

## ADVANCE DECISIONS AND LASTING POWERS OF ATTORNEY POLICY

<b>Approved By:</b>	<b>Policy &amp; Guideline Committee</b>
<b>Date of Original Approval:</b>	<b>16 July 2004</b>
<b>Date of Latest Approval:</b>	<b>16 December 2016</b>
<b>Trust Reference:</b>	<b>B20/2004</b>
<b>Version:</b>	<b>5</b>
<b>Supersedes:</b>	<b>4</b>
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<b>Latest Review Date</b>	<b>16 December 2016</b>
<b>Next Review Date:</b>	<b>December 2019</b>

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### **REVIEW DATES AND DETAILS OF CHANGES MADE DURING THE REVIEW**

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Revised December 2013 : V4 To reformat and bring into line with general policy requirements.

Revised December 2016 : V5 Minor reformatting.

### **KEY WORDS**

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Advance Decisions, Advance Directive, Living Will, Lasting Power of Attorney.

## SUMMARY

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This Policy builds upon the concepts of Advance Decisions and Lasting Power of Attorney which are described in the Policy for Consent to Examination and Treatment and the Mental Capacity Act Policy.

### 1 INTRODUCTION

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The Mental Capacity Act 2005 introduced Advance Decisions (previously referred to as Advance Directives and Living Wills) and Lasting Powers of Attorney into statute law.

The Act recognises the right of an adult individual to state in advance their refusal to medical treatment in defined circumstances. It thus provides people with an ability to express in advance their refusal of consent (or to nominate someone else to do so) at a time when they are unable to do so either through their own inability to communicate or through mental incapacity.

### 2 POLICY AIMS

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To provide assistance to staff when they encounter an Advance Decision or Lasting Power of Attorney or wish to develop an Advance Decision with a patient.

### 3 POLICY SCOPE

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This policy applies to all Trust staff whenever they need to consider either an advance decision or Lasting Power of Attorney.

### 4 DEFINITIONS

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**Advance Decision** is a statement made by a mentally competent person aged 18 years or over which defines in advance their refusal of medical treatment should he/she become mentally or physically incapable of making his/her wishes known.

**Deputy** is a court-appointed attorney who has been granted rights to make decisions on behalf of the patient in a manner analogous to a Lasting Power of Attorney

**Lasting Power of Attorney (LPA)** is a power of attorney under which a mentally competent person aged 18 years or over (the donor) confers on another person or persons (the donee(s)) the authority to make decisions about all or any of the following:

- (a) the donor's personal welfare and
- (b) the donor's property and affairs

### 5 ROLES AND RESPONSIBILITIES

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**The Director of Corporate and Legal Affairs** shall be the Executive Lead for this Policy and he shall ensure that the Trust Board are adequately informed of any developments in this area.

**The Assistant Director of Corporate and Legal Affairs** shall be operationally responsible for this policy and shall provide appropriate advice to staff when required.

**All Staff** shall act in accordance with the requirements of this policy when they are called upon to consider the existence of either an Advance Decision of Lasting of Attorney.

## **6 POLICY STATEMENTS**

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### **6.1 Advance Decision**

An Advance Decision is legally valid and legal action could follow against the staff and/or the Trust if it is knowingly ignored. The following are the pre-requisites of a legally valid advance decision:-

- i. The patient must be mentally able and aged 18 years or over when he or she makes the Advance Decision.
- ii. The person was fully informed about the nature and consequence of the advance decision at the time he or she made it.
- iii. The patient was not pressurised or influenced by anyone else when he or she made the decision to sign the decision.
- iv. The Advance Decision covers accurately the medical conditions that the patient suffers from at the time it is intended to operate. Where any doubt exists as to the conditions being accurately met, the advance decision should not be given effect by staff without first seeking further advice.
- v. The Advance Decision has not been withdrawn or altered by the patient either verbally or in writing since it was expressed providing that such withdrawal or alteration was made at a time when the patient had capacity.
- vi. The patient is now incapable of making any contemporaneous decision because they are unconscious or otherwise unable to communicate their wishes.

#### **6.1.1 Invalidity of an Advance Decision**

- (i) An Advance Decision will not be binding if the patient has:
  - (a) under a Lasting Power of Attorney (for details of Lasting Powers of Attorney and a definition of a donee see below) created after the advance decision was made, conferred authority on a donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the Advance Decision relates, or
  - (b) done anything else clearly inconsistent with an intention that the advance decision remains his fixed decision.
- (ii) An Advance Decision is not applicable (and hence not binding) to the treatment in question if:-
  - (a) that treatment is not the treatment specified in the advance decision,
  - (b) any circumstances specified in the advance decision are absent or,
  - (c) there are reasonable grounds for believing that circumstances exist which the patient did not anticipate at the time of the Advance Decision and which would have affected his decision had he anticipated them.
- (iii) An Advance Decision is not applicable to life sustaining treatment unless **all** of the following are met:

- (a) the decision is verified by a statement by the patient to the effect that it is to apply to that treatment even if their life is at risk, and
- (b) it is in writing, and
- (c) it is signed by the patient or by another person in the patient's presence and by the patient's direction, and
- (d) the signature is made or acknowledged by the patient in the presence of the witness, and
- (e) the witness signs it, or acknowledges his signature, in the patient's presence.

**It is recognised that in some circumstances, a patient may wish to make an advance decision but the progression of the patient's health problems may not allow sufficient time for the patient to seek his or her own independent advice. In these circumstances, staff may propose the use of the Model Advance Decision to the patient included here as Appendix A; Appendix B gives an example of a completed Advance Decision.**

In the event of any doubt about the validity of an Advance Decision, further advice should be sought from the Directorate of Corporate and Legal Affairs on Extension 8960

### **6.1.2 Other Legal Considerations**

Only **refusals** of specified medical treatment (whether expressed in an Advance Decision or otherwise) are valid or legally binding. A patient cannot demand medical treatment as of right if this goes against the clinical judgement of the senior doctor responsible for their care.

Although it is good practice that relatives should be consulted in cases where the patient is unable to communicate, if they are not a donee of a Lasting Power of Attorney or Court-appointed Deputy, they have no legal right to refuse treatment on behalf of the patient. The clinical responsibility rests with the Consultant in charge. No person has the right to require treatment to be provided although any refusal to offer treatment must be capable of being justified.

### **6.1.3 Restrictions on the Use of Advance Decisions**

A patient cannot, by way of an Advance Decision, refuse basic care that is clearly appropriate in the circumstances and provided for all patients. Basic care is generally reserved to matters of personal hygiene.

### **6.1.4 Implementation and Effect of Advance Decisions**

- (i) If a patient has made an Advance Decision which is:-
  - (a) Valid, and
  - (b) applicable to a treatment

The decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises as to whether the treatment should be carried out or continued.

- (ii) Staff will not incur liability for the consequences of continuing treatment or of withholding or withdrawing a treatment from a patient if, at the time, they reasonably believe that an advance decision exists which is valid and applicable to the treatment.
- (iii) Where doubt occurs, the court may make a declaration as to whether an Advance Decision:-
  - (a) exists;
  - (b) is valid;
  - (c) is applicable to a treatment

Nothing in an apparent Advance Decision stops a person

- (a) providing life-sustaining treatment, or
- (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in the patient's condition, while a decision as respects any relevant issue is sought from the court.

The following is provided for medical and nursing staff in dealing with relatives or staff who oppose a valid advance decision.

- i Relatives shall be provided with information on the legal status of Advance Decisions as defined within the terms of this policy.
- ii Relatives who oppose implementation of an Advance Decisions should be given the opportunity to discuss the issues with the member of staff who is responsible for the care of the patient. This will generally be the medical consultant or the ward sister.
- iii Staff who object to following the patient's instructions should inform their manager immediately and seek further and appropriate guidance.

## 6.2 LASTING POWER OF ATTORNEY

6.2.1 A Lasting Power of Attorney (LPA) is a power of attorney under which a mentally competent person aged 18 years or over (the donor) confers on another person or persons (the donee(s)) the authority to make decisions about all or any of the following:

- (a) the donor's personal welfare and
- (b) the donor's property and affairs

Under (a) this includes authority to make such decisions in circumstances where the patient no longer has capacity.

At the time of making an LPA both the patient and anyone appointed as a donee under an LPA must have reached 18 years of age.

Where an LPA authorises a donee to make decisions about the patient's personal welfare (where the patient no longer has capacity) this extends to giving or refusing consent to the carrying out or continuation of treatment by a person providing health care for the patient. **However, this authority does not extend to the carrying out or continuation of life sustaining treatment unless the LPA contains express provision for this. In this respect extreme care has to be exercised when reviewing the LPA to ensure that the Donee is**

**expressly empowered to give or refuse consent in the specific circumstances.**

## **6.2.2 COMPLETION AND WITNESSING OF ADVANCE DECISIONS AND LASTING POWERS OF ATTORNEY**

If a patient wishes to complete an Advance Decision or a Lasting Power of Attorney whilst an inpatient of the Trust, staff should make no attempt to influence the patient in arriving at a decision but may assist the patient in providing them with information.

It is recognised that situations will exist where patients may express a wish to refuse life sustaining treatment but where the circumstances may not allow sufficient time for the patient to seek independent advice. This may occur where surgery is imminent or where life sustaining treatment is urgently indicated.

Where such wishes are expressed, they must be in writing and witnessed

For these circumstances, staff may propose the use of the model Advance Directive to the patient (included here as Appendix A - an example of a completed Advance Directive is included for guidance purposes as Appendix B).

## **6.3 WITNESS REQUESTS**

The Trust strongly recommends that staff resist any requests by patients and/or their families to act as a witness. It is to be emphasised that if any staff members do not accept this advice and act as a witness then they do so in their private capacity as a member of the public, as opposed to an employee of the Trust, and, as such, Trust indemnity and support may not be available in the event of any challenge or disputes arising.

When requests are received, whether from the patient, the patient's family, or a solicitor acting on their behalf, it should be made clear that it is Trust policy that staff should not act in this capacity. It is the responsibility of the patient/family/solicitor to ensure that a separate independent witness is identified and that arrangements are made for their attendance at the Hospital at the time that the relevant document is to be signed.

## **6.4 OTHER SOURCES OF INFORMATION AND FURTHER ADVICE**

For further advice and guidance, please contact the Directorate of Corporate and Legal Affairs extension 8960

During out-of-hours, contact should be gained via the Duty Manager.

## **7 EDUCATION AND TRAINING REQUIREMENTS**

Advice on training and education is available from the Training Team.

## 8 PROCESS FOR MONITORING COMPLIANCE

This Policy shall be monitored as set out in the Policy Monitoring table as appears below.

Element to be monitored	Lead	Tool	Frequency	Reporting arrangements	Lead(s) for acting on recommendations	Change in practice and lessons to be shared
Incidents involving Advance Decision	Assistant Director of Corporate and Legal Affairs	Datix Reporting System	Annually	To Director of Corporate and Legal Affairs and minuted at Senior Team Meeting.	Assistant Director of Corporate and Legal Affairs	Director of Corporate and Legal Affairs to determine.
Incidents involving Lasting Powers of Attorney	Assistant Director of Corporate and Legal Affairs	Datix Reporting System	Annually	To Director of Corporate and Legal Affairs and minuted at Senior Team Meeting.	Assistant Director of Corporate and Legal Affairs	Director of Corporate and Legal Affairs to determine.

## 9 EQUALITY IMPACT ASSESSMENT

- 9.1 The Trust recognises the diversity of the local community it serves. Our aim therefore is to provide a safe environment free from discrimination and treat all individuals fairly with dignity and appropriately according to their needs.
- 9.2 As part of its development, this policy and its impact on equality have been reviewed and no detriment was identified.

## 10 LEGAL LIABILITY

The Trust will generally assume vicarious liability for the acts of its staff, including those on honorary contract. However, it is incumbent on staff to ensure that they:

- Have undergone any suitable training identified as necessary under the terms of this policy or otherwise.
- Have been fully authorised by their line manager and their CBU to undertake the activity.
- Fully comply with the terms of any relevant Trust policies and/or procedures at all times.
- Only depart from any relevant Trust guidelines providing always that such departure is confined to the specific needs of individual circumstances. In healthcare delivery such departure shall only be undertaken where, in the judgement of the responsible clinician it is fully appropriate and justifiable - such decision to be fully recorded in the patient's notes.

It is recommended that staff have Professional Indemnity Insurance cover in place for their own protection in respect of those circumstances where the Trust does not automatically assume vicarious liability and where Trust support is not generally available. Such circumstances will include Samaritan acts and criminal investigations against the staff member concerned.

Suitable Professional Indemnity Insurance Cover is generally available from the various Royal Colleges and Professional Institutions and Bodies. For further advice contact: Head of Legal Services on 0116 258 8960.

## **11 SUPPORTING REFERENCES, EVIDENCE BASE AND RELATED POLICIES**

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The Mental Capacity Act 2005 and its accompanying Code of Practice.

This policy is supported by the following Trust Policies:

The Policy for Consent to Examination and Treatment

The Mental Act Capacity Policy

## **12 PROCESS FOR VERSION CONTROL, DOCUMENT ARCHIVING AND REVIEW**

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This document will be uploaded onto SharePoint and available for access by Staff through INsite. It will be stored and archived through this system. It will be sent to all Clinical Directors and Heads of Nursing.

Review details must be described in the Policy and must give details of timescale and who will be responsible for review and updating of the document

**ADVANCE DECISIONS TO REFUSE TREATMENT**

*(Please complete Section 1 and Sections 2, 3 and 4 where appropriate)*

**SECTION 1**

**Name:** ..... **Date of Birth:** .....

Any distinguishing features: .....

**Address:** ..... **Hospital No:** .....

.....  
.....

**Tel. No.:** .....

**General Practitioner:** .....

**Address:** .....

.....

**Tel No:** .....

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**SECTION 2**

These are my Advance Decisions about my healthcare in the event that I cannot consent to or refuse treatment. They replace any previous decisions I have made.

In the following circumstances:

.....  
.....  
.....

I wish to refuse the following treatments:

.....  
.....

.....

### SECTION 3

I also wish to refuse life sustaining treatment even if my life is at risk; this will include:-

Please Initial

- Cardio-Pulmonary Resuscitation (restarting my heart or breathing)
- Assisted Ventilation (breathing), including by use of a machine
- Artificial Nutrition and Hydration  
(giving food or water by any other route than by my mouth)
- Other (please specify)

I have initiated the boxes to show that these are specific treatments I do not want. I am aware that I will be provided basic care, support and comfort.

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### SECTION 4

In the event that I cannot consent to or refuse treatment:

You may contact and discuss my wishes with:

**Name:** ..... **Relationship:** .....

**Address:** .....

.....

.....

**Tel. No:** .....

I also give permission for this document to be discussed with my relatives/carers (delete as applicable).

---

### SECTION 5

In confirmation of the above wishes:

**Signed:** .....

Name: .....

Date: .....

Witness (this advance directive must be witnessed if Section 3 - life sustaining decisions, applies)

Signed: .....

Name: .....

Date: .....

Address: .....

Tel No: .....

APPENDIX B

**ADVANCE DECISIONS TO REFUSE TREATMENT**

*(Please complete Section 1 and Sections 2, 3 and 4 where appropriate)*

**SECTION 1**

Name: ...George Emerson..... Date of Birth: ...XYX.....

Any distinguishing features: ..... Tattoo of Eagle on Right forearm .....

Address: 1 Decision Street, Leicester, LE12 3RR..... Hospital No:XYZ  
.....

.....

.....

Tel. No.: XYZ.....

**General Practitioner:** Dr Getwell- Better Street Practice .....

**Address:** Better Street, Leicester.....

**Tel No:** XYZ.....

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## SECTION 2

**These are my Advance Decisions about my healthcare in the event that I cannot consent to or refuse treatment. They replace any previous decisions I have made.**

**In the following circumstances:**

When my motor neurone disease has deteriorated to the point that I cannot swallow safely and I develop chest infections.

**I wish to refuse the following treatments:**

Any antibiotic treatment, help with breathing by a machine, and artificial feeding.

## SECTION 3

**I also wish to refuse life sustaining treatment even if my life is at risk; this will include:-**

	Please Initial
<b>Cardio-Pulmonary Resuscitation (restarting my heart or breathing)</b>	<input type="checkbox"/>
<b>Assisted Ventilation (breathing), including by use of a machine</b>	<input type="checkbox"/>
<b>Artificial Nutrition and Hydration (giving food or water by any other route than by my mouth)</b>	<input type="checkbox"/>
<b>Other (please specify)</b>	<input type="checkbox"/>

**I have initiated the boxes to show that these are specific treatments I do not want. I am aware that I will be provided basic care, support and comfort.**

**SECTION 4**

**In the event that I cannot consent to or refuse treatment:**

**You may contact and discuss my wishes with:**

**Name:** ...Lucy Honeychurch ..... **Relationship:** Wife.....

**Address:** 1 Decision Street, Leicester, LE .....

**Tel. No:** XYZ.....

**I also give permission for this document to be discussed with my relatives/carers (delete as applicable.**

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**SECTION 5**

**In confirmation of the above wishes:**

**Signed:** GE.....

**Name:** George Emerson .....

**Date:** .. XYZ .....

**Witness (this advance directive must be witnessed if Section 3 - life sustaining decisions, applies)**

**Signed:** ...ABC.....

**Name:** ...Eleanor Lavish.....

**Date:** XYZ.....

**Address:** XYZ.....

**Tel No:** ... XYZ.....