



What right do young people have to refuse treatment?

A briefing from our Health and Social Care team - June 2010

What right do young people have to refuse treatment?

The rights of children and young people are increasingly gaining weight but UK law in this area has struggled to keep pace, being seen by some as overly paternalistic and restrictive of these rights.

We are regularly asked to advise health professionals on the rights of a parent to override the refusal of treatment by a young person with capacity. The law governing this issue rests with the Family Law Reform Act 1969, the Mental Capacity Act 2005 and the Human Rights Act 1998.

Section 8 of the Family Law Reform Act 1969 gives young persons aged 16 and 17 years the statutory right to consent to surgical, medical and dental treatment. This also applies to associated procedures (for example, investigations, anaesthesia or nursing care) but not "rarer" procedures such as organ donation / non-therapeutic research. Like adults, children aged 16-17 years are presumed to have capacity to consent to treatment by virtue of the Mental Capacity Act 2005, unless the contrary is shown.

In what is still the leading case, the *Re W (a minor)* (medical treatment [1992]), the Court of Appeal decided that section 8 of the Family Law Reform Act 1969 does not prevent consent being given by parents or the court. However, this Act provides a right to consent, but not a right to refuse treatment necessary to save life. A court will not overrule the refusal of a young person lightly. There would need to be clear evidence that it was a life saving issue. This essentially means that, although, young persons do have a presumption of capacity in their favour, they are not treated in the same way as a mentally competent 18 year old. Indeed, this is why the Mental Capacity Act 2005 requires a person to be 18 years old to make an Advance Decision to refuse treatment.

Significantly, the case law in this area pre-dates the Human Rights Act 1998, particularly Article 3 as the overriding of a refusal may breach the right not to be subjected to inhuman or degrading treatment.

If a young person with capacity of this age refuses to consent to treatment determined to be in their best interests, to protect the rights of the child, parents and staff an application should be made to the court for a declaration on what is in the best interests rather than to purely rely on parental consent. We would also advise that legal advice be obtained on the individual circumstances of the case.

The Mental Capacity Act 2005 Code of Practice does give some guidance in Chapter 12:

"12.14 If a young person has capacity to agree to treatment, their decision to consent must be respected. Difficult issues can arise if a young person has legal and mental capacity and refuses consent – especially if a person with parental responsibility wishes to give consent on the young person's behalf. The Family Division of the High Court can hear cases where there is disagreement. The Court of Protection has no power to settle a dispute about a young person who is said to have the mental capacity to make the specific decision.

12.15 It may be unclear whether a young person lacks capacity within section 2(1) of the Act. In those circumstances, it would be prudent for the person providing care or treatment for the young person to seek a declaration from the court."

Section 8 (3) of the Family Law Reform Act 1969 preserves the right of a parent to consent to treatment on behalf of a child aged 16 or 17. So if for example, a person aged 17 were to arrive unconscious or collapse in the A & E waiting room, their parent can consent to treatment on their behalf.

More information

For further information on the law relating to children, capacity, consent and mental health issues contact:



Eve Piffaretti, Partner

T: 029 2038 5917

E: eve.piffaretti@morgan-cole.com

This publication is © 2010 Morgan Cole LLP and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole LLP.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on these articles.