

# CARD 9

## Advance decisions

### 1 What is an advance decision?

People who understand the implications of their choices can state in advance how they wish to be treated if they suffer loss of capacity. An advance decision (sometimes known as a living will) can be of two main types:

- a statement authorising or requesting specific procedures
- a clear instruction refusing some or all medical procedures (also called an advance directive).

### 2 What form should an advance decision take?

An advance decision can be a written document, a witnessed oral statement, a signed printed card, a smart card or a note of a particular discussion recorded in the patient's file. In England and Wales, the decision should comply with the provisions of the Mental Capacity Act if it is to be legally binding.

### 3 Who can make an advance decision?

Any person can make an advance decision including an individual under the age of 18, although advance decisions will only be legally binding in certain circumstances (see below).

## 4 Are advance decisions legally binding?

Advance refusals of treatment have long been legally binding under common law. Advance requests or authorisations have not had the same binding status but should be taken into account in assessing best interests. Following the Burke case in 2005, it is accepted that there is a duty to take reasonable steps to keep the patient alive (eg by provision of artificial nutrition and hydration) where that is the patient's known wish.

In England and Wales, advance decisions are covered by the Mental Capacity Act. Patients who are aged 18 or over who have capacity may make an advance refusal of treatment orally or in writing which will apply if they lose capacity. To be valid and legally binding the advance decision must be specific about the treatment that is being refused and the circumstances in which the refusal will apply. Where the patient's advance decision relates to a refusal of life-prolonging treatment this must be recorded in writing and witnessed. The patient must acknowledge in the written decision that they intend to refuse treatment even though this puts their life at risk. (See also Card 1 list: 'Capacity', 'MCA', 'Advance decisions'.)

In Scotland and Northern Ireland, advance decisions are not covered by statute but it is likely they are covered by common law. An advance refusal of treatment is likely to be binding in Scotland and Northern Ireland if the patient was an adult at the time the decision was made (16 years old in Scotland and 18 in Northern Ireland). The patient

must have had capacity at the time the decision was made and the circumstances that have arisen must be those that were envisaged by the patient. (See also Card 1 list: 'Capacity', 'Scotland', 'Advance decisions'.)

Advance decisions can be overruled if the individual is being treated compulsorily under mental health legislation. However, a valid and applicable advance refusal of treatment for conditions that are not covered by the compulsory powers of the legislation will be binding.

In the case of young people under the age of 18, advance decisions should be taken into account and accommodated, if possible, but do not necessarily have the same status as those of adults. (See also Card 7 on Children and Young People and Card 1 list: 'Advance decisions', '0-18 years', 'Children').

## **5 Are all advance refusals of treatment legally binding?**

An advance refusal is legally binding providing that the patient is an adult, the patient was competent and properly informed when reaching the decision, it is clearly applicable to the present circumstances and there is no reason to believe that the patient has changed his or her mind. If an advance decision does not meet these criterion but appears to set out a clear indication of the patient's wishes, it will not be legally binding but should be taken into consideration in determining the patient's best interests.

In England and Wales, an advance decision is superseded if the patient subsequently gives

someone lasting power of attorney to make that decision. If doubt exists about what the patient intended, the Court of Protection in England and Wales, the High Court in Northern Ireland and the Court of Session in Scotland can clarify the situation. In the meantime, the law supports a presumption in favour of providing clinically appropriate treatment, but where the situation that has arisen is clearly that which was envisaged by the patient, treatment should not be provided contrary to a valid advance refusal. (See Card 8 on 'Determining Best Interests' and Card 1 List: 'Scotland', 'Capacity', 'MCA', 'Advance decisions'.)