

## BEST INTERESTS

### Overview

3.1 A key principle of the Capacity Law is that any decision or any act, on behalf of a person (P), who has been assessed to lack capacity, must be made or done, in P's best interests. This principle applies to family, friends, paid workers, attorneys and guardians, and covers all decisions, simple and complex. The only exception to this is where P has made a relevant Advance Decision to Refuse Treatment.<sup>1</sup>

3.2 In determining what is in P's best interests, the decision maker must:

- (a) support P to participate in the decision or act,
- (b) avoid discrimination,
- (c) consider all the relevant information to include:
  - (i) whether it is likely that P will regain capacity to make their own decision,
  - (ii) P's past and present wishes and feelings, their beliefs and values and any other information that P would consider if they were making their own decision, and
  - (iii) if the decision concerns life sustaining treatment, not to be motivated to bring about P's death,
- (d) take account of the views of others, including anyone named by P to be consulted, as long as it is appropriate and practicable to consult them,
- (e) consider whether there is a less restrictive option, and
- (f) consider all the relevant factors to establish what is in P's best interests.

### Significant Restriction of a person's rights

3.3 The Law does not authorise a person to significantly restrict P's rights within the meaning of section 47 Capacity Law (Bailiwick of Guernsey) Law 2020. This can only be authorised under the Protective Authorisation Scheme<sup>2</sup> or by a decision of the Court or the Mental Health and Capacity Review Tribunal.<sup>3</sup>

### Who is the decision maker?

3.4 Many different people may be required to make decisions or act on behalf of any P who lacks capacity to make their own decision. The person who makes the relevant decision is called the decision maker. It is the responsibility of the decision maker to work out what is in the best interests of P. If P has a relevant Lasting

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<sup>1</sup> Advanced Decisions to Refuse Treatments will be introduced at a later date.

<sup>2</sup> The Protective Authorisation Scheme will be introduced at a later date.

<sup>3</sup> To be introduced at a later date.

Power of Attorney, the attorney will be the decision maker for decisions within the scope of their authority. The decision maker should assess P's capacity to make the specific decision (see Code of Practice section on capacity).

<b>Decision</b>	<b>Decision maker (if no relevant LPA)</b>
Day to day decisions such as what to wear, what to eat, activities	P's carer (formal or informal)
Medical treatment	The healthcare professional responsible for carrying out the proposed treatment
Social care decision, such as move to a care home (funded by the Committee)	The social care professional, responsible for arranging the placement
Financial decisions	Any person appointed as Guardian

### **Making a decision on behalf of P**

3.5 Considering what is in P's best interests can be difficult to assess, but the Law requires decision makers to follow certain steps. A best interests decision is a person-centred decision, i.e. it should be based on P's wishes, feelings and values, rather than the wishes, feelings and values of the decision maker.

#### **Scenario: Making a decision**

Mr Paul James is 80 years old and lives alone in his rented home. He has been recently diagnosed with dementia. Mr James' daughter Samantha, lives in London, so she is not able to visit often. Mr James' neighbour contacts Samantha to express concern about her father. When Samantha visits she can see that her father has lost weight and finds that there is very little food in the fridge. The property is in poor condition and there is rubbish piled up all over the floor. Mr James is unsteady on his feet and Samantha observes that he has difficulty moving safely around his house. She asks for a social worker to assess her father for a care home placement.

The social worker assesses Mr James to lack capacity to make his own decision about how best to meet his needs. He does not have a Lasting Power of Attorney for Health and Welfare decisions. Mr James does not have much money so his placement will be funded by the Committee, therefore the social worker is the decision maker. The social worker understands that she should involve Mr James, as far as possible, in making the decision about where he should live, as well as his daughter. Mr James' neighbour has been very involved as an informal carer and is also invited to participate.

The social worker arranges a best interests meeting at Mr James' house, to support his involvement. Although Mr James is quite confused, he is clear that he is happy in his house. He has previously told his daughter that he would never want to go into a care home. Despite this, Samantha wants her father to go into a care home, as she is very concerned about his safety in his own home. Mr James' neighbour says that he thinks Mr James would be very unhappy if he had to leave his own home, particularly as he has a cat and thinks that moving to a care home would not be good for his mental wellbeing.

The social worker considers all these views, the positive and negative elements of the different options and she adds weight to Mr James' views. She notes that he has not previously had a care package to support him and that he had been managing alone, until recently. Considering the principles of the Capacity Law, the social worker decides that the less restrictive approach would be to provide support to Mr James in his own home. A package of care is consequently arranged to support Mr James to stay at home.

### **Support P to participate in the decision or act**

3.6 It is important that P should be involved in the decision making process, as far as they are able to participate. The decision maker should ensure that all practical means are used to encourage participation. To support P to participate, consideration should be given to:

- using simple language and avoiding the use of jargon,
- using an interpreter (including signing) if required,
- what support is available from family, friends or carer,
- using communication aids, and
- the best time and place for the discussion.

### **Scenario – supporting the person to participate**

Sarah has a learning disability and has lived in foster care since early childhood, but now she is 18 she will be moving to an adult placement. Sarah has no verbal communication, but she uses Makaton. The social worker has assessed Sarah to lack capacity to make her own decision about where she should live; however, he wants to involve her and to get her views. The social worker has identified two care homes and takes Sarah to visit them both. He watches how Sarah relates to the staff in each care home and, after the visits they talk about the homes, using a Makaton interpreter to ensure participation. Sarah is able to express her views about the different placements. When the best interests meeting takes place, the

social worker takes account of Sarah's view to inform the decision as to where she should live.

### **Avoid discrimination**

3.7 The decision maker should not make assumptions based simply on the basis of P's age, appearance, condition or behaviour.

### **Consider all the relevant information**

#### **Assess whether P may regain capacity**

3.8 When making a decision, consideration should be given to whether P may regain capacity. If so, can the decision be delayed? This may apply if P is receiving short term medical treatment (which has affected P's capacity to make decisions) or if P has an infection.

#### **Consider P's past and present wishes and feelings, P's beliefs and values and any other information that P would take into account if they were making their own decision.**

3.9 Has the person written an Advanced Care Plan or Advanced Decision to Refuse Treatment?<sup>4</sup> Although the Advanced Care Plan is not binding, it is an expression of P's wishes and may aid the decision maker. If the decision relates to medical treatment and there is a relevant Advanced Decision, the decision maker is bound to follow this. The decision maker should also take account of P's beliefs and values which may have influenced their decision when they had capacity to make the relevant decision. This includes religious beliefs and practices. Even though P has been assessed to lack capacity to make the specific decision, P may have views, or have expressed views in the past, which should be taken into account. However, P's wishes and feelings will not necessarily be the deciding factor for working out their best interests, as the assessment will need to consider these alongside other factors.

#### **Scenario**

##### **Taking account of the person's wishes and feelings.**

Oliver Stein suffered a stroke when he was 65. He recovered well, and was able to return home but this experience has made him think about his future. Oliver writes an Advanced Care Plan which states that, in the event of a decline in his health and if he loses capacity to make his own decision, he wishes to stay in his own home and not be admitted to a care home. Oliver's only son lives in America and does not visit his father often. Oliver has not made a Lasting Power of Attorney for health and welfare decisions.

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<sup>4</sup> Advanced Care Plans will be introduced at a later date.

Two years later, Oliver has a second stroke and he suffers a brain injury. He is no longer able to walk and his communication is very limited. Whilst he is in hospital, he is assessed to have lost capacity to make his own decision about how to support him when he is fit for discharge. The social worker reads the Advanced Care Plan and takes account of this as an expression of Oliver's wishes. She considers whether his care and treatment needs could effectively be met in his own home however, Oliver's doctor advises that he needs 24 hour care and treatment. A best interests decision is taken that Oliver should move to a care home, to ensure that he is safe and that his needs are met.

### **Motivations when the decision concerns life sustaining treatment.**

3.10 Anyone making a decision about whether life-sustaining treatment is in the best interests of P, should not be motivated by a desire to bring about P's death. The healthcare professional will advise whether the treatment is life sustaining. All reasonable steps, which are in P's best interests, should be taken to prolong life; however, there will be some cases where treatment may be futile or overly burdensome for P. In such circumstances, it may be that the best interests assessment concludes that it would not be in P's best interests to have treatment, even if this may result in P's death. The decision maker must not be motivated by a desire to bring about the person's death for whatever reason, even if this is from a sense of compassion.

3.11 Before deciding to withdraw or withhold life-sustaining treatment, the decision-maker must consider the range of treatment options available to work out what would be in P's best interests. All the relevant factors should be considered, and in particular, the decision maker should consider any statements that P has previously made about their wishes and feelings about life-sustaining treatment. If there is agreement between the doctor and P's family or friends, treatment can be withdrawn, however if there is disagreement about life sustaining treatment this will need to be referred to the Royal Court.

3.12 A doctor may place a DNACPR order on P if they assess that it would be futile to attempt cardiac resuscitation due to other health conditions. A person who is nearing the end of their life due to illness may wish to die at home and therefore it might be decided that they should not be transferred to hospital, if their health declines.

### **3.13 The decision maker should take into account the views of –**

- a) Anyone named by P as someone to be consulted. This could be a friend, as well as a family member.

- b) Anyone engaged in caring for P or who is interested in their welfare. This includes paid carers, Healthcare staff, GP, and Independent Capacity Representatives.<sup>5</sup>
- c) An attorney under a Lasting Power of Attorney (where the attorney does not have the authority to make the relevant decision).
- d) Any guardian appointed for the person by a court.

3.14 The purpose of this consultation is to consider what would be in the person's best interests. The people consulted may be able to provide information about the person's past and present wishes and feelings, their values and beliefs. This will inform the decision making process.

3.15 It is good practice for the decision maker to document the views of others and how these have been considered, as part of the decision making process. This is particularly important in the event of any disagreement about what is in P's best interests.

### **What happens if a person has made an Advance Decision to Refuse Treatment (ADRT)?**

3.16 If P has made an Advance Decision relevant to the proposed treatment, then the best interests process does not apply. The healthcare professional should not provide a treatment that P has documented (in the ADRT) that they do not wish to receive. If there is any doubt as to the validity of the ADRT, the best interests process should be followed. Even if the ADRT is not valid, it should be considered as an expression of P's wishes.

### **Is there a less restrictive option?**

3.17 It is a key principle of the Law to consider whether there is a less restrictive option available, before making the decision. For example, before deciding to admit P to a care home, consideration should be given to whether P can be supported to stay in their own home, where they would have more autonomy. If a viable less restrictive option is available, this should be taken.

#### **Scenario – Less restrictive options**

Ms Ela Stanislous is Greek. She has a diagnosis of dementia. She had been living with her partner, but they had both been very unwell with Covid-19 and spent a long period in hospital. They are eventually discharged home, but Ms Stanislous is soon re-admitted to hospital, following a fall. Her partner advises the hospital that he cannot manage her care at home, even with carers, as she keeps having falls and her sleep is very disrupted. The doctor advises that Ms Stanislous is ready for discharge, but she is assessed to lack capacity to make

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<sup>5</sup> Independent Capacity Representatives will be introduced at a later date.

her own decision about where she should live. She has no insight into her needs for care and treatment. Mrs Stanislous is very wealthy and therefore can afford to pay for her own care. Her partner holds Lasting Powers of Attorney for both Property and Finances and for Health and Welfare and therefore he will decide where she should live. Ms Stanislous had always been very active and enjoyed going for long walks. She enjoyed a good social life and had a lot of friends. She expresses her unhappiness about moving to a care home.

Her partner considers whether there is a less restrictive option which could meet Ms Stanislous' needs. He is advised that she could move to a flat in a sheltered accommodation scheme with carers on site. Ms Stanislous would have some autonomy and she would not be subject to the restrictions she might have in a care home. Her partner concludes that Ms Stanislous should move to a flat in the sheltered scheme, as this is the less restrictive option available which can meet her care and treatment needs.

### **What is the relevant information and circumstances?**

3.18 When making a best interests decision, the decision maker should consider all the relevant information. This means that they should try to identify all the information and issues that would be relevant to P and to the specific decision, including P's values and any expressed wishes and feelings. See also sections 2.26-2.29 in the Capacity chapter which lists relevant information.

3.19 In a recent case <sup>6</sup> Hayden J. stated at para 24:

“When applying the best interests tests ... the focus must always be on identifying the views and feelings of P, the incapacitated individual. The objective is to reassert P's autonomy and thus restore his right to take his own decisions in the way that he would have done had he not lost capacity.

25. The weight to be attributed to P's wishes and feelings will of course differ depending on a variety of matters such as, for example, how clearly the wishes and feelings are expressed, how frequently they are (or were previously) expressed, how consistent P's views are (or have been), the complexity of the decision and how close to the borderline of capacity the person is (or was when they expressed their relevant views). In this context it is important not to conflate the concept of wishes with feelings. The two are distinct. Sometimes that which a person does not say can, in context, be every bit as articulate as wishes stated explicitly.”

3.20 Consideration should also be given to the person's individual circumstances and their values, as well as their wishes and feelings. In *X v MM and KM* [2007] EWHC 2003 (Fam) Munby J stated that people who lack capacity should still be allowed to

<sup>6</sup> *Barnsley Hospitals NHS Foundation Trust v MSP* [2020] EWCOP 26

take risks and that it is not the Court's role to remove all possible risks, at the expense of a proportionate balance. To that end, his judgment includes the rhetorical question: "what good is it making someone safer if it merely makes them miserable?" (para. 120).

3.21 Using a balance sheet approach for a best interests decision allows for consideration of all the relevant information and circumstances.

### **Scenario Considering which option is in a person's best interests**

Mrs Christie is living in her own flat. She has had a number of falls, resulting in admissions to hospital. On the most recent occasion, she was found on the floor after a long lie. She had a grade three pressure ulcer and a fractured hip. Whilst in hospital, Mrs Christie makes frequent requests to go home. She tries to get out of bed, although she is unable to mobilise independently, due to the fracture. Mrs Christie's son tells staff that his mother's memory has declined over the past year and he suspects that she may have dementia. She has lost weight and he doesn't think that she has been eating well. Whilst in hospital, Mrs Christie is diagnosed with dementia. She is later assessed to lack capacity to make her own decision as to her discharge destination. A best interests meeting is arranged to consider whether she can return home or whether she needs a care home placement. The social worker, as decision maker, draws up a balance sheet, based on the information provided and on Mrs Christie's wishes. The social worker adds weight to Mrs Christie's wishes but, weighing all the risks, makes the decision that she should be admitted to the care home.

#### **Balance sheet for Mrs Christie**

##### Care Home Placement

Benefits: Access to 24 hour care and treatment

All meals and drinks will be provided

Activities are available in the home

All laundry is completed by staff

She will have a large room with en-suite facilities

The care home has a bus which is used to take residents out for trips

Her safety will be maintained

The environment is clutter free and staff are available at all times, reducing the risk of falls

She has been offered a ground floor room which will be easier for access, due to her restricted mobility

Burdens: Mrs Christie will be living with other people, who she does not know



The care home will have routines so she will have less autonomy than she has in her own home

Mrs Christie may have to pay to live there

She may have a limited choice of meals

She will have less privacy than in her own home

This is not where Mrs Christie wishes to live

Remain in own home

Benefits: This is Mrs Christie's strong wish

She will have autonomy and freedom

She can make her own routine

She can choose her own meals and drinks and mealtimes

She can see family and friends

Burdens: Her home is in poor condition and is cluttered

Mrs Christie is reluctant to accept carers and has previously refused to allow them to come in. Even if she accepts carers there will be periods when she is left alone.

Mrs Christie has had a number of falls. This continues to be a risk, due to the cluttered environment and she has refused to allow her son to clear the flat

The flat is upstairs and Mrs Christie's mobility is restricted currently. She will be dependent upon carers to get her out of bed and to out her to bed. She will need to live in a micro-environment, for her own safety.

She was reported to not be eating well when she was at home previously so there is a risk of malnutrition and of dehydration.

Mrs Christie cannot currently mobilise independently therefore she will need carers to prepare her meals.

### **Who do these duties apply to?**

3.22 These duties apply to any person who is making a decision on behalf of P. This includes a person who holds a Lasting Power of Attorney or anyone who reasonably believes that a person lacks capacity to make a specific decision. The decision maker must comply with the requirements set out in section 6(1) of the Capacity Law if they have a reasonable belief that the decision made, or act done, is in the best interests of P.

### **Disagreement about the person's best interests**

3.23 At times there may be differing opinions expressed about what is in P's best interests. Family member and friends, as well as carers and professionals, may

have different views about the decision to be made. The decision maker should take account of these conflicting views. A best interests meeting provides an opportunity for all those involved to hear the relevant information and to express their views, but it is not the decision maker's role to resolve the disagreements. The decision maker retains the ultimate responsibility for deciding what is in the person's best interests. If the decision maker has followed the Capacity (Bailiwick of Guernsey) Law 2020 and the steps described in the Code of Practice for the Capacity Law, they will be protected from liability.

### **Is it necessary to have a meeting to make a best interests decision?**

3.24 A best interests meeting ensures that all those involved, including P, are able to express their opinions and any disagreements can be discussed however, it may not always be possible for a meeting to be arranged, particularly when a decision needs to be made quickly. Consultation can also be via email, phone or video call. The decision maker should keep a record of all those consulted and by what method, as well as how the decision was reached and how P was supported to participate in the process. If there is a valid Lasting Power of Attorney, with authority to make the relevant decision, the attorney can make this on behalf of P without the need for a meeting. However, if the decision is particularly complex or if the attorneys have conflicting views about how to proceed, a best interests meeting can be convened to consider the options.

### **Is it always necessary for P to attend a best interests meeting?**

3.25 It is a key principle that P should be supported to participate in all decisions made in P's best interests. To that end P should be supported to attend a meeting, if it is practical to do so. There may be exceptions to this, for example if attending a meeting is likely to cause undue distress to P. In such cases, the decision maker should consider alternative ways of gaining P's views and wishes and should ensure that these are considered when making the specific decision.

### **Keeping records**

3.26 It is not necessary to record every simple day-to-day decision, but staff, professionals and attorneys under a Lasting Power of Attorney should keep records of how more important decisions, or those with potentially serious consequences, have been made. Such decisions may include change of accommodation, medical treatment, contact with others, financial expenditure (other than minor amounts).

The decision maker should record:

- the decision that was made,
- who was consulted and the views expressed,
- how P was supported to participate,
- P's wishes and feelings, past and present (as far as these can be ascertained), and
- how the decision was reached and the reasons for that decision.

### **Scenario – Record keeping**

Mrs Barbara Harris made Lasting Powers of Attorney for Property and Financial Affairs and for Health and Welfare Decisions some time ago. She nominated her two daughters as her attorneys. She unfortunately had a stroke which affected her mobility although she could still walk. She remained relatively independent although when returned home she needed the support of carers with her physical care needs and meal preparation.

### **Reasonable belief about a person's best interests**

3.26 A decision maker must have a reasonable belief that the decision made is in the person's best interests. They should demonstrate that they have considered all the relevant circumstances and applied the principles of the Law, including the best interest process. If the decision maker follows the principles of the Law and has a reasonable belief that the person lacks capacity and that the decision is in their best interests, they will be protected from liability.

### **Emergency situations**

3.27 In an emergency, it may not be possible to make a formal best interests decision, for example if a person requires urgent medical treatment. If the person's treatment cannot be delayed to consider their best interests, then the relevant professional will be protected from liability, as long as they are not aware of a valid and relevant ADRT (when these are introduced). The professional should document on the person's records, why the best interests process was not followed.

### **Making a decision in an emergency situation**

Mrs Gladys Jones has a diagnosis of vascular dementia. She is able to walk with a stick, but needs support to get in and out of bed. Mrs Jones lives alone with support from carers who visit her four times a day. The final call of the day is at 8pm, to support Mrs Jones to go to bed.

At 8am one morning, carers arrive to find Mrs Jones lying on the floor. Paramedics attend and Mrs Jones is found to be severely dehydrated and she has a suspected fracture of her hip. Mrs Jones is very confused and distressed and tries to resist the ambulance staff when they tell her that she needs to go to hospital.

The ambulance staff assess that Mrs Jones' health is at high risk and make the decision to take her to hospital. The ambulance staff are acting in Mrs Jones' best interests in an emergency situation. When she goes to

hospital, the doctor can provide emergency treatment, such as medication and fluids, necessary to sustain her life.

### **Confidentiality**

3.28 Decision makers must balance the duty to consult other people with P's right to confidentiality. If confidential information is to be discussed, the decision maker should only seek the views of people who it is appropriate to consult, where their views are relevant to the decision to be made and the particular circumstances.

3.29 There may be occasions where it is necessary for personal information (for example, about P's health) to be revealed to the people consulted as part of the process of the best interests process. Health and social care staff who are trying to determine a person's best interests must follow their professional guidance, as well as other relevant guidance on confidentiality.

15<sup>th</sup> March 2022