Guidance for mental incapacity updates to consent forms

19 December 2023

Introduction

The following 14 consent forms have been updated to allow patients to consent to the storage, but not use, of their sperm, eggs or embryos in the event that they lose mental capacity: MT, WT, WPT, GS, MGI, WGI, RE, RG, RE (TP), RG (TP), WSG, MSG, MMT and WMT. We have also created a new form (the MIT) to allow patients to consent to the use of their sperm, eggs or embryos in training if they were to become mentally incapacitated. **Only patients who wish to consent to this option need to complete the MIT.**

The new and updated forms are released for information purposes in December 2023. **They come into force on 19 February 2024 and should not be used in clinical practice until that date.**

This document provides guidance to support the implementation of the new mental incapacity sections and explains the options that are now available to patients if they lose mental capacity.

In early 2024, a new 'Consent forms: a guide for clinic staff' will also be published. This document will give guidance on how each consent form should be completed, including guidance on the updated mental incapacity sections.

Important note

Clinics can only store sperm, eggs or embryos beyond the Renewal Period (or, in the case of embryos, 6 months after the end of the Renewal Period) if they are aware that the patient has lost capacity. Therefore, the clinic should inform the patient that they should organise for someone (eg, a relative or friend) to be responsible for informing the clinic if they lose capacity. This will be particularly important for single patients. The discussion and decision should also be recorded on the 'Record of information provided before obtaining consent'. Similarly, the patient should get in touch with the clinic as soon as possible if they are certified as having regained capacity within the 10-year period.

Use and storage of sperm, eggs and embryos for treatment purposes in the event of loss of capacity

This section of the document explains the layout for the new mental incapacity sections and includes guidance on how to fill these sections out correctly.

In each mental incapacity section, the patient should record whether they consent to:

- the continued storage (without use) of their sperm, eggs or embryos after their loss of capacity, or
- the continued storage of their sperm, eggs or embryos **and** for them to be used in treatment by their named partner whilst they are mental incapacitated.

Most mental incapacity sections have two questions – one question about sperm or eggs, the other about embryos created before the patient loses capacity. Forms that deal only with either gametes or embryos only have one question in this section. For each question, patients must choose whether they want their sperm, eggs or embryos to be stored (but not used) (option A), stored **and** used by a named partner (option B) or neither (option C) in the event that they lose mental capacity. The patient should select either option A, B or C and they **must not** select more than one option.

Single patients will not have the option to consent to a partner using their sperm, eggs or embryos in treatment if they were to become mentally incapacitated. This is reflected in the forms.

Once they have ticked the box next to an option, they should complete any questions related to that option which will include specifying how long they wish for their sperm, eggs or embryos to be stored.

Sperm, eggs and embryos can be stored for up to a maximum of 10 years from the date loss of capacity was certified by a registered medical practitioner.

If the patient opts for their named partner to use their sperm, eggs or embryos in treatment whilst they are mentally incapacitated, depending on their circumstances (eg, where treatment would require a surrogate), additional consent forms and screening tests must take place before the patient loses capacity.

Use and storage of sperm, eggs or embryos for training purposes in the event of loss of capacity

The use of sperm, eggs or embryos for training purposes in the event a patient loses capacity is complex and depends on a variety of factors specific to the patient and their individual circumstances. Unlike in the case of death, a patient may subsequently regain capacity and wish to use their sperm, eggs or embryos in treatment. This will not be possible if their material has already been used for training.

Under the law, patients can consent to the use of their sperm, eggs or embryos in training in the event that they lose capacity. If they would like to do so, it is vital that the clinic has discussed all the options and outcomes with them. For this reason, we have created a separate consent form (the MIT) to record this consent.

The MIT does not need to be completed by every patient. Not every patient will wish for their sperm, eggs or embryos to be used in training in the event of their mental incapacity. However, you should discuss the possibility with each patient when they complete their forms for treatment or storage. You should make patients aware that it may be possible to store or use their sperm, eggs or embryos for training where they would otherwise be removed from storage and disposed of. If a patient would like to consent to this option, then they should complete the MIT.

MIT – your consent to storage and use of eggs, sperm or embryos for training purposes in the event you lose mental capacity

Patients should complete this form with the close support of clinic staff to ensure that the consent they give on the MIT form lines up with the consent they have given for the storage and use of their eggs, sperm or embryos in treatment if they were to lose mental capacity. You should discuss with patients that – if they lose mental capacity – they may or may not regain capacity and they should consider both possible outcomes to reach a decision.

The MIT is divided into three sections. Each section uses a table format to record a patient's consent. Clinics should guide patients to complete only those section(s) which accord with the consent given on the treatment and storage, surrogacy or renewal form, remembering that they may have consented to different outcomes for their eggs/sperm or embryos.

Eggs and sperm can be stored for training purposes for up to a maximum of 55 years from the date of first storage.

Embryos can be stored for training purposes for up to a maximum of 10 years from the date the form is signed. This may mean that if more than 10 years has passed it will not be possible for embryos to be used in training even if they have given their consent on this form. Embryos can only be stored and used for training if both egg and sperm providers have given their consent.

Section 3

Section 3 should only be completed by patients who have **not** consented to the continued storage of their eggs, sperm or embryos for treatment purposes if they were to lose mental capacity. Patients should indicate how long they wish for the storage and use for training to continue if they were to lose their capacity, up to the maximum period allowed by law.

If they consent to this option, their material can be used for training purposes once the clinic is notified that the patient has lost capacity.

Section 4

Section 4 should only be completed by patients who have consented to the continued storage of their eggs, sperm or embryos for treatment purposes if they were to lose mental capacity (whether they have also consented to use by a partner or not). Patients should select whether they wish for their eggs, sperm or embryos to be stored and used for training purposes if they were to lose capacity and how long they wish for storage to continue.

If they consent to this option, their material can be used for training purposes if the material can no longer legally be stored for treatment (eg, because it has been more than 10 years since they lost capacity or, in the case of embryos, because the other gamete provider has withdrawn consent to storage for treatment).

Section 5

Section 5 should only be completed by patients who have consented to their named partner using their eggs, sperm or embryos in treatment whilst they are mentally incapacitated. Patients should select whether they wish for their eggs, sperm or embryos to be stored and used for training purposes if they were to lose capacity and how long they wish for storage to continue.

Section 5 records what a patient's wishes are if eggs, sperm or embryos are not clinically viable for the treatment of their partner. For example, whilst a patient is incapacitated their partner may use their eggs or sperm to create embryos. Some (or all) of those embryos may not be clinically viable for treatment. If the patient consents to this option, any eggs, sperm or embryos which are not suitable for treatment can be used in training when they may otherwise be disposed of.

Unlike in the case of death, the patient **cannot** consent for their eggs, sperm or embryos to be used in training in the event that their partner **does not want to use** that material whilst they are incapacitated.

Patients do not have this option because (unlike in the case of death) it is possible that they will regain capacity and subsequently want to use the eggs, sperm or embryos in treatment.

If the embryos are created using the partner's gametes, the partner **can** withdraw consent to storage for treatment purposes. The patient can record their wishes were the other gamete provider to withdraw consent at section 4.

Declaration

Patients should sign the declaration at the end of the form. It is important that they also sign the declaration on every page.

Guidance for patients who regain capacity

We set out our guidance relating to patients who regain capacity in guidance note 17 of the **Code of Practice** and in paragraph 3.5.6 of the **Clinic Guide.** It is vitally important that patients know that, should they lose and subsequently regain capacity, they should inform the clinic as soon as possible so they can renew their consent. As part of this renewal of consent process, clinics should assess whether the patient's circumstances have changed and ensure that their current wishes are reflected in their renewal of consent form(s).