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Working in partnership to increase understanding and implementation of the MCA **Central Midlands**

Specific Decisions and Serious Medical Treatment

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Some decisions are so personal that it is not appropriate for a best interests decision to be made if a person lacks capacity to decide for themselves.

The Mental Capacity Act prohibits a best interests decision on:

- consenting to marriage or divorce, or adoption
- consenting to sexual relations
- voting

Without capacity there can be no consent, and sex without consent is unlawful.

Crucially, this means that if a person lacks capacity to make a decision to consent to a sexual relationship, then any sexual relationship they have will be unlawful, and there is a duty to prevent any such sexual relationship taking place. In some cases this might mean that such restrictions come to be imposed on the person and their freedom of movement and contact with others that this in turn is a deprivation of their liberty, and requires separate authorisation under the Deprivation of Liberty Safeguards or by the Court of Protection.

Compulsory treatment of a mental disorder cannot be done under the MCA, as this is dealt with under the Mental Health Act 1983.

If a decision must be made about **serious medical treatment**, it should be made by the Court of Protection, even if there is no doubt at all about the person's capacity or best interests. "Serious medical treatment" is generally defined as where

- *there is a fine balance between its benefits to the patient and the burdens and risks it is likely to entail for him, or*
- *a decision among possible treatment options is finely balanced, or*
- *the treatment proposed would be likely to involve "serious consequences" for the patient (eg serious and prolonged pain, major consequences for the patient, or a serious impact on future life choices).*

A Practice Direction says a case **must** be brought to Court if it involves –

- Withdrawal of artificial nutrition / hydration from a patient in a permanent vegetative or minimally conscious state; or
- Organ / bone marrow donation by someone who lacks capacity to consent; or
- non-therapeutic sterilisation of a patient who lacks capacity to consent.

Other examples of serious medical treatment involve termination of pregnancy, treatment for the benefit of another person, treatment which will need a “degree

of force to restrain the person”, experimental treatment, or an ethical dilemma in an untested area, where the patient lacks capacity to consent to this. Make sure you get advice early in any such case, or if you are in any doubt.