destroyed and replaced with a copy of the new Advance Decision.

Are there things which cannot be included in an Advance Decision?

You cannot:

- Refuse basic care that is essential to keep you comfortable.
- Refuse the offer of food or drink by mouth.
- Ask for anything that is illegal, such as euthanasia or help to take your own life.
- Demand specific medical treatment. It will be for the treating clinicians at the time to determine whether a particular treatment is medically appropriate.
- Refuse treatment for a mental disorder if you are to be detained under the Mental Health Act 1983.

When may an Advance Decision not be followed?

- If it is not clear what type of treatment is refused.
- If the Advance Decision has been cancelled.
- If Health & Welfare Attorney(s) have been appointed since the Advance Decision was made.
- If an adult has capacity at the time a decision needs to be made and is therefore capable of making the decision.
- If there has been a change of circumstances since the Advance Decision was made, which casts doubt on whether the adult would make the same decision at the time a decision needs to be made.

If a healthcare professional ignores an Advance Decision, what happens?

A healthcare professional is liable in law to the incapacitated person if that person carries out or continues a particular treatment when he is satisfied that a valid and applicable Advance Decision refusing the treatment exists.

What if the applicability and/or validity of an Advance Decision is disputed?

It may be necessary to make an application to the Court of Protection (Court). The Court's role will be to consider whether an Advance Decision exists, if it is valid, and if it is applicable to a particular treatment.

What happens whilst the Court considers the validity of an Advance Decision?

A healthcare professional should continue providing life-sustaining treatment, or any treatment that the healthcare professional reasonably believes to be necessary to prevent a serious deterioration in the person's condition whilst the Court decides.

What is an Advance Statement?

A non-legally binding written document that sets out an adult's general wishes and preferences for future care. An Advance Statement cannot be used to document refusals of medical or life-sustaining treatment. The document should be used when an adult has lost capacity to help decide what is in a patient's best interests.

What problems commonly arise?

- Health professionals, family and friends may not be aware that an Advance Decision has been made.
- Health professionals may dispute the validity and applicability of an Advance Decision, meaning advance wishes cannot be respected.
- Advance Decisions may be difficult to understand or interpret because the wording used is not clear.
- The Advance Decision is not signed and witnessed correctly.

How can Lester Aldridge assist?

We can provide:

- A free, initial consultation to discuss the circumstances of the case and provide advice with regard to the most appropriate course of action.
- Assistance to help draft an Advance Decision which satisfies the necessary legal formalities to ensure your Decision is legally valid.
- Representation when the validity or applicability of a loved ones Advance Decision is disputed by health professionals, to ensure their wishes are respected.
- Advocacy at meetings to discuss Advance Decisions and ensure health professionals accord an Advance Decision due significance.
- When matters require the Court to decide, representation throughout the proceedings and access to expert Barristers, whom my virtue of their profession can provide top-tier advocacy to ensure views and the evidence is clearly articulated to the Court.
- On-going advice at each key stage.