

Advance decisions

MPS



Putting members **first**

Advice correct as of January 2015

An advance decision (“living will”) to refuse future medical treatment – should the patient then lack capacity – can be made by a person who is over 18 and who has capacity. This factsheet gives further information about advance decisions.

Advance decision

A valid and applicable advance decision to refuse treatment must be specific to the treatment in question. It has the same force as a contemporaneous decision. As a medical professional, you must follow an advance decision if it is valid and applies to the decision that needs to be made. If you do not follow an advance decision, you could be charged with committing a crime or civil liability.

A valid and applicable advance decision overrules:

- the best interests provision, which would otherwise allow healthcare professionals to give treatment they believe is in the individual's best interests; therefore, you must follow an advance decision, even if you do not believe it is in the patient's best interests.
- the decision of any personal welfare Lasting Power of Attorney (LPA), made before the advance decision was made.
- the decision of any court-appointed deputy.

The Court of Protection has no power to overrule a valid and applicable advance decision to refuse treatment.

What should it contain?

An advance decision can only be made by a person with capacity and can only refuse treatment in the future; it cannot demand specific treatments.

The statement may set out the circumstances in which the refusal should apply.

It will only apply when the person lacks the capacity to consent to, or refuse this treatment. The decision may be either written or verbal. When it is in relation to life-sustaining treatments, it must be written, signed and witnessed, and must contain “a clear, specific written statement from the person making the advance decision that it is to apply to the specific treatment even if life is at risk” (MCA Code of Practice). It can be amended or withdrawn at any time.

It is the responsibility of the person making the advance decision to make sure the healthcare professionals treating them are aware of any decision that has been made. It is recommended that the individual informs their family and GP. Some people will carry a card or wear a bracelet to alert you to the fact that they have an advance decision.

Artificial nutrition and hydration (ANH) is a recognised form of medical treatment and, therefore, can be refused in an advance decision. However, as with all refusals for life-sustaining treatment, it must satisfy requirements in the advance directive – written, signed and witnessed.

Determining whether the advance decision is valid and applicable

If you become aware that a patient who currently lacks capacity has previously made an advance decision about their treatment you must make reasonable efforts to find out details of the decision. This might involve discussions with the patient's relatives, looking at the patient's notes or contacting the patient's GP, and determining if there is an LPA.

Once you are aware the decision exists, you need to determine if it is valid and applicable, in which case you must follow it. If you are satisfied that either an advance decision does not exist, or that an existing advance decision is not valid or applicable in this case, the treatment you give must be in the patient's best interests. You should make clear notes in the patient's records about your decision and why the advance decision has not been followed.

Is the advance decision valid?

An advance decision may be invalid if:

- the decision was withdrawn while the person had capacity
- after the advance decision was made, an LPA was appointed and given express authority to make the treatment decisions that were covered by the advance decision

- the person has done something that clearly goes against the advance decision, which suggests that they have changed their mind.

No individual can make an advance decision to ask for their life to be ended – assisted suicide and voluntary euthanasia remain unlawful.

Is the advance decision applicable?

The advance decision must apply to the situation in question. It is not applicable if:

- the patient has capacity
- the treatment is not the treatment specified in the advance decision
- there are reasonable grounds for believing that there have been changes in circumstances which, in hindsight, would have affected the person's decision.

Emergencies

You should not delay emergency treatment to look for an advance decision if you have no indication that one exists. If there is an indication that one exists, you should assess its validity and applicability to the emergency situation as soon as possible and apply it.

Healthcare professionals are protected from liability if they are not aware of an advance decision, or are not satisfied that an advance decision exists, is valid and is applicable to the particular treatment and the current circumstances.

Conscientious objection

If you disagree in principle with the patient's right to refuse life-sustaining treatment, you should discuss this with a senior colleague and arrange for the transfer of the management of the patient to a colleague.

Disagreements

It is for you to decide if your patient's advance decision is applicable and valid. When there is a disagreement about the advance decision, you must consider all available evidence, which will often involve consulting with family, close friends of the patient, carers and the LPA. All the staff involved in the patient's care should be consulted and also the patient's GP. Details of these discussions should be recorded in the patient's notes.

If there is still doubt or disagreement, you should refer the decision to the Court of Protection. The Court cannot overturn a valid and applicable advance decision. Whilst the Court comes to a decision, life-sustaining treatment and any treatment required to prevent the patient's condition deteriorating should be provided. There are emergency legal procedures in place that operate 24 hours a day, to deal with urgent cases quickly.

Further information

- MPS factsheets, Mental Capacity Act series – www.medicalprotection.org/uk/factsheets
- Mental Capacity Act – www.legislation.gov.uk/ukpga/2005/9/contents
- Safeguarding Vulnerable Groups Act 2006 – www.legislation.gov.uk/ukpga/2006/47/contents
- Mental Capacity Act 2005 Code of Practice, Chapter 9 – www.publicguardian.gov.uk/mca/code-of-practice.htm
- Ministry of Justice – www.justice.gov.uk
- DH – www.dh.gov.uk
- The Office of the Public Guardian, *Making Decisions: A Guide for People who work in Health and Social Care Booklet 3* – Mental Capacity Act 2005 – www.publicguardian.gov.uk

For medicolegal advice please call us on:

0800 561 9090

or email us at: querydoc@mps.org.uk

www.mps.org.uk

This factsheet provides only a general overview of the topic and should not be relied upon as definitive guidance. If you are an MPS member, and you are facing an ethical or legal dilemma, call and ask to speak to a medicolegal adviser, who will give you specific advice.

MPS is not an insurance company. All the benefits of membership of MPS are discretionary as set out in the Memorandum and Articles of Association. The Medical Protection Society Limited. A company limited by guarantee. Registered in England No. 36142 at 33 Cavendish Square, London, W1G 0PS.