Oral Feeding Difficulties and Dilemmas, 2010 Update

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On behalf of

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Committee on Ethical Issues in Medicine

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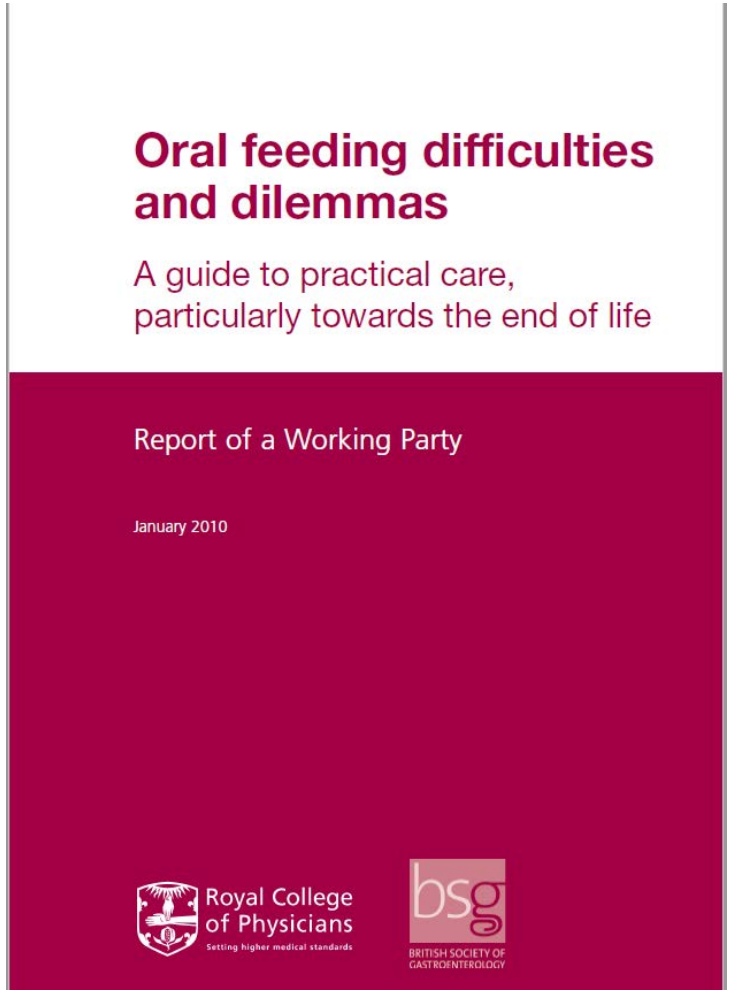
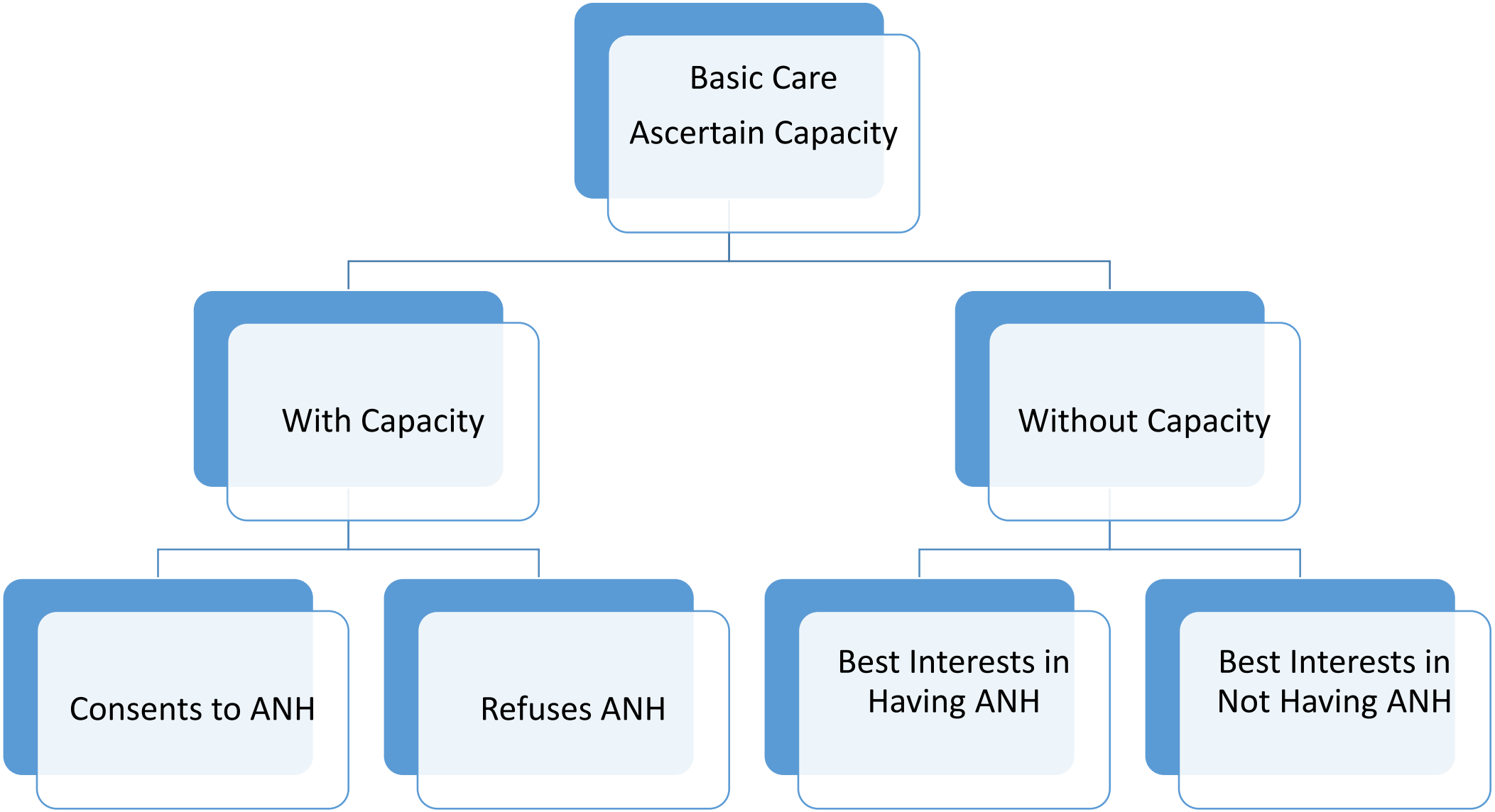



Basic Care
Ascertain Capacity
With Capacity
Without Capacity
Consents to ANH
Refuses ANH
Best Interests in Having ANH
Best Interests in Not Having ANH

Ethical Issues: the sanctity of life

- Life is sacred
- Life has intrinsic value
- Life deserves respect and to be treated with dignity

"*The life of a single human organism commands respect and protection, no matter in what form or shape, ……" [Dworkin]*

the principle of the sanctity of life creates a presumption in favour of maintaining life.

Ethical Issues: starting, stopping and withholding treatment

- There is no intrinsic moral difference between withholding and withdrawing treatment
- A treatment may be initiated to assess its effects and withdrawn, if it proves unhelpful.
- Withholding feeding, if it hastens death by allowing the effects of the terminal condition, is not the same as killing.

Basic care and medical care

- Basic care includes “warmth, shelter, pain and distressing symptom relief, hygiene measures and the offer of oral nutrition and hydration”
- Incompetent patients must be given **basic care** unless there is compelling reason to suppose that it is not in their best interests.
- Artificial nutrition and hydration constitutes **medical care (?basic medical care)**
- Therefore it can be withheld or withdrawn if it is thought not to be the best interests of a patient who lacks capacity.
- There is no duty to provide unreasonable care: a doctor can refuse to supply a treatment that is irrational or unreasonable.

Burke, 2004-6

- Leslie Burke, who has Friedrich's ataxia, was concerned that doctors might withdraw ANH, and challenged GMC guidance. The Court of Appeal said:

- *'So far as ANH is concerned, there is no need to look far for the duty to provide this. Once a patient is accepted into a hospital, the medical staff come under a positive duty at common law to care for the patient…. A fundamental aspect of this positive duty of care is a duty to take such steps as are reasonable to keep the patient alive. Where ANH is necessary to keep the patient alive, the duty of care will normally require the doctors to supply ANH….'* [Court of Appeal]

Burke, 2004-6

… it seems to us that for a doctor deliberately to interrupt life-prolonging treatment in the face of a competent patient's expressed wish to be kept alive, with the intention of thereby terminating the patient's life, would leave the doctor with no answer to a charge of murder.

- If such a patient became incompetent, ANH should continue for as long as it prolonged life. There were, however, circumstances where a doctor might find that ANH was not in the patient's best interest.

Patients without Capacity: Best Interests

- Crucial legal test is that of the ‘best interests’ of the patient.
- Not a medical assessment but an holistic determination of the patient’s welfare.
- Consistent with sanctity of life, when that principle is understood as not extending life at any cost.
- Though *prima facie* autonomy might not seem to apply, there are questions about advance decisions and the like.

"Best interests in patients without capacity: MCA, 2005, S. 4"

Must consider all the relevant circumstances …

Must consider whether it is likely that the person will at some time have capacity…

Must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate …

Where the determination relates to life-sustaining treatment the doctor must not … be motivated by a desire to bring about his death.

Must consider … : (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) … other factors …

Must take into account … 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 by the court …

Patients without capacity: the intolerability test

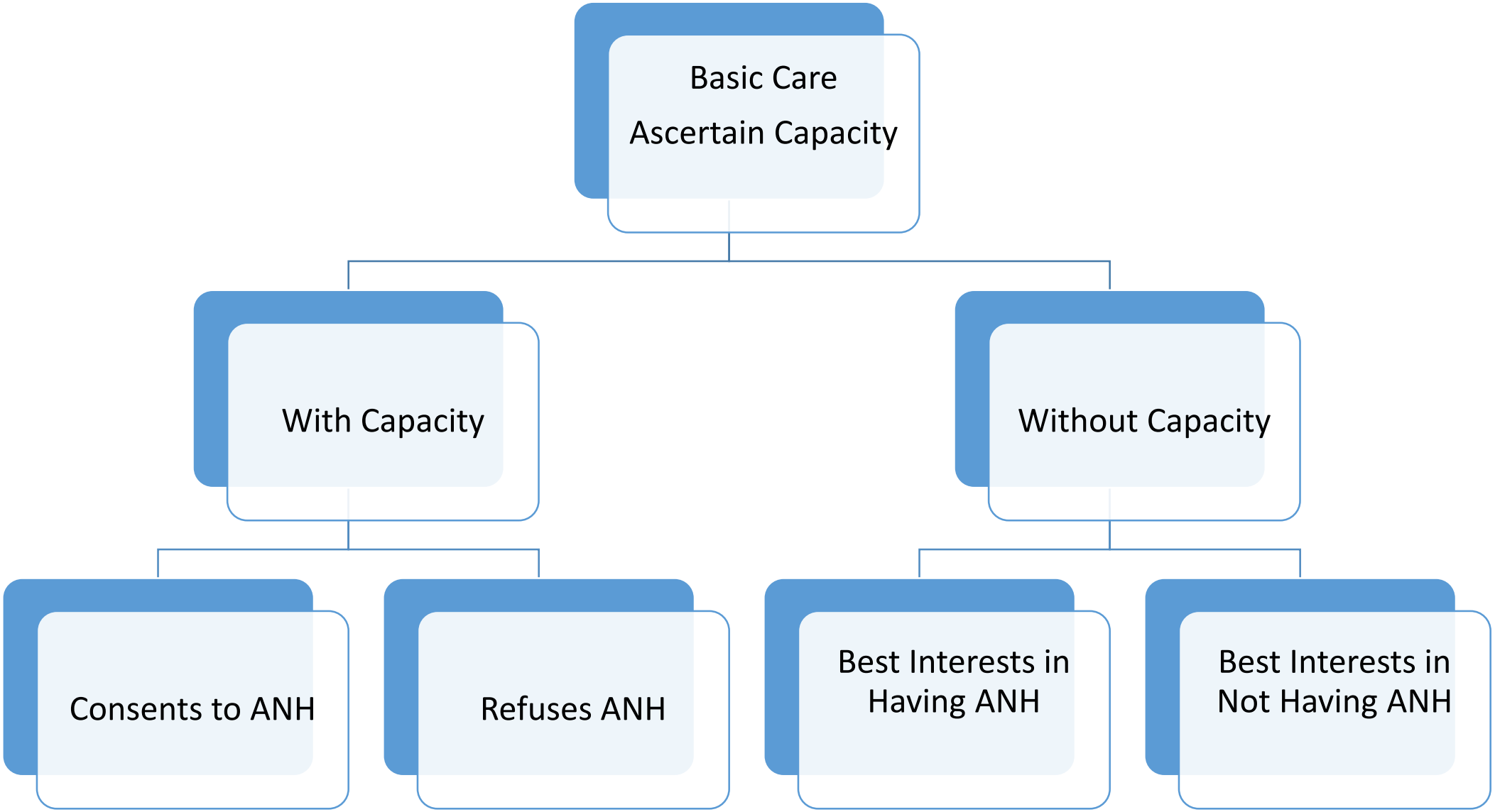
- Legally and ethically, the principle of the sanctity of life creates a presumption in favour maintaining life.
- In *Charlotte Wyatt* and others, this presumption can be over-turned if the continuation of life is 'intolerable'.
- The Court of Appeal has cast doubt on the 'intolerability test', suggesting that only best interests count.
- *But*: We consider that the intolerability test is a useful and practical guide. A hard-pressed clinician is far more likely to be able to answer the question 'Is his life demonstrably intolerable?', than the question 'Is it in his best interests to continue to exist?'.

Process and Procedures: persistent vegetative state

- Current GMC Guidance is to seek legal advice in the case of significant disagreement between physician and those close to patient.
- Lords says that all cases of withdrawal of ANH for PVS patients should go before a court.
- The Court of Protection has cast doubt on the desirability of securing court authorization. *HY currently before Supreme Court*
- But in *Burke*, the judge suggested a list, which the draft report says that it would be wise to seek in such cases.

Munby's List for cases required to go to court

- Where there is any doubt or disagreement as to the capacity (competence) of the patient;
- Where there is a lack of unanimity amongst the attending medical professionals as to
  - the patient's condition or prognosis; or
  - the patient's best interests; or
  - the likely outcome of ANH being either withheld or withdrawn; or
  - otherwise as to whether or not ANH should be withheld or withdrawn;
- Where there is evidence that the patient (even if a child or incompetent) resists or disputes the proposed withdrawal of ANH;
- Where persons having a reasonable claim to have their views taken into account (such as parents or close relatives, partners, close friends, long-term carers) assert that withdrawal of ANH is contrary to the patient's wishes or not in the patient's best interests.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Remaining Dilemmas

- Physicians are required to act in the best interests of patients, which goes beyond purely medical criteria. How can this be done?
- How far does the intolerability test remain a useful way of determining best interests?
- How to resolve the tension between autonomy considerations (MCA, Secs 24-26) and best interests judgements (MCA, Sec 4)
- When should physicians be required to seek the advice of the court?

Patients without Capacity: autonomy and advance directives

- Although a patient lacking capacity cannot exercise autonomous choice, how much respect should be given to advance decisions?
- Advance decisions in MCA, Secs 24-26 refer only to refusals of treatment.
- MCA, Sec 4 requires only that advance decisions provide evidence of best interests.
- Sec 26 seems to make compliance with an advance decision mandatory.
- There is also an issue about personality-transforming conditions.

4. Process and Procedures: Mediation?

- CEIM had a meeting in which the use of mediation between treating physicians and those close to the patient was discussed.
- Mediation similar to processes that occur in other areas of conflict, including family and commercial disputes.
- Has relevance to ANH.