

FORM 4:

ADULTS WHO MAY LACK CAPACITY TO CONSENT TO SURGICAL TREATMENT AND OR RADIOLOGICAL INTERVENTIONAL PROCEDURES

Note: Top white copy file in patients notes

Second yellow copy give to the Patient/Relative/Carer//IMCA/LPA

Information surrounding Assessment of Capacity in relation to the Mental Capacity Act 2005 can be found within the Governance, Risk and Patient safety Community within The Hub- Mental Capacity Act

Telephone advice can be sought from the Governance Department ext 2191/2093/2484- Safeguarding Matron ext 5313 and Matrons within the Specialties

Guidance to health professionals (to be read in conjunction with consent policy which includes information concerning the Mental Capacity Act)

This form should only be used where it would be usual to seek written consent but an adult patient (16 or over) lacks capacity to give or withhold consent to treatment. If an adult **has** capacity to accept or refuse treatment, you should use the standard consent form and respect any refusal. Where treatment is very urgent (for example if the patient is critically ill), it may not be feasible to fill in a form at the time, but you should document your clinical decisions appropriately afterwards. If treatment is being provided under the authority of Part IV of the *Mental Health Act 1983*, different legal provisions apply and you are required to fill in more specialised forms (although in some circumstances you may find it helpful to use this form as well). If the adult now lacks capacity, but has made a valid advance decision to refuse treatment that is applicable to the proposed treatment then you must abide by that refusal.. For further information on the law on consent, see the Department of Health's *Reference guide to consent for examination or treatment* (www.dh.gov.uk/consent).

When treatment can be given to a patient who lacks the capacity to consent

All decisions made on behalf of a patient who lacks capacity must be made in accordance with the Mental Capacity Act 2005. More information about the Act is given in the Code of Practice¹. Treatment can be given to a patient who is unable to consent, only if :

- the patient lacks the capacity to give or withhold consent to this procedure AND
- the procedure is in the patient's best interests.

Capacity

A person lacks capacity if they have an impairment or disturbance (for example, a disability, condition or trauma, or the effect of drugs or alcohol) that affects the way their mind or brain works which means that they are unable to make a specific decision at the time it needs to be made. It does not matter if the impairment or disturbance is permanent or temporary. A person is unable to make a decision if they cannot do one or more of the following things:

- Understand the information given to them that is relevant to the decision.
- Retain that information long enough to be able to make the decision.
- Use or weigh up the information as part of the decision- making process.
- Communicate their decision - this could be by talking or using sign language and includes simple muscle movements such as blinking an eye or squeezing a hand.

You must take all steps reasonable in the circumstances to assist the patient in taking their own decisions. This may involve explaining what is involved in very simple language, using pictures and communication and decision-aids as appropriate. People close to the patient (spouse/partner, family, friends and carers) may often be able to help, as may specialist colleagues such as speech and language therapists or learning disability teams, and independent advocates (as distinct from an IMCA as set out below) or supporters. Sometimes it may be necessary for a formal assessment to be carried out by a suitably qualified professional.

Capacity is 'decision-specific': a patient may lack capacity to take a particular complex decision, but be able to take other more straight-forward decisions or parts of decisions. Capacity can also fluctuate over time and you should consider whether the person is likely to regain capacity and if so whether the decision can wait until they regain capacity.

Best interests

The Mental Capacity Act requires that a health professional **must** consider all the relevant circumstances relating to the decision in question, including, as far as possible considering:

- the person's past and present wishes and feelings (in particular if they have been written down)
- any beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors
- the other factors that the person would be likely to consider if they were able to do so.

When determining what is in a person's best interests" a health professional must not make assumptions about someone's best interests merely on the basis of the person's age or appearance, condition or any aspect of their behaviour. If the decision concerns the provision or withdrawal of life-sustaining treatment the health professional must not be motivated by a desire to bring about the person's death.

The Act also requires that, as far as possible, health professionals must consult other people, if it is appropriate to do so, and take into account of 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 and anyone engaging in caring for patient and their family and friends.

Independent Mental Capacity Advocate (IMCA)

The Mental Capacity Act introduced a duty on the NHS to instruct an independent mental capacity advocate (IMCA) in serious medical treatment decisions when a person who lacks capacity to make a decision has no one who can speak for them, other than paid staff. IMCAs are not decision makers for the person who lacks capacity. They are there to support and represent that person and to ensure that decision making for people who lack capacity is done appropriately and in accordance with the *Act*.

Lasting Power of Attorney and Court Appointed Deputy

A person over the age of 18 can appoint an attorney to look after their health and welfare decisions, if they lack the capacity to make such decisions in the future. Under a Lasting Power of Attorney (LPA) the attorney can make decisions that are as valid as those made by the person themselves. The LPA may specify limits to the attorney's authority and the LPA must specify whether or not the attorney has the authority to make decisions about life-sustaining treatment. The attorney can only, therefore, make decisions as authorised in the LPA and must make decisions in the person's best interests.

Court of Protection

The Court of Protection can appoint a deputy to make decisions on behalf of a person who lacks capacity. Deputies for personal welfare decisions will only be required in the most difficult cases where important and necessary actions cannot be carried out without the court's authority or where there is no other way of settling the matter in the best interests of the person who lacks capacity. If a deputy has been appointed to make treatment decisions on behalf of a person who lacks capacity then it is the deputy rather than the health professional who makes the treatment decision and the deputy must make decisions in the patient's best interests.

Second opinions and court involvement

Where treatment is complex and/or people close to the patient express doubts about the proposed treatment, a second opinion should be sought, unless the urgency of the patient's condition prevents this. The Court of Protection deals with serious decisions affecting personal welfare matters, including healthcare, which were previously dealt with by the High Court. Cases involving:

- decisions about the proposed withholding or withdrawal of artificial nutrition and hydration (ANH) from patients in a permanent vegetative state (PVS)
- cases involving organ, bone marrow or peripheral blood stem cell (PBSC) donation by an adult who lacks capacity to consent
- cases involving the proposed non-therapeutic sterilisation of a person who lacks capacity to consent to this (e.g. for contraceptive purposes) and
- all other cases where there is a doubt or dispute about whether a particular treatment will be in a person's best interests (include cases involving ethical dilemmas in untested areas)

should be referred to the Court for approval. The Court can be asked to make a decision in cases where there are doubts about the patient's capacity and also about the validity or applicability of an advance decision to refuse treatment.

First Name:
 Surname:
 D.O.B.:
 Hospital Number:
 NHS Number:

All sections to be completed

A Details of procedure or course of treatment proposed:

.....

B Assessment of patient's capacity (in accordance to the Mental Capacity Act)

Diagnostic Test:			<input type="checkbox"/> Yes	<input type="checkbox"/> No
Is there an impairment of, or disturbance in, the functioning of the person's mind or brain (temporary or permanent)		Details:		
If yes, does the impairment or disturbance effect the person's ability to make a specific decision			<input type="checkbox"/> Yes	<input type="checkbox"/> No
Functional Test: Is the person able to:	1. Understand the information	Relevant to the decision being made?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	2. Retain the information	Long enough to make a decision	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	3. Use & Weigh up the information	To arrive at a choice (even if unwise choice made)	<input type="checkbox"/> Yes	<input type="checkbox"/> No
	4. Communicate the decision	e.g. by talking, signing, use of Trust Communication Tool etc? Note: Assessment should include communication with practical steps	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does the person lack Capacity to make the decision?			<input type="checkbox"/> Yes	<input type="checkbox"/> No
		<input type="checkbox"/> Yes (no further action)		
Can the decision be delayed because the person is likely to regain capacity in the near future?		<input type="checkbox"/> Not likely to regain capacity Detail why.....		
		<input type="checkbox"/> Not appropriate to delay Detail why.....		

C Assessment of the Patients Best Interest

Is there a registered Health and Welfare Lasting Power of Attorney in place?	<input type="checkbox"/> Yes (consider consultation)	<input type="checkbox"/> No
Has the person made an advanced decision to refuse treatment which is legally binding?	<input type="checkbox"/> Yes. Details:.....	<input type="checkbox"/> No
Has the person made an advanced statement or request?	<input type="checkbox"/> Yes. Details:.....	<input type="checkbox"/> No

D. Involvement of the patient's family and others close to the patient		
Note: The final responsibility for determining whether a procedure is in an incapacitated patient's best interests lies with the health professional performing the procedure		
	Views/Comments/Information	Name and Signature
Doctor		
Nurse / Midwife		
Social Worker		
Therapist		
Dietician		
Friends, Family		
Other		

Independent Mental Capacity Advocate (IMCA)

For decisions about serious medical treatment, where there is no one appropriate to consult other than paid staff, has an Independent Mental Capacity Advocate (IMCA) been instructed?

Yes No Details

Signature Date.....

The patient has an attorney or deputy (Where the patient has authorised an attorney to make decisions about the procedure in question under a Lasting Power of Attorney or a Court Appointed Deputy has been authorised to make decisions about the procedure in question, the attorney or deputy will have the final responsibility for determining whether a procedure is in the patient's best interests.

I have been authorised to make decisions about the procedure in question under a Lasting Power of Attorney / as a Court Appointed Deputy (delete as appropriate). I have considered the relevant circumstances relating to the decision in question (see section C) and believe the procedure to be in the patient's best interests.

Any other comments (including the circumstances considered in assessing the patient's best interests)

Signature:.....Date.....

E Decision Maker: I have reasonable belief that I have:		
I have considered "all relevant circumstances"	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I have ensured that the decision recommendation is not based on assumptions	<input type="checkbox"/> Yes	<input type="checkbox"/> No
I have considered that the decisions concerning the provision or withdrawal of life sustaining treatment have not been motivated by a desire to bring about a persons death	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Signature:.....Date:.....

Name (PRINT):.....Job title:.....

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