



# Gloucestershire Safeguarding Adults Board

## Dispute Process for Mental Capacity and Best Interest Decisions

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## SUMMARY

Staff should use this document to guide them when undertaking mental capacity assessments and best interest decisions, when there is a difference of opinion either about someone's mental capacity to make a specific decision or about what is in the person's best interest when they have been assessed as lacking capacity to make a specific decision for themselves. Disputes may be between members of staff within an organisation, with professionals from outside agencies, with other interested parties such as family members, attorneys under a Lasting Power of Attorney, court appointed deputies or advocates such as an Independent Mental Capacity Advocate. Staff can access information on how to resolve these disputes by following the processes outlined below and in the flow charts in the attached appendices.

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## ABBREVIATIONS

Abbreviation	Full Description
MCA	Mental Capacity Act
IMCA	Independent Mental Capacity Advocate
ECHR	European Convention on Human Rights
DoLS	Deprivation of Liberty Safeguards
NICE	National Institute for Health and Care Excellence
CoP	Court of Protection
RPR	Relevant Person's Representative
HRA	Human Rights Act
LPA	Lasting Power of Attorney

**Document originally produced by Gloucestershire Health and Care NHSFT and consent kindly provided to allow it to be used by GSAB.**

## **1. INTRODUCTION**

- 1.1** This policy has been written to comply with both NICE Guidance and the requirements of the Mental Capacity Act 2005 (MCA) and the Human Rights Act 1998.

NICE guideline NG108 section 1.4.5 states: *“Organisations should have clear policies or guidance on how to resolve disputes about the outcome of the capacity assessment, including how to inform the person and others affected by the outcome of the assessment.”*

The MCA 2005 code of Practice Chapter 15 deals specifically with how to settle disagreements and disputes about issues covered within the Mental Capacity Act. Whilst the MCA 2005 Code of Practice does not impose a legal duty on practitioners to comply with the code, they will need to give a good reason for why they have departed from it; therefore, it is advisable to follow the Code of Practice where it is possible. (See [Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](http://www.gov.uk)).

Part 2 of The MCA 2005 outlines the role of the Court of Protection (CoP) and details the range of individuals who can appeal to the court if they do not agree with the outcome of a mental capacity assessment or a best interest decision that has been made. It also outlines the courts powers to make decisions in relation to these matters. In addition, the court deals with appeals under s21A of the Mental Capacity Act 2005 where a person or their representative is appealing against an authorisation under Deprivation of Liberty Safeguards (DoLS) The ability to appeal against a DoLS authorisation is required to comply with the Human Rights Act which requires public bodies to practice within the articles of the European Convention on Human Rights (ECHR). Article 5(4) of the ECHR relates to deprivation of liberty and outlines a requirement that anyone deprived of their liberty under law must have access to a speedy appeal. (see [Mental Capacity Act 2005 \(legislation.gov.uk\)](http://legislation.gov.uk) and [Human Rights Act 1998 \(legislation.gov.uk\)](http://legislation.gov.uk)).

This policy is important as it will ensure compliance with legislation and compliance with the code of practice which will promote good practice, better outcomes for people who use services and minimise the risk of legal challenge and resulting consequences.

## **2. PURPOSE**

- 2.1** The purpose of this policy is to provide staff with the guidance they need to be able to resolve any disagreements or disputes in relation to mental capacity assessments and best interest decisions. It is hoped that by using this policy, organisations will be able to avoid situations where disputes cannot be resolved through informal processes. Where possible this policy should help avoid applications to the Court of Protection which could prove costly, both in monetary terms and in terms of reputation.

## **3. SCOPE**

- 3.1** This document will apply to staff who are engaged in working with any young person or adult over the age of 16 and who may at some point be involved in completing mental capacity assessments and or making best interest decisions on behalf of people who have been assessed as lacking capacity to make a specific decision for themselves.

## **4. MENTAL CAPACITY ACT COMPLIANCE**

### **4.1** Where parts of this document relate to decisions about providing any form of care, treatment or accommodation, staff using the document must do the following:

- Establish if the person able to consent to the care, treatment or accommodation that is proposed? (Consider the 5 principles of the Mental Capacity Act 2005 as outlined in section 1 of the Act. In particular principles 1,2 and 3) [Mental Capacity Act 2005 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2005/9/section/1).
- Where there are concerns that the person may not have mental capacity to make the specific decision, complete and record a formal mental capacity assessment.
- Where it has been evidenced that a person lacks the mental capacity to make the specific decision, complete and record a formal best interest decision making process using the best interest checklist as outlined in section 4 of the Mental Capacity Act 2005 [Mental Capacity Act 2005 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2005/9/section/4).
- Establish if there is an attorney under a relevant and registered Lasting Power of Attorney (LPA) or a deputy appointed by the Court of Protection to make specific decisions on behalf of the person (N.B. they will be the decision maker where a relevant best interest decision is required. The validity of an LPA or a court order can be checked with the Office of the Public Guardian) [Find out if someone has a registered attorney or deputy - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/find-out-if-someone-has-a-registered-attorney-or-deputy)
- If a person lacks mental capacity, it is important to establish if there is a valid and applicable Advance Decision before medical treatment is given. The Advance Decision is legally binding if it complies with the MCA, is valid and applies to the specific situation. If these principles are met it takes precedence over decisions made in the persons best interests by other people. To be legally binding the person must have been over 18 when it was signed and had capacity to make, understand and communicate the decision. It must specifically state which medical treatments, and in which circumstances the person refuses and only these must be considered. If a patient is detained under the Mental Health Act 1983 treatment can be given for a psychiatric disorder.
- Where the decision relates to a child or young person under the age of 16, the MCA does not apply. In these cases, the competence of the child or young person must be considered under Gillick competence. If the child or young person is deemed not to have the competence to make the decision then those who hold Parental Responsibility will make the decision, assuming it falls within the Zone of Parental control. Where the decision relates to treatment which is life sustaining or which will prevent significant long-term damage to a child or young person under 18 their refusal to consent can be overridden even if they have capacity or competence to consent.

## **5. POLICY DETAIL**

### **5.1 Who might disagree or dispute the outcomes in relation to the MCA 2005?**

Disagreements in relation to the outcome of a capacity assessment or the best interest decision made for someone who has been assessed as lacking capacity to make a decision for themselves can come from a range of sources, such as: -

- Another colleague within your organisation
- Another practitioner from another agency involved in the person's care or treatment
- Another interested party such as a family member or close friend

- The person whose capacity has been assessed
- Any advocate including an IMCA
- An Attorney under a Lasting Power of Attorney (LPA)
- A Deputy appointed by the Court of Protection.

The type of person who is disagreeing or disputing the outcome of the assessment or best interest decision will impact on how these issues are resolved and the processes that need to be followed. (See [Appendices 1 to 4](#)).

## **5.2 Disputes about the outcome of a Mental Capacity Assessment**

Section 4 paragraph 4.63 to 4.65 of the MCA 2005 Code of Practice outlines how someone might challenge the outcome of a mental capacity assessment and how this might be addressed.

If someone doesn't agree with the result of a capacity test, they should raise it with whoever made the assessment. The assessor will have to show they have applied the test correctly and adhered to the five principles. If it is a professional who made the assessment, they will also have to show that they had regard to the Code of Practice.

### **5.2.1** If the person disagreeing with the capacity assessment is another colleague within the same organisation, then the two colleagues should meet to review the assessment paperwork and discuss how the outcome has been evidenced, this will give both practitioners the opportunity to hear each other's views and rationale for the position they are taking. Hopefully the disagreement will be resolved at this point without further action required.

If the practitioners are still in disagreement, then it would be useful to get a second opinion from a colleague who is not directly involved in the case, but who has experience of undertaking mental capacity assessments, they may need to conduct a further mental capacity assessment in order to draw a conclusion. Following a further assessment the second assessor and the two practitioners in dispute should meet to discuss the outcome of the second assessment and try to reach an agreement about the outcome.

If after obtaining a second opinion there is still a disagreement, then the matter should be discussed with a senior manager in the team and the MCA Lead for the organisation. The senior manager and the MCA Lead should consider the outcome of the assessment and come to a consensus about if the person has capacity to make the decision or not. If they are still unsure about the decision, they should discuss the matter with their legal team, with a view to referring the matter to the Court of Protection (CoP) who will make a final ruling about the person's capacity.

### **5.2.2** If there is a disagreement between practitioners from different organisations then they should arrange to meet to review the assessment and if they are still unable to agree they should seek a second opinion from an independent assessor that is acceptable to both organisations. If following a second opinion there is no agreement, a meeting should be arranged between the practitioners, their managers, and the MCA Lead for both organisations. If there is still no consensus an application to the CoP should be considered.

- 5.2.3** If there is a disagreement with a family member, attorney under a Lasting Power of Attorney (LPA), deputy or another interested party, they should be invited to attend a meeting with the assessor to discuss the assessment in detail, following this if there is still a dispute, then an independent assessor, that is acceptable to both parties, should be commissioned to complete a further capacity assessment. If this still does not resolve the matter an application to the CoP should be considered.
- 5.2.4** If the person who has been assessed as lacking capacity is disagreeing with the outcome of the assessment, then steps should be taken to ensure that they have someone who can advocate on their behalf, this may be a family member, a friend, their solicitor, or some other involved party. If the person has no one who can advocate on their behalf, then the practitioner must request that an Independent Mental Capacity Advocate should be appointed through POhWER advocacy services. Once it has been identified who can advocate for the person, a meeting should be arranged with the person and their advocate to discuss the capacity assessment. If as a result of this the matter is not resolved, then an application to the Court of Protection should be considered.
- 5.2.5** Before advising a person or any interested party about the outcome of any mental capacity assessment, the assessor should ensure that in conducting the mental capacity assessment, they have followed the 5 principles of the MCA 2005 (See [appendix 5](#)), the test for mental capacity as outlined in sections 2 and 3 of the MCA 2005 and have also followed the guidance in chapter 4 of the Code of Practice for the MCA 2005. Failure to do so is likely to result in more disputes about the validity of the assessment and will leave an organisation open to legal challenge.

### **5.3 Disputes about Best Interest Decisions**

- 5.3.1** If there is a dispute about what is in a person's best interests between professionals, family members, advocates, Attorneys, or other interested parties then the first thing that is required is for a best interest meeting to be arranged. Best interest meetings should be held at a time where all interested parties can attend.

In a case of complex or disputed decision-making, a formal Best Interests Meeting offers a structured approach when a range of possible options must be considered for a relevant person who lacks capacity to do this. It establishes an opportunity for family and professionals to be open and transparent and to work in partnership to carefully consider important or life-changing issues for the relevant person and decide what should happen.

Those invited should include:

- The person the decision is about
- Anyone named by the person
- All professionals involved in the person's care and treatment
- Any involved family members or friends
- Any advocates including any appointed IMCA
- Any informal carers
- Any Attorney under an LPA
- Any court appointed deputy.

- Anyone who attends a Best Interests Meeting should be clear about their role and the contribution they can make to the meeting. Information is confidential and being shared in the best interests of the relevant person and in line with the requirements of the 1998 Data Protection Act on a 'need to know' basis.
- People may attend for the whole or part of the meeting depending on their role and contribution.
- Occasionally it may be inappropriate to include a person if they are alleged to have caused harm to the relevant person and this is under formal investigation; their views should still be sought.

As the necessity for a Best Interests Meeting indicates the complex nature of the decision or a possible lack of agreement between those concerned, it is good practice that the person who chairs the meeting is not the decision-maker, in order to avoid a conflict of interests. Depending on the nature of the decision, this is likely therefore to be a Senior Practitioner, Manager, or Senior Manager.

The decision-maker will consult with the Chair about the nature of the decisions and how to ensure the appropriate information and people are present at the meeting.

Other issues will include:

- Availability and general suitability/capacity/accessibility of venue, including any implications for those attending
- The use of an interpreter must also be considered where necessary, either for the relevant person or a family member.
- Arrangements for sending out invitations and agendas.

The chair should have the ability to:

- Oversee a meeting where competing views and opinions may be expressed and ensure each is heard: such meetings may involve challenging and upsetting issues, and the chair may need to challenge any behaviour that is likely to prevent people feeling able to express their views.
- Understand the principles of mediation and negotiation in order to ensure that the best interests of the person are fully represented.
- Summarise the discussion and confirm the decisions of the meeting; if there are differences of opinion, can these be resolved within the meeting?
- Indicate and oversee the next steps when the meeting has not been able to come to a decision and there is an unresolved disagreement.
- Recognise when other legislative frameworks or procedures are involved and how these should be referenced and addressed e.g. Adult Safeguarding procedures, Mental Health Act 1983/2007, consideration of the human rights of the relevant person and their family, Deprivation of Liberty Safeguards or progression to seeking a decision in the Court of Protection.
- Ensure a clear outcome and action plan including any interim arrangements to secure the care or safety of the relevant person.

Prior to the meeting being held it should be clearly established who is the best interest decision maker. If there is a relevant Lasting Power of Attorney in place and the

Attorney or Attorneys under it have decision making powers relevant to the best interest decision that is being made, then they will be legally the decision maker. If there is a court appointed deputy where the court has granted them decision making powers relevant to the decision that needs to be made, they will legally be the decision maker. Where someone is stating they are an attorney or deputy with relevant decision-making powers, this must be confirmed by checking that they are registered with the Office of The Public Guardian at: [Find out if someone has a registered attorney or deputy - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/find-out-if-someone-has-a-registered-attorney-or-deputy).

If there is no attorney or deputy then the practitioner involved with the person's care and treatment, who has identified that the decision needs to be made, will be the decision maker.

The purpose of the best interest meeting will be to allow all those involved to air their views about what they believe is the correct option to follow in the person's best interests, this will then give all present an opportunity to see different views and perspectives and ideally will result in a consensus being reached about what is in the person's best interests.

It is important within the best interest process to ensure the person the decision is being made for has an opportunity to express their views and wishes and to hear what others have to say.

At the end of the best interest meeting, the decision maker will be the person who has the final say in what is in the person's best interests.

All best interest decisions should be documented and the minutes shared with all those who attended and any interested parties who were unable to attend. Minutes should be uploaded into the person's record on the electronic systems available.

If following the best interest meeting there is no consensus about what option is in the person's best interests, the decision maker will have the final say in what option is followed, however if there are strong objections from other interested parties, further mediation may be required. If this fails, consideration should be given to making an application to the Court of Protection for a final ruling on what option should be followed in the person's best interests.

- 5.3.2** If the decision maker is an attorney under an LPA or a court appointed deputy, but professionals have concerns that the decision they have made is not in the best interests of the person, then they should convene a best interest meeting as detailed above, to try to resolve the matter. Any attorney or deputy has to abide by the five principles of the MCA including acting in the person's best interests and has a legal duty to have regard to the Code. If following the best interest meeting, it is still felt that they are not acting in the person's best interest the matter should be referred to the Office of the Public Guardian, who can investigate the matter. If they conclude that the attorney or deputy is not acting in the person's best interest the matter should be referred to the Court of Protection. The Court will then decide if it needs to remove the powers of the attorney or deputy.

In suspected cases of physical or sexual abuse, theft or serious fraud, the police should be contacted and a safeguarding referral raised to the Local Authority. The OPG, in



serious cases, will refer the matter to the Court of Protection, who may then revoke the LPA.

**5.3.3** If the person is themselves objecting to the best interest decision that is being made, the decision maker must consider if the person's objection is a meaningful objection (see definitions below). If it is not a meaningful objection, then they should proceed to implement the decision. If it is a meaningful objection, then the decision maker should consult with anyone advocating on behalf of the person and convene a best interest meeting as outlined above. If following a best interest decision the person continues to object to the decision that has been made in their best interests, then an application to the Court of Protection should be considered. [Court of Protection - GOV.UK \(www.gov.uk\)](https://www.gov.uk/court-of-protection)

**5.3.4** If there is a disagreement between professionals either within an organisation or from another organisation a best interest meeting should be held as above. If following this meeting, there is still disagreement, a meeting should be convened with the line managers of the professionals involved and their organisations MCA Lead to try to resolve the matter. If the matter is still not resolved an application to the CoP should be considered.

**5.3.5** Occasionally there is a major disagreement between family members and/or professionals about a serious decision and the processes of 'best interests' meetings and dispute resolution approaches have not been able to come to arrangements acceptable to those involved. The decision-maker should then consider, with their line manager, the appropriateness of seeking legal advice in a timely way with a view to seeking leave to make an application to the Court of Protection through their designated agency routes depending on whether the decision involves serious or disputed medical treatment or relates to where the relevant person should live and what care they should receive.

- Those family members who are objecting can take their own legal advice in such matters
- If the need is urgent and the person is at risk of harm it is possible to make an urgent referral to the Court of Protection for a rapid initial response. [Court of Protection - GOV.UK \(www.gov.uk\)](https://www.gov.uk/court-of-protection)
- Some serious medical issues must always be referred to the Court for decisions (See Code of Practice Chapter 8.18)
- Deprivation of Liberty Safeguards procedures have clearly defined legal processes of challenge.

## **5.4 Deprivation of Liberty Safeguards and section 21A appeals**

**5.4.1** If a person is residing in a hospital, residential care home or a nursing home and they are subject to an authorisation under Deprivation of Liberty Safeguards (DoLS), they may be objecting to residing there or objecting to the restrictions that are in place that contribute to the deprivation of liberty. If a person is objecting, then it needs to be considered if their objection is a meaningful objection. If the objection is meaningful then their Relevant Person's Representative (RPR), [See definitions below] and the local authority DoLS team should be informed. It is then the responsibility of the RPR to make an appeal application to the Court of Protection under section 21A of the MCA 2005.

## **5.5 Requirement to inform others of outcome of Capacity Assessment and Best Interest Decisions**

- 5.5.1** Following an assessment of someone's mental capacity to make a specific decision, the person whose capacity has been assessed, must be informed of the outcome, along with any interested party including any attorney or court appointed deputy. If the person is assessed as lacking capacity to make the decision for themselves, the outcome of the subsequent best interest process must be shared with the person, their advocate, any attorney or court appointed deputy or any other interested party.

## **6. DEFINITIONS**

- 6.1 Lasting Power of Attorney:** There are two types of Lasting Power of Attorney (LPA), that can be created by a person, when they have capacity to do so, to plan for any future circumstances where they may lose capacity to make decisions for themselves. The two types of LPA are Property and Finance, and Health and Welfare. Any LPA will only be valid if it has been registered with the Office of the Public Guardian. An LPA for property and finance can become effective when the person who made it still has capacity but wishes their nominated attorney to provide them with support in managing their finances. An LPA for health and welfare can only become effective when the person who made it loses capacity to make a health and welfare decision. An attorney under an LPA for health and welfare can only make decisions on behalf of the person when it has been shown they do not have capacity to make that specific decision, if they retain capacity to make some decisions then they must be allowed to make them. A person creating an LPA can nominate more than one person to be their attorneys and can specify if they must make decisions jointly, or if they can make decisions individually if one of them is not available to be consulted.
- 6.2 Court Appointed Deputies:** Where a person does not have and LPA, but has lost capacity to make certain decisions for themselves, and these decisions are of a significant nature it is possible for someone to make an application to the Court of Protection to be granted a deputyship order in which the court will make an order specifying what decisions the deputy can make on behalf of the person who has lost capacity to make certain decisions. As with an LPA this will be registered with the Office of the Public Guardian.
- 6.3 Meaningful Objection:** A meaningful objection is where someone who lacks capacity to make a decision is objecting to the decision that has been made in their best interests and they want a different decision that is possible to be made. For example, if a person does not have capacity to decide where they should live and it has been decided they should live in a residential placement and they tell you they want to return to live at home, this would be a meaningful objection if that home is still available to them. However if the place that they want to go and live no longer exists or is no longer available, such as an old address that they have not lived in for many years, or the home they lived in as a child with their parents, this is not a meaningful objection as the option they want does not exist in the way they remember.
- 6.4 Relevant Person's Representative:** A relevant person's representative is a person who is appointed to support and advocate for a person who has been made subject to Deprivation of Liberty Safeguards authorisation. Their role is to have regular contact with the person, advocate on their behalf and instigate an appeal to the Court of

Protection under s21A of the MCA 2005 if the person is making a meaningful objection to the DoLS.

## **7. PROCESS FOR MONITORING COMPLIANCE**

It is advisable to have a system in place within an organisation to monitor if the processes in this document are being adhered too.

## **8. REFERENCES**

*Mental Capacity Act 2005* [Mental Capacity Act 2005 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2005/9/contents/enacted)

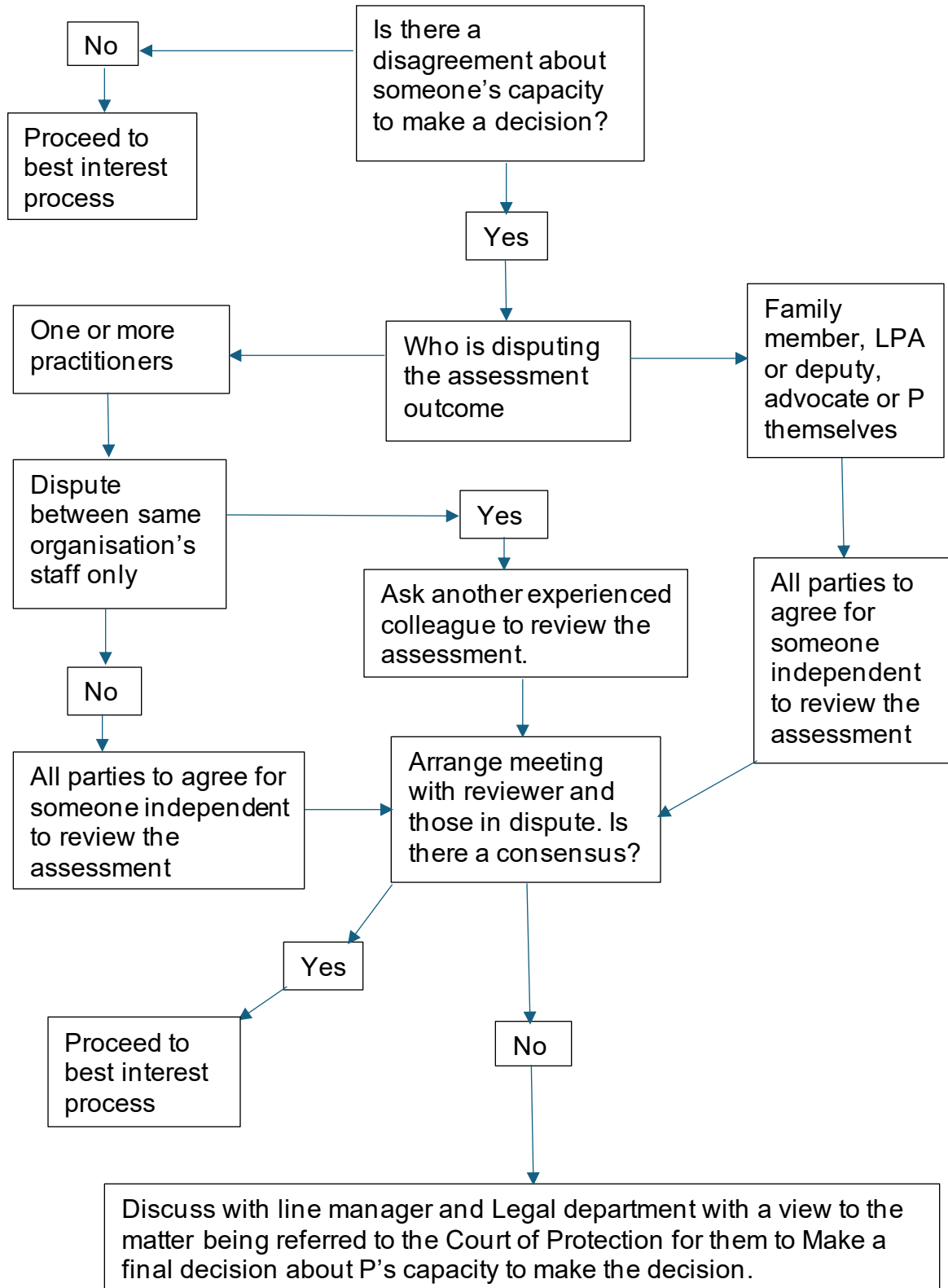
*Office of The Public Guardian* [About us - Office of the Public Guardian - GOV.UK \(www.gov.uk\)](https://www.gov.uk/about-us-office-of-the-public-guardian)

*Mental Capacity Act 2005 Code of Practice* [Mental Capacity Act Code of Practice - GOV.UK \(www.gov.uk\)](https://www.gov.uk/mca-code-of-practice)

*Human Rights Act 1998* [Human Rights Act 1998 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1998/42/contents/enacted)

## Appendix 1

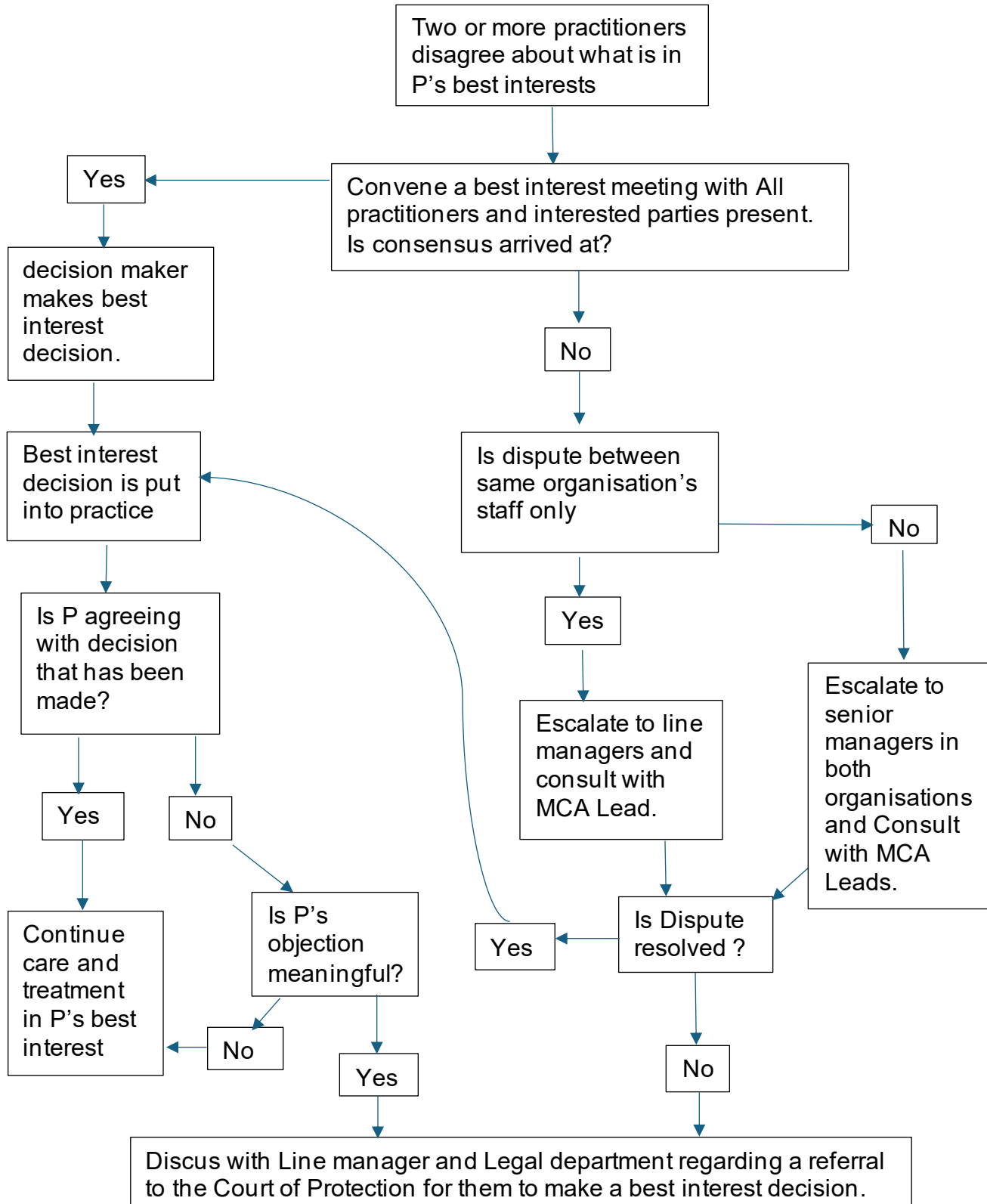
### **Dispute Process when there is a disagreement about someone's capacity to make a decision**



## Appendix 2

### **Dispute Pathway when practitioners are in dispute regarding a best interest decision**

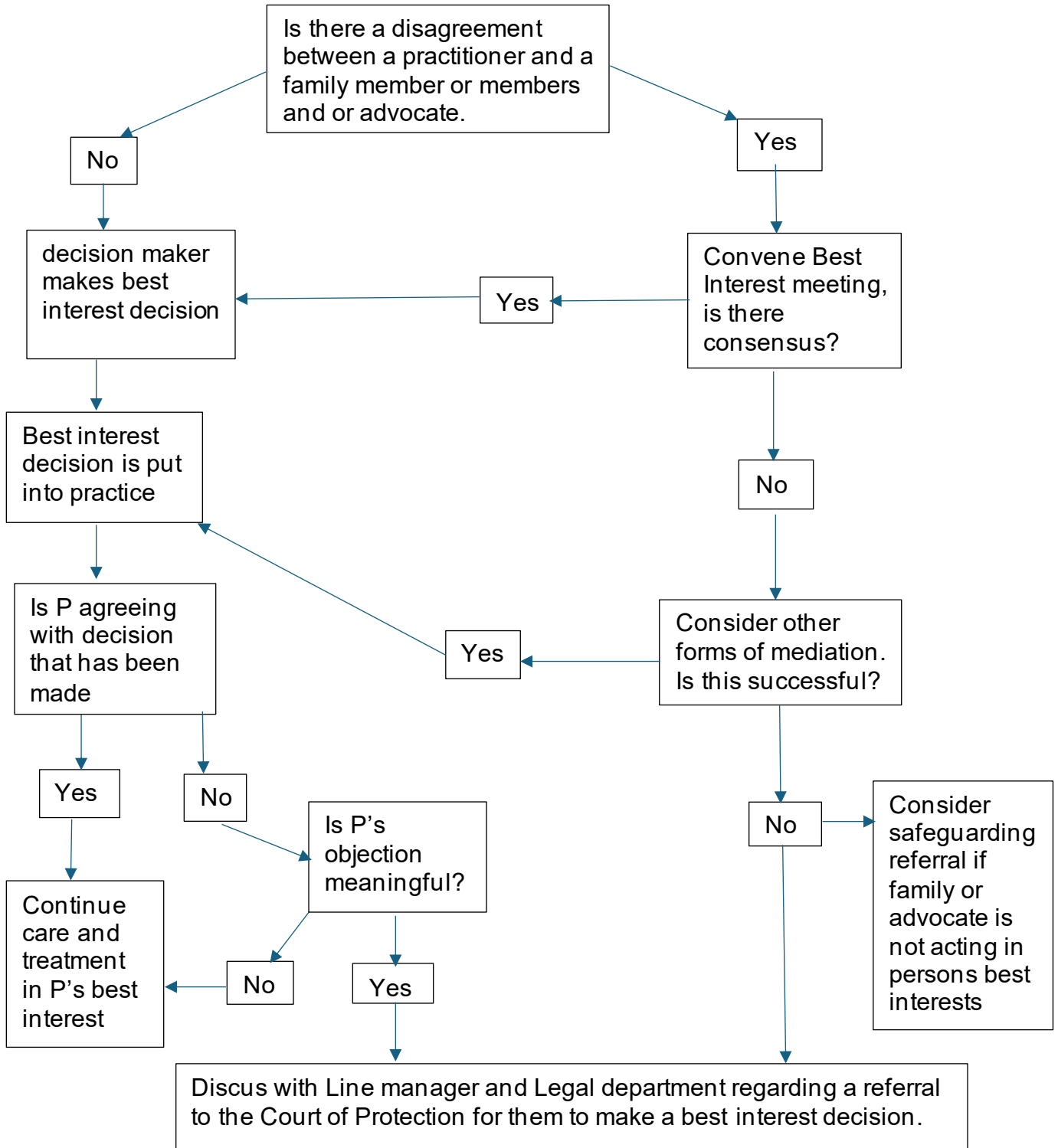
N.B. before proceeding you must clarify who is the decision maker in this matter



### Appendix 3

#### **Dispute Pathway when practitioners and family members or advocates who are not attorney's or deputies are in dispute about best interest decisions.**

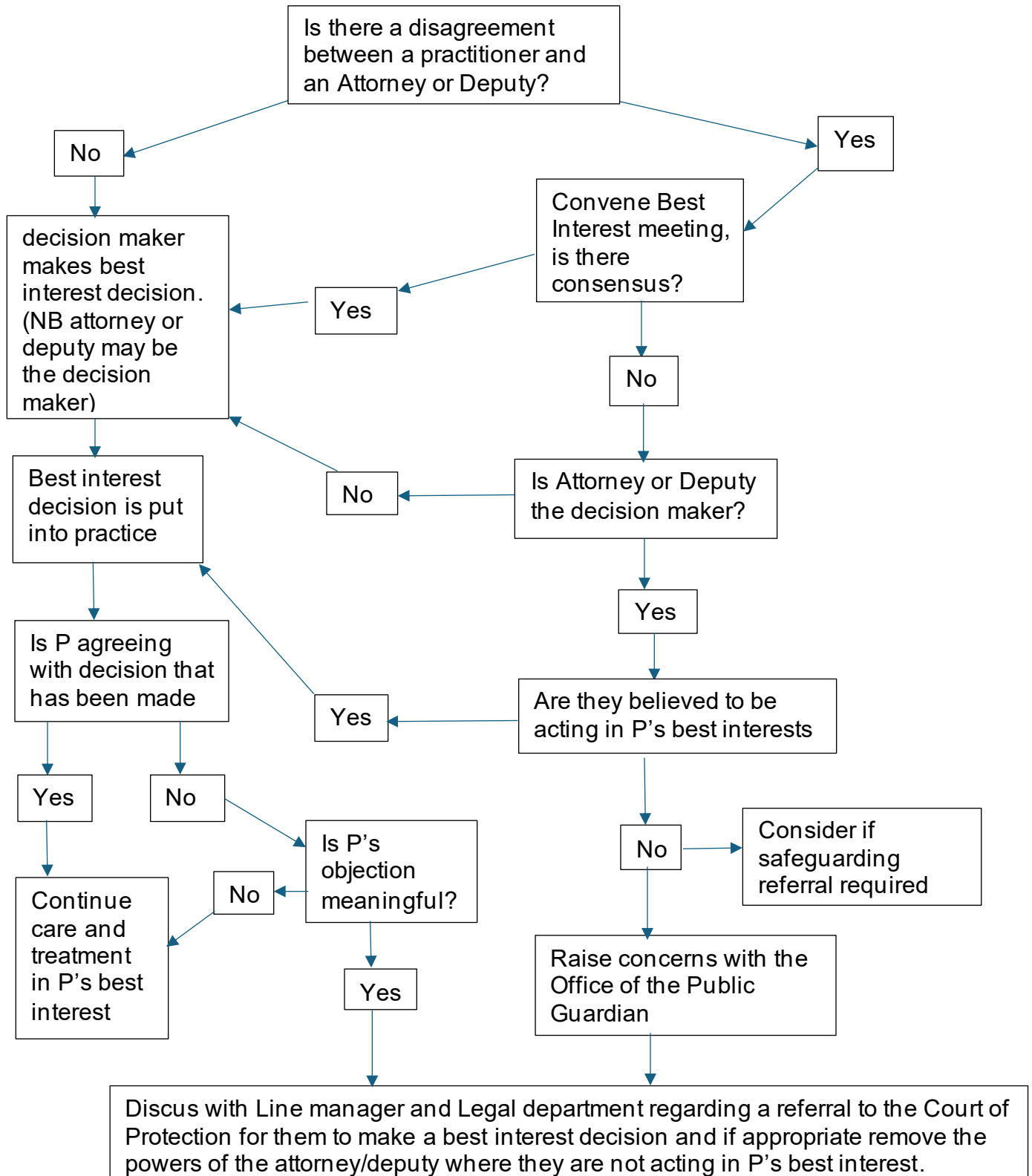
N.B. before proceeding you must clarify who is the decision maker in this matter



## Appendix 4

### **Dispute Pathway when practitioners and LPA/Deputy are in dispute about a best interest decision**

N.B. before proceeding you must clarify who is the decision maker in this matter



## **Appendix 5**

### **The Five Principles of the Mental Capacity Act 2005** (taken from section 1 MCA 2005)

#### *The principles*

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.



## Appendix 6

### **The Best Interest Checklist** (taken from Section 4 MCA 2005)

#### *Best interests*

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).