

MIDNIGHT LAW:

Disagreements on Best Interests

For England & Wales. See separate document for Scottish Law.



SITUATION

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 he lacks capacity for this decision.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision

[2] Have you assessed the patient's

- Past wishes and feelings
- Beliefs and values that would be likely to influence his decision
- Any other factors

[3] Have you talked to

- Anyone named by the person as someone to be consulted
- Anyone interested in his welfare (for example, family and friends)
- Any donee of 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)
- Documentation of 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

- Second opinion – external to the Trust
- 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:

Mental Capacity Act 2005

Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

An NHS Trust & Ors v Y & Anor - [2018] UKSC 46

FURTHER READING:

Gard (A Child), Re [2017] EWHC 1909 (Fam)

Alder Hey Hospital v Evans [2018] EWHC 308 (Fam)