Wirral Community NHS
NHS Trust

CLINICAL PROTOCOL FOR ASSESSING MENTAL CAPACITY AND BEST INTERESTS

RATIONALE

The purpose of this protocol is to set out Trust standards required to support service provision as specified within the Mental Capacity Act (2005) (MCA). English law necessitates before any healthcare professional can treat or examine a patient, they must obtain informed consent to do so. The MCA sets out a statutory basis for the assessment of mental capacity and defines assessment responsibilities for a potentially broad range of healthcare professionals, as well as formal and informal carers.

The MCA is designed to support vulnerable people to make decisions for themselves whenever and as far as possible, and to protect these individuals and those who care for them when decisions have to be made on their behalf (DH 2011). The MCA is supported by the MCA Code of Practice (2007) which provides further guidance and information relating to how the act works in practice.

TARGET GROUP

All staff employed by the Trust who are required to gain consent as part of their job role.

TRAINING

All staff within the Trust are required to comply with the Trust's Mandatory Training Matrix. Essential Learning Training includes sessions on consent and mental capacity.

RELATED POLICIES

Please refer to relevant Trust policies and procedures.

THE MENTAL CAPACITY ACT

The MCA is based on existing best practice and creates a single, coherent framework for dealing with mental capacity issues and provides a system for settling disputes, dealing with personal welfare issues and the property and affairs of people who lack capacity (MCA 2005).

It puts the individual who lacks capacity at the heart of decision making and places a strong emphasis on supporting and enabling the individual to make their own decisions. If they are unable to do this, the emphasis should be that they are involved in the decision making process as far as possible (CQC 2010; DH 2010).

The MCA is underpinned by five principles:

1) A person must be assumed to have capacity unless it is established that they lack capacity.
2) A person should not be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3) A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4) An act done or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made in their best interests.
5) Before the act is done, or the decision made, regard must be had as to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

(Refer to www.legislation.gov.uk for further information)

MENTAL CAPACITY

The MCA states that a person is unable to make a particular decision if they cannot do one or more of the four following things:

- Understand information given to them.
- Retain that information long enough to be able to make that decision.
- Weigh up the information available to make the decision.
- Communicate their decision by whatever means.

See flow chart for further guidance on page 11.

ASSESSMENT OF CAPACITY

The MCA makes clear that any assessment of a person's capacity must be decision-sensitive, therefore:-

- The assessment of capacity must be about the particular decision that has to be made at a particular time and is not about a range of decisions.
- If someone cannot make complex decisions this does not mean that they cannot make simple decisions.
- Individuals must not be judged to lack capacity based upon their age, appearance, condition or behaviour alone.

Capacity can be transient; therefore Trust staff need to recognise cases of fluctuating and temporary incapacity.

- The MCA states that the ability to retain information for a short period of time should not automatically disqualify the person from making a decision – it will depend on what is necessary for the decision in question. Aids such as videos and voice recorders can be used to assist retention and recording of information.

- Temporary factors may affect the ability to make decisions, such as acute illness, intoxication, the effect of medication, or distress caused by bereavement, depression or sudden shock.

LEARNING DISABILITIES

People with learning disabilities are able to learn new skills and abilities throughout their lives, so assessments of their capacity to make particular decisions may need to be made and reviewed periodically.

GOOD PRACTICE PRINCIPLES FOR ASSESSING MENTAL CAPACITY

Assess the patient at their best:

- Choose specific times of the day when the patient's level of understanding may be enhanced. Also if possible, choose a suitable place for the consultation/procedure to take place as this may make the patient feel more relaxed.
- In cases, such as dementia, the onset of debilitating illness is gradual and the point at which capacity is affected or a person can be said to be having "a good day" is hard to define. During the period of borderline capacity, a secondary medical opinion or liaison with the General Practitioner may be informative.
- There may be circumstances in which a person, whose capacity is in doubt, refuses to undergo an assessment of capacity or to be subject to tests or examinations. In these circumstances the focus should be on explaining the consequences, to help the person towards an informed decision.

Interview the person in the best circumstances:

- Choose a quiet location to minimise the risk of interruptions and background noise e. g. television and people talking.

Consult others:

- It may prove beneficial for the patient to have assistance from an advocate who is independent of any family or other agencies involved in the patient's care. An advocate can help the person express their wishes and aspirations.
- Where the person has learning disabilities, a designated support worker can reflect back personal understandings and choices through the use of their Health Action Plan.

Get help with communication if required:

- Use appropriate aids – visual, sign language and mechanical devices such as voice synthesizers may prove useful.
- Interpreters should be used to enable the patient to use their first language or sign language as appropriate.
- For extreme communication or cognitive difficulties, other forms of professional help should be considered such as clinical neuropsychology and speech and language therapy.

Maximise capacity:

- Give non-verbal demonstration, where relevant
- Present information in reasonably sized portions which can be easily processed.

- Repeat information when required to do so.
- Encourage the patient to ask questions.
- Focus on one specific decision at a time, being careful to avoid tiring or confusing the patient.
- Be prepared to halt or reschedule the interview, it may be more appropriate to repeat the process at a more convenient time or location.
- Allow time for reflection or clarification as appropriate. Depending on the urgency of a decision, it may be possible to return at another time to resolve uncertainty relating to the capacity of a patient.

RECORDING INFORMATION OBTAINED USING TRUST MENTAL CAPACITY ASSESSMENT FORM AND ASSESSMENT OF BEST INTERESTS FORM

Capacity assessments must be completed when a patient's ability to make an informed decision is impaired. Trust documentation (Mental Capacity Assessment Form) must be used and placed within the patient's health care records. A clear rationale for the assessment must be documented with all outcomes of the assessment evidenced within the patient's healthcare records comprehensively.

Issues relating to capacity may need to be shared with other members of the multidisciplinary team. If a person lacks capacity to consent to disclosure of this information then it has to be decided as to whether it would be in their best interests to disclose the information, remembering that only relevant information should be divulged as in line with the Caldicott Principles.

Good practice principles when recording information relating to capacity

- Document whether they have a Lasting Power of Attorney (LPA) that is registered with the Office of the Public Guardian.
- Document whether they have a Deputy appointed by the Court of Protection.
- Document whether they have an Advance Decision to refuse treatment or an Advance Directive. (Refer to Trust Do Not Attempt Cardiopulmonary Resuscitation Policy).

LPA records should be checked as the individual will have a copy of their LPA forms. Contact the Trust Safeguarding Team if any further queries arise.

LASTING POWER OF ATTORNEY (LPA)

There are two different types of LPA:

- A Personal Welfare LPA is for decisions relating to health and personal welfare

  A Personal Welfare attorney will have no power to consent to, or refuse treatment, before the person loses capacity to make the decision for him or herself or at any time when the person has regained capacity.

- A Property and Affairs LPA is for decisions relating to financial matters.

An LPA must be registered with the Office of the Public Guardian, as it cannot be used without doing so.

Any concerns or questions that may arise when dealing with a Lasting Power of Attorney must be raised with a senior manager and fully documented.

COURT OF PROTECTION

The Court of Protection is a specialist court for all issues relating to people who lack capacity to make specific decisions and was brought about by the MCA. The Court makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity to do so. Paid health and social care professionals will not usually be appointed as deputies due to possible conflicts of interest.

The Court of Protection has powers to:

- Decide whether a person has capacity to make a particular decision for themselves
- Make declarations, decisions or orders on financial or welfare matters affecting people who lack capacity to make such decisions
- Appoint deputies to make decisions for people lacking capacity to make those decisions
- Decide whether an LPA is valid
- Remove deputies or attorneys who fail to carry out their duties.

(MCA 2005)

ADVANCE DECISION MAKING TO REFUSE TREATMENT

An Individual can make an Advance Decision to refuse treatment even if doing so might put their life at risk. An advance decision is written by the individual, often with support from professionals, relatives or carers (NCPC 2008). They cannot be prepared if the individual lacks capacity following assessment and the Advance Decision to refuse treatment must meet the provisions set out in the MCA.

Key Elements

- Making an advance decision is entirely voluntary and should not be made as a result of external pressure.
- An advance decision can only be made by someone over 18 years of age.
- An individual making an advance decision must have the capacity to do so.
- The advance decision should specify the treatment which is to be refused and may specify the circumstances in which the refusal applies.
- The decision must be valid - the person who drew up the advance decision must have had mental capacity to do so at the time.
- The decision must be applicable to current circumstances.
- An advance decision can only be used to refuse treatment not to demand treatment or to request procedures which are against the law e.g. assisted suicide.

- A copy should be retained by the patient and (with consent) be evidenced in all relevant patient records.
- If the advance decision refuses life-sustaining treatment, it must be in writing (it can be written by someone else or recorded in healthcare notes), signed and witnessed and it must state clearly that the decision applies even if life is at risk.

Advance directives differ significantly from advance decisions to refuse treatment. Advance directives are currently made under common law whilst a person has capacity, are not binding, and contain a range of wishes and feelings specifically related to the patient in question. Examples of advance directives include:

- **Preferred Priorities for Care**

The Preferred Priorities for Care (PPC) document is designed to help people prepare for the future. It gives them an opportunity to think about, talk about and write down their preferences and priorities for care at the end of life.

- **Health Action Plan**

All young people and adults with a learning disability should have a Health Action Plan, as affirmed by the Department of Health. A Health Action Plan is developed with the person's key worker (when appropriate) and contains information on specific aspects relating to the person which include: health, preferred method of communication, nutrition, finance and housing.

BEST INTERESTS

Any decision, however minor must be made in the best interests of the person (Hutchinson & Foster 2008). Assessing best interests is patient specific and any interventions made or withdrawn at any one time must be clearly documented within the patient's health care records and a comprehensive rationale provided accordingly. Trust staff must complete the Trust Assessment of Best Interests Form where appropriate to do so. Refer to Department of Health (2001) guidance 12 Key Points on Consent for further advice.

Key principles of the MCA state:-

- It is important not to make assumptions regarding someone's best interests merely on the basis of the person's age or appearance, condition or any aspect of their behaviour.
- The person assessing best interests must consider all the relevant circumstances relating to the decision in question.
- There needs to be consideration as to whether the person is likely to regain capacity. If so, it must be considered whether the decision to be made can wait till then.
- The person must be fully involved in the decision that is being made on their behalf.
- There must never be a desire to bring about a person's death if the decision to be made concerns the provision or withdrawal of life-sustaining treatment.

Trust staff who assess a patient's best interests due to a lack of capacity must consult other people if it is appropriate to do so and take into account their views as to what would be in the best interests of the person lacking capacity, especially:-

- Anyone previously named by the person lacking capacity as someone to be consulted.
- Carers, relatives, friends or anyone else interested in the person's welfare.
- Any attorney appointed under a Lasting Power of Attorney (unless the decision is to be taken by the attorney).
- Any deputy appointed by the Court of protection to make decisions for the person (unless the decision is to be taken by the Deputy).

Trust staff assessing a patient's best interests must weigh up all the information provided to them in order to determine what decision is in the person's best interests. Trust staff assessing a patient's capacity and best interests must be able to justify their decision at a later date if they are required to do so. A multidisciplinary team meeting may need to be arranged by the appropriate person and further guidance sought from service managers as Trust solicitors may need to be consulted regarding the issue. A risk assessment may need to be completed when appropriate, to identify risks relevant to the situation.

DEPRIVATION OF LIBERTY SAFEGUARDS

The MCA Deprivation of Liberty Safeguards (DOLS) form part of the MCA. The safeguards provide legal protection for people who lack capacity who are or may be deprived of their liberty. They exist to provide an appropriate legal process and suitable protection in those circumstances where deprivation of liberty appears to be unavoidable in the person's best interests. Anyone depriving a person who lacks capacity of their liberty must be able to clearly justify the reasons for deprivation as it cannot be based on a vague notion of what might be best for someone. The process also allows healthcare professionals to question and challenge each other in relation to care being provided (MCA 2005).

Any concerns must be reported using a Trust incident form and contact the Trust Safeguarding Team for further guidance.

INDEPENDENT MENTAL CAPACITY ADVOCATE

The purpose of the Independent Mental Capacity Advocate (IMCA) Service is to help particularly vulnerable people who lack capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult regarding those decisions. The IMCA is not the decision maker, however is an important contributor to the decision making process (MCA 2005).

An IMCA **must** be instructed, and then consulted, for people lacking capacity who have no-one else to support them, when:-

- An NHS body is proposing to provide serious medical treatment
- An NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home
- The person will stay in hospital longer than 28 days
- They will stay in a care home for more than eight weeks.

An IMCA may also be instructed to support someone who lacks capacity to make decisions concerning:

- Care reviews, where no-one else is available to be consulted.
- Adult protection cases, whether or not family, friends or others are involved.

An IMCA does not have to be involved if the treatment is to be given under the Mental Health Act 1983, or the person under the Act is required to go into a specific hospital or home environment.

Please refer to following website for IMCA contacts and further information within the Wirral area:
http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@pg/documents/digitalasset/dh_124594.xls

IMCA referral forms can be obtained from the Trust Intranet.

WHERE TO GET ADVICE FROM

Members of the multidisciplinary team with specialised skills in verbal and non-verbal communication i.e. speech and language therapists, can provide further guidance when making decisions in relation to mental capacity.

INCIDENT REPORTING

Clinical incidents or near misses must be reported and a Trust Incident Form must be completed

SAFEGUARDING

In any situation where staff may consider the patient to be a vulnerable adult, they need to follow the Trust Safeguarding Adult Policy and discuss with their line manager and document outcomes.

EQUALITY ASSESSMENT

During the development of this protocol the Trust has considered the clinical needs of each protected characteristic (age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief, sexual orientation). There is no evidence of exclusion of these named groups.

If staff become aware of any clinical exclusions that impact on the delivery of care a Trust Incident form would need to be completed and an appropriate action plan put in place.

REFERENCES

Care Quality Commission (2010) Essential standards of quality and safety.

Department of Health (2001) 12 Key Points on Consent: the law in England

Department of Health (2001) Reference guide to consent for examination or treatment.

Department of Health (2010) Essence of Care.

Department of Health (2011) The Operating Framework for the NHS in England 2012/13

Hutchinson, C. and Foster, J. (2008) Best Interests at End of Life.

Mental Capacity Act (2005)

Mental Capacity Act (2007) Code of Practice

National Council for Palliative Care (2008) Advance Decisions to Refuse Treatment: A Guide for Health and Social Care Professionals.

Wirral Community NHS Trust (2010) Policy for Consent to Examination and Treatment

GLOSSARY OF TERMS

Advance decision to refuse treatment – A decision to refuse specified treatment made in advance by a person who has capacity to do so. This decision will then apply at a future time when that person lacks capacity to consent to, or refuse, the specified treatment.

Advance directive – Advance directives are currently made under common law whilst a person has capacity, are not binding, and contain a range of wishes and feelings specifically related to the patient in question.

Best Interests – Any decision made, or anything done for a person who lacks capacity to make specific decisions, must be in the person's best interests.

Capacity – The ability to make a decision about a particular matter at the time the decision needs to be made.

Court of Protection – The specialist Court for all issues relating to people who lack capacity to make specific decision.

Deprivation of Liberty – Deprivation of liberty is a term used in the European Convention on Human Rights about circumstances when a person's freedom is taken away.

Deputy – Someone appointed by the Court of Protection with ongoing legal authority as prescribed by the Court to make decisions on behalf of a person who lacks capacity to make particular decisions themselves.

Independent Mental Capacity Advocate (IMCA) – Someone who provides support and representation for a person who lacks capacity to make specific decisions, where the person has no-one else to support them.

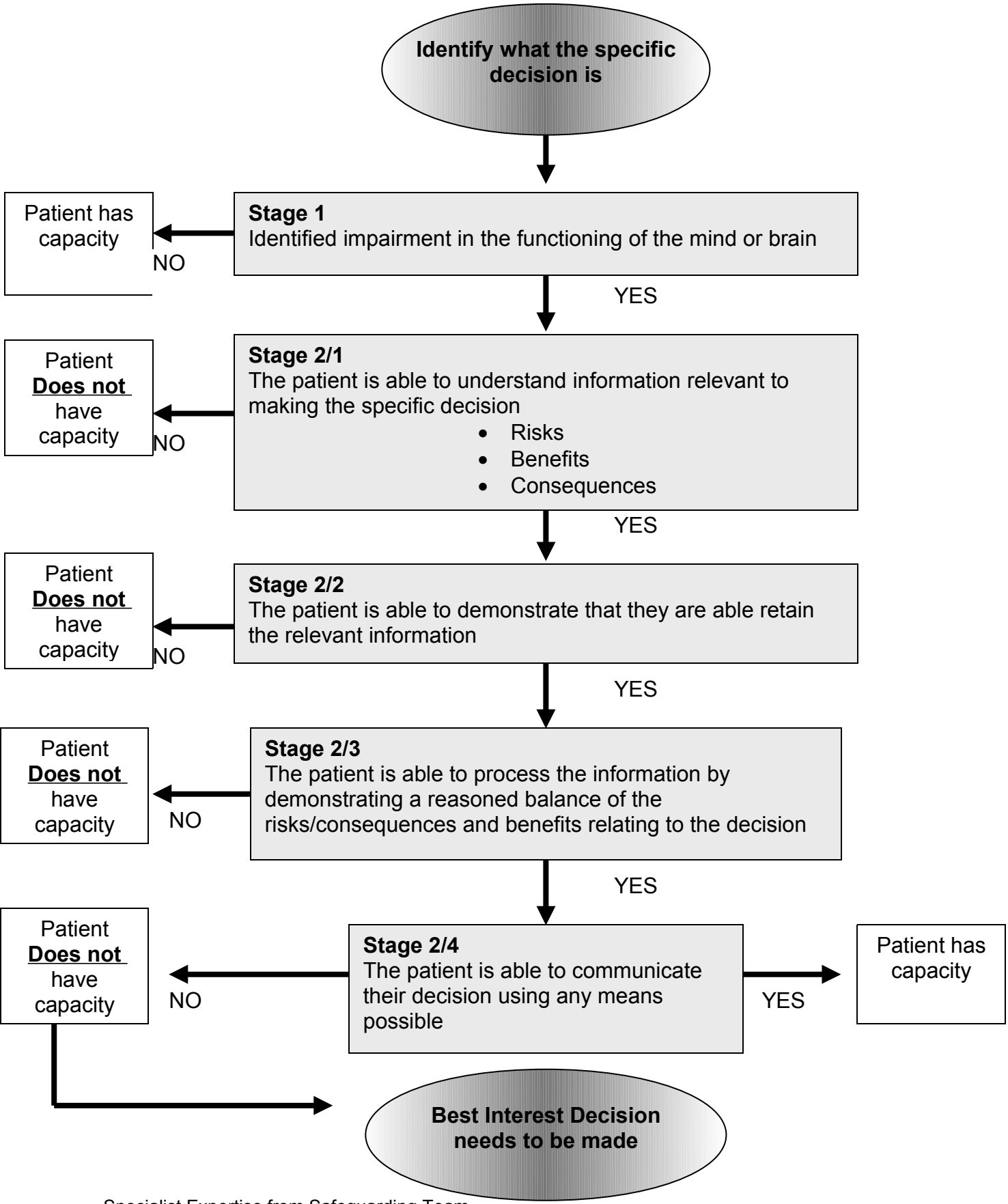
Lasting Power of Attorney - A Power of Attorney makes decisions regarding the person's personal welfare; including healthcare and/or the person's property and affairs.

Office of the Public Guardian – The Office of the Public Guardian supervises deputies, keeps a register of deputies and Lasting Powers of Attorney, checks on what attorneys are doing, and investigates any complaints about attorneys or deputies.

Personal Welfare – Personal welfare decisions are any decisions about a person's healthcare, where they live, what clothes they wear, what they eat and anything needed for their general care and well-being.

Property and affairs – Any possessions owned by a person, the money they have in income, savings or investments and any expenditure. Attorneys and deputies can be appointed to make decisions about property and affairs on behalf of a person who lacks capacity.

Mental Capacity and Best Interest Decision Flow Chart



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Specific Best Interest Decision Required

Identify a decision maker

Has the Patient an advanced decision and is it:
A refusal
Relevant to the decision
Signed
Witnessed
Dated

YES ▶ Decision made

NO

Does the patient have a lasting power of attorney and is it:

- Relevant to the decision
- Stamped by the court of protection
- Health and welfare or property and affairs specific

YES ▶ Decision made

NO

Does the patient have a close relative, friend or others who take an interest in their welfare?

NO ▶ Complete a referral to Safeguarding for an Independent Mental Capacity Advocate (IMCA)

YES

Decision maker should consult those people involved in the provision of care and gain their opinion.
E.G. Medical/Nursing staff, O.T, Social Worker, etc. If discharge decision social services must be involved in decision making process.

And

Close relatives, friends or others who take an interest in the patient's welfare

Or

Independent Mental Capacity Advocate (IMCA)

Decision Made and Documented in the Medical Notes

CONTROL RECORD			
Title	Clinical Protocol for Assessing Mental Capacity and Best Interests		
Purpose	Provide Trust staff with guidance on assessing mental capacity and best interests		
Author	Quality and Governance Service (QGS)		
Equality Assessment	Integrated into procedure	**Yes**	No
Subject Experts	Caroline Hewitt / Safeguarding Team		
Document Librarian	QGS		
Groups consulted with :-	Clinical Policies and Procedures Group		
Infection Control Approved	N/A		
Date formally approved by Risk and Governance Group	February 2012		
Method of distribution	Email ✓	Intranet ✓	
Archived	Date 16th March 2012	Location:- S Drive QGS	
Access	Via QGS		

VERSION CONTROL RECORD			
Version Number	**Author**	**Status**	**Changes / Comments**
Version 1	Quality and Governance Service	N	First version