

Best interests – getting it right

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IS IT EVEN YOUR DECISION?

Best interests: the MCA 2005 (1)

Section 1: The Principles

The following principles apply for the purposes of this Act.

[...]

- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Section 4 MCA

Section 4: Best interests

- The factors that must be taken into account in determining what is in a person's best interests can broadly be summarised as follows:
 - equal consideration and non-discrimination;
 - considering all relevant circumstances;
 - considering whether (and when) that the person may regain capacity;
 - permitting and encouraging participation;
 - the person's wishes and feelings, beliefs and values;
 - the views of other people;
 - special considerations for life-sustaining treatment;
- It cannot be emphasised enough that s.4 MCA 2005 never gives the answer, it just makes us (hopefully) ask the right questions.
- The best interests guide: [39 Essex Chambers | Mental Capacity Guidance Note: Best Interests - 39 Essex Chambers | Barristers' Chambers](#)

Best interests as a process

- Clarity as to roles – who is the ‘decision-maker’?
 - The person via ADRT, at which point no best interests decision to be taken - *NHS Cumbria CCG v Rushton* [2018] EWCOP 41
 - Attorney/deputy
 - Trick question: the next of kin
 - Otherwise, collaborative process to identify best interests and accountability
- The choice between available options: *N v ACCG* [2017] UKSC 22
- Calibration to the gravity and urgency of the situation
 - Documentation
 - Keeping under review

The approach to best interests

- “The purpose of the best interests test is to **consider matters from the patient’s point of view**” *Aintree v James* [2014] 1 AC 591
- Putting yourself in the shoes of P
- Not a ‘what P would have done test,’ but if it is clear what P would have done will carry (at a minimum) very great weight absent compelling reasons to contrary
 - *Briggs v Briggs* [2016] EWCOP 53
 - Contrast *Wye Valley NHS Trust v B* [2015] EWCOP 60 and *East Lancashire NHS Trust v PW* [2019] EWCOP 10

Risk and the person

- *B v D* [2017] EWCOP 15 – stem cell:
 - All life is an experiment: what good is it making someone safer if it merely makes them...
- *LB Islington v AA* [2018] EWCOP 24
 - Basically adequate care at home, strong desire to remain vs rehabilitation support in placement

Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- www.mentalhealthlaw.co.uk
- <http://www.scie.org.uk/mca-directory/>
- <http://www.mentalcapacitylawandpolicy.org.uk/>
- www.courtofprotectionhandbook.com

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