Mental Health and Justice

Best-Interest Decision-Making Under the NICE Guidelines

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The NICE Guidelines

NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE

NICE GUIDELINE NG108

Decision-making and mental capacity

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By the Numbers …

444 Pages

6 Appendices

20 Recommendations on Best-Interests

Alex Ruck Keene: "Two-Thirds of a Banana"

Some are very elementary -- but still important!

Recommendation 1.5.4

Health and social care services must ensure that best interests decisions are being made in line with the Mental Capacity Act 2005.

Some speak to the basic architecture of the Act

Recommendation 1.5.1

In line with the Mental Capacity Act 2005, practitioners must conduct a capacity assessment, and a decision must be made and recorded that a person lacks capacity to make the decision in question, before a best interests decision can be made. Except in emergency situations, this assessment must be recorded before the best interests decision is made.

Among the most important

Recommendation 1.5.3

As part of the best interests decision-making process, practitioners must take all reasonable steps to help the person to provide their own views on the decision.

Among the most problematic

Recommendation 1.5.9

If a decision maker considers it helpful or necessary to convene a meeting with the relevant consultees to assist with the decision-making process, they should:

- Involve the person themselves, unless a decision is made that it would be contrary to their best interests for them to attend the meeting. Where this is the case, this decision and the reasons for it should be recorded.

Among the most problematic

Recommendation 1.5.7

Unless it would be contrary to the person's best interests to do so, health and social care practitioners should work with carers, family and friends, advocates, attorneys and deputies, to find out the person's values, feelings, beliefs, wishes and preferences in relation to the specific decision and to understand the person's decision-making history.

Among the most challenging to implement

Recommendation 1.5.13

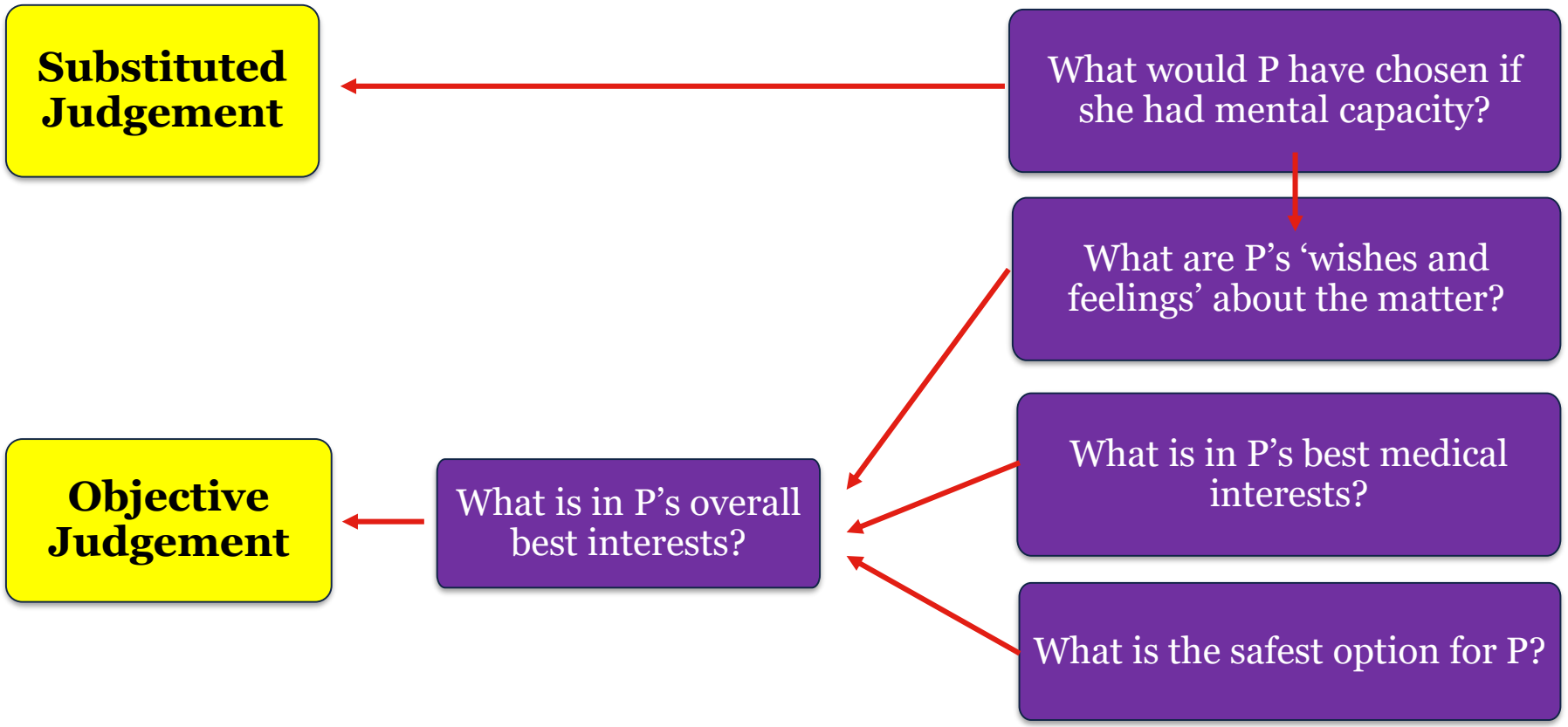
Carers and practitioners must, wherever possible, find out the person's wishes and feelings in order to ensure any best interests decision made reflects those wishes and feelings unless it is not possible/appropriate to do so. Where the best interests decision ultimately made does not accord with the person's wishes and feelings, the reasons for this should be clearly documented and an explanation given. The documentation of the assessment should also make clear what steps have been taken to ascertain the person's wishes and feelings and where it has not been possible to do this, the reasons for this should be explained.

‘Substituted Judgement’ or ‘Objective Test’?

disability it would not be acceptable to assume that, because of this disability, they will not have a good quality of life and should therefore not receive treatment. As with *section 2(3)* the references to “condition” and “appearance” capture a range of factors. The section goes on to list particular steps that must be taken. Best interests is not a test of “substituted judgement” (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person’s best interests. All the relevant circumstances, including the factors mentioned in the section must be considered, but none carries any more weight or priority than another. They must all be balanced in order to determine what would be in the best interests of the person concerned. The factors in this section do not provide a definition of best interests and are not exhaustive.

Source: The Explanatory Notes to the Mental Capacity Act

What Question am I asking?



POLLY's Story

March, 2009: Polly is involved in a head-on automobile collision, in which she suffered a severe head injury.

2009-2010: Polly is left her in a coma for a year, and with permanent brain damage.

2011: Polly has regained minimal conscious awareness. But she is totally dependent on round-the-clock medical assistance; she is kept alive by Artificial Nutrition and Hydration.

Those who are close to Polly are clear that, if she had had the choice, Polly would have preferred to die rather than survive in this dependent condition.

Three Best-Interests Situations

Paramedic at the Roadside:

Suppose Polly is still conscious at the accident scene when the Paramedic Team arrives. It is plain that she has a serious head injury; she is disoriented; but she protests that she does not want help.

Day 3 at the Hospital:

Polly is in a coma, breathing with a ventilator. The indicated medical treatment is a tracheostomy.

Month 4 at the Hospital:

Polly develops pneumonia. The indicated medical treatment is a course of antibiotics.

Recommendation 1.5.2

Ensure that everyone involved in the best interests decision-making process knows and agrees who the decision maker is.

So in Polly's Case, who is the decision-maker:

-- at the roadside?

-- on Day 3?

-- at Month 4?

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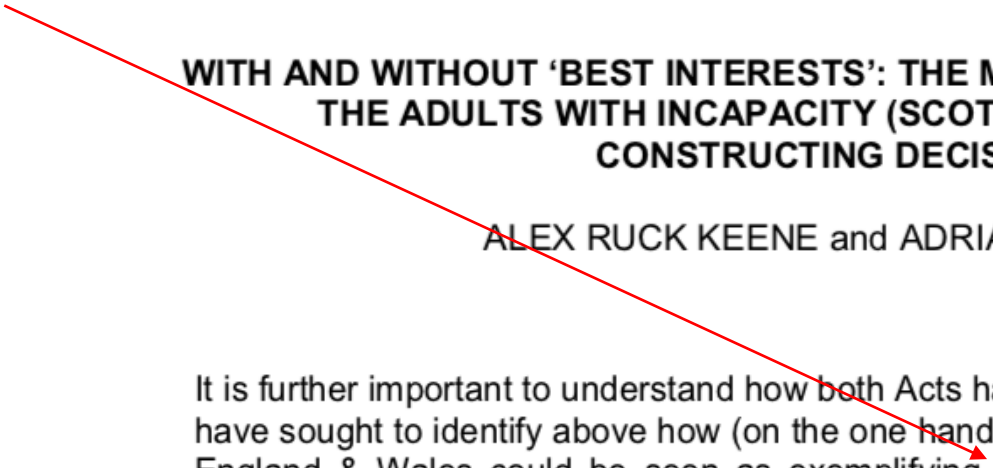
MCA Sec 4(5):

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

Trends



[2016] International Journal of Mental Health and Capacity Law

WITH AND WITHOUT 'BEST INTERESTS': THE MENTAL CAPACITY ACT 2005, THE ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000 AND CONSTRUCTING DECISIONS

ALEX RUCK KEENE and ADRIAN D WARD*

It is further important to understand how both Acts have been applied in practice. We have sought to identify above how (on the one hand) the evolution of the case-law in England & Wales could be seen as exemplifying a trend towards paying greater heed to the individual's wishes and feelings (and, perhaps, suggesting what 'respect' might look like in practice), while (on the other) judicial decisions in Scotland have disappointingly trended, particularly in the last decade, towards what seems in practice to bring a more paternalistic 'best interests' approach – even using that rejected terminology – and away from greater respect for the individual's will and preferences, and past and present wishes and feelings.

The Fundamental Tension Remains:

Health and Social Care in the community

Health and Social Care in the Community (2014) **22**(1), 78–86 doi: 10.1111/hsc.12066

"The Fundamental tension faced by all the participants was between their role in supporting autonomy and protecting people lacking capacity."

Williams et al 2014: "Best interests decisions: professional practices in health and social care"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