

The Court of Protection and Serious Medical Treatment Cases

What is the Court of Protection?

A specialised court created under the Mental Capacity Act 2005. The court's scope is limited to considering the management of decisions on behalf of individuals who lack capacity or may have fluctuating capacity. Decisions are usually divided between property and financial affairs and health and welfare matters.

What is a 'Serious Medical Treatment' case?

Any situation which involves providing, withdrawing or withholding medical treatment where there is a fine balance between the benefits, burdens and risks and where a proposed course of action may have serious consequences for the patient.

Examples include the proposed withdrawal of clinically-assisted nutrition and hydration or antibiotics, which may lead to serious consequences for the patient.

The General Rule

Life-sustaining treatment can be withdrawn without court approval if:

- The principles of the Mental Capacity Act 2005 are followed; and
- Relevant guidance is observed; and
- The question of what is in the patient's best interests is agreed.

When is Court approval required?

If at the end of the assessment and decision-making process:

- The way forward is finely balanced; or
- There is a difference of medical opinion; or
- The proposed medical treatment is regarded as being experimental; or
- There is a disagreement with regard to whether a proposed course of action is in the best interests of the patient between family members and clinicians.

What 'relevant guidance' should clinicians follow?

The Guidance issued by the British Medical Association and Royal College of Physicians.

What steps should clinicians take in 'serious medical treatment' cases?

1. The patient's capacity to make a decision about the medical treatment in question must be established. The fundamental principle is that a person should be assumed to have capacity, unless it is established otherwise.
2. Once a lack of capacity has been established, any decisions should be made in the patient's best interests.
3. Clinicians should investigate how serious an injury or illness is.

4. Family members should be provided with unbiased, honest and realistic information about the patient's condition and expected level of recovery.
5. If, having completed investigations, clinicians take the view that it would not be in the patient's best interests to continue treatment, a second opinion should be obtained from a senior clinician.
6. If the second opinion agrees with the first, the evidence suggests it is not in the patient's best interests to continue treatment, and the family agree, treatment should be stopped. The focus should become end of life care.
7. If the investigations indicate the way forward is finely balanced, or there is a difference of medical opinion, an application to the Court should be made.
8. If family members disagree with clinical opinion(s), the starting point is to raise concerns with the clinicians directly.
9. A further medical opinion and/or a "case conference" may be required to review the decision. A mediator or advocate can attend to help advocate family views.
10. If agreement cannot be reached, the treatment provider should make a Court application.

The Court Application Process

Urgent applications of this nature are inherently complex. It is essential to obtain legal advice before an application is made.

The process, if a Deputyship application has not been submitted, is as follows:

1. The starting point is to telephone the Court. In cases of extreme urgency, applications may be dealt with initially by telephone.
2. The following Court Forms should be lodged:
 - COP1 (Application Notice)
 - COP24 (Witness Statement)
 - COP3 (Assessment of Capacity)
 - COP1B (Supporting Information)

-The applicable Court fee

The circumstances of the case, the reasons why the decision is urgent and the declaration sought should be explained in the COP1 and COP24.

3. Permission for the application may be required if the applicant is the treatment provider (i.e. the Hospital). The Court must agree that the application will benefit the patient.

If permission is granted, the Court will seal and stamp the COP1 with the date of issue (the date proceedings are approved) before the COP1 is returned to the Applicant.

4. Issue of an application is the trigger for Case Management. This means the Court will set out how the case will be processed.

The patient (P) will usually be joined as a party to the proceedings. The Official Solicitor (an officer of the Court appointed to protect the interests of persons who lack capacity) will usually act as P's litigation friend.

5. Unless the Court directs otherwise, the Applicant must serve (which means tell) proceedings on:

- Anyone named as a Respondent or a person to be notified of the application (using Forms COP15 and a COP5), and
- The patient (using Forms COP14 and COP5) within 14 days of issue by the Court.

Forms COP20A and COP20B should be lodged within 7 days of service to confirm the dates the application has been served on all parties and P.

6. If a person notified, or a Respondent, considers the application is reasonable no further action is necessary.

Alternatively, this is the opportunity to request to become a party to the application, or lodge an objection.

What is the Court's role in a medical treatment case?

To consider whether or not a proposed course of action by the treating clinicians (such as the withdrawal of life support) is lawful. The Court's decision and reasoning will be confirmed in a declaration.

It is important to note that the Court of Protection cannot compel a treating clinician to provide a particular form of treatment to the patient that is not being offered. The Court can only consider whether it would be in the patient's best interests for the proposed course of action or treatment to proceed. The fact that a patient lacks capacity does not mean they would be necessarily entitled to treatment they wouldn't ordinarily receive if they had capacity.

When a treatment provider has made a Court application, can a patient's family be involved?

Yes. If a member of the patient's family has been named as Respondent, the person will automatically become a party to the proceedings once the COP5 is returned to the Court. Any objections should be noted on the COP5.

The COP5 can also be used by a person notified to request to be joined as a party, or to lodge an objection.

What if the treatment provider refuses to make an application and the family disagree with clinical opinion(s)?

It may be possible for a family member to bring an application on P's behalf, which names the treatment provider as a Respondent.

How is legal representation funded?

The costs of the patient's representation by the Official Solicitor may be met partly by the treatment provider with the remainder from public funds. Family members are responsible for their own legal costs.

For more information please visit: www.lesteraldridge.com

Tel: 02380 827484 | Email: communitycare@LA-Law.com

The information contained in this publication is for guidance only. No responsibility can be accepted by Lester Aldridge LLP (LA) or by external contributors for action taken as a result of the information contained in this publication. It is not intended to be an exhaustive statement of the law or a substitute for seeking specific advice. Photocopying or other reproduction without LA's permission is a breach of copyright. LA is authorised and regulated by the Solicitors Regulation Authority. A list of members is available on request. Registered Office: Russell House, Oxford Road, Bournemouth, Dorset BH8 8EX. Registered in England OC321318.

What issues commonly arise?

- Often it is assumed that a person who requires serious medical treatment lacks capacity because of an inability to verbally communicate.
- A person's past and present wishes, feelings, beliefs and values may be discounted by clinicians. Disputes occur if these conflict with clinical opinion(s), particularly if P's wishes are not documented in an Advance Decision.
- Family views are often dismissed.
- Disagreements which cannot be resolved between clinicians and the family may necessitate a Court application.

How can Lester Aldridge assist?

We can provide:

- An initial, free consultation to discuss the circumstances of the case and the most appropriate way forward.
- The role of an intermediary. We can liaise with everyone involved, obtain all the information and evidence required to facilitate meaningful best interests discussions.
- A draft 'balance sheet' which succinctly details all the available options, the pros and cons of each option, and the key evidence to be considered.
- Advocacy to ensure family views are clearly articulated and considered.
- Representation if the matter requires resolution by way of a Court application.
- Access to independent experts to help support Court applications.
- If mediation or Court proceedings are required, we can recommend expert Barristers whom by virtue of their profession, can provide top tier advocacy to ensure your views and the evidence is clearly articulated to the Court.
- On-going advice and support at each key stage.

