

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Advance decisions to refuse treatment

Section 25: Validity and applicability of advance decisions

86. This introduces the two important safeguards of validity and applicability in relation to advance decisions to refuse treatment.
87. To be valid the advance decision must not have been withdrawn or overridden by a subsequent LPA giving a donee the authority to consent or refuse consent to the treatment (other LPAs will not override – see *subsection ((7))*). Also, if the person has acted in a way that is clearly inconsistent with the advance decision remaining his fixed decision, then the advance decision is invalid. An example of an inconsistent action might be a former Jehovah’s Witness converting to Islam and marrying a Muslim man. Even if she had forgotten to destroy a written advance decision refusing blood transfusion, her actions could be taken into account in determining whether that earlier refusal remained her fixed decision.
88. An advance decision will not be applicable if the person actually has capacity to make the decision when the treatment concerned is proposed. It will also not be applicable to treatments, or in circumstances, not specified in the decision. Furthermore the decision will not be applicable if there are reasonable grounds for believing that the current circumstances were not anticipated by the person and, if they had been anticipated by him, would have affected his decision. For example, there may be new medications available that radically change the outlook for a particular condition and make treatment much less burdensome than was previously the case.
89. *Subsection (5)* introduces further rules about the applicability of advance decisions to refuse treatment that is necessary to sustain life. An advance decision will not apply to life-sustaining treatment unless it is verified by a statement confirming that the decision is to apply to that treatment even if life is at risk. The reference to “life” includes the life of an unborn child. Both the decision and the statement verifying it must be in writing and be signed and the signature must be witnessed. It is important to note that a person does not physically need to write his advance decision himself. This means that advance decisions recorded in medical notes are considered to be in writing. Writing can also include electronic records.
90. If the maker of the advance decision cannot sign then another person can sign for him at his direction and in his presence (*section 25(6)(b)*). As with a signature by the person himself, the witness must be present when the third party signs.