

**APPLICATIONS RELATING TO MEDICAL TREATMENT:
GUIDANCE AUTHORISED BY THE HONOURABLE MR JUSTICE HAYDEN,
THE VICE PRESIDENT OF THE COURT OF PROTECTION.**

Applications to which this practice guidance applies

1. This practice guidance sets out the procedure to be followed where a decision relating to medical treatment arises and where thought requires to be given to bringing an application before the Court of Protection. The procedure is currently being reviewed within the revised MCA Code. That will, in due course, be subject to public consultation and Parliamentary scrutiny. This guidance is intended to operate until such time as it is superseded by the revised Code.
2. It is emphasised that this document is intended to be by way of **guidance only**.
3. The practice guidance is directed to those acting for providers and commissioners of clinical and caring services. As set out below, the expectation is that such providers/commissioners should be responsible for bringing any application that is required.
4. The starting point for the making of medical treatment decisions in relation to those lacking decision-making capacity is Section 5 Mental Capacity Act 2005. This provides a defence against liability for the medical professional(s) carrying out the relevant act (including, where relevant, withholding or withdrawing treatment) where they reasonably believe that the person in question lacks the necessary decision-making capacity and that the act in question is in the person's best interests.
5. The fact that certain medical treatments are defined as 'serious'¹ does not determine whether they should be subject to an application to the Court of Protection. Rather they indicate the need for special care and attention to the decision-making process surrounding them, including the appointment of an Independent Mental Capacity Advocate in appropriate circumstances.
6. If the provisions of the Mental Capacity Act 2005 are followed, any relevant professional guidance observed² and relevant guidance in the Code of Practice followed,³ including as to the undertaking of the decision-making process, then, if there is agreement at the end of the decision-making process as to:

¹ For purposes of section 37 Mental Capacity Act 2005 See the MCA 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, SI 2006/1832, regulation 4.

² In the case of decisions concerning clinically assisted nutrition and hydration, treating clinicians are directed to the BMA/RCP Guidance (endorsed by the GMC): 'Clinically assisted nutrition and hydration (CANH) and adults who lack the capacity to consent,' available at www.bma.org.uk/canh.

³ Note, the Code of Practice must be read together with any subsequent case-law; the Code of Practice is also under review as at January 2020.

- a. the decision-making capacity of; and
- b. best interests of the person in question,

then, in principle, medical treatment may be provided to, withdrawn from or withheld in accordance with the agreement, without application to the court, in reliance upon the defence in section 5.⁴

7. Paragraphs 8-13 below set out the circumstances in which section 5 either will not or may not provide a defence. If section 5 does not provide a defence, then an application to the Court of Protection will be required.”

Situations where consideration should be given to bringing an application to court

8. If, at the conclusion of the medical decision-making process, there remain concerns that the way forward in any case is:
 - (a) **finely balanced**, or
 - (b) there **is a difference of medical opinion**, or
 - (c) a **lack of agreement** as to a proposed course of action from those with an interest in the person’s welfare, or
 - (d) there is a **potential conflict of interest** on the part of those involved in the decision-making process(not an exhaustive list)

Then it is highly probable that an application to the Court of Protection is appropriate. In such an event consideration **must** always be given as to whether an application to the Court of Protection is required.

9. Where any of the matters at paragraph 8 above arise and the decision relates to the provision of life-sustaining treatment an application to the Court of Protection **must** be made. This is to be regarded as an inalienable facet of the individual’s rights, guaranteed by the European Convention on Human Rights (‘ECHR’). For the avoidance of any doubt, this specifically includes the withdrawal or withholding of clinically assisted nutrition and hydration.
10. In any case which is not about the provision of life-sustaining treatment, but involves the serious interference with the person’s rights under the ECHR, it is “highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that step will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of [capacity and] best interests, with [the person] having the benefit of legal representation and independent expert advice.”⁵ This will be so even where there is agreement between all those with an interest in the person’s welfare.

⁴ *NHS Trust v Y* [2018] UKSC 46 at paragraph 126.

⁵ *Re P (Sexual Relations and Contraception)* [2018] EWCOP 10 at paragraph 56, concerning the covert insertion of a contraceptive device.

11. Examples of cases which may fall into paragraph 10 above will include, but are not limited to:
- a. where a medical procedure or treatment is for the primary purpose of sterilisation;
 - b. where a medical procedure is proposed to be performed on a person who lacks capacity to consent to it, where the procedure is for the purpose of a donation of an organ, bone marrow, stem cells, tissue or bodily fluid to another person;
 - c. a procedure for the covert insertion of a contraceptive device or other means of contraception;
 - d. where it is proposed that an experimental or innovative treatment to be carried out;
 - e. a case involving a significant ethical question in an untested or controversial area of medicine.
12. Separately to the matters set out above, an application to court may also be **required** where the proposed procedure or treatment is to be carried out using a degree of force to restrain the person concerned and the restraint may go beyond the parameters set out in sections 5 and 6 Mental Capacity Act 2005. In such a case, the restraint will amount to a deprivation of the person's liberty and thus constitute a **deprivation of liberty**.⁶ The authority of the court will be required to make this deprivation of liberty lawful.
13. It requires to be stated clearly that those providing or commissioning clinical and caring services should approach the Court of Protection in any case in which they assess it as right to do so.

Pre-issue steps

14. An application relating to medical treatment falls within the Personal Welfare Pathway. The pre-issue stage of the Personal Welfare Pathway (Practice Direction 3B) should be followed. It is important:
- a. to consider whether steps can be taken to resolve the relevant issues without the need for proceedings; but
 - b. to recognise that delay will invariably be inimical to P's welfare and where resolution cannot be achieved within P's own timescales proceedings should be issued.
15. Lawyers at the Official Solicitor's office are available to discuss applications in relation to medical treatment before an application is made. They should be given as much notice as possible of any application. Any enquiries about adult medical and welfare cases should be addressed to a lawyer in the healthcare and

⁶ *ACCG v MN* [2017] UKSC 22 at paragraph 38.

welfare team at the Office of the Official Solicitor, Victory House, 30 to 34 Kingsway, London WC2B 6EX, telephone 020 3681 2751, email: oswelfare referrals@ospt.gov.uk. In urgent cases please phone to alert a lawyer in the healthcare and welfare team and do not rely solely on email communication as this may not receive immediate attention.

16. The **Official Solicitor's office is not able to offer an 'out of hours' service**, which means that the Official Solicitor can only participate in hearings that are either (1) listed or (2) made on short notice to the applications judge during court hours. Accordingly, applications to the 'out of hours' Judge should be regarded as exceptional.

Parties to proceedings

17. The person bringing the application will always be a party to proceedings, as will a respondent named in the application form who files an acknowledgment of service.⁷ In cases involving issues as to medical treatment, the organisation which is, or will be, responsible for commissioning or providing clinical or caring services to P should normally (although not always) be the applicant. If the organisation is not the applicant, it should normally be named as a respondent in the application form. The expectation in applications relating to medical treatment is that P would normally be joined as a party. It is therefore important that the applicant provides as fully as possible details (including contact details) for members of P's family and others with an interest in P's welfare.

(Practice Direction B accompanying Part 9 sets out the persons who are to be notified that an application form has been issued.)

18. The court will consider whether anyone not already a party should be joined as a party to the proceedings. Other persons with sufficient interest may apply to be joined as parties to the proceedings⁸ and the court has a duty to identify at as early a stage as possible who the parties to the proceedings should be.⁹

Allocation of the case

19. Where a decision has been made to pursue an application to the court in relation to a serious medical treatment decision or in respect of a case involving an ethical dilemma, in an untested area, the proceedings (including permission, the giving of any directions, and any hearing) must be conducted by a Tier 3 judge,¹⁰ unless the Senior Judge or a Tier 3 judge determines to the contrary.¹¹
20. In any other case, the expectation is that the court, on making case management directions, on issue, will in gatekeeping under paragraph 2.4(1)(a) of Practice Direction 3B have regard, in particular, to:

⁷ Rule 9.13 of the Court of Protection Rules 2017.

⁸ Rule 9.15 of the Court of Protection Rules 2017.

⁹ Rule 1.3(3)(e)(ii).

¹⁰ Practice Direction 3A, paragraph 2(a). Practice Direction 2A defines tiers of judge.

¹¹ Practice Direction 3A, paragraph 3.

- a. The seriousness of the consequences for P of the proposed treatment decision(s);
- b. The seriousness of the interference with the ECHR rights of P involved the proposed treatment decision(s).

Matters to be considered at the first directions hearing

21. Unless the matter is one which needs to be addressed immediately, at the case management directions upon issue stage the court will list it for a Case Management Conference within 28 days as per paragraph 2.4(1) of Practice Direction 3B. The court at the case management directions upon issue stage will further consider whether it is possible to join P as a party and whether the Official Solicitor should be invited to act as their litigation friend. It should be noted that:

- a. the expectation in applications for medical treatment is that P will normally be joined as a party;
- b. When P is joined as a party to the application, the Official Solicitor will usually consent to act if invited to do so by the court. There is no need for confirmation that there is no other person willing or able to act as litigation friend. The Official Solicitor will therefore normally be invited to act as litigation friend, and the standard practice is that the organisation which is, or will be, responsible for providing clinical or caring services to P will meet half of the costs incurred by the Official Solicitor (as P's solicitor). In urgent cases the issue of P's representation should be resolved as quickly as possible to ensure that those acting for P can quickly take the necessary steps to investigate the case and secure the best possible evidence in the available time scale.

22. At the Case Management Conference, the court will consider the matters set out at paragraph 2.5 of Practice Direction 3B. It will also consider how the press should be notified of the application, and whether such notification should be accompanied by an agreed statement of facts and issues.

Urgent hearings

23. Practice Direction 10B sets out the general procedure to be followed for urgent applications.

24. In urgent hearings in medical treatment cases, the following steps should be taken:

- a. proper arrangements should be made for family members to be able to participate in the hearing;
- b. the Official Solicitor's office should be alerted so that (if possible) he is in a position to respond promptly. It is to be emphasised, as set out at paragraph 16 above, the Official Solicitor does not offer an 'out of hours' service. The Official Solicitor is prepared in principle to attend very urgent hearings as prospective

litigation friend where the caring organisation agrees to pay half of his costs but ideally the Court should be asked to make an urgent order in respect of P's representation if time permits;

- c. the Urgent Applications Judge and the Clerk of the Rules are to be alerted at the earliest opportunity that an application is likely;
 - d. a Word version of any draft order should be made available;
 - e. any statements in support of an application relating to life-sustaining treatment must set out the salient details of the relevant medical history which precedes the application and an assessment of any material which illuminates P's quality of life;
 - f. any IMCA or advocate report(s) relating to the treatment decision which are in existence should be filed;
 - g. Usually, and particularly if written evidence is limited or incomplete, one or more treating clinician should attend in person to provide evidence for the court. If such is not possible attendance may be permitted by telephone, or by video link, to provide evidence for the court.
25. In an urgent hearing, the court will take every opportunity it can to ensure that P is represented before granting substantive relief. Only in a truly exceptional case would the court grant substantive relief without representation. The court will otherwise only grant such interim relief as is urgently required to secure P's interests, and the following steps should then be taken:
- a. The case should then be listed, **avoiding delay**, at the earliest opportunity to permit full consideration of the evidence and representations on behalf of P;
 - b. The represented applicant's advocate/legal representative should prepare a note of the hearing as soon as is reasonably practicable afterwards, and file a copy of the note with the court and serve a copy upon (a) the Official Solicitor or any other litigation friend appointed to act for P and (b) any respondent who was not present at the hearing.

Orders

26. In every case, in addition to any declaration made under section 15(1)(a) Mental Capacity Act 2005, the court will consider whether the relief sought should be granted in the form of a declaration of lawfulness under section 15(1)(c) and/or a decision under section 16(2)(a). In so doing, the court will have regard to the statutory purpose of section 16(2)(a) as being to empower the court to make a decision on behalf of P in relation to a matter in respect of which P lacks capacity.