Flowchart for decision making when patients may lack capacity

**STEP 1: Maximising capacity:** Start from the presumption that your patient has capacity to make the decision.

To maximise their capacity: Discuss the options in a time and place that helps them to understand and remember what you say; Ask whether having a friend or relative with them might help them to remember information, or otherwise help to make the decision; Offer written or audio information if it will help and speak to the patient’s relatives, friends and others in the healthcare team, about how best to communicate with the patient.

**QUESTION 1:** Having worked through these steps are you still in doubt about your patient’s capacity to make the decision?

- **Yes**
  - Your patient has capacity to make the decision for themselves

- **No**
  - Seek legal advice with a view to asking a court to determine capacity

**STEP 2:** Assess your patient’s capacity to make the decision. Give your patient the information that they need to make the decision.

**QUESTION 2:** Is your patient able to understand, retain and weigh up the information and communicate their wishes?

- **Yes**
  - The patient has capacity

- **No**
  - Are you still unsure about your patient’s capacity to make a decision?

- **Yes**
  - Question 2

- **No**
  - The patient lacks capacity

**STEP 3A:** Decision-making when a patient lacks capacity: Advance decisions. Check whether your patient has previously said what they’d like to happen in these circumstances. Check with the healthcare team and those close to the patient.

**QUESTION 3A:** Is there a valid and applicable advance refusal of treatment?

- **Yes**
  - Written and verbal advance refusals of treatment that are not legally binding should be taken into account as evidence of your patient’s wishes when you are assessing whether a particular treatment would be of overall benefit to them

- **No**
  - In England and Wales, a valid and applicable advance refusal of treatment is legally binding. Advance requests are not legally binding but must be given weight and if the treatment options are finely balanced (in terms of benefits, burdens and risks) then an advance request will usually be the deciding factor. You still need to consider other issues, and aim to reach agreement with those close to the patient.

**STEP 3B:** Decision-making when a patient lacks capacity: Proxy decision makers. In Scotland a welfare attorney or a court-appointed guardian may have the legal authority to make healthcare decisions on the patient’s behalf. In England or Wales, this could be someone with lasting power of attorney, or a court-appointed deputy. Or an Independent Mental Capacity Advocate (an ‘IMCA’) may have been appointed to represent the patient. Proxy decision-making is not currently available in Northern Ireland for these circumstances.

**QUESTION 3B:** Has someone else been given legal authority to make this decision for the patient?

- **Yes**
  - The legal proxy makes the decision. You must talk to the legal proxy the same as you would talk to your patient if they had capacity and also involve members of the healthcare team and others close to the patient: they may have information that will help the proxy to reach a decision.

- **No**
  - You are responsible for making the decision. Consult with the patient’s friends and relatives, and members of the healthcare team. You must take account of their views. Consider which option will be the least restrictive of the patient’s future options, and which option will be of overall benefit to the patient.

**STEP 4:** Reaching a consensus: You should allow enough time for discussion and aim to reach agreement with those close to the patient, including the healthcare team. Taking into account the different decision making roles and authority of those you consult.

**QUESTION 4:** After discussion, have you all reached agreement about your patient’s treatment and care?

- **Yes**
  - Decision is made.

- **No**
  - Seek legal advice with a view to asking a court to determine capacity

**STEP 5:** Resolving disagreements: Sometimes disagreements arise between members of the healthcare team, or between the team and those close to the patient, including the proxy. In Scotland in this instance, you should consult a ‘Nominated Practitioner’.

**QUESTION 5:** Is there still significant disagreement?

- **Yes**
  - If you cannot reach agreement about the patient’s treatment, you will need to seek legal advice from the appropriate statutory body in Scotland or appropriate court for an independent ruling. This needs not be an adversarial process and does not necessarily mean that trust or relationships have broken down. Sometimes approaching the court is a constructive way of thoroughly exploring the issues and providing reassurance that the patient’s interests have been properly considered in the decision.