

# Best Interests Decision Making

## Who should make the decision if the person lacks capacity?

If it is established that a person, P, lacks the capacity to make the specific decision, the decision will need to be made in the person's 'best interests' in accordance with the Mental Capacity Act 2005 ("MCA 2005").

For significant decisions relating to medical treatment or care, the decision maker is usually the treatment or care provider proposing a particular course of action. However, carers and family members will also need to consider what is in P's best interests regarding day to day decisions if P lacks capacity to make those decisions.

## What does 'best interests' mean?

The concept of 'best interests' is not defined in the MCA 2005. Instead, section 4 of the MCA 2005 sets out a checklist of factors which must be considered whenever a person is determining what is in P's best interests. Assessing what is in P's 'best interests' is therefore a process.

## What factors guide a best interests decision?

Section 4 of the MCA 2005 provides a non-exhaustive checklist of factors which must be considered when determining what is in P's best interests. These include:

- P's past and present wishes and feelings.
- The beliefs and values that would be likely to influence the decision if P had capacity, and any other factors that P would be likely to consider if P were able to do so.
- The views of others, such as anyone engaged in caring for P, family members, an Attorney or court appointed Deputy.

If there is nobody within these categories available, then an Independent Mental Capacity Advocate ('IMCA') must be consulted for serious medical treatment and significant change of accommodation decisions.

Thought should be given to:

- Ensure that assumptions are not made about P's best interests based on age, appearance or condition.
- What all the relevant circumstances relating to the decision in question are and which are most relevant to the person who lacks capacity to make that decision.
- Whether P may regain capacity.

P should be actively encouraged and supported to participate in the decision-making process.

## How are 'best interests' decisions made?

For complex decisions, such as where P should live and receive care, all the relevant evidence and available options should be discussed and documented at a round table or 'best interests meeting'.

Collaborative discussion should result in a reasoned analysis of the advantages and disadvantages, and risks associated with each available option, to facilitate a best interests decision. This is known as the 'balance sheet' approach.

When considering each option as part of a balance sheet exercise, it is often useful to set out with reasons:

- The risks and benefit to P.
- The likelihood of those risks and benefits occurring.
- The relative seriousness and/or importance of the risk and benefits to P.
- If certain risks are worth taking in P's best interests, or certain disadvantages are outweighed by benefits, what practical steps could be taken to reduce the risks or disadvantages.
- If a proposed option may fail, detail what may happen and what practical steps could be taken to minimise the risk of detriment to P.
- A conclusion about which option is considered to be in P's best interests and why.

## What does the 'least restrictive' option mean?

All of the possible options should be considered when assessing what is in P's best interests, including those which are less intrusive on P's freedom. This does not mean however that the least restrictive option must always be taken.

Case law has established that it is possible for a particular course of action to have many apparent risks to P and only one benefit, however that one benefit is of overriding importance. Sometimes this is referred to as the factor of 'magnetic importance'.

## How should serious medical treatment decisions be made?

Please refer to our 'serious medical treatment cases' information sheet which explains how serious medical treatment cases should be dealt with in detail.

## Who determines best interests?

The MCA 2005 does not identify any formal decision-makers except where:

- The person has made a valid advance decision to refuse treatment which applies to the treatment in question.
- If a Lasting Power of Attorney or Enduring Power of Attorney has been made and registered, or a Deputy has been appointed under a Court order, then the Attorney or Deputy will be the decision-maker for decisions within the scope of their authority.
- The Court of Protection makes the decision on behalf of the person

In every other case, a decision as to what is in P's best interests should be reached informally and collaboratively between those involved in P's care or interested in their welfare.

### **If I am "next of kin", do I have the final say?**

No. Status as P's next of kin does not mean the next of kin has any legal right to make any decision on P's behalf.

### **Are there any consequences for caring out an act in connection with the care or treatment of another without properly determining a person lacks capacity, and in the event they do, which option is in P's best interests?**

Yes. The person may be subject to criminal and civil liability unless the person can demonstrate they have established the person lacks capacity, and that a proper best interests assessment has been completed.

### **What if a disagreement occurs?**

Ultimately if agreement cannot be reached informally and a dispute arises about what is in P's best interests, an application to the Court of Protection may be required to ask the Court to decide.

### **What issues commonly arise?**

- Often a person with a disability, illness or injury, is presumed to lack capacity. This is wrong. The fundamental principle is that a person is to be assumed to have capacity unless it is established otherwise.
- Supported decision making is frequently misunderstood.
- Assessing capacity is complex. It is very rarely clear-cut. It takes time and often a number of assessments are required to gain an accurate picture of a person's capacity. Disputes often arise in difficult cases of fluctuating capacity.
- Professionals may lack the time and resources to adequately assess capacity and investigate all of the potential options. This causes delays and leads to ill-informed best interests meetings.
- Sometimes families, Attorneys, and Deputies feel best interests decisions are made without taking into account their views, experiences and knowledge of P.

### **How can Lester Aldridge assist?**

At Lester Aldridge we have significant experience of supporting families and their loved ones in respect of all mental capacity matters. We can provide:

- An initial, free consultation to discuss your circumstances and how to ensure best interests decisions are made properly when a person lacks capacity.
- The role of an intermediary. We can liaise with all the people involved, obtain all of the information and evidence required to facilitate a meaningful best interests meeting.
- A draft balance sheet which neatly details all of the available options and the advantages and disadvantages of each option based on the evidence. This can be used to support a best interests meeting and to evidence decision-making.

- Advocacy at best interests meetings to ensure views are represented and taken into account.
- Access to independent experts to help challenge a capacity assessment if the evidence suggests a capacity assessment may be flawed.
- Advice at each key stage and with regard to what steps can be taken to resolve disputes. This may involve an application to the Court of Protection.

For more information please visit: [www.lesteraldridge.com](http://www.lesteraldridge.com)  
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