2005 MENTAL CAPACITY ACT GUIDE

Is patient 16 years or older

→ **PATIENT LESS THAN 16**
Refer to person with parental responsibility unless 'Gillick competent'

↓ YES

Have all reasonable steps been taken to facilitate capacity

→ **DOUBT REGARDING CAPACITY**
Do not need to be an expert – just show you believe on reasonable grounds that the patient lacks capacity. If still unsure, ask a psychiatrist to advise but person directing or undertaking proposed action in patients best interests is ultimately responsible for deciding capacity

↓ YES

Has patient failed '2 stage test of capacity' despite all reasonable assistance

↓ YES

Is patient unable to make specific decision at specific time

→ IF PATIENT HAS CAPACITY HIS OR HER WISHES MUST BE RESPECTED EVEN IF THIS MAY RESULT IN PATIENTS' INJURY OR DEATH

↓ YES

Is incapacity permanent and/or does decision need to be made now

→ CAN DECISION WAIT TILL CAPACITY REGAINED?

↓ YES

Is there no applicable Lasting Power of Attorney, valid and applicable Advance Directive or Court Appointed Deputy
If one exists, this should be respected and over-rides a 'clinicians' best interests assessment

LASTING POWER OF ATTORNEY (LPA)
- Can only be made by capable patient 18 years old or more
- Must post-date any valid AD
- Must be registered with the Office of Public Guardian to be valid
- Must be a personal welfare LPA
- Can allow consent or refusal of life-sustaining treatment if specifically granted and counter-signed
- May be subject to restrictions
- LPA must act in patients best interests and abide by core principles
- Cannot prevent detention and treatment under the Mental Health Act except ECT

If concerned LPA is not acting in the patients best interests, seek 2nd opinion, arrange case conference or refer to OPG
Presume capacity when LPA drawn up unless strong evidence to contrary
NB counter signature does not confirm capacity when drawn-up

ADVANCE DIRECTIVE (AD)
- Can be general and or advanced expression of wishes
- Can be specific – advanced refusal of treatment
- Can only be made by capable patient aged 18 or more
- Ensure not suicidal in intent
- Ensure relevant to clinical scenario
- Only valid if post dates LPA
- Must be signed and witnessed and applicable to circumstances if refusing life saving treatment
- Can be revoked by words or conduct

AD's inherently revocable in action, voice or word

If doubt exists about the applicability of an AD, must make application with Court of protection

Cannot prevent detention and treatment under the mental Health Act except for ECT

↓ YES

Have the patients best interests been reasonably ascertained given any time constraints

INDEPENDENT MENTAL CAPACITY ADVOCATE
- Only if major or serious medical treatment considered (a potential grey area)
- If next of kin exists – not required unless you think the NOK not acting in patients best interests or does not want to make decisions
  Entitled to see relevant medical records and reports
- IMCA decision is specific to specific decision

Like clinicians IMCA must also follow the 5 principles and act in patients best interests – if doubt on either side refer to second opinion, PALS, or ultimately the 'Court Of Protection'
Like NOK statements, is not determinative – MUST be taken in to account but can treat differently if you can justify it
IMCA's involved in major treatment decisions, adult protection cases, residential care moves and in-patient stays greater than 28 days
IMCA PHONE NUMBER: 01752 753 718

↓ YES

Is this the least restricitve treatment option

→ If not least restrictive option, need 'objective evidence' why clinician reasonably believes least restrictive option not appropriate

↓ YES

Is restraint unnecessary

→ **RESTRAINT NEEDED**
Need to fulfil to steps:-
1: evidence to reasonably believe restraint necessary to allow treatment to proceed in the patients best interests to prevent harm
2: must be the least restraining option and proportionate to risk of seriousness of harm whilst not depriving patient of their liberty
The MCA 2005 does not guarantee protection from liability of the Article 5 of the ECHR

↓ YES

Is treatment not lifesaving or life sustaining treatment

→ **LIFE SAVING TREATMENT**
Ensure decision not motivated by desire to bring about death as opposed to treatment according to patients best interest. Where doubt or conflict exists about the AD, or if treatment is in the patients best interests, must get a second opinion, case conference or ultimately Court of Protection

↓ YES

Proceed with treatment that is in the patients best interests

DOCUMENTATION OF STEPS TAKEN ESSENTIAL

REASONABLE STEPS
Time permitting, examples of reasonable and practicable steps include use of interpretors, next of kin, simple language, visual aides

'2 STAGE TEST OF CAPACITY'
1: does patient have impairment of, or disturbance in functioning of mind or brain
AND
2: does impairment mean patient cannot make specific decision when required
Conclusions as to capacity must not be based on unjustified assumptions such-as age, appearance (ie Downs syndrome)

CAPACITY ASSESSMENT
1: Does patient have and understand information relevant to decision
2: Can patient retain information long enough to make decision
3: Can patient use information in relation to ones-self to make decision
4: Can patient communicate decision
Unwise decisions do not imply incapacity
Clinicians do not need to be experts: they need to show they have reasonable grounds for believing patient lacks capacity. If doubt or conflict exists, consider formal psychiatric assessment but this is advice. The decision of capacity rests with person undertaking the action to which the decision relates. If serious dispute, contact the Legal Department

BEST INTERESTS
The MCA imposes a duty to consult relative, carer or LPA (time permitting)
If lacks capacity must consider all relevant medical and non-medical circumstances, beliefs and wishes of patient, written statements, LPA or court appointed deputy
If no one appropriate to consult about best interests, or you think they are not acting in the patients best interests – must instruct an IMCA for all serious medical treatment or long term accomodation
Unlike a competent patient, an appropriate lasting power of attorney or an advance directive, the views of relatives or carers are not determinative. They must be taken in to account but can be discounted.
If conflict exists, consider second opinion, case conference, PALS, court of protection

THE FIVE CORE PRINCIPLES
1: presumption all patients have capacity
2: cannot be deemed incapacited until all reasonable steps taken to fascilitate capacity
3: unwise decisions do not mean patient incapacitated
4: actions taken must be in the patients overall best interests
5: have regard to achieving desired outcome in least restictive means for pateint as possible

USEFUL CONTACT NUMBERS
SENIOR NURSE: BLEEP - 355
Legal Department: 01752 431 055
Office of Public Guardian and Court Of Protection 0845 330 2900 *If urgent/24hr No.* 0207 947 6000

USEFUL REFERENCE AREAS
- THE MCA 2005 CODE OF PRACTICE
- GMC: 'CONSENT: PATIENTS AND DOCTORS MAKING DECISIONS TOGETHER'2008
- DEPARTMENT OF HEALTH: 'Seeking Consent: Working With Children' 2001
- UK CLINICAL ETHICS NETWORK: www.ethics-network.org.uk/educational-resources/mental-capacity-act-2005

Plymouth Hospitals NHS
NHS Trust