

MIDNIGHT LAW

Disagreement on Best Interests

For England and Wales



SITUATION

There is disagreement with family (or friends) about best interests.

STEPS TO CONSIDER

[1] Have you formally established that the patient lacks capacity for this decision?

- A person must be assumed to have capacity unless it is established that they lack capacity for this decision.
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because they make an unwise decision.

[2] Have you assessed

- The patient's past and present wishes and feelings?
- Beliefs and values that would be likely to influence the patient's decision?
- Any other factors that might influence the patient's decision or the situation?

[3] Have you talked to

- Anyone named by the person as someone to be consulted?
- Anyone interested in their welfare (for example, family and friends)?
- Any donee (the recipient of a gift or power of appointment) on a lasting power of attorney?
- Any deputy appointed for the person by the court?

[4] Local steps to resolve disagreement:

- Discussion with another clinician and/or team.
- Best Interests meeting (ensure equal representation between family and team).
- Document areas of agreement and disagreement.
- Allow time for reflection.
- Discuss with medical director (or appropriate corporate medical team member) at the earliest opportunity.

[5] Formal steps to resolve disagreement:

- Seek a second opinion, external to the Trust.
- Try mediation. Suitable mediators can be found from the Civil Mediation Council or NHS Resolution (faster, cheaper than litigation and more likely to preserve relationships).
- Take legal advice, including the option of an application to the Court of Protection.

GUIDING PRINCIPLES

Any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves is made in their best interests.

KNOW THE LAW

1. Mental Capacity Act 2005
2. Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67
3. An NHS Trust & Ors v Y & Anor [2018] UKSC 46

FURTHER READING

1. Serious Medical Treatment Practice Guidance [2020] EW COP 2