

Paediatric Safeguarding

East Suffolk Clinical Commissioning Group

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Overview

- Treatment decisions and children
- Who has parental responsibility?
- What about looked after children?
- Children with Special Educational Needs (SEN) and learning disabilities - supported decision making
- Preparing for adulthood - what do parents need to know about the Court of Protection?

Treatment decisions - capacity

Applicable tests vary according to age

- 18 years of age +
- 16 - 18 years of age
- 16 years and under

18 years and up

- Even if educational development severely retarded so as to have understanding/reasoning capacity of a child, considered as an adult
- MCA 2005 applies
- Under the MCA, the general principle of best interests still applies. (Section 1(5)). Capacity is presumed unless otherwise established
- To decide if an individual does not have capacity to make a decision, a two-stage procedure must be applied:
 1. It must be established that there is an impairment of, or disturbance in the functioning of, the person's mind or brain;
 2. It must be established that the impairment or disturbance is sufficient to render the person incapable of making that particular decision

18 years and up

- 2 above means a person must be unable to:
 1. Understand the information relevant to the decision
 2. Retain the information
 3. Use or weigh that information as part of the process of decision making and
 4. Communicate the decision

MCA and best interests

- The MCA places a great deal of weight on the notion of a patient's best interests, and suggests the following is considered:
 1. The person's past and present wishes and feelings (and in particular any relevant written statements made by them when they had capacity)
 2. The beliefs and values that would be likely to influence their decision if they had capacity
 3. The other factors that they would be likely to consider if they were able to do so

- Consultation is stressed as a very important part of assessment of capacity and the views of carers, family members and friends ought to be sought before decisions are made
- When making decisions about best interests, capacity and treatment, take account of the views of:
 - Carers
 - Family members
 - Close friends
 - Other relevant people

16 - 18 years of age - Consent to Treatment

- The Family Law Reform Act 1969 s8
- presumed to be competent to consent to:
 - o surgical treatment
 - o medical and dental treatment
- ‘treatment’ includes any procedure:
 - o undertaken for the purposes of diagnosis
 - o is ancillary to any treatment
- it DOES NOT cover:
 - o the donation of blood or other organs
 - o procedures that do not constitute treatment or diagnosis
 - o for these decisions, the minor is in the same position as a pre-16 year old

16 - 18 years of age - Refusal of treatment

- Family Law Reform Act 1968 relates to CONSENT not REFUSAL
- refusal not binding if another person with capacity to consent on the child's behalf does so
- parent can impose treatment on unwilling child

Making decisions - Gillick Competency and Fraser Guidelines 1

- What is Gillick Competency / Fraser Guidelines
 - Gillick v West Norfolk 1986
- Fraser Guidelines
 - Per Lord Fraser, a doctor could proceed to give advice and treatment provided he is satisfied in the following criteria:
 1. That the girl (although under the age of 16 years of age) will understand his advice
 2. That he cannot persuade her to inform her parents or to allow him to inform the parents that she is seeking contraceptive advice
 3. That she is very likely to continue having sexual intercourse with or without contraceptive treatment

Making decisions - Gillick Competency and Fraser Guidelines 2

4. That unless she receives contraceptive advice or treatment her physical or mental health or both are likely to suffer
5. That his best interests require him to give her contraceptive advice, treatment or both without the parental consent

“Gillick Competent”

- child can be deemed ‘Gillick Competent’ if:
 - achieves sufficient understanding, and
 - intelligence
 - to enable him or her to understand fully what is proposed
 - possibly an additional condition: the attainment by a child of an age of sufficient discretion to enable him or her to exercise a wise choice in his or her own interests
- can then consent to own treatment

Where Gillick competence does not exist

- Where there is a child under 16 who is unable to properly consent, whether by lack of capacity or incompetence, it is left to those with parental responsibility to consent on their behalf.
- S.3 of the Childrens Act 1989 defines “parental responsibility” as:
“all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”
- Parental responsibility includes the duty to seek medical assistance for child under the age of 16.

Note: parental consent can be given by those with care of the child, such a local authority (R v Kirklees Metropolitan Borough Council, ex parte C (a minor) (1993))

16 years and under - Consent to Treatment

- presumption that children under 16 are incompetent
- consent can be provided by:
 - o the mother
 - o father, if
 - married to the mother
 - parental responsibility
 - o person with parental responsibility
 - o court, if
 - no person with capacity to consent on behalf of the child can be found
 - dispute

16 years and under - Refusal of Treatment

- Gillick Competent child:
 - refusal not binding if another person with capacity to consent on the child's behalf does so
 - parent can impose treatment on unwilling child
- Incompetent child:
 - Person with parental responsibility
 - Court
- Re R (a minor) (wardship: consent to treatment) [1992] Fam 11 CA

Gillick competence

- Gillick competence gives right to consent but not the right to withhold consent.
- Difficult to enforce if child's cooperative is required for treatment to be given.

Consent - examples

- *Gillick v West Norfolk & Wisbeach Area Health Authority (1986)* - A mother sought to ensure that contraceptive advice was not given to her daughters - all under 16. Held - a doctor exercising his clinical judgement can provide contraceptive advice to children under the age of 16 without parental consent.
- *R (on the application of Axon) v SoS for Health (2006)* - In certain circumstances, an abortion can be conducted on a child under the age of 16 without the need to inform, or obtain consent from a parent.
- *Re S (A Minor)(Consent to Medical Treatment) (1994)* - it was held that a 15 year old suffering from thalassaemia who wanted to refuse blood transfusions did not have capacity to refuse treatment due to the gravity of the repercussions of refusal.
- *Re E (A Minor) (Wardship: Medical Treatment)(1993)*
- *Re W (a minor) (medical treatment: court jurisdiction) [1993] Fam 64*

Parental and medical disagreement 1

- Glass v UK
 - Severely disabled child, disagreement over diamorphine and resuscitation
 - Held by ECHR:
 - decision to impose treatment on A in defiance of the mothers objections gave rise to an interference with A's right to respect for his private life, and in particular his right to physical integrity
 - the onus was on the trust to take the initiative and to defuse the situation by applying to the court
 - the decision of the doctor to override the mother's objection to the proposed treatment in the absence of authorisation by the court resulted in a violation of art 8 of the Convention
- Re Wyatt (a child) treatment

Parental and medical disagreement 1

- Re B (a minor) (wardship: medical treatment) [1990] 3 All ER 927
- Re T (a minor) (wardship: medical treatment) [1997] 1 All ER 906
- Re A (children) (conjoined twins: surgical separation) [2001] Fam 147

Medical treatment decisions

- Abortion:
 - It is the best interests of the mother not the unborn child.
 - Court will order an abortion even against parental objection if appropriate.
 - In theory parental consent can overrule consent of the child but very unlikely clinicians or the Court will order abortion if child objects. Unlikely to be satisfied abortion in child's best interests.

Medical treatment decisions

- Anorexia
- Blood transfusion

- The Court must apply the principle of paramount welfare. A child or minor over 16 can be treated against their wishes where irreversible harm to health is imminent.

Practicalities - Urgent Hearings

- Medical opinion from the treating physician.
If possible:
 - More than 1 treating physician from different practice areas
 - Opinion from another practitioner from outside the Trust
- At least one practitioner should be available by telephone for the hearing
- Medical reports from others if not available for the hearing

Urgent hearings

- The following information is required:
 - When the patient first presented
 - Medical history
 - Diagnosis/ differential diagnoses
 - What treatment is proposed
 - How soon does it need to be given
 - Pros and cons of the treatment: checklist
 - Likelihood of a positive outcome
 - What will be the outcome if the treatment is not given?
How certain is this? Over what time frame?
 - Have you informed CAFCASS? If not, do so.

Who has Parental Responsibility

- Section 2
- Father and mother married at the time of birth - each have parental responsibility
- Father and mother not married - mother has parental responsibility. Father acquires PR by:
 - Registering as the father
 - Makes an agreement with mother
 - Applies to the Court
- Local Authority on a Court Order

Parental Responsibility

- Section 2
- More than one person may have parental responsibility for a child at the same time.
- Do not cease to have parental responsibility because another person acquires it.

Parental Responsibility

- Section 3
- “all the rights, duties, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.
- “A person who does not have parental responsibility but has care of the child may do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s welfare.”

Parental Responsibility - different Orders

- Care and supervision Orders
- Section 33(3) of the Children Act
- Special Guardianship Order
- Adoption Order

Section 8 - Residence, Contact, Orders

- A contact order
- A prohibited steps order
- A residence order
- A specific issue order
 - Can determine a specific question in connection with any aspect of parental responsibility for a child.

Section 20 - Provision of accommodation

- Every local authority shall provide accommodation for any child in need if:
 - There is no person who has parental responsibility;
 - The child is lost or abandoned;
 - The carer is prevented from providing suitable accommodation or care.
- A person with parental responsibility can object and remove from accommodation unless residence order or Court order.

Section 31 - Care and Supervision

- Court may make an Order placing a child in the care or supervision of a local authority if there is a likelihood of a child suffering significant harm in the future.
- Local authority obtains parental responsibility.
- No care or supervision order after age of 17 (or 16 if married).
- A care/supervision order includes an interim order.
- What is the effect of a care order?
 - The local authority receives the child into care and keeps them while the order remains in force.
 - The local authority has parental responsibility and the power to determine the extent that another person may meet his/her parental responsibility
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Section 31 - Effect of care order

- The local authority receives the child into care and keeps them while the order remains in force.
- The local authority has parental responsibility and the power to determine the extent that another person may meet his/her parental responsibility.

Medical Treatment Orders

- Section 8 - specific issue order for medical treatment.
- Inherent jurisdiction of the Court
- Official Solicitor
- Children and Family Court Advisory and Support Service (Cafcass) - Cafcass Legal

Specific Issue Orders

- Re C (a child: immunisation) (2003)
- Two children from separated families. Fathers wished for vaccinations, mothers did not.
- High Court Judge concluded that the benefits to the children, outweighed the risks, save in relation to pertussis and Hib which he excluded in the older child.
- Specific Issue Orders for children to taken for immunisation

Specific Issue Orders

- An NHS Trust v SR (2012)
- N, a boy aged 7 diagnosed with a malignant brain tumour.
- N had surgery. Trust wanted to treat with radiotherapy and chemotherapy.
- Father agreed. Mother refused.
- Cafcass Legal appointed for N - supported Trust's position

Children with SEN / learning disabilities

- Making decisions
- Does the child have SEN / learning disabilities?
 - If they are over 16 - they can make their own decisions but may need support
 - Local offer should set out the support services available
 - The child may have an Education, Health and Care plan (if still in school)
- Does the child lack capacity?
 - MCA 2005

Relationship between Children Act 1989 and MCA 2005

- MCA 2005 applies to adults who lack capacity
- Decision about children - Children Act 1989
- HOWEVER some provisions do not apply to children between 16 and 18 - including a Care Order
- This reflects the autonomy of a teenager who is Gillick competent by age 16 and therefore able to make his or her own decision about treatment
- What about teenagers who aren't "neuro-typical" and Gillick competent?

How to apply to the Court of Protection - Deputies

- Application
 - Application Form (COP1)
 - Assessment of Capacity (COP3)
 - Deputy's declaration (COP4)
 - Information form (COP1A P&A, COP1B welfare)
 - Visit the person - COP14
- Fees
 - Application fee - £400
 - Possibly £500 hearing fee
 - After appointed - annual supervision fee (either £320 or £35 if minimal supervision of affairs less than £21,000)
 - Security bond to protect finances
- There are likely to be supervision visits from COP visitor

Court of Protection - continued

- Deputy must keep accounts
- Deputy must write an annual report explaining decisions made
 - Reason for decisions and why in best interests
 - Who spoken to and what they said was in the person's best interests
 - Persons finances including bank statements or spreadsheets
- What is covered will be set out in Order
 - If something not covered - will need to apply to the COP to make a one off decision

Read coding

- Remember to read code these young people correctly.
- It is important to read code if they are a looked after young person transitioning into adult care
- It is likewise important to read code that the young person / young adult has a disability that is ongoing

Any questions?

- Please feel free to contact me if you have any specific queries.
- My e-mail address is Eleanor.Howie@kennedyslaw.com
- Thank you for your time this afternoon.