ABSTRACT. This paper considers advance decision-making in the context of healthcare. The common law recognition of advance decisions is contrasted with new statutory provision. This paper will examine the Mental Capacity Act 2005 framework for advance decisions and lasting powers of attorney. The ‘best interests’ test and substituted judgment as criteria for proxy decision-making are compared by application to a case example. The paper examines the statutory safeguards in respect of refusals of ‘life-sustaining treatment’ and postulates that these safeguards may render respect for autonomous advance decision-making difficult to achieve in practice.

KEY WORDS: advance decisions, autonomy, lasting power of attorney, life sustaining treatment, medical treatment, Mental Capacity Act 2005

Parliamentary debates\(^1\) on the proposed mental capacity legislation focussed attention on end of life decision-making and particularly whether the statutory framework would put vulnerable, elderly patients at risk of having nutrition and hydration withdrawn in their ‘best interests’.

At the time the Mental Capacity Bill (the Bill) received its third reading, headlines such as ‘Commons must reject the ‘right to murder’’\(^2\) and ‘Vote for life, says Duncan Smith in battle over ‘euthanasia law’’\(^3\) appeared in the press. Concerns arose that the new legislation may authorise a decision where the motive is the killing of the patient.

 Debates of the Bill focussed on the possibility that decisions could be taken by proxies appointed under LPAs resulting in
withdrawal of nutrition and hydration from vulnerable, elderly patients, amounting to ‘euthanasia by the back door’. In such debates, the connotation of ‘euthanasia’ has been used with imprecision and in a perjorative sense. This paper will review the existing common law on advance decision-making and analyse the changes to be brought about by the statutory framework, including the new Lasting Power of Attorney (LPA). It will analyse whether the Mental Capacity Act 2005 (the Act) promotes respect for patient autonomy through advance decision-making whilst adequately safeguarding the interests of vulnerable patients.

**ADVANCE DECISIONS AND RESPECT FOR PATIENT AUTONOMY**

"An advance directive is the generic term for an act whereby a person, whilst competent, specifically makes arrangements about his future health care decisions should he become incompetent. This may be achieved either by an instrument which is known as a living will, or by a durable (or enduring) power of attorney".

Although conventionally terms such as ‘living wills’, ‘advance directives’ and ‘advance statements’ have been used, the Act refers to ‘advance decisions’ and Lasting Powers of Attorney.

The courts have recognised that an advance refusal of treatment should be respected. In *Re T (Adult: Refusal of Medical Treatment)* the Court of Appeal stated that prior refusals of medical treatment would be binding in principle if three requirements were fulfilled – the patient must be competent at the time the advance decision is made, the patient must have anticipated the circumstances when the advance decision would take effect and intend his/her decision to apply to those circumstances and the patient must know “in broad terms the nature and effect of the procedure to which consent (or refusal) was given” and must have understood and fully appreciated the significance of making such a declaration.

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4 The provisions of the Mental Capacity Act 2005 are likely to come into force in 2007.

