

By Any Other Name: the withdrawal of an Advance Decision.

Apologies for the fact that I'm going to assume that people interested enough to read this piece, already know what an Advance Decision as defined by the Mental Capacity Act (MCA) is.

A few years ago, Mr Justice Poole stated in a ruling, that he believes section 25(2)(c) of the MCA applies even if a person does not have the [mental] capacity to create an Advance Decision. The usual way that a capacitous person would retract an Advance Decision, would be by means of section 25(2)(a) of the MCA, which says that an Advance Decision is not valid if:

the person has withdrawn the decision when he had capacity to do so.

The clearest way to think about this, is that as soon as an Advance Decision has been validly created it exists, and as soon as an Advance Decision has been withdrawn it no longer exists.

Normally a capacitous person would withdraw [or retract] his/her Advance Decision, by saying or writing 'I withdraw my Advance Decision'. As soon as you do that, the Advance Decision no longer exists.

Now, section 25(2)(c) of the MCA, says that an Advance Decision is not valid if:

the person has done anything else clearly inconsistent with the Advance decision remaining his fixed decision.

Surely if a person who is deemed incapacitous says 'I withdraw my Advance Decision' then while the person ISN'T withdrawing the Advance Decision (section 25(2)(a) does not apply because of the person's incapacity), section 25(2)(c) would cause the Advance Decision to become invalid if we apply the ruling of Mr Justice Poole.

So, whatever the mental capacity of a person, if the person says 'I withdraw my Advance Decision' then the Advance Decision becomes invalid, or to express that differently the Advance Decision no longer exists.

I was surprised by Mr Justice Poole's ruling, because I had always considered that 25(2)(c) only applied while the person was capacitous, and covered 'informal retractions'. For example, if a person held up a written Advance

Decision and announced 'This is my Advance Decision' and then, WITHOUT SAYING that he was withdrawing his Advance Decision, he tore it into shreds and dropped the pieces in a bin.

Written by Mike Stone, November 2025