



# Mental Capacity Act 2005

## 2005 CHAPTER 9

An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes.  
[7th April 2005]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

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**Modifications etc. (not altering text)**

C1 Act applied (E.W.) (1.4.2015 for specified purposes) by [Care Act 2014 \(c. 23\)](#), [ss. 80\(2\)](#), 127(1); [S.I. 2015/993](#), [art. 2\(u\)](#) (with transitional provisions in [S.I. 2015/995](#))

## PART 1

### PERSONS WHO LACK CAPACITY

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**Modifications etc. (not altering text)**

C2 Pt. 1 applied (1.12.2017) by [The Court of Protection Rules 2017 \(S.I. 2017/1035\)](#), [rules 23.3](#), 24.6(1)

### *The principles*

#### 1 The principles

(1) The following principles apply for the purposes of this Act.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (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.

#### **Commencement Information**

- II** S. 1 wholly in force at 1.10.2007; s. 1 not in force at Royal Assent see s. 68(1)-(3); s. 1 in force for certain purposes at 1.4.2007 by [S.I. 2007/563](#), arts. [1\(2\)\(3\)](#), [2\(2\)\(a\)\(3\)](#) and s. 1 in force otherwise at 1.10.2007 by [S.I. 2007/1897](#), art. [2\(2\)\(a\)](#)

### *Preliminary*

## **2 People who lack capacity**

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
  - (a) a 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 his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person (“D”) may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or
  - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

#### **Modifications etc. (not altering text)**

- C3** [S. 2](#) applied (temp.) (1.4.2015) by [The Health and Social Care Act 2008 \(Regulated Activities\) Regulations 2014 \(S.I. 2014/2936\)](#), regs. [1\(5\)\(6\)](#), [8\(3\)](#)

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Commencement Information

- I2** S. 2 wholly in force at 1.10.2007; s. 2 not in force at Royal Assent see s. 68(1)-(3); s. 2 in force for certain purposes at 1.4.2007 by S.I. 2007/563, arts. 1(2)(3), 2(2)(b)(3) and s. 2 in force otherwise at 1.10.2007 by S.I. 2007/1897, art. 2(2)(b)

### 3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- to understand the information relevant to the decision,
  - to retain that information,
  - to use or weigh that information as part of the process of making the decision, or
  - to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- deciding one way or another, or
  - failing to make the decision.

#### Modifications etc. (not altering text)

- C4** S. 3 applied (temp.) (1.4.2015) by The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (S.I. 2014/2936), regs. 1(5)(6), 8(3)

#### Commencement Information

- I3** S. 3 wholly in force at 1.10.2007; s. 3 not in force at Royal Assent see s. 68(1)-(3); s. 3 in force for certain purposes at 1.4.2007 by S.I. 2007/563, arts. 1(2)(3), 2(2)(c)(3) and s. 3 in force otherwise at 1.10.2007 by S.I. 2007/1897, art. 2(2)(c)

### 4 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—
- the person's age or appearance, or
  - 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—

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- (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).
- (8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—
- (a) are exercisable under a lasting power of attorney, or
  - (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.
- (9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.
- (10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.
- (11) “Relevant circumstances” are those—
- (a) of which the person making the determination is aware, and
  - (b) which it would be reasonable to regard as relevant.

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**Modifications etc. (not altering text)**

- C5** S. 4 applied by SI 2010/781 reg. 18 (as substituted (18.6.2012) by [The Health and Social Care Act 2008 \(Regulated Activities\) \(Amendment\) Regulations 2012 \(S.I. 2012/1513\)](#), regs. 1(2)(a), **5**)
- C6** S. 4(1)-(7) applied (E.) (1.6.2010) by [The National Health Service \(Direct Payments\) Regulations 2010 \(S.I. 2010/1000\)](#), **art. 1(3)**

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Commencement Information

- I4** S. 4 wholly in force at 1.10.2007; s. 4 not in force at Royal Assent see s. 68(1)-(3); s. 4 in force for certain purposes at 1.4.2007 by [S.I. 2007/563](#), arts. 1(2)(3), **2(2)(d)(3)** and s. 4 in force otherwise at 1.10.2007 by [S.I. 2007/1897](#), art. **2(2)(d)**

#### 4A Restriction on deprivation of liberty

- (1) This Act does not authorise any person (“D”) to deprive any other person (“P”) of his liberty.
- (2) But that is subject to—
  - (a) the following provisions of this section, and
  - (b) section 4B.
- (3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.
- (4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.
- (5) [<sup>F1</sup>D may deprive P of liberty if, by doing so, D is carrying out arrangements authorised under Schedule AA1 (arrangements enabling the care and treatment of persons who lack capacity).]

#### Textual Amendments

- F1** S. 4A(5) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019](#) (c. 18), ss. **1(2)**, 6(3)

#### 4B [<sup>F2</sup>Deprivation of liberty necessary for life-sustaining treatment etc][<sup>F2</sup>Deprivation of liberty necessary for life-sustaining treatment or vital act]

- [<sup>F2</sup>(1) If Conditions 1 to 4 are met, D is authorised to take steps which deprive P of liberty.
- (2) Condition 1 is that the steps—
    - (a) are wholly or partly for the purpose of giving P life-sustaining treatment or doing any vital act, or
    - (b) consist wholly or partly of giving P life-sustaining treatment or doing any vital act.
  - (3) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.
  - (4) Condition 2 is that the steps are necessary in order to give the life-sustaining treatment or do the vital act.
  - (5) Condition 3 is that D reasonably believes that P lacks capacity to consent to D taking the steps.
  - (6) Condition 4 is that—
    - (a) subsection (7) applies, or
    - (b) there is an emergency.

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- (7) This subsection applies if—
- (a) a decision relevant to whether D is authorised to deprive P of liberty is being sought from the court, or
  - (b) a responsible body is carrying out functions under Schedule AA1 with a view to determining whether to authorise arrangements that give rise to a deprivation of P’s liberty.
- (8) In subsection (7) it does not matter—
- (a) whether the decision mentioned in paragraph (a) relates to the steps mentioned in subsection (1);
  - (b) whether the arrangements mentioned in paragraph (b) include those steps.
- (9) There is an emergency if D reasonably believes that—
- (a) there is an urgent need to take the steps mentioned in subsection (1) in order to give the life-sustaining treatment or do the vital act, and
  - (b) it is not reasonably practicable before taking those steps—
    - (i) to make an application for P to be detained under Part 2 of the Mental Health Act,
    - (ii) to make an application within subsection (7)(a), or
    - (iii) to secure that action within subsection (7)(b) is taken.]

#### Textual Amendments

- F2** S. 4B substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), **ss. 2, 6(3)**

#### [<sup>F3</sup>4C **Carrying out of authorised arrangements giving rise to deprivation of liberty**

- (1) This section applies to an act that a person (“D”) does in carrying out arrangements authorised under Schedule AA1.
- (2) D does not incur any liability in relation to the act that would not have been incurred if the cared-for person—
  - (a) had had capacity to consent in relation to D doing the act, and
  - (b) had consented to D doing the act.
- (3) Nothing in this section excludes a person’s civil liability for loss or damage, or a person’s criminal liability, resulting from that person’s negligence in doing the act.
- (4) Paragraph 31 of Schedule AA1 applies if an authorisation ceases to have effect in certain cases.
- (5) “Cared-for person” has the meaning given by paragraph 2(1) of that Schedule.]

#### Textual Amendments

- F3** S. 4C inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), **ss. 1(3), 6(3)**

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## **5 Acts in connection with care or treatment**

- (1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if—
  - (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
  - (b) when doing the act, D reasonably believes—
    - (i) that P lacks capacity in relation to the matter, and
    - (ii) that it will be in P's best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that he would not have incurred if P—
  - (a) had had capacity to consent in relation to the matter, and
  - (b) had consented to D's doing the act.
- (3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.
- (4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment).

## **6 Section 5 acts: limitations**

- (1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (3) The second is that the act is a proportionate response to—
  - (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.
- (4) For the purposes of this section D restrains P if he—
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists.
- (5) <sup>F4</sup> .....
- (6) Section 5 does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by—
  - (a) a donee of a lasting power of attorney granted by P, or
  - (b) a deputy appointed for P by the court.
- (7) But nothing in subsection (6) stops a person—
  - (a) providing life-sustaining treatment, or
  - (b) doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition,while a decision as respects any relevant issue is sought from the court.

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*Status: Point in time view as at 31/12/2020.*

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### Textual Amendments

- F4** S. 6(5) repealed (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50(4)(a), 55, 56, [Sch. 11 Pt. 10](#); [S.I. 2009/139](#), [art. 2\(b\)\(f\)](#) (with [art. 3](#))

## 7 Payment for necessary goods and services

- (1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.
- (2) “Necessary” means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.

## 8 Expenditure

- (1) If an act to which section 5 applies involves expenditure, it is lawful for D—
  - (a) to pledge P's credit for the purpose of the expenditure, and
  - (b) to apply money in P's possession for meeting the expenditure.
- (2) If the expenditure is borne for P by D, it is lawful for D—
  - (a) to reimburse himself out of money in P's possession, or
  - (b) to be otherwise indemnified by P.
- (3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person—
  - (a) has lawful control of P's money or other property, and
  - (b) has power to spend money for P's benefit.

### *Lasting powers of attorney*

## 9 Lasting powers of attorney

- (1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following—
  - (a) P's personal welfare or specified matters concerning P's personal welfare, and
  - (b) P's property and affairs or specified matters concerning P's property and affairs,
 and which includes authority to make such decisions in circumstances where P no longer has capacity.
- (2) A lasting power of attorney is not created unless—
  - (a) section 10 is complied with,
  - (b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and
  - (c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.
- (3) An instrument which—
  - (a) purports to create a lasting power of attorney, but



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- (b) does not comply with this section, section 10 or Schedule 1, confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to—
  - (a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and
  - (b) any conditions or restrictions specified in the instrument.

**Modifications etc. (not altering text)**

- C7 S. 9 applied (temp.) (1.4.2015) by [The Health and Social Care Act 2008 \(Regulated Activities\) Regulations 2014 \(S.I. 2014/2936\)](#), regs. 1(5)(6), **14(5)**

## 10 Appointment of donees

- (1) A donee of a lasting power of attorney must be—
  - (a) an individual who has reached 18, or
  - (b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.
- (2) An individual who is bankrupt<sup>F5</sup> or is a person in relation to whom a debt relief order is made] may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.
- (3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
- (4) The instrument may appoint them to act—
  - (a) jointly,
  - (b) jointly and severally, or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.
- (6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.
- (7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—
  - (a) prevents the appointment taking effect in his case, but
  - (b) does not prevent a lasting power of attorney from being created in the case of the other or others.
- (8) An instrument used to create a lasting power of attorney—
  - (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but
  - (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Textual Amendments

**F5** Words in s. 10(2) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007](#) (Consequential Amendments) Order 2012 (S.I. 2012/2404), art. 1, **Sch. 2 para. 53(2)** (with art. 5)

### 11 Lasting powers of attorney: restrictions

- (1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain P, unless three conditions are satisfied.
- (2) The first condition is that P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question.
- (3) The second is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (4) The third is that the act is a proportionate response to—
  - (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.
- (5) For the purposes of this section, the donee restrains P if he—
  - (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists, or if he authorises another person to do any of those things.
- (6) <sup>F6</sup> .....
- (7) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about P's personal welfare, the authority—
  - (a) does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity,
  - (b) is subject to sections 24 to 26 (advance decisions to refuse treatment), and
  - (c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.
- (8) But subsection (7)(c)—
  - (a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and
  - (b) is subject to any conditions or restrictions in the instrument.

#### Textual Amendments

**F6** S. 11(6) repealed (1.4.2009) by [Mental Health Act 2007](#) (c. 12), ss. 50(4)(b), 55, 56, **Sch. 11 Pt. 10**; S.I. 2009/139, **art. 2(b)(f)** (with art. 3)

### 12 Scope of lasting powers of attorney: gifts

- (1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them)

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to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

- (2) The donee may make gifts—
- (a) on customary occasions to persons (including himself) who are related to or connected with the donor, or
  - (b) to any charity to whom the donor made or might have been expected to make gifts,
- if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.
- (3) “Customary occasion” means—
- (a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or
  - (b) any other occasion on which presents are customarily given within families or among friends or associates.
- (4) Subsection (2) is subject to any conditions or restrictions in the instrument.

### **13 Revocation of lasting powers of attorney etc.**

- (1) This section applies if—
- (a) P has executed an instrument with a view to creating a lasting power of attorney, or
  - (b) a lasting power of attorney is registered as having been conferred by P,
- and in this section references to revoking the power include revoking the instrument.
- (2) P may, at any time when he has capacity to do so, revoke the power.
- (3) P's bankruptcy<sup>F7</sup>, or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of P,] revokes the power so far as it relates to P's property and affairs.
- (4) But where P is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him<sup>F8</sup> or where P is subject to an interim debt relief restrictions order (under Schedule 4ZB of the Insolvency Act 1986)], the power is suspended, so far as it relates to P's property and affairs, for so long as the order has effect.
- (5) The occurrence in relation to a donee of an event mentioned in subsection (6)—
- (a) terminates his appointment, and
  - (b) except in the cases given in subsection (7), revokes the power.
- (6) The events are—
- (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor,
  - (b) subject to subsections (8) and (9), the death or bankruptcy of the donee<sup>F9</sup> or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of the donee] or, if the donee is a trust corporation, its winding-up or dissolution,
  - (c) subject to subsection (11), the dissolution or annulment of a marriage or civil partnership between the donor and the donee,
  - (d) the lack of capacity of the donee.

*Status: Point in time view as at 31/12/2020.*

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- (7) The cases are—
- (a) the donee is replaced under the terms of the instrument,
  - (b) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.
- (8) The bankruptcy of a donee<sup>F10</sup> or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of a donee] does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.
- (9) Where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him<sup>F11</sup> or where the donee is subject to an interim debt relief restrictions order (under Schedule 4ZB of the Insolvency Act 1986), his appointment and the power are suspended, so far as they relate to P's property and affairs, for so long as the order has effect.
- (10) Where the donee is one of two or more appointed to act jointly and severally under the power in respect of any matter, the reference in subsection (9) to the suspension of the power is to its suspension in so far as it relates to that donee.
- (11) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

#### Textual Amendments

- F7** Words in s. 13(3) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(3)(a)** (with art. 5)
- F8** Words in s. 13(4) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(3)(b)** (with arts. 5, 6)
- F9** Words in s. 13(6)(b) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(3)(c)** (with art. 5)
- F10** Words in s. 13(8) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(3)(d)** (with art. 5)
- F11** Words in s. 13(9) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(3)(e)** (with arts. 5, 6)

## 14 Protection of donee and others if no power created or power revoked

- (1) Subsections (2) and (3) apply if—
- (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
  - (b) a lasting power of attorney was not created,
- whether or not the registration has been cancelled at the time of the act or transaction in question.
- (2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he—
- (a) knows that a lasting power of attorney was not created, or

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.
- (3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).
- (4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—
  - (a) the transaction was completed within 12 months of the date on which the instrument was registered, or
  - (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.
- (5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs.
- (6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

#### *General powers of the court and appointment of deputies*

### **15 Power to make declarations**

- (1) The court may make declarations as to—
  - (a) whether a person has or lacks capacity to make a decision specified in the declaration;
  - (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
  - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
- (2) “Act” includes an omission and a course of conduct.

### **16 Powers to make decisions and appoint deputies: general**

- (1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning—
  - (a) P's personal welfare, or
  - (b) P's property and affairs.
- (2) The court may—
  - (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
  - (b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
- (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
  - (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
  - (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.
- (5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
- (6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.
- (7) An order of the court may be varied or discharged by a subsequent order.
- (8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—
  - (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or
  - (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

## **16A [F12Section 16 powers: Mental Health Act patients etc]**

- [F12(1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.
- (2) If—
- (a) a welfare order includes provision which authorises a person to be deprived of his liberty, and
  - (b) that person becomes ineligible to be deprived of liberty by this Act, the provision ceases to have effect for as long as the person remains ineligible.
- (3) Nothing in subsection (2) affects the power of the court under section 16(7) to vary or discharge the welfare order.
- (4) For the purposes of this section—
- (a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;
  - (b) “welfare order” means an order under section 16(2)(a).]

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### **Textual Amendments**

**F12** S. 16A omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 2\(a\)](#)

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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## **17 Section 16 powers: personal welfare**

- (1) The powers under section 16 as respects P's personal welfare extend in particular to—
  - (a) deciding where P is to live;
  - (b) deciding what contact, if any, P is to have with any specified persons;
  - (c) making an order prohibiting a named person from having contact with P;
  - (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
  - (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.
- (2) Subsection (1) is subject to section 20 (restrictions on deputies).

## **18 Section 16 powers: property and affairs**

- (1) The powers under section 16 as respects P's property and affairs extend in particular to—
  - (a) the control and management of P's property;
  - (b) the sale, exchange, charging, gift or other disposition of P's property;
  - (c) the acquisition of property in P's name or on P's behalf;
  - (d) the carrying on, on P's behalf, of any profession, trade or business;
  - (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
  - (f) the carrying out of any contract entered into by P;
  - (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
  - (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
  - (i) the execution for P of a will;
  - (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
  - (k) the conduct of legal proceedings in P's name or on P's behalf.
- (2) No will may be made under subsection (1)(i) at a time when P has not reached 18.
- (3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.
- (4) Schedule 2 supplements the provisions of this section.
- (5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.
- (6) Subsection (1) is subject to section 20 (restrictions on deputies).

## **19 Appointment of deputies**

- (1) A deputy appointed by the court must be—
  - (a) an individual who has reached 18, or

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.
- (2) The court may appoint an individual by appointing the holder for the time being of a specified office or position.
- (3) A person may not be appointed as a deputy without his consent.
- (4) The court may appoint two or more deputies to act—
  - (a) jointly,
  - (b) jointly and severally, or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies—
  - (a) in such circumstances, or on the happening of such events, as may be specified by the court;
  - (b) for such period as may be so specified.
- (6) A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.
- (7) The deputy is entitled—
  - (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and
  - (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.
- (8) The court may confer on a deputy powers to—
  - (a) take possession or control of all or any specified part of P's property;
  - (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.
- (9) The court may require a deputy—
  - (a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
  - (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

## **20 Restrictions on deputies**

- (1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter.
- (2) Nothing in section 16(5) or 17 permits a deputy to be given power—
  - (a) to prohibit a named person from having contact with P;
  - (b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.
- (3) A deputy may not be given powers with respect to—
  - (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) the execution for P of a will, or
  - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- (4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).
- (5) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P.
- (6) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests).
- (7) A deputy may not do an act that is intended to restrain P unless four conditions are satisfied.
- (8) The first condition is that, in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court.
- (9) The second is that P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question.
- (10) The third is that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (11) The fourth is that the act is a proportionate response to—
- (a) the likelihood of P's suffering harm, <sup>F13</sup>and<sup>F13</sup>
  - (b) the seriousness of that harm.
- (12) For the purposes of this section, a deputy restrains P if he—
- (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists,
- or if he authorises another person to do any of those things.
- (13) <sup>F14</sup> .....

**Textual Amendments**

**F13** Word in s. 20(11)(a) substituted (1.10.2007) by [Mental Health Act 2007 \(c. 12\)](#), ss. 51, 56; S.I. 2007/2635, art. 2

**F14** S. 20(13) repealed (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50(4)(c), 55, 56, [Sch. 11 Pt. 10](#); S.I. 2009/139, art. 2(b)(f) (with art. 3)

**21 Transfer of proceedings relating to people under 18**

- <sup>F15</sup>(1)<sup>F15</sup> The <sup>F16</sup>Lord Chief Justice, with the concurrence of the Lord Chancellor,<sup>F16</sup> may by order make provision as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order—
- (a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or
  - (b) from a court having jurisdiction under that Act to the Court of Protection.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

[<sup>F17</sup>(2) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).]<sup>F17</sup>

#### Textual Amendments

- F15** S. 21 renumbered as s. 21(1) (3.4.2006) by virtue of [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006](#) (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(2)**
- F16** Words in s. 21(1) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006](#) (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(3)**
- F17** S. 21(2) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006](#) (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(4)**

#### <sup>F18</sup>*Powers of the court in relation to Schedule AA1*

#### Textual Amendments

- F18** [S. 21ZA](#) and cross-heading inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019](#) (c. 18), **ss. 3, 6(3)**

### **21ZA Powers of court in relation to Schedule AA1**

- (1) This section applies where an authorisation under Schedule AA1—
  - (a) has effect, or
  - (b) is to have effect from a date specified under paragraph 28 of that Schedule.
- (2) The court may determine any question relating to—
  - (a) whether Schedule AA1 applies to the arrangements, or whether the authorisation conditions are met;
  - (b) what period the authorisation has effect for;
  - (c) what the authorisation relates to.
- (3) If the court determines a question under subsection (2), the court may make an order—
  - (a) varying or terminating the authorisation;
  - (b) directing the responsible body to vary the authorisation.
- (4) Where the court makes an order under subsection (3) the court may make an order about a person’s liability for anything done in carrying out the arrangements before the variation or termination.
- (5) An order under subsection (4) may, in particular, exclude a person from liability.
- (6) “Authorisation conditions” has the meaning given by paragraph 13 of Schedule AA1.]

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### *[<sup>F19</sup>Powers of the court in relation to Schedule A1]*

#### **Textual Amendments**

- F19** S. 21A and cross-heading omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 2\(b\)](#)

## **21A Powers of court in relation to Schedule A1**

- [<sup>F19</sup>(1) This section applies if either of the following has been given under Schedule A1—
- (a) a standard authorisation;
  - (b) an urgent authorisation.
- (2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—
- (a) whether the relevant person meets one or more of the qualifying requirements;
  - (b) the period during which the standard authorisation is to be in force;
  - (c) the purpose for which the standard authorisation is given;
  - (d) the conditions subject to which the standard authorisation is given.
- (3) If the court determines any question under subsection (2), the court may make an order—
- (a) varying or terminating the standard authorisation, or
  - (b) directing the supervisory body to vary or terminate the standard authorisation.
- (4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—
- (a) whether the urgent authorisation should have been given;
  - (b) the period during which the urgent authorisation is to be in force;
  - (c) the purpose for which the urgent authorisation is given.
- (5) Where the court determines any question under subsection (4), the court may make an order—
- (a) varying or terminating the urgent authorisation, or
  - (b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.
- (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.
- (7) An order under subsection (6) may, in particular, exclude a person from liability.]

### *Powers of the court in relation to lasting powers of attorney*

## **22 Powers of court in relation to validity of lasting powers of attorney**

- (1) This section and section 23 apply if —
- (a) a person (“P”) has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or
  - (b) an instrument has been registered as a lasting power of attorney conferred by P.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (2) The court may determine any question relating to—
  - (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;
  - (b) whether the power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the court is satisfied—
  - (a) that fraud or undue pressure was used to induce P—
    - (i) to execute an instrument for the purpose of creating a lasting power of attorney, or
    - (ii) to create a lasting power of attorney, or
  - (b) that the donee (or, if more than one, any of them) of a lasting power of attorney—
    - (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or
    - (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.
- (4) The court may—
  - (a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or
  - (b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.
- (5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.
- (6) “Donee” includes an intended donee.

## **23 Powers of court in relation to operation of lasting powers of attorney**

- (1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.
- (2) The court may—
  - (a) give directions with respect to decisions—
    - (i) which the donee of a lasting power of attorney has authority to make, and
    - (ii) which P lacks capacity to make;
  - (b) give any consent or authorisation to act which the donee would have to obtain from P if P had capacity to give it.
- (3) The court may, if P lacks capacity to do so—
  - (a) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;
  - (b) require the donee to supply information or produce documents or things in his possession as donee;
  - (c) give directions with respect to the remuneration or expenses of the donee;
  - (d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).
- (5) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

#### *Advance decisions to refuse treatment*

### **24 Advance decisions to refuse treatment: general**

- (1) “Advance decision” means a decision made by a person (“P”), after he has reached 18 and when he has capacity to do so, that if—
  - (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
  - (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,the specified treatment is not to be carried out or continued.
- (2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.
- (3) P may withdraw or alter an advance decision at any time when he has capacity to do so.
- (4) A withdrawal (including a partial withdrawal) need not be in writing.
- (5) An alteration of an advance decision need not be in writing (unless section 25(5) applies in relation to the decision resulting from the alteration).

### **25 Validity and applicability of advance decisions**

- (1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to P unless the decision is at the material time—
  - (a) valid, and
  - (b) applicable to the treatment.
- (2) An advance decision is not valid if P—
  - (a) has withdrawn the decision at a time when he had capacity to do so,
  - (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or
  - (c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.
- (3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.
- (4) An advance decision is not applicable to the treatment in question if—
  - (a) that treatment is not the treatment specified in the advance decision,
  - (b) any circumstances specified in the advance decision are absent, or

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.
- (5) An advance decision is not applicable to life-sustaining treatment unless—
  - (a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
  - (b) the decision and statement comply with subsection (6).
- (6) A decision or statement complies with this subsection only if—
  - (a) it is in writing,
  - (b) it is signed by P or by another person in P's presence and by P's direction,
  - (c) the signature is made or acknowledged by P in the presence of a witness, and
  - (d) the witness signs it, or acknowledges his signature, in P's presence.
- (7) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

## **26 Effect of advance decisions**

- (1) If P has made an advance decision which is—
  - (a) valid, and
  - (b) applicable to a treatment,
 the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.
- (2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment.
- (3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment.
- (4) The court may make a declaration as to whether an advance decision—
  - (a) exists;
  - (b) is valid;
  - (c) is applicable to a treatment.
- (5) Nothing in an apparent advance decision stops a person—
  - (a) providing life-sustaining treatment, or
  - (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition,
 while a decision as respects any relevant issue is sought from the court.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### *Excluded decisions*

## **27 Family relationships etc.**

(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person—

- (a) consenting to marriage or a civil partnership,
- (b) consenting to have sexual relations,
- (c) consenting to a decree of divorce being granted on the basis of two years' separation,
- (d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation,
- (e) consenting to a child's being placed for adoption by an adoption agency,
- (f) consenting to the making of an adoption order,
- (g) discharging parental responsibilities in matters not relating to a child's property,
- (h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37).

[<sup>F20</sup>(i) giving a consent under the Human Fertilisation and Embryology Act 2008.]

<sup>F20</sup>(2) “Adoption order” means—

- (a) an adoption order within the meaning of the Adoption and Children Act 2002 (c. 38) (including a future adoption order), and
- (b) an order under section 84 of that Act (parental responsibility prior to adoption abroad).

#### **Textual Amendments**

**F20** S. 27(1)(i) inserted (6.4.2009) by [Human Fertilisation and Embryology Act 2008 \(c. 22\)](#), ss. 56, 68, [Sch. 6 para. 40](#); [S.I. 2009/479](#), [art. 6\(1\)\(d\)](#) (with transitional provisions in [art. 7 Sch. 1](#))

#### **Modifications etc. (not altering text)**

**C8** S. 27(1)(g) restricted (1.9.2014) by [The Special Educational Needs and Disability Regulations 2014 \(S.I. 2014/1530\)](#), regs. 1, [65](#)

**C9** S. 27(1)(g) excluded (1.4.2015) by [The Special Educational Needs and Disability \(Detained Persons\) Regulations 2015 \(S.I. 2015/62\)](#), regs. 1, [33](#)

**C10** S. 27(1)(g) restricted by [2010 c. 15, Sch. 17 para. 6F](#) (as inserted (2.11.2020 for specified purposes) by [Additional Learning Needs and Education Tribunal \(Wales\) Act 2018 \(anaw 2\)](#), s. 100(3), [Sch. 1 para. 19\(5\)\(h\)](#); [S.I. 2020/1182](#), reg. 3(1)(n))

**C11** S. 27(1)(g): power to restrict conferred (2.11.2020 for specified purposes) by [Additional Learning Needs and Education Tribunal \(Wales\) Act 2018 \(anaw 2\)](#), [ss. 83](#), 100(3); [S.I. 2020/1182](#), reg. 3(1)(j)

## **28 Mental Health Act matters**

(1) Nothing in this Act authorises anyone—

- (a) to give a patient medical treatment for mental disorder, or
- (b) to consent to a patient's being given medical treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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[<sup>F21</sup>(1A) Subsection (1) does not apply in relation to any form of treatment to which section 58A of that Act (electro-convulsive therapy, etc.) applies if the patient comes within subsection (7) of that section (informal patient under 18 who cannot give consent).]

<sup>F21</sup>[<sup>F22</sup>(1B) Section 5 does not apply to an act to which section 64B of the Mental Health Act applies (treatment of community patients not recalled to hospital).]

<sup>F22</sup>(2) “Medical treatment”, “mental disorder” and “patient” have the same meaning as in that Act.

#### Textual Amendments

**F21** S. 28(1A) inserted (3.11.2008) by [Mental Health Act 2007 \(c. 12\)](#), **ss. 28(10)**, 56; S.I. 2008/1900, **art. 2(g)** (with [art. 3](#), Sch.)

**F22** S. 28(1B) inserted (3.11.2008) by [Mental Health Act 2007 \(c. 12\)](#), **ss. 35(5)**, 56; S.I. 2008/1900, **art. 2(k)** (with [art. 3](#), Sch.)

## 29 Voting rights

- (1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.
- (2) “Referendum” has the same meaning as in section 101 of the Political Parties, Elections and Referendums Act 2000 (c. 41).

### *Research*

## 30 Research

- (1) Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out—
  - (a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and
  - (b) in accordance with sections 32 and 33.
- (2) Research is intrusive if it is of a kind that would be unlawful if it was carried out—
  - (a) on or in relation to a person who had capacity to consent to it, but
  - (b) without his consent.
- (3) A clinical trial which is subject to the provisions of clinical trials regulations is not to be treated as research for the purposes of this section.

[<sup>F23</sup>(3A) Research is not intrusive to the extent that it consists of the use of a person's human cells to bring about the creation *in vitro* of an embryo or human admixed embryo, or the subsequent storage or use of an embryo or human admixed embryo so created.

(3B) Expressions used in subsection (3A) and in Schedule 3 to the Human Fertilisation and Embryology Act 1990 (consents to use or storage of gametes, embryos or human admixed embryos etc.) have the same meaning in that subsection as in that Schedule.]



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- <sup>F23</sup>(4) “Appropriate body”, in relation to a research project, means the person, committee or other body specified in regulations made by the appropriate authority as the appropriate body in relation to a project of the kind in question.
- (5) “Clinical trials regulations” means—
- (a) the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) and any other regulations replacing those regulations or amending them, and
  - (b) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of this section.
- (6) In this section, section 32 and section 34, “appropriate authority” means—
- (a) in relation to the carrying out of research in England, the Secretary of State, and
  - (b) in relation to the carrying out of research in Wales, the National Assembly for Wales.

#### Textual Amendments

**F23** S. 30(3A)(3B) inserted (1.10.2009) by [Human Fertilisation and Embryology Act 2008 \(c. 22\)](#), ss. 65, 68, [Sch. 7 para. 25](#); [S.I. 2009/2232](#), [art. 2\(y\)](#)

#### Commencement Information

**I5** S. 30 wholly in force at 1.10.2008; s. 30 not in force at Royal Assent see s. 68(1)-(3); s. 30 in force for certain purposes at 1.7.2007 and 1.10.2007 and in force at 1.10.2008 in so far as not already in force by [S.I. 2006/2814](#), [arts. 2, 3, 4](#) (as amended by [S.I. 2006/3473](#), [art. 2](#)); [S.I. 2007/856](#), [arts. 2, 3, 4](#)

## 31 Requirements for approval

- (1) The appropriate body may not approve a research project for the purposes of this Act unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity to consent to taking part in the project (“P”).
- (2) The research must be connected with—
  - (a) an impairing condition affecting P, or
  - (b) its treatment.
- (3) “Impairing condition” means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain.
- (4) There must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it.
- (5) The research must—
  - (a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or
  - (b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (6) If the research falls within paragraph (b) of subsection (5) but not within paragraph (a), there must be reasonable grounds for believing—
- (a) that the risk to P from taking part in the project is likely to be negligible, and
  - (b) that anything done to, or in relation to, P will not—
    - (i) interfere with P's freedom of action or privacy in a significant way, or
    - (ii) be unduly invasive or restrictive.
- (7) There must be reasonable arrangements in place for ensuring that the requirements of sections 32 and 33 will be met.

#### Commencement Information

**I6** S. 31 wholly in force at 1.10.2008; s. 31 not in force at Royal Assent see s. 68(1)-(3); s. 31 in force for certain purposes at 1.7.2007 and 1.10.2007 and in force at 1.10.2008 in so far as not already in force by S.I. 2006/2814, **arts. 2, 3, 4** (as amended by S.I. 2006/3473, **art. 2**); S.I. 2007/856, **arts. 2, 3, 4**

### 32 Consulting carers etc.

- (1) This section applies if a person (“R”)—
- (a) is conducting an approved research project, and
  - (b) wishes to carry out research, as part of the project, on or in relation to a person (“P”) who lacks capacity to consent to taking part in the project.
- (2) R must take reasonable steps to identify a person who—
- (a) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P's welfare, and
  - (b) is prepared to be consulted by R under this section.
- (3) If R is unable to identify such a person he must, in accordance with guidance issued by the appropriate authority, nominate a person who—
- (a) is prepared to be consulted by R under this section, but
  - (b) has no connection with the project.
- (4) R must provide the person identified under subsection (2), or nominated under subsection (3), with information about the project and ask him—
- (a) for advice as to whether P should take part in the project, and
  - (b) what, in his opinion, P's wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter.
- (5) If, at any time, the person consulted advises R that in his opinion P's wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure—
- (a) if P is not already taking part in the project, that he does not take part in it;
  - (b) if P is taking part in the project, that he is withdrawn from it.
- (6) But subsection (5)(b) does not require treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.
- (7) The fact that a person is the donee of a lasting power of attorney given by P, or is P's deputy, does not prevent him from being the person consulted under this section.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (8) Subsection (9) applies if treatment is being, or is about to be, provided for P as a matter of urgency and R considers that, having regard to the nature of the research and of the particular circumstances of the case—
- (a) it is also necessary to take action for the purposes of the research as a matter of urgency, but
  - (b) it is not reasonably practicable to consult under the previous provisions of this section.
- (9) R may take the action if—
- (a) he has the agreement of a registered medical practitioner who is not involved in the organisation or conduct of the research project, or
  - (b) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by the appropriate body at the time when the research project was approved under section 31.
- (10) But R may not continue to act in reliance on subsection (9) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency.

#### **Commencement Information**

- I7** S. 32 wholly in force at 1.10.2008; s. 32 not in force at Royal Assent see s. 68(1)-(3); s. 32 in force for certain purposes at 1.7.2007 and 1.10.2007 and in force at 1.10.2008 in so far as not already in force by S.I. 2006/2814, **arts. 2, 3, 4** (as amended by S.I. 2006/3473, **art. 2**); S.I. 2007/856, **arts. 2, 3, 4**

### **33 Additional safeguards**

- (1) This section applies in relation to a person who is taking part in an approved research project even though he lacks capacity to consent to taking part.
- (2) Nothing may be done to, or in relation to, him in the course of the research—
- (a) to which he appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect him from harm or to reduce or prevent pain or discomfort, or
  - (b) which would be contrary to—
    - (i) an advance decision of his which has effect, or
    - (ii) any other form of statement made by him and not subsequently withdrawn,of which R is aware.
- (3) The interests of the person must be assumed to outweigh those of science and society.
- (4) If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay.
- (5) P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements set out in section 31(2) to (7) is no longer met in relation to research being carried out on, or in relation to, P.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (6) But neither subsection (4) nor subsection (5) requires treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.

#### Commencement Information

- 18** S. 33 wholly in force at 1.10.2008; s. 33 not in force at Royal Assent see s. 68(1)-(3); s. 33 in force for certain purposes at 1.7.2007 and 1.10.2007 and in force at 1.10.2008 in so far as not already in force by S.I. 2006/2814, **arts. 2, 3, 4** (as amended by S.I. 2006/3473, **art. 2**); S.I. 2007/856, **arts. 2, 3, 4**

### 34 Loss of capacity during research project

- (1) This section applies where a person (“P”)—
- (a) has consented to take part in a research project begun before the commencement of section 30, but
  - (b) before the conclusion of the project, loses capacity to consent to continue to take part in it.
- (2) The appropriate authority may by regulations provide that, despite P's loss of capacity, research of a prescribed kind may be carried out on, or in relation to, P if—
- (a) the project satisfies prescribed requirements,
  - (b) any information or material relating to P which is used in the research is of a prescribed description and was obtained before P's loss of capacity, and
  - (c) the person conducting the project takes in relation to P such steps as may be prescribed for the purpose of protecting him.
- (3) The regulations may, in particular,—
- (a) make provision about when, for the purposes of the regulations, a project is to be treated as having begun;
  - (b) include provision similar to any made by section 31, 32 or 33.

#### Commencement Information

- 19** S. 34 wholly in force at 1.10.2008; s. 34 not in force at Royal Assent see s. 68(1)-(3); s. 34 in force for certain purposes at 1.7.2007 and 1.10.2007 and in force at 1.10.2008 in so far as not already in force by S.I. 2006/2814, **arts. 2, 3, 4** (as amended by S.I. 2006/3473, **art. 2**); S.I. 2007/856, **arts. 2, 3, 4**

#### *Independent mental capacity advocate service*

### 35 Appointment of independent mental capacity advocates

- (1) The [F24]responsible authority] must make such arrangements as it considers reasonable to enable persons (“independent mental capacity advocates”) to be [F25]available to represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate or persons who fall within section 39A, 39C or 39D.] [F25]available to—
- (a) represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate,
  - (b) represent and support cared-for persons where paragraph 42 of Schedule AA1 applies, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (c) support appropriate persons where paragraph 43 of Schedule AA1 applies.]
- (2) The appropriate authority may make regulations as to the appointment of independent mental capacity advocates.
- (3) The regulations may, in particular, provide—
- (a) that a person may act as an independent mental capacity advocate only in such circumstances, or only subject to such conditions, as may be prescribed;
  - (b) for the appointment of a person as an independent mental capacity advocate to be subject to approval in accordance with the regulations.
- (4) In making arrangements under subsection (1), the [<sup>F26</sup>responsible authority] must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision.
- (5) The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.
- (6) For the purpose of enabling him to carry out his functions, an independent mental capacity advocate—
- (a) may interview in private the person whom he has been instructed to represent, and
  - (b) may, at all reasonable times, examine and take copies of—
    - (i) any health record,
    - (ii) any record of, or held by, a local authority and compiled in connection with a social services function, and
    - (iii) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) [<sup>F27</sup>, Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2)],which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.
- [<sup>F28</sup>(6A) In subsections (1) and (4), “ the responsible authority ” means—
- (a) in relation to the provision of the services of independent mental capacity advocates in the area of a local authority in England, that local authority, and
  - (b) in relation to the provision of the services of independent mental capacity advocates in Wales, the Welsh Ministers.]

[<sup>F28</sup>(6B) In subsection (6A)(a), “ local authority ” has the meaning given in section 64(1) except that it does not include the council of a county or county borough in Wales. ]

(7) In this section, section 36 and section 37, “the appropriate authority” means—

    - (a) in relation to the provision of the services of independent mental capacity advocates in England, the Secretary of State, and
    - (b) in relation to the provision of the services of independent mental capacity advocates in Wales, the National Assembly for Wales.

#### Textual Amendments

**F24** Words in s. 35(1) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 134\(a\)](#); [S.I. 2013/160](#), art. 2(2) (with arts. 7-9)

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- F25** Words in s. 35(1) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 3](#)
- F26** Words in s. 35(4) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\), Sch. 5 para. 134\(b\); S.I. 2013/160, art. 2\(2\) \(with arts. 7-9\)](#)
- F27** Words in s. 35(6)(b)(iii) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\), regs. 2\(1\), 28](#)
- F28** S. 35(6A)(6B) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\), Sch. 5 para. 134\(c\); S.I. 2013/160, art. 2\(2\) \(with arts. 7-9\)](#)

#### Modifications etc. (not altering text)

- C12** S. 35 extended (E.) (1.11.2006 for certain purposes and otherwise 1.4.2007) by [The Mental Capacity Act 2005 \(Independent Mental Capacity Advocates\) \(Expansion of Role\) Regulations 2006 \(S.I. 2006/2883\), regs. 1\(2\), 2-4](#)

#### Commencement Information

- I10** S. 35 wholly in force at 1.10.2007; s. 35 not in force at Royal Assent see s. 68(1)-(3); s. 35 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814, art. 5](#); s. 35 in force at 1.10.2007 for W. by [S.I. 2007/856, art. 5](#)

## 36 Functions of independent mental capacity advocates

- (1) The appropriate authority may make regulations as to the functions of independent mental capacity advocates.
- (2) The regulations may, in particular, make provision requiring an advocate to take such steps as may be prescribed for the purpose of—
  - (a) providing support to the person whom he has been instructed to represent<sup>[F29]</sup> (“P”) so that P<sup>[F29]</sup> or support so that that person] may participate as fully as possible in any relevant decision;
  - (b) obtaining and evaluating relevant information;
  - (c) ascertaining what <sup>[F30]</sup>P’s wishes and feelings<sup>[F30]</sup> the wishes and feelings of the person the advocate has been instructed to represent (“P”) would be likely to be, and the beliefs and values that would be likely to influence P, if he had capacity;
  - (d) ascertaining what alternative courses of action are available in relation to P;
  - <sup>[F31]</sup>(da) in the case of an advocate instructed to support an appropriate person where paragraph 43 of Schedule AA1 applies, supporting that person to ascertain—
    - (i) what the wishes and feelings of the cared-for person who that appropriate person represents and supports would be likely to be and the beliefs and values that would be likely to influence the cared-for person;
    - (ii) what alternative courses of action are available in relation to the cared-for person who that appropriate person represents and supports;]
  - (e) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained.
- (3) The regulations may also make provision as to circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging, any relevant decision.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Textual Amendments

- F29** Words in s. 36(2)(a) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 4\(2\)](#)
- F30** Words in s. 36(2)(c) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 4\(3\)](#)
- F31** S. 36(2)(da) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 4\(4\)](#)

#### Commencement Information

- I11** S. 36 wholly in force at 1.10.2007; s. 36 not in force at Royal Assent see s. 68(1)-(3); s. 36 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814, art. 5](#); s. 36 in force at 1.10.2007 for W. by [S.I. 2007/856, art. 5](#)

### 37 Provision of serious medical treatment by NHS body

- (1) This section applies if an NHS body—
- is proposing to provide, or secure the provision of, serious medical treatment for a person (“P”) who lacks capacity to consent to the treatment, and
  - is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.
- (2) But this section does not apply if P's treatment is regulated by Part 4 [<sup>F32</sup>or 4A]<sup>F32</sup> of the Mental Health Act.
- (3) Before the treatment is provided, the NHS body must instruct an independent mental capacity advocate to represent P.
- (4) If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with subsection (3).
- (5) The NHS body must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the independent mental capacity advocate.
- (6) “Serious medical treatment” means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority.
- (7) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by—
- the Secretary of State, in relation to bodies in England, or
  - the National Assembly for Wales, in relation to bodies in Wales.

#### Textual Amendments

- F32** Words in s. 37(2) inserted (3.11.2008) by [Mental Health Act 2007 \(c. 12\), ss. 35\(6\), 56; S.I. 2008/1900, art. 2\(k\)](#) (with [art. 3, Sch.](#))

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### Commencement Information

**I12** S. 37 wholly in force at 1.10.2007; s. 37 not in force at Royal Assent see s. 68(1)-(3); s. 37 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 37 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

## 38 Provision of accommodation by NHS body

- (1) This section applies if an NHS body proposes to make arrangements—
- (a) for the provision of accommodation in a hospital or care home for a person (“P”) who lacks capacity to agree to the arrangements, or
  - (b) for a change in P’s accommodation to another hospital or care home,
- and is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for it to consult in determining what would be in P’s best interests.
- (2) But this section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.
- (2A) [<sup>F33</sup> And this section does not apply if—
- (a) an independent mental capacity advocate is appointed under paragraph 42 of Schedule AA1 to represent and support P, and
  - (b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the hospital or care home referred to in this section.]
- (3) Before making the arrangements [<sup>F34</sup> mentioned in subsection (1)], the NHS body must instruct an independent mental capacity advocate to represent P unless it is satisfied that—
- (a) the accommodation is likely to be provided for a continuous period which is less than the applicable period, or
  - (b) the arrangements need to be made as a matter of urgency.
- (4) If the NHS body—
- (a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because it was satisfied that subsection (3)(a) or (b) applied, but
  - (b) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period—
- (i) beginning with the day on which accommodation was first provided in accordance with the arrangements, and
  - (ii) ending on or after the expiry of the applicable period,
- it must instruct an independent mental capacity advocate to represent P.
- (5) The NHS body must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.
- [<sup>F35</sup>(6) “Care home” means—
- (a) a care home in England within the meaning given in section 3 of the Care Standards Act 2000 (c. 14), and



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 is provided wholly or mainly to persons aged 18 or over.]
- [<sup>F36</sup>(7) “Hospital” means—
- (a) in relation to England, a hospital as defined by section 275 of the National Health Service Act 2006; and
  - (b) in relation to Wales, a health service hospital as defined by section 206 of the National Health Service (Wales) Act 2006 or an independent hospital as defined by section 2 of the Care Standards Act 2000.]
- (8) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by—
- (a) the Secretary of State, in relation to bodies in England, or
  - (b) the National Assembly for Wales, in relation to bodies in Wales.
- (9) “Applicable period” means—
- (a) in relation to accommodation in a hospital, 28 days, and
  - (b) in relation to accommodation in a care home, 8 weeks.
- (10) [<sup>F37</sup>For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P’s representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration.]

#### Textual Amendments

- F33** S. 38(2A) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 5\(2\)](#)
- F34** Words in s. 38(3) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 5\(3\)](#)
- F35** S. 38(6) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), [regs. 2\(1\), 9](#)
- F36** S. 38(7) substituted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\)](#), [art. 17\(3\)](#)
- F37** S. 38(10) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 5\(4\)](#)

#### Commencement Information

- I13** S. 38 wholly in force at 1.10.2007; s. 38 not in force at Royal Assent see s. 68(1)-(3); s. 38 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 38 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

### 39 Provision of accommodation by local authority

- (1) This section applies if a local authority propose to make arrangements—
- (a) for the provision of residential accommodation for a person (“P”) who lacks capacity to agree to the arrangements, or
  - (b) for a change in P’s residential accommodation,
- and are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for them to consult in determining what would be in P’s best interests.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- <sup>F38</sup>(1A) But this section applies only if—
- (a) in the case of a local authority in England, subsection (1B) applies;
  - (b) in the case of a local authority in Wales, subsection (2) applies.]
- <sup>F39</sup>(1B) This subsection applies if the accommodation is to be provided in accordance with—
- (a) Part 1 of the Care Act 2014, or
  - (b) section 117 of the Mental Health Act.]
- (2) [<sup>F40</sup>This subsection applies] if the accommodation is to be provided in accordance with—
- <sup>F41</sup>(a) Part 4 of the Social Services and Well-being (Wales) Act 2014; or]
  - (b) section 117 of the Mental Health Act,
- <sup>F42</sup> ...
- (3) This section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.
- (3A) [<sup>F43</sup>And this section does not apply if—
- (a) an independent mental capacity advocate is appointed under paragraph 42 of Schedule AA1 to represent and support P, and
  - (b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the residential accommodation referred to in this section.]
- <sup>F44</sup>(4) Before making the arrangements [<sup>F45</sup>mentioned in subsection (1)] , the local authority must instruct an independent mental capacity advocate to represent P unless they are satisfied that—
- (a) the accommodation is likely to be provided for a continuous period of less than 8 weeks, or
  - (b) the arrangements need to be made as a matter of urgency.
- (5) If the local authority—
- (a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because they were satisfied that subsection (4)(a) or (b) applied, but
  - (b) subsequently have reason to believe that the accommodation is likely to be provided for a continuous period that will end 8 weeks or more after the day on which accommodation was first provided in accordance with the arrangements,
- they must instruct an independent mental capacity advocate to represent P.
- (6) The local authority must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.
- (7) [<sup>F46</sup> For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration. ]

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### Textual Amendments

- F38** S. 39(1A) inserted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(2)** (with arts. 1(3), 3)
- F39** S. 39(1B) inserted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(3)** (with arts. 1(3), 3)
- F40** Words in s. 39(2) substituted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(4)** (with arts. 1(3), 3)
- F41** S. 39(2)(a) substituted (6.4.2016) by [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **227(a)**
- F42** Words in s. 39(2)(b) omitted (6.4.2016) by virtue of [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **227(b)**
- F43** S. 39(3A) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 6(2)**
- F44** S. 39(3A) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, **Sch. 9 para. 5(2)**; [S.I. 2009/139](#), **art. 2(e)** (with art. 3)
- F45** Words in s. 39(4) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 6(3)**
- F46** S. 39(7) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 6(4)**

### Commencement Information

- I14** S. 39 wholly in force at 1.10.2007; s. 39 not in force at Royal Assent see s. 68(1)-(3); s. 39 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), **art. 5**; s. 39 in force at 1.10.2007 for W. by [S.I. 2007/856](#), **art. 5**

## 39A Person becomes subject to Schedule A1

- [<sup>F47</sup>(1) This section applies if—
- (a) a person (“P”) becomes subject to Schedule A1, and
  - (b) the managing authority of the relevant hospital or care home are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.
- (2) The managing authority must notify the supervisory body that this section applies.
- (3) The supervisory body must instruct an independent mental capacity advocate to represent P.
- (4) Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.
- (5) This section is subject to paragraph 161 of Schedule A1.
- (6) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration.]

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Textual Amendments

**F47** Ss. 39A-39E omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 7](#)

### 39B Section 39A: supplementary provision

- [<sup>F47</sup>(1) This section applies for the purposes of section 39A.
- (2) P becomes subject to Schedule A1 in any of the following cases.
  - (3) The first case is where an urgent authorisation is given in relation to P under paragraph 76(2) of Schedule A1 (urgent authorisation given before request made for standard authorisation).
  - (4) The second case is where the following conditions are met.
  - (5) The first condition is that a request is made under Schedule A1 for a standard authorisation to be given in relation to P (“the requested authorisation”).
  - (6) The second condition is that no urgent authorisation was given under paragraph 76(2) of Schedule A1 before that request was made.
  - (7) The third condition is that the requested authorisation will not be in force on or before, or immediately after, the expiry of an existing standard authorisation.
  - (8) The expiry of a standard authorisation is the date when the authorisation is expected to cease to be in force.
  - (9) The third case is where, under paragraph 69 of Schedule A1, the supervisory body select a person to carry out an assessment of whether or not the relevant person is a detained resident.]

#### Textual Amendments

**F47** Ss. 39A-39E omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 7](#)

### 39C Person unrepresented whilst subject to Schedule A1

- [<sup>F47</sup>(1) This section applies if—
- (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) the appointment of a person as P’s representative ends in accordance with regulations made under Part 10 of Schedule A1, and
  - (c) the managing authority of the relevant hospital or care home are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P’s best interests.
- (2) The managing authority must notify the supervisory body that this section applies.
  - (3) The supervisory body must instruct an independent mental capacity advocate to represent P.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) Paragraph 159 of Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.
- (5) The appointment of an independent mental capacity advocate under this section ends when a new appointment of a person as P's representative is made in accordance with Part 10 of Schedule A1.
- (6) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration.]

#### Textual Amendments

**F47** Ss. 39A-39E omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 7](#)

### 39D Person subject to Schedule A1 without paid representative

- [<sup>F47</sup>(1) This section applies if—
- (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) P has a representative (“R”) appointed under Part 10 of Schedule A1, and
  - (c) R is not being paid under regulations under Part 10 of Schedule A1 for acting as P's representative.
- (2) The supervisory body must instruct an independent mental capacity advocate to represent P in any of the following cases.
- (3) The first case is where P makes a request to the supervisory body to instruct an advocate.
- (4) The second case is where R makes a request to the supervisory body to instruct an advocate.
- (5) The third case is where the supervisory body have reason to believe one or more of the following—
- (a) that, without the help of an advocate, P and R would be unable to exercise one or both of the relevant rights;
  - (b) that P and R have each failed to exercise a relevant right when it would have been reasonable to exercise it;
  - (c) that P and R are each unlikely to exercise a relevant right when it would be reasonable to exercise it.
- (6) The duty in subsection (2) is subject to section 39E.
- (7) If an advocate is appointed under this section, the advocate is, in particular, to take such steps as are practicable to help P and R to understand the following matters—
- (a) the effect of the authorisation;
  - (b) the purpose of the authorisation;
  - (c) the duration of the authorisation;
  - (d) any conditions to which the authorisation is subject;

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*Status: Point in time view as at 31/12/2020.*

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- (e) the reasons why each assessor who carried out an assessment in connection with the request for the authorisation, or in connection with a review of the authorisation, decided that P met the qualifying requirement in question;
  - (f) the relevant rights;
  - (g) how to exercise the relevant rights.
- (8) The advocate is, in particular, to take such steps as are practicable to help P or R—
- (a) to exercise the right to apply to court, if it appears to the advocate that P or R wishes to exercise that right, or
  - (b) to exercise the right of review, if it appears to the advocate that P or R wishes to exercise that right.
- (9) If the advocate helps P or R to exercise the right of review—
- (a) the advocate may make submissions to the supervisory body on the question of whether a qualifying requirement is reviewable;
  - (b) the advocate may give information, or make submissions, to any assessor carrying out a review assessment.
- (10) In this section—
- “relevant rights” means—
    - (a) the right to apply to court, and
    - (b) the right of review;
  - “right to apply to court” means the right to make an application to the court to exercise its jurisdiction under section 21A;
  - “right of review” means the right under Part 8 of Schedule A1 to request a review.]

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#### **Textual Amendments**

**F47** Ss. 39A-39E omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 7](#)

### **39E Limitation on duty to instruct advocate under section 39D**

- [<sup>F47</sup>(1) This section applies if an advocate is already representing P in accordance with an instruction under section 39D.
- (2) Section 39D(2) does not require another advocate to be instructed, unless the following conditions are met.
- (3) The first condition is that the existing advocate was instructed—
- (a) because of a request by R, or
  - (b) because the supervisory body had reason to believe one or more of the things in section 39D(5).
- (4) The second condition is that the other advocate would be instructed because of a request by P.]

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Textual Amendments

- F47** Ss. 39A-39E omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 7](#)

## 40 Exceptions

- [<sup>F48</sup>(1)] The duty imposed by section 37(3), 38(3) or (4) [<sup>F49</sup>, 39(4) or (5), 39A(3), 39C(3) or 39D(2)] [<sup>F49</sup> or 39(4) or (5)]<sup>F50</sup> does not apply where there is—
- (a) a person nominated by P (in whatever manner) as a person to be consulted on matters to which that duty relates,
  - (b) a donee of a lasting power of attorney created by P who is authorised to make decisions in relation to those matters, or
  - (c) a deputy appointed by the court for P with power to make decisions in relation to those matters.
- (2) [<sup>F51</sup>A person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, a person nominated by P as a person to be consulted in matters to which a duty mentioned in subsection (1) relates.]

#### Textual Amendments

- F48** S. 40 renumbered as s. 40(1) (1.4.2009) by virtue of [The Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(2\)](#); [S.I. 2009/139](#), [art. 2\(e\)](#) (with [art. 3](#))
- F49** Words in s. 40(1) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 8\(a\)](#)
- F50** Words in s. 40(1) substituted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(3\)](#); [S.I. 2009/139](#), [art. 2\(e\)](#) (with [art. 3](#))
- F51** S. 40(2) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 8\(b\)](#)

#### Commencement Information

- I15** S. 40 wholly in force at 1.10.2007; s. 40 not in force at Royal Assent see s. 68(1)-(3); s. 40 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 40 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

## 41 Power to adjust role of independent mental capacity advocate

- (1) The appropriate authority may make regulations—
- (a) expanding the role of independent mental capacity advocates in relation to persons who lack capacity, and
  - (b) adjusting the obligation to make arrangements imposed by section 35.
- (2) The regulations may, in particular—
- (a) prescribe circumstances (different to those set out in sections 37, 38 and 39) in which an independent mental capacity advocate must, or circumstances in which one may, be instructed by a person of a prescribed description to represent a person who lacks capacity, and
  - (b) include provision similar to any made by section 37, 38, 39 or 40.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

(3) “Appropriate authority” has the same meaning as in section 35.

#### Commencement Information

**I16** S. 41 wholly in force at 1.10.2007; s. 41 not in force at Royal Assent see s. 68(1)-(3); s. 41 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 41 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

#### Miscellaneous and supplementary

## 42 Codes of practice

- (1) The Lord Chancellor must prepare and issue one or more codes of practice—
- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
  - (b) for the guidance of persons acting in connection with the care or treatment of another person (see section 5),
  - (c) for the guidance of donees of lasting powers of attorney,
  - (d) for the guidance of deputies appointed by the court,
  - (e) for the guidance of persons carrying out research in reliance on any provision made by or under this Act (and otherwise with respect to sections 30 to 34),
  - (f) for the guidance of independent mental capacity advocates,
  - (fa) [<sup>F52</sup>for the guidance of persons exercising functions under Schedule AA1,]
  - (fb) [<sup>F52</sup>for the guidance of appropriate persons within paragraph [42\(5\)](#) of Schedule AA1,]
  - <sup>F53</sup>(g) with respect to the provisions of sections 24 to 26 (advance decisions and apparent advance decisions), and
  - (h) with respect to such other matters concerned with this Act as he thinks fit.

[<sup>F54</sup>(1A) Guidance about what kinds of arrangements for enabling the care or treatment of a person fall within paragraph 2(1)(b) of Schedule AA1 must be included in the code, or one of the codes, issued under subsection (1).]

(2) The Lord Chancellor may from time to time revise a code.

[<sup>F55</sup>(2A) Before the end of each review period the Lord Chancellor must—

- (a) review each code for the guidance of persons exercising functions under Schedule AA1, and
- (b) lay a report of the review before Parliament.

But this does not affect the Lord Chancellor’s functions under subsection (2).

(2B) A review period is—

- (a) in relation to the first review, the period of 3 years beginning with the day on which this subsection comes into force, and
- (b) in relation to subsequent reviews, each period of 5 years beginning with the day on which the report of the previous review was laid before Parliament.]

(3) The Lord Chancellor may delegate the preparation [<sup>F56</sup>, review] or revision of the whole or any part of a code so far as he considers expedient.



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways—
- (a) as the donee of a lasting power of attorney,
  - (b) as a deputy appointed by the court,
  - (c) as a person carrying out research in reliance on any provision made by or under this Act (see sections 30 to 34),
  - (d) as an independent mental capacity advocate,
  - (da) [<sup>F57</sup>in the exercise of functions under Schedule AA1,]
  - (db) [<sup>F57</sup>as an appropriate person within paragraph 42(5) of Schedule AA1,]
  - <sup>F58</sup>(e) in a professional capacity,
  - (f) for remuneration.
- (5) If it appears to a court or tribunal conducting any criminal or civil proceedings that—
- (a) a provision of a code, or
  - (b) a failure to comply with a code,
- is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.
- (6) A code under subsection (1)(d) may contain separate guidance for deputies appointed by virtue of paragraph 1(2) of Schedule 5 (functions of deputy conferred on receiver appointed under the Mental Health Act).
- (7) In this section and in section 43, “code” means a code prepared or revised under this section.

#### Textual Amendments

- F52** S. 42(1)(fa)(fb) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 9\(2\)](#)
- F53** S. 42(1)(fa)(fb) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 8\(2\)](#); [S.I. 2008/745](#), [art. 4\(b\)](#)
- F54** S. 42(1A) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(2\)](#), 6(3)
- F55** S. 42(2A)(2B) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(3\)](#), 6(3)
- F56** Word in s. 42(3) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(4\)](#), 6(3)
- F57** S. 42(4)(da)(db) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 9\(3\)](#)
- F58** S. 42(4)(da)(db) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 8\(3\)](#); [S.I. 2008/745](#), [art. 4\(b\)](#)

#### Commencement Information

- I17** S. 42 wholly in force at 1.10.2007; s. 42 not in force at Royal Assent see s. 68(1)-(3); s. 42(1)(2)(3)(6)(7) in force for E.W. and s. 42(4)(5) in force for certain purposes for E. at 1.4.2007 by [S.I. 2007/563](#), [arts. 1\(2\)\(3\)](#), [2\(2\)\(e\)\(3\)](#); s. 42(4)(5) in force for all purposes at 1.10.2007 by [S.I. 2007/1897](#), [art. 2\(2\)\(e\)](#)

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### **43 Codes of practice: procedure**

- (1) Before preparing or revising a code, the Lord Chancellor must consult—
  - (a) the National Assembly for Wales, and
  - (b) such other persons as he considers appropriate.
- (2) The Lord Chancellor may not issue a code unless—
  - (a) a draft of the code has been laid by him before both Houses of Parliament, and
  - (b) the 40 day period has elapsed without either House resolving not to approve the draft.
- (3) The Lord Chancellor must arrange for any code that he has issued to be published in such a way as he considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions.
- (4) “40 day period”, in relation to the draft of a proposed code, means—
  - (a) if the draft is laid before one House on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days;
  - (b) in any other case, the period of 40 days beginning with the day on which it is laid before each House.
- (5) In calculating the period of 40 days, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

### **44 Ill-treatment or neglect**

- (1) Subsection (2) applies if a person (“D”)—
  - (a) has the care of a person (“P”) who lacks, or whom D reasonably believes to lack, capacity,
  - (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
  - (c) is a deputy appointed by the court for P.
- (2) D is guilty of an offence if he ill-treats or wilfully neglects P.
- (3) A person guilty of an offence under this section is liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

## PART 2

### THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN

#### *The Court of Protection*

#### 45 The Court of Protection

- (1) There is to be a superior court of record known as the Court of Protection.
- (2) The court is to have an official seal.
- (3) The court may sit at any place in England and Wales, on any day and at any time.
- (4) The court is to have a central office and registry at a place appointed by the Lord Chancellor [F59, after consulting the Lord Chief Justice]F59.
- (5) The Lord Chancellor may [F60, after consulting the Lord Chief Justice.]F60 designate as additional registries of the court any district registry of the High Court and any county court office.

[F61(5A) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).]

F61(6) The office of the Supreme Court called the Court of Protection ceases to exist.

#### Textual Amendments

- F59** Words in s. 45(4) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 32(2)**
- F60** Words in s. 45(5) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 32(3)**
- F61** S. 45(5A) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 32(4)**

#### 46 The judges of the Court of Protection

- (1) Subject to Court of Protection Rules under section 51(2)(d), the jurisdiction of the court is exercisable by a judge nominated for that purpose by—
  - (a) the [F62Lord Chief Justice]F62, or
  - [F63(b) where nominated by the Lord Chief Justice to act on his behalf under this subsection—
    - (i) the President of the Court of Protection; or
    - (ii) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).]

F63(2) To be nominated, a judge must be—

- (a) the President of the Family Division,
- (b) the [F64Chancellor of the High Court],

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (c) a puisne judge of the High Court,
  - (d) a circuit judge, <sup>F65</sup> ...
  - (e) a district judge.
  - [<sup>F66</sup>(f) a District Judge (Magistrates' Courts),]
  - [<sup>F66</sup>(g) a judge of the First-tier Tribunal, or of the Upper Tribunal, by virtue of appointment under paragraph 1(1) of Schedule 2 or 3 to the Tribunals, Courts and Enforcement Act 2007,]
  - [<sup>F66</sup>(h) a transferred-in judge of the First-tier Tribunal or of the Upper Tribunal (see section 31(2) of that Act),]
  - [<sup>F66</sup>(i) a deputy judge of the Upper Tribunal (whether under paragraph 7 of Schedule 3 to, or section 31(2) of, that Act),]
  - [<sup>F66</sup>(j) the Chamber President, or Deputy Chamber President, of a chamber of the First-tier Tribunal or of a chamber of the Upper Tribunal,]
  - [<sup>F66</sup>(k) the Judge Advocate General,]
  - [<sup>F66</sup>(l) a Recorder,]
  - [<sup>F66</sup>(m) the holder of an office listed in the first column of the table in section 89(3C) of the Senior Courts Act 1981 (senior High Court Masters etc ), ]
  - [<sup>F66</sup>(n) a holder of an office listed in column 1 of Part 2 of Schedule 2 to that Act (High Court Masters etc ), ]
  - [<sup>F66</sup>(o) a deputy district judge appointed under section 102 of that Act or under section 8 of the County Courts Act 1984,]
  - [<sup>F66</sup>(p) a member of a panel of Employment Judges established for England and Wales or for Scotland,]
  - [<sup>F66</sup>(q) a person appointed under section 30(1)(a) or (b) of the Courts-Martial (Appeals) Act 1951 (assistants to the Judge Advocate General),]
  - [<sup>F66</sup>(r) a deputy judge of the High Court,]
  - [<sup>F66</sup>(s) the Senior President of Tribunals,]
  - [<sup>F66</sup>(t) an ordinary judge of the Court of Appeal (including the vice-president, if any, of either division of that court),]
  - [<sup>F66</sup>(u) the President of the Queen's Bench Division,]
  - [<sup>F66</sup>(v) the Master of the Rolls, or]
  - [<sup>F66</sup>(w) the Lord Chief Justice.]
- (3) The [<sup>F67</sup>Lord Chief Justice, after consulting the Lord Chancellor,]<sup>F67</sup> must—
- (a) appoint one of the judges nominated by virtue of subsection (2)(a) to (c) to be President of the Court of Protection, and
  - (b) appoint another of those judges to be Vice-President of the Court of Protection.
- (4) The [<sup>F68</sup>Lord Chief Justice, after consulting the Lord Chancellor,]<sup>F68</sup> must appoint one of the judges nominated by virtue of subsection (2)(d) [<sup>F69</sup>to (q)] to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor [<sup>F70</sup>, after consulting the Lord Chief Justice,]<sup>F70</sup> may direct.

#### Textual Amendments

**F62** Words in s. 46(1)(a) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 33(2)**

**F63** S. 46(1)(b) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 33(3)**

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- F64** Words in s. 46(2)(b) substituted (1.10.2013) by [Crime and Courts Act 2013 \(c. 22\), s. 61\(3\), Sch. 14 para. 5\(3\)](#); S.I. 2013/2200, art. 3(g)
- F65** Word in s. 46(2)(d) omitted (1.10.2013) by virtue of [Crime and Courts Act 2013 \(c. 22\), s. 61\(3\), Sch. 14 para. 5\(2\)](#); S.I. 2013/2200, art. 3(g)
- F66** S. 46(2)(f)-(w) inserted (1.10.2013) by [Crime and Courts Act 2013 \(c. 22\), s. 61\(3\), Sch. 14 para. 5\(2\)](#); S.I. 2013/2200, art. 3(g)
- F67** Words in s. 46(3) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\), arts. 1, 2, Sch. 1 para. 33\(4\)](#)
- F68** Words in s. 46(4) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\), arts. 1, 2, Sch. 1 para. 33\(5\)\(a\)](#)
- F69** Words in s. 46(4) substituted (1.10.2013) by [Crime and Courts Act 2013 \(c. 22\), s. 61\(3\), Sch. 14 para. 5\(4\)](#); S.I. 2013/2200, art. 3(g)
- F70** Words in s. 46(4) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\), arts. 1, 2, Sch. 1 para. 33\(5\)\(b\)](#)

### *Supplementary powers*

#### **47 General powers and effect of orders etc.**

- (1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.
- (2) Section 204 of the Law of Property Act 1925 (c. 20) (orders of High Court conclusive in favour of purchasers) applies in relation to orders and directions of the court as it applies to orders of the High Court.
- (3) Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal are admissible in all legal proceedings as evidence of the originals without any further proof.

#### **48 Interim orders and directions**

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

#### **49 Power to call for reports**

- (1) This section applies where, in proceedings brought in respect of a person (“P”) under Part 1, the court is considering a question relating to P.
- (2) The court may require a report to be made to it by the Public Guardian or by a Court of Protection Visitor.
- (3) The court may require a local authority, or an NHS body, to arrange for a report to be made—
  - (a) by one of its officers or employees, or
  - (b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) The report must deal with such matters relating to P as the court may direct.
- (5) Court of Protection Rules may specify matters which, unless the court directs otherwise, must also be dealt with in the report.
- (6) The report may be made in writing or orally, as the court may direct.
- (7) In complying with a requirement, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of—
  - (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) [<sup>F71</sup>, Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016], so far as the record relates to P.
- (8) If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement, he may interview P in private.
- (9) If a Court of Protection Visitor who is a Special Visitor is making a visit in the course of complying with a requirement, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.
- (10) “NHS body” has the meaning given in section 148 of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43).
- (11) “Requirement” means a requirement imposed under subsection (2) or (3).

#### **Textual Amendments**

**F71** Words in s. 49(7)(c) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), **regs. 2(1), 30**

### *Practice and procedure*

## **50 Applications to the Court of Protection**

- (1) No permission is required for an application to the court for the exercise of any of its powers under this Act—
  - (a) by a person who lacks, or is alleged to lack, capacity,
  - (b) if such a person has not reached 18, by anyone with parental responsibility for him,
  - (c) by the donor or a donee of a lasting power of attorney to which the application relates,
  - (d) by a deputy appointed by the court for a person to whom the application relates, or
  - (e) by a person named in an existing order of the court, if the application relates to the order.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (1A) [<sup>F72</sup>Nor is permission required for an application to the court under section 21ZA by any independent mental capacity advocate or appropriate person representing and supporting the cared-for person (see Part 5 of Schedule AA1).]
- <sup>F73</sup>(2) But, subject to Court of Protection Rules and to paragraph 20(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.
- (3) In deciding whether to grant permission the court must, in particular, have regard to—
- (a) the applicant's connection with the person to whom the application relates,
  - (b) the reasons for the application,
  - (c) the benefit to the person to whom the application relates of a proposed order or directions, and
  - (d) whether the benefit can be achieved in any other way.
- (4) “Parental responsibility” has the same meaning as in the Children Act 1989 (c. 41).

**Textual Amendments**

- F72** S. 50(1A) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 10](#)
- F73** S. 50(1A) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 9](#); S.I. 2009/139, [art. 2\(e\)](#) (with art. 3)

**51 Court of Protection Rules**

- [<sup>F74</sup>(1) Rules of court with respect to the practice and procedure of the court (to be called “Court of Protection Rules”) may be made in accordance with Part 1 of Schedule 1 to the Constitutional Reform Act 2005.]
- <sup>F74</sup>(2) Court of Protection Rules may, in particular, make provision—
- (a) as to the manner and form in which proceedings are to be commenced;
  - (b) as to the persons entitled to be notified of, and be made parties to, the proceedings;
  - (c) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges;
  - <sup>F75</sup>(d) .....
  - (e) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate;
  - (f) for enabling an application to the court to be disposed of without a hearing;
  - (g) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
  - (h) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
  - (i) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented;
  - (j) for the enforcement of orders made and directions given in the proceedings.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.
- (4) Court of Protection Rules may make different provision for different areas.

#### Textual Amendments

- F74** S. 51(1) substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 34**
- F75** S. 51(2)(d) omitted (6.4.2020) by virtue of [Courts and Tribunals \(Judiciary and Functions of Staff\) Act 2018 \(c. 33\)](#), s. 4(3), **Sch. para. 38** (with savings in S.I. 2020/100, reg. 3); S.I. 2020/24, reg. 3(b)

### [<sup>F76</sup>52 Practice directions

- (1) Directions as to the practice and procedure of the court may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.
- (2) Practice directions given otherwise than under subsection (1) may not be given without the approval of—
  - (a) the Lord Chancellor, and
  - (b) the Lord Chief Justice.
- (3) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—
  - (a) the President of the Court of Protection;
  - (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).]<sup>F76</sup>

#### Textual Amendments

- F76** S. 52 substituted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 35**

### 53 Rights of appeal

- (1) Subject to the provisions of this section, an appeal lies to the Court of Appeal from any decision of the court.
- [<sup>F77</sup>(2) Court of Protection Rules may provide that, where a decision of the court is made by a specified description of person, an appeal from the decision lies to a specified description of judge of the court and not to the Court of Appeal.]
- <sup>F78</sup>(3) .....
- (4) Court of Protection Rules may make provision—
  - (a) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission;
  - (b) as to the person or persons entitled to grant permission to appeal;
  - (c) as to any requirements to be satisfied before permission is granted;



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (d) that where a <sup>F79</sup>... judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—
- (i) the appeal would raise an important point of principle or practice, or
  - (ii) there is some other compelling reason for the Court of Appeal to hear it;
- (e) as to any considerations to be taken into account in relation to granting or refusing permission to appeal.

#### Textual Amendments

- F77** S. 53(2) substituted (12.2.2015) by [Criminal Justice and Courts Act 2015 \(c. 2\)](#), ss. 62(2), 95(1)
- F78** S. 53(3) omitted (12.2.2015) by virtue of 2015 [Criminal Justice and Courts Act 2015 \(c. 2\)](#), ss. 62(3), 95(1)
- F79** Word in s. 53(4)(d) omitted (12.2.2015) by virtue of [Criminal Justice and Courts Act 2015 \(c. 2\)](#), ss. 62(4), 95(1)

### *Fees and costs*

#### **54 Fees**

- (1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the court.
- (2) An order under this section may in particular contain provision as to—
  - (a) scales or rates of fees;
  - (b) exemptions from and reductions in fees;
  - (c) remission of fees in whole or in part.
- (3) Before making an order under this section, the Lord Chancellor must consult—
  - (a) the President of the Court of Protection,
  - (b) the Vice-President of the Court of Protection, and
  - (c) the Senior Judge of the Court of Protection.
- (4) The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them.
- (5) Fees payable under this section are recoverable summarily as a civil debt.

#### **55 Costs**

- (1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.
- (2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.
- (3) The court has full power to determine by whom and to what extent the costs are to be paid.
- (4) The court may, in any proceedings—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) disallow, or
  - (b) order the legal or other representatives concerned to meet,
- the whole of any wasted costs or such part of them as may be determined in accordance with the rules.
- (5) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.
- (6) “Wasted costs” means any costs incurred by a party—
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

## **56 Fees and costs: supplementary**

- (1) Court of Protection Rules may make provision—
- (a) as to the way in which, and funds from which, fees and costs are to be paid;
  - (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;
  - (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings.
- (2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing.

### *The Public Guardian*

## **57 The Public Guardian**

- (1) For the purposes of this Act, there is to be an officer, to be known as the Public Guardian.
- (2) The Public Guardian is to be appointed by the Lord Chancellor.
- (3) There is to be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine.
- (4) The Lord Chancellor may, after consulting the Public Guardian—
- (a) provide him with such officers and staff, or
  - (b) enter into such contracts with other persons for the provision (by them or their sub-contractors) of officers, staff or services,
- as the Lord Chancellor thinks necessary for the proper discharge of the Public Guardian's functions.
- (5) Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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## 58 Functions of the Public Guardian

- (1) The Public Guardian has the following functions—
- (a) establishing and maintaining a register of lasting powers of attorney,
  - (b) establishing and maintaining a register of orders appointing deputies,
  - (c) supervising deputies appointed by the court,
  - (d) directing a Court of Protection Visitor to visit—
    - (i) a donee of a lasting power of attorney,
    - (ii) a deputy appointed by the court, or
    - (iii) the person granting the power of attorney or for whom the deputy is appointed (“P”),and to make a report to the Public Guardian on such matters as he may direct,
  - (e) receiving security which the court requires a person to give for the discharge of his functions,
  - (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court,
  - (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
  - (h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,
  - (i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.
- (2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.

- [<sup>F80</sup>(2A) The Public Guardian also has the following functions—
- (a) establishing and maintaining a register of guardianship orders,
  - (b) supervising guardians,
  - (c) receiving security which the court requires a guardian to give for the exercise of the guardian’s functions,
  - (d) receiving reports from guardians,
  - (e) reporting to the court on such matters relating to proceedings under the Guardianship (Missing Persons) Act 2017 as the court requires,
  - (f) dealing with representations (including complaints) about the way in which a guardian is exercising the guardian’s functions, and
  - (g) publishing, in any manner the Public Guardian thinks appropriate, information about the exercise of his or her functions in connection with guardians and guardianship orders.]
- (3) The Lord Chancellor may by regulations make provision—
- (a) conferring on the Public Guardian other functions in connection with this Act [<sup>F81</sup>or the Guardianship (Missing Persons) Act 2017];
  - (b) in connection with the discharge by the Public Guardian of his functions.
- (4) Regulations made under subsection (3)(b) may in particular make provision as to—
- (a) the giving of security by deputies appointed by the court [<sup>F82</sup>or guardians] and the enforcement and discharge of security so given;

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) the fees which may be charged by the Public Guardian;
  - (c) the way in which, and funds from which, such fees are to be paid;
  - (d) exemptions from and reductions in such fees;
  - (e) remission of such fees in whole or in part;
  - (f) the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity.
- [<sup>F83</sup>(g) the making of reports to the Public Guardian by guardians.]
- (5) For the purpose of enabling him to carry out his functions [<sup>F84</sup>in relation to lasting powers of attorney or deputies], the Public Guardian may, at all reasonable times, examine and take copies of—
- (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) [<sup>F85</sup>, Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016], so far as the record relates to P.
- (6) The Public Guardian may also for that purpose interview P in private.
- [<sup>F86</sup>(7) In this section “guardian” and “guardianship order” have the same meaning as in the Guardianship (Missing Persons) Act 2017.]

#### Textual Amendments

- F80** S. 58(2A) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(2), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3
- F81** Words in s. 58(3) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(3), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3
- F82** Words in s. 58(4)(a) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(4)(a), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3
- F83** S. 58(4)(g) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(4)(b), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3
- F84** Words in s. 58(5) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(5), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3
- F85** Words in s. 58(5)(c) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), regs. 2(1), 31
- F86** S. 58(7) inserted (27.4.2017 for specified purposes, 31.7.2019 in so far as not already in force) by [Guardianship \(Missing Persons\) Act 2017 \(c. 27\)](#), **ss. 17(6), 25(2)(b)** (with s. 18(5)); S.I. 2019/1032, reg. 3

#### <sup>F87</sup>59 Public Guardian Board

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*Status: Point in time view as at 31/12/2020.*

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### Textual Amendments

- F87** S. 59 repealed (18.9.2012) by [The Public Bodies \(Abolition of Her Majesty's Inspectorate of Courts Administration and the Public Guardian Board\) Order 2012 \(S.I. 2012/2401\)](#), art. 1(2)(3), [Sch. 2 para. 2](#) (with art. 2)

## 60 Annual report

- (1) The Public Guardian must make an annual report to the Lord Chancellor about the discharge of his functions.
- (2) The Lord Chancellor must, within one month of receiving the report, lay a copy of it before Parliament.

### *Court of Protection Visitors*

## 61 Court of Protection Visitors

- (1) A Court of Protection Visitor is a person who is appointed by the Lord Chancellor to—
  - (a) a panel of Special Visitors, or
  - (b) a panel of General Visitors.
- (2) A person is not qualified to be a Special Visitor unless he—
  - (a) is a registered medical practitioner or appears to the Lord Chancellor to have other suitable qualifications or training, and
  - (b) appears to the Lord Chancellor to have special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain.
- (3) A General Visitor need not have a medical qualification.
- (4) A Court of Protection Visitor—
  - (a) may be appointed for such term and subject to such conditions, and
  - (b) may be paid such remuneration and allowances,as the Lord Chancellor may determine.
- (5) For the purpose of carrying out his functions under this Act in relation to a person who lacks capacity ("P"), a Court of Protection Visitor may, at all reasonable times, examine and take copies of—
  - (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) <sup>F88</sup>, Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016], so far as the record relates to P.
- (6) A Court of Protection Visitor may also for that purpose interview P in private.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### Textual Amendments

- F88** Words in s. 61(5)(c) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), **regs. 2(1), 32**

## PART 3

### MISCELLANEOUS AND GENERAL

#### *Declaratory provision*

#### **62 Scope of the Act**

For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (c. 60) (assisting suicide).

#### *Private international law*

#### **63 International protection of adults**

Schedule 3—

- (a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and
- (b) makes related provision as to the private international law of England and Wales.

#### *General*

#### **64 Interpretation**

(1) In this Act—

- “the 1985 Act” means the Enduring Powers of Attorney Act 1985 (c. 29),
- “advance decision” has the meaning given in section 24(1),
- [<sup>F89</sup> “authorisation under Schedule A1” means either—

  - (a) a standard authorisation under that Schedule, or
  - (b) an urgent authorisation under that Schedule.]
  - “the court” means the Court of Protection established by section 45,
  - “Court of Protection Rules” has the meaning given in section 51(1),
  - “Court of Protection Visitor” has the meaning given in section 61,
  - “deputy” has the meaning given in section 16(2)(b),
  - “enactment” includes a provision of subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30)),
  - [<sup>F90</sup> “health record” has the same meaning as in the Data Protection Act 2018 (see section 205 of that Act);]

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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“the Human Rights Convention” has the same meaning as “the Convention” in the Human Rights Act 1998 (c. 42),

“independent mental capacity advocate” has the meaning given in section 35(1),

“lasting power of attorney” has the meaning given in section 9,

“life-sustaining treatment” has the meaning given in section 4(10),

“local authority” <sup>[F91]</sup>, except in <sup>[F92]</sup>section 35(6A)(a) and <sup>[F93]</sup>Schedule A1 <sup>[F93]</sup>Schedule AA1 <sup>[F93]</sup>, means—

- (a) the council of a county in England in which there are no district councils,
- (b) the council of a district in England,
- (c) the council of a county or county borough in Wales,
- (d) the council of a London borough,
- (e) the Common Council of the City of London, or
- (f) the Council of the Isles of Scilly,

“Mental Health Act” means the Mental Health Act 1983 (c. 20),

“prescribed”, in relation to regulations made under this Act, means prescribed by those regulations,

“property” includes any thing in action and any interest in real or personal property,

“public authority” has the same meaning as in the Human Rights Act 1998,

“Public Guardian” has the meaning given in section 57,

“purchaser” and “purchase” have the meaning given in section 205(1) of the Law of Property Act 1925 (c. 20),

“social services function” <sup>[F94]</sup>—

- (a) in relation to England] has the meaning given in section 1A of the Local Authority Social Services Act 1970 (c. 42),
- (b) <sup>[F95]</sup>in relation to Wales, has the meaning given in section 143 of the Social Services and Well-being (Wales) Act 2014 (anaw 4).]

“treatment” includes a diagnostic or other procedure,

“trust corporation” has the meaning given in section 68(1) of the Trustee Act 1925 (c. 19), and

“will” includes codicil.

(2) In this Act, references to making decisions, in relation to a donee of a lasting power of attorney or a deputy appointed by the court, include, where appropriate, acting on decisions made.

(3) In this Act, references to the bankruptcy of an individual include a case where a bankruptcy restrictions order under the Insolvency Act 1986 (c. 45) has effect in respect of him.

<sup>[F96]</sup>(3A) In this Act references to a debt relief order (under Part 7A of the Insolvency Act 1986) being made in relation to an individual include a case where a debt relief restrictions order under the Insolvency Act 1986 has effect in respect of him.]

(4) “Bankruptcy restrictions order” includes an interim bankruptcy restrictions order.

<sup>[F97]</sup>(4A) “Debt relief restrictions order” includes an interim debt relief restrictions order.]

<sup>[F98]</sup>(5) In this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (6) For the purposes of such references, it does not matter whether a person is deprived of his liberty by a public authority or not. ]

#### Textual Amendments

- F89** Words in s. 64(1) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 11\(a\)](#)
- F90** Words in s. 64(1) substituted (25.5.2018) by [Data Protection Act 2018 \(c. 12\)](#), s. 212(1), [Sch. 19 para. 108](#) (with [ss. 117, 209, 210](#)); S.I. 2018/625, reg. 2(1)(g)
- F91** Words in s. 64(1) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 10\(3\)](#); S.I. 2008/745, [art. 4\(b\)](#)
- F92** Words in s. 64(1) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 135](#); S.I. 2013/160, [art. 2\(2\)](#) (with [arts. 7-9](#))
- F93** Words in s. 64(1) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 11\(b\)](#)
- F94** Words in s. 64(1) inserted (6.4.2016) by [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), [228\(a\)](#)
- F95** Words in s. 64(1) inserted (6.4.2016) by [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), [228\(b\)](#)
- F96** S. 64(3A) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(4\)\(a\)](#) (with [arts. 5, 6](#))
- F97** S. 64(4A) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(4\)\(b\)](#) (with [arts. 5, 6](#))
- F98** S. 64(5)(6) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 10\(4\)](#); S.I. 2008/745, [art. 4\(b\)](#)

#### Commencement Information

- I18** S. 64 wholly in force at 1.10.2007; s. 64 not in force at Royal Assent see s. 68(1)-(3); s. 64 in force for certain purposes at 1.4.2007 by [S.I. 2007/563](#), [art. 2\(4\)](#); and s. 64 in force for all purposes at 1.10.2007 by [S.I. 2007/1897](#), [art. 2\(2\)\(f\)](#)

## 65 Rules, regulations and orders

- (1) Any power to make rules, regulations or orders under this Act [F99], other than the power in section 21[F99]—
- is exercisable by statutory instrument;
  - includes power to make supplementary, incidental, consequential, transitional or saving provision;
  - includes power to make different provision for different cases.
- (2) Any statutory instrument containing rules, regulations or orders made by the Lord Chancellor or the Secretary of State under this Act, other than—
- regulations under section 34 (loss of capacity during research project),
  - regulations under section 41 (adjusting role of independent mental capacity advocacy service),
  - regulations under paragraph 32(1)(b) of Schedule 3 (private international law relating to the protection of adults),
  - an order of the kind mentioned in section 67(6) (consequential amendments of primary legislation), or
  - an order under section 68 (commencement),



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

is subject to annulment in pursuance of a resolution of either House of Parliament.

- [<sup>F100</sup>(2A) Any statutory instrument containing regulations made by the Welsh Ministers under Schedule AA1 is subject to annulment in pursuance of a resolution of the National Assembly for Wales.]
- (3) A statutory instrument containing an Order in Council under paragraph 31 of Schedule 3 (provision to give further effect to Hague Convention) is subject to annulment in pursuance of a resolution of either House of Parliament.
- (4) A statutory instrument containing regulations made by the Secretary of State under section 34 or 41 or by the Lord Chancellor under paragraph 32(1)(b) of Schedule 3 may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.
- (4A) [<sup>F101</sup>Subsection (2) does not apply to a statutory instrument containing regulations made by the Secretary of State under Schedule A1.]
- (4B) [<sup>F101</sup>If such a statutory instrument contains regulations under paragraph 42(2)(b), 129, 162 or 164 of Schedule A1 (whether or not it also contains other regulations), the instrument may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.]
- (4C) [<sup>F101</sup>Subject to that, such a statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament.]
- <sup>F102</sup>[<sup>F103</sup>(5) An order under section 21—
- (a) may include supplementary, incidental, consequential, transitional or saving provision;
  - (b) may make different provision for different cases;
  - (c) is to be made in the form of a statutory instrument to which the Statutory Instruments Act 1946 applies as if the order were made by a Minister of the Crown; and
  - (d) is subject to annulment in pursuance of a resolution of either House of Parliament.]<sup>F103</sup>

#### Textual Amendments

- F99** Words in s. 65(1) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 37(2)**
- F100** S. 65(2A) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 12(2)**
- F101** S. 65(4A)-(4C) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 12(3)**
- F102** S. 65(4A)-(4C) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, **Sch. 9 para. 11(2)**; [S.I. 2008/745](#), **art. 4(b)**
- F103** S. 65(5) inserted (3.4.2006) by [The Lord Chancellor \(Transfer of Functions and Supplementary Provisions\) \(No.2\) Order 2006 \(S.I. 2006/1016\)](#), arts. 1, 2, **Sch. 1 para. 37(3)**

#### 66 Existing receivers and enduring powers of attorney etc.

- (1) The following provisions cease to have effect—
- (a) Part 7 of the Mental Health Act,

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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(b) the Enduring Powers of Attorney Act 1985 (c. 29).

- (2) No enduring power of attorney within the meaning of the 1985 Act is to be created after the commencement of subsection (1)(b).
- (3) Schedule 4 has effect in place of the 1985 Act in relation to any enduring power of attorney created before the commencement of subsection (1)(b).
- (4) Schedule 5 contains transitional provisions and savings in relation to Part 7 of the Mental Health Act and the 1985 Act.

## **67 Minor and consequential amendments and repeals**

- (1) Schedule 6 contains minor and consequential amendments.
- (2) Schedule 7 contains repeals.
- (3) The Lord Chancellor may by order make supplementary, incidental, consequential, transitional or saving provision for the purposes of, in consequence of, or for giving full effect to a provision of this Act.
- (4) An order under subsection (3) may, in particular—
  - (a) provide for a provision of this Act which comes into force before another provision of this Act has come into force to have effect, until the other provision has come into force, with specified modifications;
  - (b) amend, repeal or revoke an enactment, other than one contained in an Act or Measure passed in a Session after the one in which this Act is passed.
- (5) The amendments that may be made under subsection (4)(b) are in addition to those made by or under any other provision of this Act.
- (6) An order under subsection (3) which amends or repeals a provision of an Act or Measure may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

## **68 Commencement and extent**

- (1) This Act, other than sections 30 to 41, comes into force in accordance with provision made by order by the Lord Chancellor.
- (2) Sections 30 to 41 come into force in accordance with provision made by order by—
  - (a) the Secretary of State, in relation to England, and
  - (b) the National Assembly for Wales, in relation to Wales.
- (3) An order under this section may appoint different days for different provisions and different purposes.
- (4) Subject to subsections (5) and (6), this Act extends to England and Wales only.
- (5) The following provisions extend to the United Kingdom—
  - (a) paragraph 16(1) of Schedule 1 (evidence of instruments and of registration of lasting powers of attorney),
  - (b) paragraph 15(3) of Schedule 4 (evidence of instruments and of registration of enduring powers of attorney).

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (6) Subject to any provision made in Schedule 6, the amendments and repeals made by Schedules 6 and 7 have the same extent as the enactments to which they relate.

**Subordinate Legislation Made**

- P1** S. 68(1) power partly exercised: 1.4.2007 appointed for specified provisions and purposes by {[S.I. 2007/563](#)}, art. 2
- P2** S. 68(1) power partly exercised: 1.10.2007 appointed for specified provisions and purposes by {[S.I. 2007/1897](#)}, art. 2
- P3** S. 68(2) power partly exercised: different dates appointed for specified provisions and purposes by {[S.I. 2007/856](#)}, arts. 2-5
- P4** S. 68(2)(a) power partly exercised: different dates appointed for specified provisions and purposes by {[S.I. 2006/2814](#)}, arts. 2-5 (as amended by [S.I. 2006/3473](#), **art. 2**)

**69 Short title**

This Act may be cited as the Mental Capacity Act 2005.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

## SCHEDULES

### SCHEDULE A1

#### [<sup>F104</sup>HOSPITAL AND CARE HOME RESIDENTS: DEPRIVATION OF LIBERTY]

##### Textual Amendments

**F104** Sch. A1 omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019](#) (c. 18), s. 6(3), [Sch. 2 para. 2\(c\)](#)

#### [<sup>F104</sup>PART 1

##### AUTHORISATION TO DEPRIVE RESIDENTS OF LIBERTY ETC

###### *Application of Part*

- 1 (1) This Part applies if the following conditions are met.
- (2) The first condition is that a person (“P”) is detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.
- (3) The second condition is that a standard or urgent authorisation is in force.
- (4) The third condition is that the standard or urgent authorisation relates—
  - (a) to P, and
  - (b) to the hospital or care home in which P is detained.

###### *Authorisation to deprive P of liberty*

- 2 The managing authority of the hospital or care home may deprive P of his liberty by detaining him as mentioned in paragraph 1(2).

###### *No liability for acts done for purpose of depriving P of liberty*

- 3 (1) This paragraph applies to any act which a person (“D”) does for the purpose of detaining P as mentioned in paragraph 1(2).
- (2) D does not incur any liability in relation to the act that he would not have incurred if P—
  - (a) had had capacity to consent in relation to D's doing the act, and
  - (b) had consented to D's doing the act.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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*No protection for negligent acts etc*

- 4 (1) Paragraphs 2 and 3 do not exclude a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing any thing.
- (2) Paragraphs 2 and 3 do not authorise a person to do anything otherwise than for the purpose of the standard or urgent authorisation that is in force.
- (3) In a case where a standard authorisation is in force, paragraphs 2 and 3 do not authorise a person to do anything which does not comply with the conditions (if any) included in the authorisation.

**PART 2**

INTERPRETATION: MAIN TERMS

*Introduction*

- 5 This Part applies for the purposes of this Schedule.

*Detained resident*

- 6 “Detained resident” means a person detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.

*Relevant person etc*

- 7 In relation to a person who is, or is to be, a detained resident—  
“relevant person” means the person in question;  
“relevant hospital or care home” means the hospital or care home in question;  
“relevant care or treatment” means the care or treatment in question.

*Authorisations*

- 8 “Standard authorisation” means an authorisation given under Part 4.
- 9 “Urgent authorisation” means an authorisation given under Part 5.
- 10 “Authorisation under this Schedule” means either of the following—  
(a) a standard authorisation;  
(b) an urgent authorisation.
- 11 (1) The purpose of a standard authorisation is the purpose which is stated in the authorisation in accordance with paragraph 55(1)(d).
- (2) The purpose of an urgent authorisation is the purpose which is stated in the authorisation in accordance with paragraph 80(d).

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### PART 3

#### THE QUALIFYING REQUIREMENTS

##### *The qualifying requirements*

- 12 (1) These are the qualifying requirements referred to in this Schedule—
- (a) the age requirement;
  - (b) the mental health requirement;
  - (c) the mental capacity requirement;
  - (d) the best interests requirement;
  - (e) the eligibility requirement;
  - (f) the no refusals requirement.
- (2) Any question of whether a person who is, or is to be, a detained resident meets the qualifying requirements is to be determined in accordance with this Part.
- (3) In a case where—
- (a) the question of whether a person meets a particular qualifying requirement arises in relation to the giving of a standard authorisation, and
  - (b) any circumstances relevant to determining that question are expected to change between the time when the determination is made and the time when the authorisation is expected to come into force,
- those circumstances are to be taken into account as they are expected to be at the later time.

##### *The age requirement*

- 13 The relevant person meets the age requirement if he has reached 18.

##### *The mental health requirement*

- 14 (1) The relevant person meets the mental health requirement if he is suffering from mental disorder (within the meaning of the Mental Health Act, but disregarding any exclusion for persons with learning disability).
- (2) An exclusion for persons with learning disability is any provision of the Mental Health Act which provides for a person with learning disability not to be regarded as suffering from mental disorder for one or more purposes of that Act.

##### *The mental capacity requirement*

- 15 The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment.

##### *The best interests requirement*

- 16 (1) The relevant person meets the best interests requirement if all of the following conditions are met.
- (2) The first condition is that the relevant person is, or is to be, a detained resident.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (3) The second condition is that it is in the best interests of the relevant person for him to be a detained resident.
- (4) The third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident.
- (5) The fourth condition is that it is a proportionate response to—
  - (a) the likelihood of the relevant person suffering harm, and
  - (b) the seriousness of that harm,for him to be a detained resident.

*The eligibility requirement*

- 17 (1) The relevant person meets the eligibility requirement unless he is ineligible to be deprived of liberty by this Act.
- (2) Schedule 1A applies for the purpose of determining whether or not P is ineligible to be deprived of liberty by this Act.

*The no refusals requirement*

- 18 The relevant person meets the no refusals requirement unless there is a refusal within the meaning of paragraph 19 or 20.
- 19 (1) There is a refusal if these conditions are met—
  - (a) the relevant person has made an advance decision;
  - (b) the advance decision is valid;
  - (c) the advance decision is applicable to some or all of the relevant treatment.
- (2) Expressions used in this paragraph and any of sections 24, 25 or 26 have the same meaning in this paragraph as in that section.
- 20 (1) There is a refusal if it would be in conflict with a valid decision of a donee or deputy for the relevant person to be accommodated in the relevant hospital or care home for the purpose of receiving some or all of the relevant care or treatment—
  - (a) in circumstances which amount to deprivation of the person's liberty, or
  - (b) at all.
- (2) A donee is a donee of a lasting power of attorney granted by the relevant person.
- (3) A decision of a donee or deputy is valid if it is made—
  - (a) within the scope of his authority as donee or deputy, and
  - (b) in accordance with Part 1 of this Act.

**PART 4**

STANDARD AUTHORISATIONS

*Supervisory body to give authorisation*

- 21 Only the supervisory body may give a standard authorisation.
- 22 The supervisory body may not give a standard authorisation unless—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) the managing authority of the relevant hospital or care home have requested it, or
  - (b) paragraph 71 applies (right of third party to require consideration of whether authorisation needed).
- 23 The managing authority may not make a request for a standard authorisation unless—
- (a) they are required to do so by paragraph 24 (as read with paragraphs 27 to 29),
  - (b) they are required to do so by paragraph 25 (as read with paragraph 28), or
  - (c) they are permitted to do so by paragraph 30.

*Duty to request authorisation: basic cases*

- 24 (1) The managing authority must request a standard authorisation in any of the following cases.
- (2) The first case is where it appears to the managing authority that the relevant person—
- (a) is not yet accommodated in the relevant hospital or care home,
  - (b) is likely — at some time within the next 28 days — to be a detained resident in the relevant hospital or care home, and
  - (c) is likely—
    - (i) at that time, or
    - (ii) at some later time within the next 28 days,
 to meet all of the qualifying requirements.
- (3) The second case is where it appears to the managing authority that the relevant person—
- (a) is already accommodated in the relevant hospital or care home,
  - (b) is likely — at some time within the next 28 days — to be a detained resident in the relevant hospital or care home, and
  - (c) is likely—
    - (i) at that time, or
    - (ii) at some later time within the next 28 days,
 to meet all of the qualifying requirements.
- (4) The third case is where it appears to the managing authority that the relevant person—
- (a) is a detained resident in the relevant hospital or care home, and
  - (b) meets all of the qualifying requirements, or is likely to do so at some time within the next 28 days.
- (5) This paragraph is subject to paragraphs 27 to 29.

*Duty to request authorisation: change in place of detention*

- 25 (1) The relevant managing authority must request a standard authorisation if it appears to them that these conditions are met.
- (2) The first condition is that a standard authorisation—
- (a) has been given, and
  - (b) has not ceased to be in force.



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (3) The second condition is that there is, or is to be, a change in the place of detention.
- (4) This paragraph is subject to paragraph 28.
- 26 (1) This paragraph applies for the purposes of paragraph 25.
- (2) There is a change in the place of detention if the relevant person—
- (a) ceases to be a detained resident in the stated hospital or care home, and
  - (b) becomes a detained resident in a different hospital or care home (“the new hospital or care home”).
- (3) The stated hospital or care home is the hospital or care home to which the standard authorisation relates.
- (4) The relevant managing authority are the managing authority of the new hospital or care home.

*Other authority for detention: request for authorisation*

- 27 (1) This paragraph applies if, by virtue of section 4A(3), a decision of the court authorises the relevant person to be a detained resident.
- (2) Paragraph 24 does not require a request for a standard authorisation to be made in relation to that detention unless these conditions are met.
- (3) The first condition is that the standard authorisation would be in force at a time immediately after the expiry of the other authority.
- (4) The second condition is that the standard authorisation would not be in force at any time on or before the expiry of the other authority.
- (5) The third condition is that it would, in the managing authority's view, be unreasonable to delay making the request until a time nearer the expiry of the other authority.
- (6) In this paragraph—
- (a) the other authority is—
    - (i) the decision mentioned in sub-paragraph (1), or
    - (ii) any further decision of the court which, by virtue of section 4A(3), authorises, or is expected to authorise, the relevant person to be a detained resident;
  - (b) the expiry of the other authority is the time when the other authority is expected to cease to authorise the relevant person to be a detained resident.

*Request refused: no further request unless change of circumstances*

- 28 (1) This paragraph applies if—
- (a) a managing authority request a standard authorisation under paragraph 24 or 25, and
  - (b) the supervisory body are prohibited by paragraph 50(2) from giving the authorisation.
- (2) Paragraph 24 or 25 does not require that managing authority to make a new request for a standard authorisation unless it appears to the managing authority that—
- (a) there has been a change in the relevant person's case, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) because of that change, the supervisory body are likely to give a standard authorisation if requested.

*Authorisation given: request for further authorisation*

- 29 (1) This paragraph applies if a standard authorisation—
- (a) has been given in relation to the detention of the relevant person, and
  - (b) that authorisation (“the existing authorisation”) has not ceased to be in force.
- (2) Paragraph 24 does not require a new request for a standard authorisation (“the new authorisation”) to be made unless these conditions are met.
- (3) The first condition is that the new authorisation would be in force at a time immediately after the expiry of the existing authorisation.
- (4) The second condition is that the new authorisation would not be in force at any time on or before the expiry of the existing authorisation.
- (5) The third condition is that it would, in the managing authority's view, be unreasonable to delay making the request until a time nearer the expiry of the existing authorisation.
- (6) The expiry of the existing authorisation is the time when it is expected to cease to be in force.

*Power to request authorisation*

- 30 (1) This paragraph applies if—
- (a) a standard authorisation has been given in relation to the detention of the relevant person,
  - (b) that authorisation (“the existing authorisation”) has not ceased to be in force,
  - (c) the requirement under paragraph 24 to make a request for a new standard authorisation does not apply, because of paragraph 29, and
  - (d) a review of the existing authorisation has been requested, or is being carried out, in accordance with Part 8.
- (2) The managing authority may request a new standard authorisation which would be in force on or before the expiry of the existing authorisation; but only if it would also be in force immediately after that expiry.
- (3) The expiry of the existing authorisation is the time when it is expected to cease to be in force.
- (4) Further provision relating to cases where a request is made under this paragraph can be found in—
- (a) paragraph 62 (effect of decision about request), and
  - (b) paragraph 124 (effect of request on Part 8 review).

*Information included in request*

- 31 A request for a standard authorisation must include the information (if any) required by regulations.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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#### *Records of requests*

- 32 (1) The managing authority of a hospital or care home must keep a written record of—
- (a) each request that they make for a standard authorisation, and
  - (b) the reasons for making each request.
- (2) A supervisory body must keep a written record of each request for a standard authorisation that is made to them.

#### *Relevant person must be assessed*

- 33 (1) This paragraph applies if the supervisory body are requested to give a standard authorisation.
- (2) The supervisory body must secure that all of these assessments are carried out in relation to the relevant person—
- (a) an age assessment;
  - (b) a mental health assessment;
  - (c) a mental capacity assessment;
  - (d) a best interests assessment;
  - (e) an eligibility assessment;
  - (f) a no refusals assessment.
- (3) The person who carries out any such assessment is referred to as the assessor.
- (4) Regulations may be made about the period (or periods) within which assessors must carry out assessments.
- (5) This paragraph is subject to paragraphs 49 and 133.

#### *Age assessment*

- 34 An age assessment is an assessment of whether the relevant person meets the age requirement.

#### *Mental health assessment*

- 35 A mental health assessment is an assessment of whether the relevant person meets the mental health requirement.
- 36 When carrying out a mental health assessment, the assessor must also—
- (a) consider how (if at all) the relevant person's mental health is likely to be affected by his being a detained resident, and
  - (b) notify the best interests assessor of his conclusions.

#### *Mental capacity assessment*

- 37 A mental capacity assessment is an assessment of whether the relevant person meets the mental capacity requirement.

#### *Best interests assessment*

- 38 A best interests assessment is an assessment of whether the relevant person meets the best interests requirement.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- 39 (1) In carrying out a best interests assessment, the assessor must comply with the duties in sub-paragraphs (2) and (3).
- (2) The assessor must consult the managing authority of the relevant hospital or care home.
- (3) The assessor must have regard to all of the following—
- (a) the conclusions which the mental health assessor has notified to the best interests assessor in accordance with paragraph 36(b);
  - (b) any relevant needs assessment;
  - (c) any relevant care plan.
- (4) A relevant needs assessment is an assessment of the relevant person's needs which—
- (a) was carried out in connection with the relevant person being accommodated in the relevant hospital or care home, and
  - (b) was carried out by or on behalf of—
    - (i) the managing authority of the relevant hospital or care home, or
    - (ii) the supervisory body.
- (5) A relevant care plan is a care plan which—
- (a) sets out how the relevant person's needs are to be met whilst he is accommodated in the relevant hospital or care home, and
  - (b) was drawn up by or on behalf of—
    - (i) the managing authority of the relevant hospital or care home, or
    - (ii) the supervisory body.
- (6) The managing authority must give the assessor a copy of—
- (a) any relevant needs assessment carried out by them or on their behalf, or
  - (b) any relevant care plan drawn up by them or on their behalf.
- (7) The supervisory body must give the assessor a copy of—
- (a) any relevant needs assessment carried out by them or on their behalf, or
  - (b) any relevant care plan drawn up by them or on their behalf.
- (8) The duties in sub-paragraphs (2) and (3) do not affect any other duty to consult or to take the views of others into account.
- 40 (1) This paragraph applies whatever conclusion the best interests assessment comes to.
- (2) The assessor must state in the best interests assessment the name and address of every interested person whom he has consulted in carrying out the assessment.
- 41 Paragraphs 42 and 43 apply if the best interests assessment comes to the conclusion that the relevant person meets the best interests requirement.
- 42 (1) The assessor must state in the assessment the maximum authorisation period.
- (2) The maximum authorisation period is the shorter of these periods—
- (a) the period which, in the assessor's opinion, would be the appropriate maximum period for the relevant person to be a detained resident under the standard authorisation that has been requested;
  - (b) 1 year, or such shorter period as may be prescribed in regulations.
- (3) Regulations under sub-paragraph (2)(b)—

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (a) need not provide for a shorter period to apply in relation to all standard authorisations;
  - (b) may provide for different periods to apply in relation to different kinds of standard authorisations.
- (4) Before making regulations under sub-paragraph (2)(b) the Secretary of State must consult all of the following—
- (a) each body required by regulations under paragraph 162 to monitor and report on the operation of this Schedule in relation to England;
  - (b) such other persons as the Secretary of State considers it appropriate to consult.
- (5) Before making regulations under sub-paragraph (2)(b) the National Assembly for Wales must consult all of the following—
- (a) each person or body directed under paragraph 163(2) to carry out any function of the Assembly of monitoring and reporting on the operation of this Schedule in relation to Wales;
  - (b) such other persons as the Assembly considers it appropriate to consult.
- 43 The assessor may include in the assessment recommendations about conditions to which the standard authorisation is, or is not, to be subject in accordance with paragraph 53.
- 44 (1) This paragraph applies if the best interests assessment comes to the conclusion that the relevant person does not meet the best interests requirement.
- (2) If, on the basis of the information taken into account in carrying out the assessment, it appears to the assessor that there is an unauthorised deprivation of liberty, he must include a statement to that effect in the assessment.
- (3) There is an unauthorised deprivation of liberty if the managing authority of the relevant hospital or care home are already depriving the relevant person of his liberty without authority of the kind mentioned in section 4A.
- 45 The duties with which the best interests assessor must comply are subject to the provision included in appointment regulations under Part 10 (in particular, provision made under paragraph 146).

#### *Eligibility assessment*

- 46 An eligibility assessment is an assessment of whether the relevant person meets the eligibility requirement.
- 47 (1) Regulations may—
- (a) require an eligibility assessor to request a best interests assessor to provide relevant eligibility information, and
  - (b) require the best interests assessor, if such a request is made, to provide such relevant eligibility information as he may have.
- (2) In this paragraph—
- “best interests assessor” means any person who is carrying out, or has carried out, a best interests assessment in relation to the relevant person;
  - “eligibility assessor” means a person carrying out an eligibility assessment in relation to the relevant person;

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*No refusals assessment*

- 48      A no refusals assessment is an assessment of whether the relevant person meets the no refusals requirement.

*Equivalent assessment already carried out*

- 49      (1) The supervisory body are not required by paragraph 33 to secure that a particular kind of assessment (“the required assessment”) is carried out in relation to the relevant person if the following conditions are met.
- (2) The first condition is that the supervisory body have a written copy of an assessment of the relevant person (“the existing assessment”) that has already been carried out.
- (3) The second condition is that the existing assessment complies with all requirements under this Schedule with which the required assessment would have to comply (if it were carried out).
- (4) The third condition is that the existing assessment was carried out within the previous 12 months; but this condition need not be met if the required assessment is an age assessment.
- (5) The fourth condition is that the supervisory body are satisfied that there is no reason why the existing assessment may no longer be accurate.
- (6) If the required assessment is a best interests assessment, in satisfying themselves as mentioned in sub-paragraph (5), the supervisory body must take into account any information given, or submissions made, by—
- (a) the relevant person's representative,
- (b) any section 39C IMCA, or
- (c) any section 39D IMCA.
- (7) It does not matter whether the existing assessment was carried out in connection with a request for a standard authorisation or for some other purpose.
- (8) If, because of this paragraph, the supervisory body are not required by paragraph 33 to secure that the required assessment is carried out, the existing assessment is to be treated for the purposes of this Schedule—
- (a) as an assessment of the same kind as the required assessment, and
- (b) as having been carried out under paragraph 33 in connection with the request for the standard authorisation.

*Duty to give authorisation*

- 50      (1) The supervisory body must give a standard authorisation if—
- (a) all assessments are positive, and
- (b) the supervisory body have written copies of all those assessments.
- (2) The supervisory body must not give a standard authorisation except in accordance with sub-paragraph (1).
- (3) All assessments are positive if each assessment carried out under paragraph 33 has come to the conclusion that the relevant person meets the qualifying requirement to which the assessment relates.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### *Terms of authorisation*

- 51 (1) If the supervisory body are required to give a standard authorisation, they must decide the period during which the authorisation is to be in force.
- (2) That period must not exceed the maximum authorisation period stated in the best interests assessment.
- 52 A standard authorisation may provide for the authorisation to come into force at a time after it is given.
- 53 (1) A standard authorisation may be given subject to conditions.
- (2) Before deciding whether to give the authorisation subject to conditions, the supervisory body must have regard to any recommendations in the best interests assessment about such conditions.
- (3) The managing authority of the relevant hospital or care home must ensure that any conditions are complied with.

### *Form of authorisation*

- 54 A standard authorisation must be in writing.
- 55 (1) A standard authorisation must state the following things—
- (a) the name of the relevant person;
  - (b) the name of the relevant hospital or care home;
  - (c) the period during which the authorisation is to be in force;
  - (d) the purpose for which the authorisation is given;
  - (e) any conditions subject to which the authorisation is given;
  - (f) the reason why each qualifying requirement is met.
- (2) The statement of the reason why the eligibility requirement is met must be framed by reference to the cases in the table in paragraph 2 of Schedule 1A.
- 56 (1) If the name of the relevant hospital or care home changes, the standard authorisation is to be read as if it stated the current name of the hospital or care home.
- (2) But sub-paragraph (1) is subject to any provision relating to the change of name which is made in any enactment or in any instrument made under an enactment.

### *Duty to give information about decision*

- 57 (1) This paragraph applies if—
- (a) a request is made for a standard authorisation, and
  - (b) the supervisory body are required by paragraph 50(1) to give the standard authorisation.
- (2) The supervisory body must give a copy of the authorisation to each of the following—
- (a) the relevant person's representative;
  - (b) the managing authority of the relevant hospital or care home;
  - (c) the relevant person;
  - (d) any section 39A IMCA;
  - (e) every interested person consulted by the best interests assessor.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) The supervisory body must comply with this paragraph as soon as practicable after they give the standard authorisation.
- 58 (1) This paragraph applies if—
- (a) a request is made for a standard authorisation, and
  - (b) the supervisory body are prohibited by paragraph 50(2) from giving the standard authorisation.
- (2) The supervisory body must give notice, stating that they are prohibited from giving the authorisation, to each of the following—
- (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) any section 39A IMCA;
  - (d) every interested person consulted by the best interests assessor.
- (3) The supervisory body must comply with this paragraph as soon as practicable after it becomes apparent to them that they are prohibited from giving the authorisation.

*Duty to give information about effect of authorisation*

- 59 (1) This paragraph applies if a standard authorisation is given.
- (2) The managing authority of the relevant hospital or care home must take such steps as are practicable to ensure that the relevant person understands all of the following—
- (a) the effect of the authorisation;
  - (b) the right to make an application to the court to exercise its jurisdiction under section 21A;
  - (c) the right under Part 8 to request a review;
  - (d) the right to have a section 39D IMCA appointed;
  - (e) how to have a section 39D IMCA appointed.
- (3) Those steps must be taken as soon as is practicable after the authorisation is given.
- (4) Those steps must include the giving of appropriate information both orally and in writing.
- (5) Any written information given to the relevant person must also be given by the managing authority to the relevant person's representative.
- (6) They must give the information to the representative as soon as is practicable after it is given to the relevant person.
- (7) Sub-paragraph (8) applies if the managing authority is notified that a section 39D IMCA has been appointed.
- (8) As soon as is practicable after being notified, the managing authority must give the section 39D IMCA a copy of the written information given in accordance with sub-paragraph (4).

*Records of authorisations*

- 60 A supervisory body must keep a written record of all of the following information—
- (a) the standard authorisations that they have given;



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the requests for standard authorisations in response to which they have not given an authorisation;
- (c) in relation to each standard authorisation given: the matters stated in the authorisation in accordance with paragraph 55.

*Variation of an authorisation*

- 61 (1) A standard authorisation may not be varied except in accordance with Part 7 or 8.
- (2) This paragraph does not affect the powers of the Court of Protection or of any other court.

*Effect of decision about request made under paragraph 25 or 30*

- 62 (1) This paragraph applies where the managing authority request a new standard authorisation under either of the following—
- (a) paragraph 25 (change in place of detention);
  - (b) paragraph 30 (existing authorisation subject to review).
- (2) If the supervisory body are required by paragraph 50(1) to give the new authorisation, the existing authorisation terminates at the time when the new authorisation comes into force.
- (3) If the supervisory body are prohibited by paragraph 50(2) from giving the new authorisation, there is no effect on the existing authorisation's continuation in force.

*When an authorisation is in force*

- 63 (1) A standard authorisation comes into force when it is given.
- (2) But if the authorisation provides for it to come into force at a later time, it comes into force at that time.
- 64 (1) A standard authorisation ceases to be in force at the end of the period stated in the authorisation in accordance with paragraph 55(1)(c).
- (2) But if the authorisation terminates before then in accordance with paragraph 62(2) or any other provision of this Schedule, it ceases to be in force when the termination takes effect.
- (3) This paragraph does not affect the powers of the Court of Protection or of any other court.
- 65 (1) This paragraph applies if a standard authorisation ceases to be in force.
- (2) The supervisory body must give notice that the authorisation has ceased to be in force.
- (3) The supervisory body must give that notice to all of the following—
- (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) the relevant person's representative;
  - (d) every interested person consulted by the best interests assessor.
- (4) The supervisory body must give that notice as soon as practicable after the authorisation ceases to be in force.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*When a request for a standard authorisation is “disposed of”*

- 66 A request for a standard authorisation is to be regarded for the purposes of this Schedule as disposed of if the supervisory body have given—
- (a) a copy of the authorisation in accordance with paragraph 57, or
  - (b) notice in accordance with paragraph 58.

*Right of third party to require consideration of whether authorisation needed*

- 67 For the purposes of paragraphs 68 to 73 there is an unauthorised deprivation of liberty if—
- (a) a person is already a detained resident in a hospital or care home, and
  - (b) the detention of the person is not authorised as mentioned in section 4A.
- 68 (1) If the following conditions are met, an eligible person may request the supervisory body to decide whether or not there is an unauthorised deprivation of liberty.
- (2) The first condition is that the eligible person has notified the managing authority of the relevant hospital or care home that it appears to the eligible person that there is an unauthorised deprivation of liberty.
  - (3) The second condition is that the eligible person has asked the managing authority to request a standard authorisation in relation to the detention of the relevant person.
  - (4) The third condition is that the managing authority has not requested a standard authorisation within a reasonable period after the eligible person asks it to do so.
  - (5) In this paragraph “eligible person” means any person other than the managing authority of the relevant hospital or care home.
- 69 (1) This paragraph applies if an eligible person requests the supervisory body to decide whether or not there is an unauthorised deprivation of liberty.
- (2) The supervisory body must select and appoint a person to carry out an assessment of whether or not the relevant person is a detained resident.
  - (3) But the supervisory body need not select and appoint a person to carry out such an assessment in either of these cases.
  - (4) The first case is where it appears to the supervisory body that the request by the eligible person is frivolous or vexatious.
  - (5) The second case is where it appears to the supervisory body that—
    - (a) the question of whether or not there is an unauthorised deprivation of liberty has already been decided, and
    - (b) since that decision, there has been no change of circumstances which would merit the question being decided again.
  - (6) The supervisory body must not select and appoint a person to carry out an assessment under this paragraph unless it appears to the supervisory body that the person would be—
    - (a) suitable to carry out a best interests assessment (if one were obtained in connection with a request for a standard authorisation relating to the relevant person), and
    - (b) eligible to carry out such a best interests assessment.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (7) The supervisory body must notify the persons specified in sub-paragraph (8)—
- (a) that the supervisory body have been requested to decide whether or not there is an unauthorised deprivation of liberty;
  - (b) of their decision whether or not to select and appoint a person to carry out an assessment under this paragraph;
  - (c) if their decision is to select and appoint a person, of the person appointed.
- (8) The persons referred to in sub-paragraph (7) are—
- (a) the eligible person who made the request under paragraph 68;
  - (b) the person to whom the request relates;
  - (c) the managing authority of the relevant hospital or care home;
  - (d) any section 39A IMCA.
- 70 (1) Regulations may be made about the period within which an assessment under paragraph 69 must be carried out.
- (2) Regulations made under paragraph 129(3) apply in relation to the selection and appointment of a person under paragraph 69 as they apply to the selection of a person under paragraph 129 to carry out a best interests assessment.
- (3) The following provisions apply to an assessment under paragraph 69 as they apply to an assessment carried out in connection with a request for a standard authorisation—
- (a) paragraph 131 (examination and copying of records);
  - (b) paragraph 132 (representations);
  - (c) paragraphs 134 and 135(1) and (2) (duty to keep records and give copies).
- (4) The copies of the assessment which the supervisory body are required to give under paragraph 135(2) must be given as soon as practicable after the supervisory body are themselves given a copy of the assessment.
- 71 (1) This paragraph applies if—
- (a) the supervisory body obtain an assessment under paragraph 69,
  - (b) the assessment comes to the conclusion that the relevant person is a detained resident, and
  - (c) it appears to the supervisory body that the detention of the person is not authorised as mentioned in section 4A.
- (2) This Schedule (including Part 5) applies as if the managing authority of the relevant hospital or care home had, in accordance with Part 4, requested the supervisory body to give a standard authorisation in relation to the relevant person.
- (3) The managing authority of the relevant hospital or care home must supply the supervisory body with the information (if any) which the managing authority would, by virtue of paragraph 31, have had to include in a request for a standard authorisation.
- (4) The supervisory body must notify the persons specified in paragraph 69(8)—
- (a) of the outcome of the assessment obtained under paragraph 69, and
  - (b) that this Schedule applies as mentioned in sub-paragraph (2).
- 72 (1) This paragraph applies if—
- (a) the supervisory body obtain an assessment under paragraph 69, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) the assessment comes to the conclusion that the relevant person is not a detained resident.
- (2) The supervisory body must notify the persons specified in paragraph 69(8) of the outcome of the assessment.
- 73 (1) This paragraph applies if—
  - (a) the supervisory body obtain an assessment under paragraph 69,
  - (b) the assessment comes to the conclusion that the relevant person is a detained resident, and
  - (c) it appears to the supervisory body that the detention of the person is authorised as mentioned in section 4A.
- (2) The supervisory body must notify the persons specified in paragraph 69(8)—
  - (a) of the outcome of the assessment, and
  - (b) that it appears to the supervisory body that the detention is authorised.

## PART 5

### URGENT AUTHORISATIONS

#### *Managing authority to give authorisation*

- 74 Only the managing authority of the relevant hospital or care home may give an urgent authorisation.
- 75 The managing authority may give an urgent authorisation only if they are required to do so by paragraph 76 (as read with paragraph 77).

#### *Duty to give authorisation*

- 76 (1) The managing authority must give an urgent authorisation in either of the following cases.
- (2) The first case is where—
  - (a) the managing authority are required to make a request under paragraph 24 or 25 for a standard authorisation, and
  - (b) they believe that the need for the relevant person to be a detained resident is so urgent that it is appropriate for the detention to begin before they make the request.
- (3) The second case is where—
  - (a) the managing authority have made a request under paragraph 24 or 25 for a standard authorisation, and
  - (b) they believe that the need for the relevant person to be a detained resident is so urgent that it is appropriate for the detention to begin before the request is disposed of.
- (4) References in this paragraph to the detention of the relevant person are references to the detention to which paragraph 24 or 25 relates.
- (5) This paragraph is subject to paragraph 77.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- 77 (1) This paragraph applies where the managing authority have given an urgent authorisation (“the original authorisation”) in connection with a case where a person is, or is to be, a detained resident (“the existing detention”).
- (2) No new urgent authorisation is to be given under paragraph 76 in connection with the existing detention.
- (3) But the managing authority may request the supervisory body to extend the duration of the original authorisation.
- (4) Only one request under sub-paragraph (3) may be made in relation to the original authorisation.
- (5) Paragraphs 84 to 86 apply to any request made under sub-paragraph (3).

#### *Terms of authorisation*

- 78 (1) If the managing authority decide to give an urgent authorisation, they must decide the period during which the authorisation is to be in force.
- (2) That period must not exceed 7 days.

#### *Form of authorisation*

- 79 An urgent authorisation must be in writing.
- 80 An urgent authorisation must state the following things—
- (a) the name of the relevant person;
  - (b) the name of the relevant hospital or care home;
  - (c) the period during which the authorisation is to be in force;
  - (d) the purpose for which the authorisation is given.
- 81 (1) If the name of the relevant hospital or care home changes, the urgent authorisation is to be read as if it stated the current name of the hospital or care home.
- (2) But sub-paragraph (1) is subject to any provision relating to the change of name which is made in any enactment or in any instrument made under an enactment.

#### *Duty to keep records and give copies*

- 82 (1) This paragraph applies if an urgent authorisation is given.
- (2) The managing authority must keep a written record of why they have given the urgent authorisation.
- (3) As soon as practicable after giving the authorisation, the managing authority must give a copy of the authorisation to all of the following—
- (a) the relevant person;
  - (b) any section 39A IMCA.

#### *Duty to give information about authorisation*

- 83 (1) This paragraph applies if an urgent authorisation is given.
- (2) The managing authority of the relevant hospital or care home must take such steps as are practicable to ensure that the relevant person understands all of the following—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) the effect of the authorisation;
  - (b) the right to make an application to the court to exercise its jurisdiction under section 21A.
- (3) Those steps must be taken as soon as is practicable after the authorisation is given.
- (4) Those steps must include the giving of appropriate information both orally and in writing.

*Request for extension of duration*

- 84 (1) This paragraph applies if the managing authority make a request under paragraph 77 for the supervisory body to extend the duration of the original authorisation.
- (2) The managing authority must keep a written record of why they have made the request.
- (3) The managing authority must give the relevant person notice that they have made the request.
- (4) The supervisory body may extend the duration of the original authorisation if it appears to them that—
- (a) the managing authority have made the required request for a standard authorisation,
  - (b) there are exceptional reasons why it has not yet been possible for that request to be disposed of, and
  - (c) it is essential for the existing detention to continue until the request is disposed of.
- (5) The supervisory body must keep a written record that the request has been made to them.
- (6) In this paragraph and paragraphs 85 and 86—
- (a) “original authorisation” and “existing detention” have the same meaning as in paragraph 77;
  - (b) the required request for a standard authorisation is the request that is referred to in paragraph 76(2) or (3).
- 85 (1) This paragraph applies if, under paragraph 84, the supervisory body decide to extend the duration of the original authorisation.
- (2) The supervisory body must decide the period of the extension.
- (3) That period must not exceed 7 days.
- (4) The supervisory body must give the managing authority notice stating the period of the extension.
- (5) The managing authority must then vary the original authorisation so that it states the extended duration.
- (6) Paragraphs 82(3) and 83 apply (with the necessary modifications) to the variation of the original authorisation as they apply to the giving of an urgent authorisation.
- (7) The supervisory body must keep a written record of—
- (a) the outcome of the request, and

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the period of the extension.
- 86 (1) This paragraph applies if, under paragraph 84, the supervisory body decide not to extend the duration of the original authorisation.
- (2) The supervisory body must give the managing authority notice stating—
- (a) the decision, and
- (b) their reasons for making it.
- (3) The managing authority must give a copy of that notice to all of the following—
- (a) the relevant person;
- (b) any section 39A IMCA.
- (4) The supervisory body must keep a written record of the outcome of the request.

*No variation*

- 87 (1) An urgent authorisation may not be varied except in accordance with paragraph 85.
- (2) This paragraph does not affect the powers of the Court of Protection or of any other court.

*When an authorisation is in force*

- 88 An urgent authorisation comes into force when it is given.
- 89 (1) An urgent authorisation ceases to be in force at the end of the period stated in the authorisation in accordance with paragraph 80(c) (subject to any variation in accordance with paragraph 85).
- (2) But if the required request is disposed of before the end of that period, the urgent authorisation ceases to be in force as follows.
- (3) If the supervisory body are required by paragraph 50(1) to give the requested authorisation, the urgent authorisation ceases to be in force when the requested authorisation comes into force.
- (4) If the supervisory body are prohibited by paragraph 50(2) from giving the requested authorisation, the urgent authorisation ceases to be in force when the managing authority receive notice under paragraph 58.
- (5) In this paragraph—
- “required request” means the request referred to in paragraph 76(2) or (3);
- “requested authorisation” means the standard authorisation to which the required request relates.
- (6) This paragraph does not affect the powers of the Court of Protection or of any other court.
- 90 (1) This paragraph applies if an urgent authorisation ceases to be in force.
- (2) The supervisory body must give notice that the authorisation has ceased to be in force.
- (3) The supervisory body must give that notice to all of the following—
- (a) the relevant person;
- (b) any section 39A IMCA.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects  
for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) The supervisory body must give that notice as soon as practicable after the authorisation ceases to be in force.

## PART 6

### ELIGIBILITY REQUIREMENT NOT MET: SUSPENSION OF STANDARD AUTHORISATION

- 91 (1) This Part applies if the following conditions are met.
- (2) The first condition is that a standard authorisation—
- (a) has been given, and
  - (b) has not ceased to be in force.
- (3) The second condition is that the managing authority of the relevant hospital or care home are satisfied that the relevant person has ceased to meet the eligibility requirement.
- (4) But this Part does not apply if the relevant person is ineligible by virtue of paragraph 5 of Schedule 1A (in which case see Part 8).
- 92 The managing authority of the relevant hospital or care home must give the supervisory body notice that the relevant person has ceased to meet the eligibility requirement.
- 93 (1) This paragraph applies if the managing authority give the supervisory body notice under paragraph 92.
- (2) The standard authorisation is suspended from the time when the notice is given.
- (3) The supervisory body must give notice that the standard authorisation has been suspended to the following persons—
- (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.
- 94 (1) This paragraph applies if, whilst the standard authorisation is suspended, the managing authority are satisfied that the relevant person meets the eligibility requirement again.
- (2) The managing authority must give the supervisory body notice that the relevant person meets the eligibility requirement again.
- 95 (1) This paragraph applies if the managing authority give the supervisory body notice under paragraph 94.
- (2) The standard authorisation ceases to be suspended from the time when the notice is given.
- (3) The supervisory body must give notice that the standard authorisation has ceased to be suspended to the following persons—
- (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) any section 39D IMCA;
  - (d) the managing authority of the relevant hospital or care home.



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (4) The supervisory body must give notice under this paragraph as soon as practicable after they are given notice under paragraph 94.
- 96 (1) This paragraph applies if no notice is given under paragraph 94 before the end of the relevant 28 day period.
- (2) The standard authorisation ceases to have effect at the end of the relevant 28 day period.
- (3) The relevant 28 day period is the period of 28 days beginning with the day on which the standard authorisation is suspended under paragraph 93.
- 97 The effect of suspending the standard authorisation is that Part 1 ceases to apply for as long as the authorisation is suspended.

## PART 7

### STANDARD AUTHORISATIONS: CHANGE IN SUPERVISORY RESPONSIBILITY

#### *Application of this Part*

- 98 (1) This Part applies if these conditions are met.
- (2) The first condition is that a standard authorisation—
- (a) has been given, and
  - (b) has not ceased to be in force.
- (3) The second condition is that there is a change in supervisory responsibility.
- (4) The third condition is that there is not a change in the place of detention (within the meaning of paragraph 25).
- 99 For the purposes of this Part there is a change in supervisory responsibility if—
- (a) one body (“the old supervisory body”) have ceased to be supervisory body in relation to the standard authorisation, and
  - (b) a different body (“the new supervisory body”) have become supervisory body in relation to the standard authorisation.

#### *Effect of change in supervisory responsibility*

- 100 (1) The new supervisory body becomes the supervisory body in relation to the authorisation.
- (2) Anything done by or in relation to the old supervisory body in connection with the authorisation has effect, so far as is necessary for continuing its effect after the change, as if done by or in relation to the new supervisory body.
- (3) Anything which relates to the authorisation and which is in the process of being done by or in relation to the old supervisory body at the time of the change may be continued by or in relation to the new supervisory body.
- (4) But—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) the old supervisory body do not, by virtue of this paragraph, cease to be liable for anything done by them in connection with the authorisation before the change; and
- (b) the new supervisory body do not, by virtue of this paragraph, become liable for any such thing.

## PART 8

### STANDARD AUTHORISATIONS: REVIEW

#### *Application of this Part*

- 101 (1) This Part applies if a standard authorisation—
- (a) has been given, and
  - (b) has not ceased to be in force.
- (2) Paragraphs 102 to 122 are subject to paragraphs 123 to 125.

#### *Review by supervisory body*

- 102 (1) The supervisory body may at any time carry out a review of the standard authorisation in accordance with this Part.
- (2) The supervisory body must carry out such a review if they are requested to do so by an eligible person.
- (3) Each of the following is an eligible person—
- (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.

#### *Request for review*

- 103 (1) An eligible person may, at any time, request the supervisory body to carry out a review of the standard authorisation in accordance with this Part.
- (2) The managing authority of the relevant hospital or care home must make such a request if one or more of the qualifying requirements appear to them to be reviewable.

#### *Grounds for review*

- 104 (1) Paragraphs 105 to 107 set out the grounds on which the qualifying requirements are reviewable.
- (2) A qualifying requirement is not reviewable on any other ground.

#### *Non-qualification ground*

- 105 (1) Any of the following qualifying requirements is reviewable on the ground that the relevant person does not meet the requirement—
- (a) the age requirement;
  - (b) the mental health requirement;

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (c) the mental capacity requirement;
  - (d) the best interests requirement;
  - (e) the no refusals requirement.
- (2) The eligibility requirement is reviewable on the ground that the relevant person is ineligible by virtue of paragraph 5 of Schedule 1A.
- (3) The ground in sub-paragraph (1) and the ground in sub-paragraph (2) are referred to as the non-qualification ground.

*Change of reason ground*

- 106 (1) Any of the following qualifying requirements is reviewable on the ground set out in sub-paragraph (2)—
- (a) the mental health requirement;
  - (b) the mental capacity requirement;
  - (c) the best interests requirement;
  - (d) the eligibility requirement;
  - (e) the no refusals requirement.
- (2) The ground is that the reason why the relevant person meets the requirement is not the reason stated in the standard authorisation.
- (3) This ground is referred to as the change of reason ground.

*Variation of conditions ground*

- 107 (1) The best interests requirement is reviewable on the ground that—
- (a) there has been a change in the relevant person's case, and
  - (b) because of that change, it would be appropriate to vary the conditions to which the standard authorisation is subject.
- (2) This ground is referred to as the variation of conditions ground.
- (3) A reference to varying the conditions to which the standard authorisation is subject is a reference to—
- (a) amendment of an existing condition,
  - (b) omission of an existing condition, or
  - (c) inclusion of a new condition (whether or not there are already any existing conditions).

*Notice that review to be carried out*

- 108 (1) If the supervisory body are to carry out a review of the standard authorisation, they must give notice of the review to the following persons—
- (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.
- (2) The supervisory body must give the notice—
- (a) before they begin the review, or
  - (b) if that is not practicable, as soon as practicable after they have begun it.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) This paragraph does not require the supervisory body to give notice to any person who has requested the review.

*Starting a review*

- 109 To start a review of the standard authorisation, the supervisory body must decide which, if any, of the qualifying requirements appear to be reviewable.

*No reviewable qualifying requirements*

- 110 (1) This paragraph applies if no qualifying requirements appear to be reviewable.  
 (2) This Part does not require the supervisory body to take any action in respect of the standard authorisation.

*One or more reviewable qualifying requirements*

- 111 (1) This paragraph applies if one or more qualifying requirements appear to be reviewable.  
 (2) The supervisory body must secure that a separate review assessment is carried out in relation to each qualifying requirement which appears to be reviewable.  
 (3) But sub-paragraph (2) does not require the supervisory body to secure that a best interests review assessment is carried out in a case where the best interests requirement appears to the supervisory body to be non-assessable.  
 (4) The best interests requirement is non-assessable if—  
     (a) the requirement is reviewable only on the variation of conditions ground, and  
     (b) the change in the relevant person's case is not significant.  
 (5) In making any decision whether the change in the relevant person's case is significant, regard must be had to—  
     (a) the nature of the change, and  
     (b) the period that the change is likely to last for.

*Review assessments*

- 112 (1) A review assessment is an assessment of whether the relevant person meets a qualifying requirement.  
 (2) In relation to a review assessment—  
     (a) a negative conclusion is a conclusion that the relevant person does not meet the qualifying requirement to which the assessment relates;  
     (b) a positive conclusion is a conclusion that the relevant person meets the qualifying requirement to which the assessment relates.  
 (3) An age review assessment is a review assessment carried out in relation to the age requirement.  
 (4) A mental health review assessment is a review assessment carried out in relation to the mental health requirement.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (5) A mental capacity review assessment is a review assessment carried out in relation to the mental capacity requirement.
  - (6) A best interests review assessment is a review assessment carried out in relation to the best interests requirement.
  - (7) An eligibility review assessment is a review assessment carried out in relation to the eligibility requirement.
  - (8) A no refusals review assessment is a review assessment carried out in relation to the no refusals requirement.
- 113 (1) In carrying out a review assessment, the assessor must comply with any duties which would be imposed upon him under Part 4 if the assessment were being carried out in connection with a request for a standard authorisation.
- (2) But in the case of a best interests review assessment, paragraphs 43 and 44 do not apply.
  - (3) Instead of what is required by paragraph 43, the best interests review assessment must include recommendations about whether — and, if so, how — it would be appropriate to vary the conditions to which the standard authorisation is subject.

*Best interests requirement reviewable but non-assessable*

- 114 (1) This paragraph applies in a case where—
- (a) the best interests requirement appears to be reviewable, but
  - (b) in accordance with paragraph 111(3), the supervisory body are not required to secure that a best interests review assessment is carried out.
- (2) The supervisory body may vary the conditions to which the standard authorisation is subject in such ways (if any) as the supervisory body think are appropriate in the circumstances.

*Best interests review assessment positive*

- 115 (1) This paragraph applies in a case where—
- (a) a best interests review assessment is carried out, and
  - (b) the assessment comes to a positive conclusion.
- (2) The supervisory body must decide the following questions—
- (a) whether or not the best interests requirement is reviewable on the change of reason ground;
  - (b) whether or not the best interests requirement is reviewable on the variation of conditions ground;
  - (c) if so, whether or not the change in the person's case is significant.
- (3) If the supervisory body decide that the best interests requirement is reviewable on the change of reason ground, they must vary the standard authorisation so that it states the reason why the relevant person now meets that requirement.
- (4) If the supervisory body decide that—
- (a) the best interests requirement is reviewable on the variation of conditions ground, and

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the change in the relevant person's case is not significant, they may vary the conditions to which the standard authorisation is subject in such ways (if any) as they think are appropriate in the circumstances.
- (5) If the supervisory body decide that—
  - (a) the best interests requirement is reviewable on the variation of conditions ground, and
  - (b) the change in the relevant person's case is significant, they must vary the conditions to which the standard authorisation is subject in such ways as they think are appropriate in the circumstances.
- (6) If the supervisory body decide that the best interests requirement is not reviewable on—
  - (a) the change of reason ground, or
  - (b) the variation of conditions ground,
 this Part does not require the supervisory body to take any action in respect of the standard authorisation so far as the best interests requirement relates to it.

*Mental health, mental capacity, eligibility or no refusals review assessment positive*

- 116 (1) This paragraph applies if the following conditions are met.
- (2) The first condition is that one or more of the following are carried out—
    - (a) a mental health review assessment;
    - (b) a mental capacity review assessment;
    - (c) an eligibility review assessment;
    - (d) a no refusals review assessment.
  - (3) The second condition is that each assessment carried out comes to a positive conclusion.
  - (4) The supervisory body must decide whether or not each of the assessed qualifying requirements is reviewable on the change of reason ground.
  - (5) If the supervisory body decide that any of the assessed qualifying requirements is reviewable on the change of reason ground, they must vary the standard authorisation so that it states the reason why the relevant person now meets the requirement or requirements in question.
  - (6) If the supervisory body decide that none of the assessed qualifying requirements are reviewable on the change of reason ground, this Part does not require the supervisory body to take any action in respect of the standard authorisation so far as those requirements relate to it.
  - (7) An assessed qualifying requirement is a qualifying requirement in relation to which a review assessment is carried out.

*One or more review assessments negative*

- 117 (1) This paragraph applies if one or more of the review assessments carried out comes to a negative conclusion.
- (2) The supervisory body must terminate the standard authorisation with immediate effect.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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#### *Completion of a review*

- 118 (1) The review of the standard authorisation is complete in any of the following cases.
- (2) The first case is where paragraph 110 applies.
- (3) The second case is where—
- (a) paragraph 111 applies, and
  - (b) paragraph 117 requires the supervisory body to terminate the standard authorisation.
- (4) In such a case, the supervisory body need not comply with any of the other provisions of paragraphs 114 to 116 which would be applicable to the review (were it not for this sub-paragraph).
- (5) The third case is where—
- (a) paragraph 111 applies,
  - (b) paragraph 117 does not require the supervisory body to terminate the standard authorisation, and
  - (c) the supervisory body comply with all of the provisions of paragraphs 114 to 116 (so far as they are applicable to the review).

#### *Variations under this Part*

- 119 Any variation of the standard authorisation made under this Part must be in writing.

#### *Notice of outcome of review*

- 120 (1) When the review of the standard authorisation is complete, the supervisory body must give notice to all of the following—
- (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) the relevant person's representative;
  - (d) any section 39D IMCA.
- (2) That notice must state—
- (a) the outcome of the review, and
  - (b) what variation (if any) has been made to the authorisation under this Part.

#### *Records*

- 121 A supervisory body must keep a written record of the following information—
- (a) each request for a review that is made to them;
  - (b) the outcome of each request;
  - (c) each review which they carry out;
  - (d) the outcome of each review which they carry out;
  - (e) any variation of an authorisation made in consequence of a review.

#### *Relationship between review and suspension under Part 6*

- 122 (1) This paragraph applies if a standard authorisation is suspended in accordance with Part 6.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) No review may be requested under this Part whilst the standard authorisation is suspended.
- (3) If a review has already been requested, or is being carried out, when the standard authorisation is suspended, no steps are to be taken in connection with that review whilst the authorisation is suspended.
- Relationship between review and request for new authorisation*
- 123 (1) This paragraph applies if, in accordance with paragraph 24 (as read with paragraph 29), the managing authority of the relevant hospital or care home make a request for a new standard authorisation which would be in force after the expiry of the existing authorisation.
- (2) No review may be requested under this Part until the request for the new standard authorisation has been disposed of.
- (3) If a review has already been requested, or is being carried out, when the new standard authorisation is requested, no steps are to be taken in connection with that review until the request for the new standard authorisation has been disposed of.
- 124 (1) This paragraph applies if—
- (a) a review under this Part has been requested, or is being carried out, and
  - (b) the managing authority of the relevant hospital or care home make a request under paragraph 30 for a new standard authorisation which would be in force on or before, and after, the expiry of the existing authorisation.
- (2) No steps are to be taken in connection with the review under this Part until the request for the new standard authorisation has been disposed of.
- 125 In paragraphs 123 and 124—
- (a) the existing authorisation is the authorisation referred to in paragraph 101;
  - (b) the expiry of the existing authorisation is the time when it is expected to cease to be in force.

## PART 9

### ASSESSMENTS UNDER THIS SCHEDULE

#### *Introduction*

- 126 This Part contains provision about assessments under this Schedule.
- 127 An assessment under this Schedule is either of the following—
- (a) an assessment carried out in connection with a request for a standard authorisation under Part 4;
  - (b) a review assessment carried out in connection with a review of a standard authorisation under Part 8.
- 128 In this Part, in relation to an assessment under this Schedule—
- “assessor” means the person carrying out the assessment;
- “relevant procedure” means—
- (a) the request for the standard authorisation, or



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the review of the standard authorisation;  
“supervisory body” means the supervisory body responsible for securing that the assessment is carried out.

*Supervisory body to select assessor*

- 129 (1) It is for the supervisory body to select a person to carry out an assessment under this Schedule.
- (2) The supervisory body must not select a person to carry out an assessment unless the person—
- (a) appears to the supervisory body to be suitable to carry out the assessment (having regard, in particular, to the type of assessment and the person to be assessed), and
  - (b) is eligible to carry out the assessment.
- (3) Regulations may make provision about the selection, and eligibility, of persons to carry out assessments under this Schedule.
- (4) Sub-paragraphs (5) and (6) apply if two or more assessments are to be obtained for the purposes of the relevant procedure.
- (5) In a case where the assessments to be obtained include a mental health assessment and a best interests assessment, the supervisory body must not select the same person to carry out both assessments.
- (6) Except as prohibited by sub-paragraph (5), the supervisory body may select the same person to carry out any number of the assessments which the person appears to be suitable, and is eligible, to carry out.
- 130 (1) This paragraph applies to regulations under paragraph 129(3).
- (2) The regulations may make provision relating to a person's—
- (a) qualifications,
  - (b) skills,
  - (c) training,
  - (d) experience,
  - (e) relationship to, or connection with, the relevant person or any other person,
  - (f) involvement in the care or treatment of the relevant person,
  - (g) connection with the supervisory body, or
  - (h) connection with the relevant hospital or care home, or with any other establishment or undertaking.
- [<sup>F105</sup>(2A) In relation to England—
- (a) the provision that the regulations may make in relation to a person's training in connection with best interests assessments includes provision for particular training to be specified by Social Work England or the Secretary of State otherwise than in the regulations;
  - (b) the provision that the regulations may make in relation to a person's training in connection with other assessments includes provision for particular training to be specified by the Secretary of State otherwise than in the regulations.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2B) The regulations may give Social Work England power to charge fees for specifying any training as mentioned in sub-paragraph (2A)(a).
- (2C) If the regulations give Social Work England power to charge fees, section 50(2) to (7) of the Children and Social Work Act 2017 apply for the purposes of sub-paragraph (2B) as they apply for the purposes of that section.]
- (3) [<sup>F106</sup>In relation to Wales] the provision that the regulations may make in relation to a person's training may provide for particular training to be specified by [<sup>F107</sup>the Welsh Ministers] otherwise than in the regulations.
- <sup>F108</sup>(4) . . . . .
- (5) The regulations may make provision requiring a person to be insured in respect of liabilities that may arise in connection with the carrying out of an assessment.
- (6) In relation to cases where two or more assessments are to be obtained for the purposes of the relevant procedure, the regulations may limit the number, kind or combination of assessments which a particular person is eligible to carry out.
- (7) Sub-paragraphs (2) to (6) do not limit the generality of the provision that may be made in the regulations.

#### Textual Amendments

- F105** Sch. A1 para. 130(2A)-(2C) inserted (1.4.2018) by [Children and Social Work Act 2017 \(c. 16\)](#), [ss. 49\(2\)](#), [70\(2\)](#); [S.I. 2018/346](#), [reg. 4\(q\)](#)
- F106** Words in Sch. A1 para. 130(3) inserted (1.4.2018) by [Children and Social Work Act 2017 \(c. 16\)](#), [ss. 49\(3\)\(a\)](#), [70\(2\)](#); [S.I. 2018/346](#), [reg. 4\(q\)](#)
- F107** Words in Sch. A1 para. 130(3) substituted (1.4.2018) by [Children and Social Work Act 2017 \(c. 16\)](#), [ss. 49\(3\)\(b\)](#), [70\(2\)](#); [S.I. 2018/346](#), [reg. 4\(q\)](#)
- F108** Sch. A1 para. 130(4) omitted (1.4.2018) by virtue of [Children and Social Work Act 2017 \(c. 16\)](#), [ss. 49\(4\)](#), [70\(2\)](#); [S.I. 2018/346](#), [reg. 4\(q\)](#)

#### *Examination and copying of records*

- 131 An assessor may, at all reasonable times, examine and take copies of—
- (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in accordance with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 [<sup>F109</sup>, Chapter 2 of Part 1 of the Health and Social Care Act 2008 or Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016], which the assessor considers may be relevant to the assessment which is being carried out.

#### Textual Amendments

- F109** Words in Sch. A1 para. 131(c) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), [regs. 2\(1\)](#), [33\(a\)](#)

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### *Representations*

- 132 In carrying out an assessment under this Schedule, the assessor must take into account any information given, or submissions made, by any of the following—
- (a) the relevant person's representative;
  - (b) any section 39A IMCA;
  - (c) any section 39C IMCA;
  - (d) any section 39D IMCA.

### *Assessments to stop if any comes to negative conclusion*

- 133 (1) This paragraph applies if an assessment under this Schedule comes to the conclusion that the relevant person does not meet one of the qualifying requirements.
- (2) This Schedule does not require the supervisory body to secure that any other assessments under this Schedule are carried out in relation to the relevant procedure.
- (3) The supervisory body must give notice to any assessor who is carrying out another assessment in connection with the relevant procedure that they are to cease carrying out that assessment.
- (4) If an assessor receives such notice, this Schedule does not require the assessor to continue carrying out that assessment.

### *Duty to keep records and give copies*

- 134 (1) This paragraph applies if an assessor has carried out an assessment under this Schedule (whatever conclusions the assessment has come to).
- (2) The assessor must keep a written record of the assessment.
- (3) As soon as practicable after carrying out the assessment, the assessor must give copies of the assessment to the supervisory body.
- 135 (1) This paragraph applies to the supervisory body if they are given a copy of an assessment under this Schedule.
- (2) The supervisory body must give copies of the assessment to all of the following—
- (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) any section 39A IMCA;
  - (d) the relevant person's representative.
- (3) If—
- (a) the assessment is obtained in relation to a request for a standard authorisation, and
  - (b) the supervisory body are required by paragraph 50(1) to give the standard authorisation,
- the supervisory body must give the copies of the assessment when they give copies of the authorisation in accordance with paragraph 57.
- (4) If—
- (a) the assessment is obtained in relation to a request for a standard authorisation, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) the supervisory body are prohibited by paragraph 50(2) from giving the standard authorisation,  
the supervisory body must give the copies of the assessment when they give notice in accordance with paragraph 58.
- (5) If the assessment is obtained in connection with the review of a standard authorisation, the supervisory body must give the copies of the assessment when they give notice in accordance with paragraph 120.
- 136 (1) This paragraph applies to the supervisory body if—
- (a) they are given a copy of a best interests assessment, and
  - (b) the assessment includes, in accordance with paragraph 44(2), a statement that it appears to the assessor that there is an unauthorised deprivation of liberty.
- (2) The supervisory body must notify all of the persons listed in sub-paragraph (3) that the assessment includes such a statement.
- (3) Those persons are—
- (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) any section 39A IMCA;
  - (d) any interested person consulted by the best interests assessor.
- (4) The supervisory body must comply with this paragraph when (or at some time before) they comply with paragraph 135.

## PART 10

### RELEVANT PERSON'S REPRESENTATIVE

#### *The representative*

- 137 In this Schedule the relevant person's representative is the person appointed as such in accordance with this Part.
- 138 (1) Regulations may make provision about the selection and appointment of representatives.
- (2) In this Part such regulations are referred to as “appointment regulations”.

#### *Supervisory body to appoint representative*

- 139 (1) The supervisory body must appoint a person to be the relevant person's representative as soon as practicable after a standard authorisation is given.
- (2) The supervisory body must appoint a person to be the relevant person's representative if a vacancy arises whilst a standard authorisation is in force.
- (3) Where a vacancy arises, the appointment under sub-paragraph (2) is to be made as soon as practicable after the supervisory body becomes aware of the vacancy.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- 140 (1) The selection of a person for appointment under paragraph 139 must not be made unless it appears to the person making the selection that the prospective representative would, if appointed—
- (a) maintain contact with the relevant person,
  - (b) represent the relevant person in matters relating to or connected with this Schedule, and
  - (c) support the relevant person in matters relating to or connected with this Schedule.
- 141 (1) Any appointment of a representative for a relevant person is in addition to, and does not affect, any appointment of a donee or deputy.
- (2) The functions of any representative are in addition to, and do not affect—
- (a) the authority of any donee,
  - (b) the powers of any deputy, or
  - (c) any powers of the court.

#### *Appointment regulations*

- 142 Appointment regulations may provide that the procedure for appointing a representative may begin at any time after a request for a standard authorisation is made (including a time before the request has been disposed of).
- 143 (1) Appointment regulations may make provision about who is to select a person for appointment as a representative.
- (2) But regulations under this paragraph may only provide for the following to make a selection—
- (a) the relevant person, if he has capacity in relation to the question of which person should be his representative;
  - (b) a donee of a lasting power of attorney granted by the relevant person, if it is within the scope of his authority to select a person;
  - (c) a deputy, if it is within the scope of his authority to select a person;
  - (d) a best interests assessor;
  - (e) the supervisory body.
- (3) Regulations under this paragraph may provide that a selection by the relevant person, a donee or a deputy is subject to approval by a best interests assessor or the supervisory body.
- (4) Regulations under this paragraph may provide that, if more than one selection is necessary in connection with the appointment of a particular representative—
- (a) the same person may make more than one selection;
  - (b) different persons may make different selections.
- (5) For the purposes of this paragraph a best interests assessor is a person carrying out a best interests assessment in connection with the standard authorisation in question (including the giving of that authorisation).
- 144 (1) Appointment regulations may make provision about who may, or may not, be—
- (a) selected for appointment as a representative, or
  - (b) appointed as a representative.
- (2) Regulations under this paragraph may relate to any of the following matters—

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) a person's age;
- (b) a person's suitability;
- (c) a person's independence;
- (d) a person's willingness;
- (e) a person's qualifications.

145 Appointment regulations may make provision about the formalities of appointing a person as a representative.

146 In a case where a best interests assessor is to select a person to be appointed as a representative, appointment regulations may provide for the variation of the assessor's duties in relation to the assessment which he is carrying out.

*Monitoring of representatives*

147 Regulations may make provision requiring the managing authority of the relevant hospital or care home to—

- (a) monitor, and
- (b) report to the supervisory body on,

the extent to which a representative is maintaining contact with the relevant person.

*Termination*

148 Regulations may make provision about the circumstances in which the appointment of a person as the relevant person's representative ends or may be ended.

149 Regulations may make provision about the formalities of ending the appointment of a person as a representative.

*Suspension of representative's functions*

150 (1) Regulations may make provision about the circumstances in which functions exercisable by, or in relation to, the relevant person's representative (whether under this Schedule or not) may be—

- (a) suspended, and
- (b) if suspended, revived.

(2) The regulations may make provision about the formalities for giving effect to the suspension or revival of a function.

(3) The regulations may make provision about the effect of the suspension or revival of a function.

*Payment of representative*

151 Regulations may make provision for payments to be made to, or in relation to, persons exercising functions as the relevant person's representative.

*Regulations under this Part*

152 The provisions of this Part which specify provision that may be made in regulations under this Part do not affect the generality of the power to make such regulations.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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*Effect of appointment of section 39C IMCA*

- 153 Paragraphs 159 and 160 make provision about the exercise of functions by, or towards, the relevant person's representative during periods when—
- (a) no person is appointed as the relevant person's representative, but
  - (b) a person is appointed as a section 39C IMCA.

**PART 11**

**IMCAs**

*Application of Part*

- 154 This Part applies for the purposes of this Schedule.

*The IMCAs*

- 155 A section 39A IMCA is an independent mental capacity advocate appointed under section 39A.
- 156 A section 39C IMCA is an independent mental capacity advocate appointed under section 39C.
- 157 A section 39D IMCA is an independent mental capacity advocate appointed under section 39D.
- 158 An IMCA is a section 39A IMCA or a section 39C IMCA or a section 39D IMCA.

*Section 39C IMCA: functions*

- 159 (1) This paragraph applies if, and for as long as, there is a section 39C IMCA.
- (2) In the application of the relevant provisions, references to the relevant person's representative are to be read as references to the section 39C IMCA.
- (3) But sub-paragraph (2) does not apply to any function under the relevant provisions for as long as the function is suspended in accordance with provision made under Part 10.
- (4) In this paragraph and paragraph 160 the relevant provisions are—
- (a) paragraph 102(3)(b) (request for review under Part 8);
  - (b) paragraph 108(1)(b) (notice of review under Part 8);
  - (c) paragraph 120(1)(c) (notice of outcome of review under Part 8).
- 160 (1) This paragraph applies if—
- (a) a person is appointed as the relevant person's representative, and
  - (b) a person accordingly ceases to hold an appointment as a section 39C IMCA.
- (2) Where a function under a relevant provision has been exercised by, or towards, the section 39C IMCA, there is no requirement for that function to be exercised again by, or towards, the relevant person's representative.

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*Changes to legislation: There are currently no known outstanding effects  
for the Mental Capacity Act 2005. (See end of Document for details)*

*Section 39A IMCA: restriction of functions*

- 161 (1) This paragraph applies if—
- (a) there is a section 39A IMCA, and
  - (b) a person is appointed under Part 10 to be the relevant person's representative (whether or not that person, or any person subsequently appointed, is currently the relevant person's representative).
- (2) The duties imposed on, and the powers exercisable by, the section 39A IMCA do not apply.
- (3) The duties imposed on, and the powers exercisable by, any other person do not apply, so far as they fall to be performed or exercised towards the section 39A IMCA.
- (4) But sub-paragraph (2) does not apply to any power of challenge exercisable by the section 39A IMCA.
- (5) And sub-paragraph (3) does not apply to any duty or power of any other person so far as it relates to any power of challenge exercisable by the section 39A IMCA.
- (6) Before exercising any power of challenge, the section 39A IMCA must take the views of the relevant person's representative into account.
- (7) A power of challenge is a power to make an application to the court to exercise its jurisdiction under section 21A in connection with the giving of the standard authorisation.

**PART 12**

MISCELLANEOUS

*Monitoring of operation of Schedule*

- 162 (1) Regulations may make provision for, and in connection with, requiring one or more prescribed bodies to monitor, and report on, the operation of this Schedule in relation to England.
- (2) The regulations may, in particular, give a prescribed body authority to do one or more of the following things—
- (a) to visit hospitals and care homes;
  - (b) to visit and interview persons accommodated in hospitals and care homes;
  - (c) to require the production of, and to inspect, records relating to the care or treatment of persons.
- (3) “Prescribed” means prescribed in regulations under this paragraph.
- 163 (1) Regulations may make provision for, and in connection with, enabling the National Assembly for Wales to monitor, and report on, the operation of this Schedule in relation to Wales.
- (2) The National Assembly may direct one or more persons or bodies to carry out the Assembly's functions under regulations under this paragraph.



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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### *Disclosure of information*

- 164 (1) Regulations may require either or both of the following to disclose prescribed information to prescribed bodies—
- (a) supervisory bodies;
  - (b) managing authorities of hospitals or care homes.
- (2) “Prescribed” means prescribed in regulations under this paragraph.
- (3) Regulations under this paragraph may only prescribe information relating to matters with which this Schedule is concerned.

### *Directions by National Assembly in relation to supervisory functions*

- 165 (1) The National Assembly for Wales may direct a Local Health Board to exercise in relation to its area any supervisory functions which are specified in the direction.
- (2) Directions under this paragraph must not preclude the National Assembly from exercising the functions specified in the directions.
- (3) In this paragraph “supervisory functions” means functions which the National Assembly have as supervisory body, so far as they are exercisable in relation to hospitals (whether NHS or independent hospitals, and whether in Wales or England).
- 166 (1) This paragraph applies where, under paragraph 165, a Local Health Board (“the specified LHB”) is directed to exercise supervisory functions (“delegated functions”).
- (2) The National Assembly for Wales may give directions to the specified LHB about the Board's exercise of delegated functions.
- (3) The National Assembly may give directions for any delegated functions to be exercised, on behalf of the specified LHB, by a committee, sub-committee or officer of that Board.
- (4) The National Assembly may give directions providing for any delegated functions to be exercised by the specified LHB jointly with one or more other Local Health Boards.
- (5) Where, under sub-paragraph (4), delegated functions are exercisable jointly, the National Assembly may give directions providing for the functions to be exercised, on behalf of the Local Health Boards in question, by a joint committee or joint sub-committee.
- 167 (1) Directions under paragraph 165 must be given in regulations.
- (2) Directions under paragraph 166 may be given—
- (a) in regulations, or
  - (b) by instrument in writing.
- 168 The power under paragraph 165 or paragraph 166 to give directions includes power to vary or revoke directions given under that paragraph.

### *Notices*

- 169 Any notice under this Schedule must be in writing.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### *Regulations*

- 170 (1) This paragraph applies to all regulations under this Schedule, except regulations under paragraph 162, 163, 167 or 183.
- (2) It is for the Secretary of State to make such regulations in relation to authorisations under this Schedule which relate to hospitals and care homes situated in England.
- (3) It is for the National Assembly for Wales to make such regulations in relation to authorisations under this Schedule which relate to hospitals and care homes situated in Wales.
- 171 It is for the Secretary of State to make regulations under paragraph 162.
- 172 It is for the National Assembly for Wales to make regulations under paragraph 163 or 167.
- 173 (1) This paragraph applies to regulations under paragraph 183.
- (2) It is for the Secretary of State to make such regulations in relation to cases where a question as to the ordinary residence of a person is to be determined by the Secretary of State.
- (3) It is for the National Assembly for Wales to make such regulations in relation to cases where a question as to the ordinary residence of a person is to be determined by the National Assembly.

## PART 13

### INTERPRETATION

#### *Introduction*

- 174 This Part applies for the purposes of this Schedule.

#### *Hospitals and their managing authorities*

- 175 (1) “Hospital ” means—
- (a) an NHS hospital, or
  - (b) an independent hospital.
- (2) “NHS hospital ” means—
- (a) a health service hospital as defined by section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006, or
  - (b) a hospital as defined by section 206 of the National Health Service (Wales) Act 2006 vested in a Local Health Board.
- [<sup>F110</sup>(3) Independent hospital”—
- (a) in relation to England, means a hospital as defined by section 275 of the National Health Service Act 2006 that is not an NHS hospital; and
  - (b) in relation to Wales, means a hospital as defined by section 2 of the Care Standards Act 2000 that is not an NHS hospital.]<sup>F110</sup>

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

#### Textual Amendments

**F110** Sch. A1 para. 175(3) substituted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\)](#), [art. 17\(7\)\(b\)\(i\)](#)

- 176 (1) “Managing authority”, in relation to an NHS hospital, means—
- (a) if the hospital—
    - (i) is vested in the appropriate national authority for the purposes of its functions under the National Health Service Act 2006 or of the National Health Service (Wales) Act 2006, or
    - (ii) consists of any accommodation provided by a local authority and used as a hospital by or on behalf of the appropriate national authority under either of those Acts,
- the<sup>F111</sup> ... <sup>F112</sup> ... Local Health Board or Special Health Authority responsible for the administration of the hospital;
- [<sup>F113</sup>(aa) in relation to England, if the hospital falls within paragraph (a)(i) or (ii) and no Special Health Authority has responsibility for its administration, the Secretary of State;]
- (b) if the hospital is vested in a <sup>F114</sup> ... National Health Service trust or NHS foundation trust, that trust;
  - (c) if the hospital is vested in a Local Health Board, that Board.
- (2) For this purpose the appropriate national authority is—
- (a) in relation to England: the Secretary of State;
  - (b) in relation to Wales: the National Assembly for Wales;
  - (c) in relation to England and Wales: the Secretary of State and the National Assembly acting jointly.

#### Textual Amendments

**F111** Words in Sch. A1 para. 176(1)(a) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 136\(2\)\(a\)](#); S.I. 2013/160, art. 2(2) (with arts. 7-9)

**F112** Words in Sch. A1 para. 176(1)(a) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 136\(2\)\(b\)](#); S.I. 2013/160, art. 2(2) (with arts. 7-9)

**F113** Sch. A1 para. 176(1)(aa) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 136\(2\)\(c\)](#); S.I. 2013/160, art. 2(2) (with arts. 7-9)

**F114** Words in Sch. A1 para. 176(1)(b) omitted (1.4.2013) by virtue of [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 136\(2\)\(d\)](#); S.I. 2013/160, art. 2(2) (with arts. 7-9)

- [<sup>F115</sup>177 “Managing authority”, in relation to an independent hospital, means—
- (a) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of regulated activities (within the meaning of that Part) carried on in the hospital, and
  - (b) in relation to Wales, the person registered, or required to be registered, under Part 2 of the Care Standards Act 2000 in respect of the hospital.]<sup>F115</sup>

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

**Textual Amendments**

**F115** Sch. A1 para. 177 substituted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\)](#), **art. 17(7)(b)(ii)**

*Care homes and their managing authorities*

- [<sup>F116</sup>178. “Care home” means—
- (a) a care home in England within the meaning given by section 3 of the Care Standards Act 2000, and
  - (b) a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 is provided wholly or mainly to persons aged 18 or over.]

**Textual Amendments**

**F116** Sch. A1 para. 178 substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), **regs. 2(1), 33(b)**

- [<sup>F117</sup>179 “Managing authority”, in relation to a care home, means—
- (a) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the provision of residential accommodation, together with nursing or personal care, in the care home, and
  - (b) in relation to Wales, the person registered, or required to be registered, [<sup>F118</sup>under Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 in respect of the care home].]

**Textual Amendments**

**F117** Sch. A1 para. 179 substituted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\)](#), **art. 17(7)(b)(iii)**

**F118** Words in Sch. A1 para. 179(b) substituted (2.4.2018) by virtue of [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), **regs. 2(1), 33(c)**

*Supervisory bodies: hospitals*

- 180 (1) The identity of the supervisory body is determined under this paragraph in cases where the relevant hospital is situated in England.
- [<sup>F119</sup>(2) If the relevant person is ordinarily resident in the area of a local authority in England, the supervisory body are that local authority.]
- (3) If [<sup>F120</sup>the relevant person is not ordinarily resident in England and] the National Assembly for Wales or a Local Health Board commission the relevant care or treatment, the National Assembly are the supervisory body.
- (4) In any other case, the supervisory body are [<sup>F121</sup>the local authority] for the area in which the relevant hospital is situated.

[<sup>F122</sup>(4A) Local authority” means—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) the council of a county;
- (b) the council of a district for which there is no county council;
- (c) the council of a London borough;
- (d) the Common Council of the City of London;
- (e) the Council of the Isles of Scilly.]

- (5) If a hospital is situated in the areas of two (or more) [<sup>F123</sup>local authorities], it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.

#### Textual Amendments

- F119** Sch. A1 para. 180(2) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(3\)\(a\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)
- F120** Words in Sch. A1 para. 180(3) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(3\)\(b\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)
- F121** Words in Sch. A1 para. 180(4) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(3\)\(c\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)
- F122** Sch. A1 para. 180(4A) inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(3\)\(d\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)
- F123** Words in Sch. A1 para. 180(5) substituted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(3\)\(e\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)

- 181 (1) The identity of the supervisory body is determined under this paragraph in cases where the relevant hospital is situated in Wales.
- (2) The National Assembly for Wales are the supervisory body.
- [<sup>F124</sup>(3) But if the relevant person is ordinarily resident in the area of a local authority in England, the supervisory body are that local authority.
- (4) “ Local authority ” means—
- (a) the council of a county;
  - (b) the council of a district for which there is no county council;
  - (c) the council of a London borough;
  - (d) the Common Council of the City of London;
  - (e) the Council of the Isles of Scilly.]

#### Textual Amendments

- F124** Sch. A1 para. 181(3)(4) substituted for Sch. A1 para. 181(3) (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\), s. 306\(4\)](#), [Sch. 5 para. 136\(4\)](#); [S.I. 2013/160, art. 2\(2\)](#) (with arts. 7-9)

#### *Supervisory bodies: care homes*

- 182 (1) The identity of the supervisory body is determined under this paragraph in cases where the relevant care home is situated in England or in Wales.
- (2) The supervisory body are the local authority for the area in which the relevant person is ordinarily resident.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) But if the relevant person is not ordinarily resident in the area of a local authority, the supervisory body are the local authority for the area in which the care home is situated.
- (4) In relation to England “ local authority ” means—
- (a) the council of a county;
  - (b) the council of a district for which there is no county council;
  - (c) the council of a London borough;
  - (d) the Common Council of the City of London;
  - (e) the Council of the Isles of Scilly.
- (5) In relation to Wales “ local authority ” means the council of a county or county borough.
- (6) If a care home is situated in the areas of two (or more) local authorities, it is to be regarded for the purposes of sub-paragraph (3) as situated in whichever of the areas the greater (or greatest) part of the care home is situated.

*[<sup>F125</sup>Supervisory bodies: determination of place of ordinary residence]*

#### **Textual Amendments**

**F125** Sch. A1 para. 183 heading inserted (1.4.2013) by [Health and Social Care Act 2012 \(c. 7\)](#), s. 306(4), [Sch. 5 para. 136\(5\)](#); [S.I. 2013/160](#), art. 2(2) (with arts. 7-9)

183<sup>26</sup>( 1 ) . . . . .

<sup>F126</sup>( 2 ) . . . . .

[<sup>F127</sup>(2A) Section 39(1), (2) and (4) to (6) of the Care Act 2014 and paragraphs 1(1), 2(1) and 8 of Schedule 1 to that Act apply to any determination of where a person is ordinarily resident for the purposes of paragraphs 180, 181 and 182 as they apply for the purposes of Part 1 of that Act.]

[<sup>F128</sup>(2B) Section 194(1), (2), (4) and (5) of the Social Services and Well-being (Wales) Act 2014 apply to a determination of where a person is ordinarily resident for the purposes of paragraphs 180, 181 and 182 as it applies for the purposes of that Act.]

- (3) Any question arising as to the ordinary residence of a person is to be determined by the Secretary of State or by the National Assembly for Wales.
- (4) The Secretary of State and the National Assembly must make and publish arrangements for determining which cases are to be dealt with by the Secretary of State and which are to be dealt with by the National Assembly.
- (5) Those arrangements may include provision for the Secretary of State and the National Assembly to agree, in relation to any question that has arisen, which of them is to deal with the case.
- (6) Regulations may make provision about arrangements that are to have effect before, upon, or after the determination of any question as to the ordinary residence of a person.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (7) The regulations may, in particular, authorise or require a local authority to do any or all of the following things—
- (a) to act as supervisory body even though it may wish to dispute that it is the supervisory body;
  - (b) to become the supervisory body in place of another local authority;
  - (c) to recover from another local authority expenditure incurred in exercising functions as the supervisory body.

#### Textual Amendments

- F126** Sch. A1 para. 183(1)(2) omitted (6.4.2016) by virtue of [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **229(a)**
- F127** Sch. A1 para. 183(2A) inserted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 80** (with arts. 1(3), 3)
- F128** Sch. A1 para. 183(2B) inserted (6.4.2016) by [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **229(b)**

#### *Same body managing authority and supervisory body*

- 184 (1) This paragraph applies if, in connection with a particular person's detention as a resident in a hospital or care home, the same body are both—
- (a) the managing authority of the relevant hospital or care home, and
  - (b) the supervisory body.
- (2) The fact that a single body are acting in both capacities does not prevent the body from carrying out functions under this Schedule in each capacity.
- (3) But, in such a case, this Schedule has effect subject to any modifications contained in regulations that may be made for this purpose.

#### *Interested persons*

- 185 Each of the following is an interested person—
- (a) the relevant person's spouse or civil partner;
  - <sup>[F129]</sup>(b) where the relevant person and another person are not married to each other, nor in a civil partnership with each other, but are living together as if they were a married couple <sup>[F130]</sup>or civil partners]: that other person;]
  - (d) the relevant person's children and step-children;
  - (e) the relevant person's parents and step-parents;
  - (f) the relevant person's brothers and sisters, half-brothers and half-sisters, and stepbrothers and stepsisters;
  - (g) the relevant person's grandparents;
  - (h) a deputy appointed for the relevant person by the court;
  - (i) a donee of a lasting power of attorney granted by the relevant person.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### Textual Amendments

**F129** Sch. A1 paragraph 185(b) substituted for Sch. A1 paragraph 185(b)(c) (13.3.2014) by [The Marriage \(Same Sex Couples\) Act 2013 \(Consequential and Contrary Provisions and Scotland\) Order 2014 \(S.I. 2014/560\)](#), art. 1(2), **Sch. 1 para. 30**

**F130** Words in [Sch. A1 para. 185\(b\)](#) inserted (2.12.2019) by [The Civil Partnership \(Opposite-sex Couples\) Regulations 2019 \(S.I. 2019/1458\)](#), reg. 1(2), **Sch. 3 para. 28**

186 (1) An interested person consulted by the best interests assessor is any person whose name is stated in the relevant best interests assessment in accordance with paragraph 40 (interested persons whom the assessor consulted in carrying out the assessment).

(2) The relevant best interests assessment is the most recent best interests assessment carried out in connection with the standard authorisation in question (whether the assessment was carried out under Part 4 or Part 8).

187 Where this Schedule imposes on a person a duty towards an interested person, the duty does not apply if the person on whom the duty is imposed—

(a) is not aware of the interested person's identity or of a way of contacting him, and

(b) cannot reasonably ascertain it.

188 The following table contains an index of provisions defining or otherwise explaining expressions used in this Schedule—

age assessment	paragraph 34
age requirement	paragraph 13
age review assessment	paragraph 112(3)
appointment regulations	paragraph 138
assessment under this Schedule	paragraph 127
assessor (except in Part 9)	paragraph 33
assessor (in Part 9)	paragraphs 33 and 128
authorisation under this Schedule	paragraph 10
best interests (determination of)	section 4
best interests assessment	paragraph 38
best interests requirement	paragraph 16
best interests review assessment	paragraph 112(6)
care home	paragraph 178
change of reason ground	paragraph 106
complete (in relation to a review of a standard authorisation)	paragraph 118
deprivation of a person's liberty	section 64(5) and (6)
deputy	section 16(2)(b)
detained resident	paragraph 6



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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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disposed of (in relation to a request for a standard authorisation)	paragraph 66
eligibility assessment	paragraph 46
eligibility requirement	paragraph 17
eligibility review assessment	paragraph 112(7)
eligible person (in relation to paragraphs 68 to 73)	paragraph 68
eligible person (in relation to Part 8)	paragraph 102(3)
expiry (in relation to an existing authorisation)	paragraph 125(b)
existing authorisation (in Part 8)	paragraph 125(a)
hospital	paragraph 175
IMCA	paragraph 158
in force (in relation to a standard authorisation)	paragraphs 63 and 64
in force (in relation to an urgent authorisation)	paragraphs 88 and 89
ineligible (in relation to the eligibility requirement)	Schedule 1A
interested person	paragraph 185
interested person consulted by the best interests assessor	paragraph 186
lack of capacity	section 2
lasting power of attorney	section 9
managing authority (in relation to a care home)	paragraph 179
managing authority (in relation to a hospital)	paragraph 176 or 177
maximum authorisation period	paragraph 42
mental capacity assessment	paragraph 37
mental capacity requirement	paragraph 15
mental capacity review assessment	paragraph 112(5)
mental health assessment	paragraph 35
mental health requirement	paragraph 14
mental health review assessment	paragraph 112(4)
negative conclusion	paragraph 112(2)(a)
new supervisory body	paragraph 99(b)
no refusals assessment	paragraph 48

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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no refusals requirement	paragraph 18
no refusals review assessment	paragraph 112(8)
non-qualification ground	paragraph 105
old supervisory body	paragraph 99(a)
positive conclusion	paragraph 112(2)(b)
purpose of a standard authorisation	paragraph 11(1)
purpose of an urgent authorisation	paragraph 11(2)
qualifying requirements	paragraph 12
refusal (for the purposes of the no refusals requirement)	paragraphs 19 and 20
relevant care or treatment	paragraph 7
relevant hospital or care home	paragraph 7
relevant managing authority	paragraph 26(4)
relevant person	paragraph 7
relevant person's representative	paragraph 137
relevant procedure	paragraph 128
review assessment	paragraph 112(1)
reviewable	paragraph 104
section 39A IMCA	paragraph 155
section 39C IMCA	paragraph 156
section 39D IMCA	paragraph 157
standard authorisation	paragraph 8
supervisory body (except in Part 9)	paragraph 180, 181 or 182
supervisory body (in Part 9)	paragraph 128 and paragraph 180, 181 or 182
unauthorised deprivation of liberty (in relation to paragraphs 68 to 73)	paragraph 67
urgent authorisation	paragraph 9
variation of conditions ground	paragraph 107]

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## [<sup>F131</sup>SCHEDULE AA1

Section 4A(5)

### DEPRIVATION OF LIBERTY: AUTHORISATION OF ARRANGEMENTS ENABLING CARE AND TREATMENT

#### Textual Amendments

**F131** Sch. AA1 inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 1](#)

## PART 1

### INTRODUCTORY AND INTERPRETATION

#### *Contents of this Schedule*

- 1 In this Schedule—
- Part 1 (this Part) describes the arrangements dealt with and gives definitions (including “the responsible body”)
  - Part 2 sets out the procedure for the responsible body to authorise arrangements
  - Part 3 is about the duration, renewal, variation and review of authorisations
  - Part 4 is about Approved Mental Capacity Professionals (involved under Part 2 in certain cases)
  - Part 5 is about appointing persons to give representation and support in connection with arrangements
  - Part 6 gives power to provide for monitoring and reporting
  - Part 7 excludes—
    - (a) mental health arrangements, and
    - (b) arrangements that are not in accordance with mental health requirements
  - Part 8 contains transitory provision.

#### *Arrangements this Schedule applies to*

- 2 (1) This Schedule applies to arrangements—
- (a) for enabling the care or treatment of a person (the “cared-for person”) described in sub-paragraph (2),
  - (b) that give rise to a deprivation of the cared-for person’s liberty, and
  - (c) that are not excluded by Part 7.
- (2) The cared-for person must be a person who—
- (a) is aged 16 or over,
  - (b) lacks capacity to consent to the arrangements, and
  - (c) has a mental disorder.
- (3) The arrangements may for example be—
- (a) for the cared-for person to reside in a particular place;
  - (b) for the cared-for person to receive care or treatment at a particular place;

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (c) for the means and manner of transport for the cared-for person to, from or between particular places.
- (4) The arrangements may be ones that are proposed, or that are being carried out.
- (5) If they are proposed, references in this Schedule to where or how they are carried out are to whatever is proposed in the arrangements.
- (6) If provision to which sub-paragraph (1)(a) and (b) apply and other provision are combined, the “arrangements” for the purposes of this Schedule do not include that other provision.

### *Definitions*

3 In this Schedule—

“Approved Mental Capacity Professional” means a person approved in accordance with Part 4 as an Approved Mental Capacity Professional for the purposes of this Schedule;

“arrangements” must be read in accordance with paragraph 2;

“authorisation” means authorisation of arrangements under this Schedule, and “authorise” and related words are to be read accordingly;

“authorisation conditions” has the meaning given by paragraph 13;

“authorisation record” has the meaning given by paragraph 27;

“care home” means—

(a) a place which is a care home within the meaning given by section 3 of the Care Standards Act 2000, or

(b) a place in Wales at which a care home service within the meaning of Part 1 of the [Regulation and Inspection of Social Care \(Wales\) Act 2016 \(anaw 2\)](#) is provided wholly or mainly to persons aged 18 or over;

“care home arrangements” means arrangements, in relation to a cared-for person aged 18 or over, carried out wholly or partly in a care home;

“care home manager”, in relation to a care home or care home arrangements, means—

(a) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the provision of residential accommodation, together with nursing or personal care, in the care home, and

(b) in relation to Wales, the person registered, or required to be registered, under Chapter 2 of Part 1 of the [Regulation and Inspection of Social Care \(Wales\) Act 2016 \(anaw 2\)](#) in respect of the provision of a care home service, in the care home;

“cared-for person” has the meaning given by paragraph 2(1);

“clinical commissioning group” means a body established under section 14D of the National Health Service Act 2006;

“Education, Health and Care plan” means a plan within the meaning of section 37(2) of the Children and Families Act 2014;

“English responsible body” has the meaning given by paragraph 11;

“hospital manager” has the meaning given by paragraph 7;

“independent hospital” has the meaning given by paragraph 5;

“local authority” has the meaning given by paragraph 4;

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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“Local Health Board” means a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006;

“mental disorder” has the meaning given by section 1(2) of the Mental Health Act;

“mental health arrangements” has the meaning given by paragraph 46;

“mental health requirements” has the meaning given by paragraph 57;

“NHS hospital” has the meaning given by paragraph 5;

“responsible body” has the meaning given by paragraph 6;

“specified”, except in paragraph 57, means specified in an authorisation record;

“Welsh responsible body” has the meaning given by paragraph 12.

#### *Local authority*

4 (1) “Local authority” means—

(a) in England—

(i) the council of a county;

(ii) the council of a district for which there is no county council;

(iii) the council of a London borough;

(iv) the Common Council of the City of London;

(v) the Council of the Isles of Scilly;

(b) in Wales, the council of a county or county borough.

(2) For the purposes of this Schedule the area of the Common Council of the City of London is to be treated as including the Inner Temple and the Middle Temple.

#### *NHS hospital and independent hospital*

5 (1) “NHS hospital” means—

(a) a health service hospital as defined by section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006, or

(b) a hospital as defined by section 206 of the National Health Service (Wales) Act 2006 vested in a Local Health Board.

(2) “Independent hospital”—

(a) in relation to England, means a hospital as defined by section 275 of the National Health Service Act 2006 that is not an NHS hospital, and

(b) in relation to Wales, means a hospital as defined by section 2 of the Care Standards Act 2000 that is not an NHS hospital.

#### *Responsible body*

6 (1) The responsible body, in relation to a cared-for person, means—

(a) if the arrangements are carried out mainly in an NHS hospital, the hospital manager;

(b) if the arrangements are carried out mainly in an independent hospital in England, the responsible local authority determined in accordance with paragraph 9;

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (c) if the arrangements are carried out mainly in an independent hospital in Wales, the Local Health Board for the area in which the hospital is situated;
  - (d) if none of paragraphs (a) to (c) applies and the arrangements are carried out mainly through—
    - (i) the provision of NHS continuing healthcare under arrangements made by a clinical commissioning group, or
    - (ii) in Wales, the provision of an equivalent to NHS continuing healthcare under arrangements made by a Local Health Board, that clinical commissioning group or Local Health Board;
  - (e) if none of paragraphs (a) to (d) applies, the responsible local authority determined in accordance with paragraph 10.
- (2) If an independent hospital is situated in the areas of two or more Local Health Boards, it is to be regarded for the purposes of sub-paragraph (1)(c) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.
- 7 (1) “Hospital manager”, in relation to an NHS hospital, means—
- (a) if the hospital—
    - (i) is vested in a relevant national authority for the purposes of its functions under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or
    - (ii) consists of any accommodation provided by a local authority and used as a hospital by or on behalf of a relevant national authority under either of those Acts,
 the Local Health Board or Special Health Authority responsible for the administration of the hospital;
  - (b) in relation to England, if the hospital falls within paragraph (a)(i) or (ii) and no Special Health Authority has responsibility for its administration, the Secretary of State;
  - (c) if the hospital is vested in an NHS trust or an NHS foundation trust, that trust;
  - (d) if the hospital is vested in a Local Health Board, that Board.
- (2) In sub-paragraph (1) “relevant national authority” means—
- (a) the Secretary of State,
  - (b) the Welsh Ministers, or
  - (c) the Secretary of State and the Welsh Ministers acting jointly.
- 8 In paragraph 6(1)(d) “NHS continuing healthcare” is to be construed in accordance with standing rules under section 6E of the National Health Service Act 2006.
- 9 (1) In paragraph 6(1)(b), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if paragraph (a) does not apply and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014, the local authority meeting those needs;
  - (c) in any other case, the local authority determined in accordance with sub-paragraph (4).

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act.
- (3) In paragraph 6(1)(b), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if paragraph (a) does not apply and the cared-for person is being provided with accommodation under section 20 of the Children Act 1989, the local authority providing that accommodation;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, and a local authority in England is responsible under the order for the care of the cared-for person, that local authority;
  - (d) if none of paragraphs (a) to (c) applies, the local authority determined in accordance with sub-paragraph (4).
- (4) In the cases mentioned in sub-paragraphs (1)(c) and (3)(d), the “responsible local authority” is the local authority for the area in which the independent hospital mentioned in paragraph 6(1)(b) is situated.
- (5) If an independent hospital is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.
- 10 (1) In paragraph 6(1)(e), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if there is an individual development plan for the cared-for person—
    - (i) the local authority responsible for maintaining that plan, or
    - (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014 or under Part 4 of the [Social Services and Well-being \(Wales\) Act 2014 \(anaw 4\)](#), the local authority meeting those needs;
  - (d) in any other case, the local authority determined in accordance with sub-paragraph (6).
- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act.
- (3) If more than one local authority is meeting the needs for care and support of a cared-for person under the [Social Services and Well-being \(Wales\) Act 2014 \(anaw 4\)](#), the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Act.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) If the cared-for person is having needs for care and support met under both of the Acts mentioned in sub-paragraph (1)(c), the responsible local authority is the local authority determined in accordance with sub-paragraph (6).
- (5) In paragraph 6(1)(e), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if there is an individual development plan for the cared-for person—
    - (i) the local authority responsible for maintaining that plan, or
    - (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is being provided with accommodation—
    - (i) under section 20 of the Children Act 1989, or
    - (ii) under section 76 of the [Social Services and Well-being \(Wales\) Act 2014 \(anaw 4\)](#),  
 the local authority providing that accommodation;
  - (d) if none of paragraphs (a) to (c) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, the local authority that is responsible under the order for the care of the cared-for person;
  - (e) if none of paragraphs (a) to (d) applies, the local authority determined in accordance with sub-paragraph (6).
- (6) In the cases mentioned in sub-paragraphs (1)(d), (4) and (5)(e), the “responsible local authority” is—
- (a) if the arrangements provide for the cared-for person to reside in one place, the local authority for the area in which that place is situated;
  - (b) if the arrangements provide for the cared-for person to reside in more than one place, the local authority for the area in which the main place of residence is situated;
  - (c) in any other case, the local authority for the area in which the arrangements are mainly carried out.
- (7) If a building is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (6) as situated in whichever of the areas the greater (or greatest) part of the building is situated.
- (8) In this paragraph—
- “individual development plan” means a plan within the meaning of section 10 of the [Additional Learning Needs and Education Tribunal \(Wales\) Act 2018 \(anaw 2\)](#).
- 11 “English responsible body” means—
- (a) a hospital manager of a hospital in England;
  - (b) a clinical commissioning group;
  - (c) a local authority in England.
- 12 “Welsh responsible body” means—
- (a) a hospital manager of a hospital in Wales;



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) a Local Health Board;
- (c) a local authority in Wales.

## PART 2

### AUTHORISATION OF ARRANGEMENTS

#### *The authorisation conditions*

- 13 The authorisation conditions are that—
- (a) the cared-for person lacks capacity to consent to the arrangements,
  - (b) the cared-for person has a mental disorder, and
  - (c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.

#### *Rights to information etc*

- 14 (1) The following must publish information about authorisation of arrangements under this Schedule—
- (a) the hospital manager of each NHS hospital;
  - (b) each clinical commissioning group;
  - (c) each Local Health Board;
  - (d) each local authority.
- (2) The information must include information on the following matters in particular—
- (a) the effect of an authorisation;
  - (b) the process for authorising arrangements, including making or carrying out—
    - (i) assessments and determinations required under paragraphs 21 and 22;
    - (ii) consultation under paragraph 23;
    - (iii) a pre-authorisation review (see paragraphs 24 to 26);
  - (c) the circumstances in which an independent mental capacity advocate should be appointed under paragraph 42 or 43;
  - (d) the role of a person within paragraph 42(5) (an “appropriate person”) in relation to a cared-for person and the effect of there being an appropriate person;
  - (e) the circumstances in which a pre-authorisation review is to be carried out by an Approved Mental Capacity Professional under paragraph 24;
  - (f) the right to make an application to the court to exercise its jurisdiction under section 21ZA;
  - (g) reviews under paragraph 38, including—
    - (i) when a review will be carried out;
    - (ii) the rights to request a review;
    - (iii) the circumstances in which a referral may or will be made to an Approved Mental Capacity Professional.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) The information must be accessible to, and appropriate to the needs of, cared-for persons and appropriate persons.
- 15 (1) Where arrangements are proposed, the responsible body must as soon as practicable take such steps as are practicable to ensure that—
- (a) the cared-for person, and
  - (b) any appropriate person in relation to the cared-for person, understands the matters mentioned in sub-paragraph (3).
- (2) If, subsequently, at any time while the arrangements are being proposed the responsible body becomes satisfied under paragraph 42(5) that a person is an appropriate person in relation to the cared-for person, the responsible body must, as soon as practicable, take such steps as are practicable to ensure that the appropriate person understands the matters mentioned in sub-paragraph (3).
- (3) Those matters are—
- (a) the nature of the arrangements, and
  - (b) the matters mentioned in paragraph 14(2) as they apply in relation to the cared-for person’s case.
- (4) If it is not appropriate to take steps to ensure that the cared-for person or any appropriate person understands a particular matter then, to that extent, the duties in sub-paragraphs (1) and (2) do not apply.
- (5) In this paragraph “appropriate person”, in relation to a cared-for person, means a person within paragraph 42(5).
- 16 (1) After authorising arrangements the responsible body must, without delay, arrange for a copy of the authorisation record to be given or sent to—
- (a) the cared-for person,
  - (b) any independent mental capacity advocate appointed under paragraph 42 to represent and support the cared-for person,
  - (c) any person within paragraph 42(5) in respect of the cared-for person (the “appropriate person”), and
  - (d) any independent mental capacity advocate appointed under paragraph 43 to support the appropriate person.
- (2) If the responsible body has not, within 72 hours of arrangements being authorised, arranged for a copy of the authorisation record to be given or sent to each of the persons mentioned in paragraphs (a) to (d) of sub-paragraph (1), the responsible body must review and record why not.
- (3) As soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable and appropriate, having regard to the steps taken under paragraph 15 and the length of time since they were taken, to ensure that the cared-for person and any appropriate person understands the matters mentioned in paragraph 14(2)(a), (c), (d), (f), and (g) as they apply in relation to the cared-for person’s case.

#### *Authorisation*

- 17 The responsible body may authorise arrangements—
- (a) under paragraph 18, if the conditions in that paragraph are met, or

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) under paragraph 19 if—
    - (i) the arrangements are care home arrangements,
    - (ii) the responsible body decides that authorisation should be determined under that paragraph instead of under paragraph 18, and
    - (iii) the conditions in paragraph 19 are met.
- 18 The conditions in this paragraph are that—
  - (a) the responsible body is satisfied that this Schedule applies to the arrangements,
  - (b) the responsible body is satisfied, on the basis of the determinations required by paragraphs 21 and 22, that the authorisation conditions are met,
  - (c) the responsible body has carried out consultation under paragraph 23,
  - (d) the responsible body is satisfied that any requirement under paragraph 42 or 43, that arises in relation to the arrangements before they are authorised, has been complied with,
  - (e) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 24 to 26,
  - (f) the person carrying out the review has determined—
    - (i) under paragraph 25, that the authorisation conditions are met, or
    - (ii) under paragraph 26, that it is reasonable for the responsible body to conclude that those conditions are met, and
  - (g) a draft authorisation record has been prepared in accordance with paragraph 27.
- 19 The conditions in this paragraph are that—
  - (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 20,
  - (b) having regard to the statement (and the accompanying material), the responsible body is satisfied—
    - (i) that this Schedule applies to the arrangements,
    - (ii) that the authorisation conditions are met, and
    - (iii) that the care home manager has carried out consultation under paragraph 23,
  - (c) the responsible body is satisfied that any requirement under paragraph 42 or 43, that arises in relation to the arrangements before they are authorised, has been complied with,
  - (d) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 24 to 26, and
  - (e) the person carrying out the review has determined—
    - (i) under paragraph 25, that the authorisation conditions are met, or
    - (ii) under paragraph 26, that it is reasonable for the responsible body to conclude that those conditions are met.
- 20 (1) A statement for the purposes of paragraph 19(a) is a statement in writing by the care home manager—
  - (a) that the cared-for person is aged 18 or over,
  - (b) that the arrangements give rise to a deprivation of the cared-for person's liberty,
  - (c) that the arrangements are not excluded by Part 7,

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (d) that the determinations required by paragraphs 21 and 22 have been made,
  - (e) that the care home manager has carried out consultation under paragraph 23, and
  - (f) that the care home manager—
    - (i) is satisfied that paragraph 24(2)(a) or (b) applies,
    - (ii) is satisfied that neither applies, or
    - (iii) is not satisfied that a decision can be made as to whether either applies.
- (2) The statement—
- (a) must include the reasons for what is stated under sub-paragraph (1)(b) and (f);
  - (b) must be accompanied by—
    - (i) a record of the assessments on which the determinations required by paragraphs 21 and 22 were made,
    - (ii) evidence of the consultation mentioned in sub-paragraph (1)(e), and
    - (iii) a draft authorisation record prepared in accordance with paragraph 27.

*Determinations made on capacity and medical assessments*

- 21 (1) The determinations required by this paragraph are—
- (a) a determination made on an assessment in respect of the cared-for person, that the person lacks capacity to consent to the arrangements, and
  - (b) a determination made on an assessment in respect of the cared-for person, that the person has a mental disorder.
- (2) The person who makes the determination need not be the same as the person who carries out the assessment.
- (3) The appropriate authority may by regulations make provision for requirements which must be met by a person—
- (a) making a determination, or
  - (b) carrying out an assessment,
- under this paragraph.
- (4) Regulations under sub-paragraph (3) may make different provision—
- (a) for determinations and assessments, and
  - (b) for determinations and assessments required under sub-paragraph (1)(a) and determinations and assessments required under sub-paragraph (1)(b).
- (5) But if the arrangements are care home arrangements and authorisation is being determined under paragraph 19, an assessment may not be carried out by a person who has a connection, of a kind prescribed by regulations, with a care home.
- (6) Regulations made by the appropriate authority under sub-paragraph (5)—
- (a) may make provision about a connection of any kind (financial or otherwise), and
  - (b) may make different provision for assessments under sub-paragraph (1)(a) and sub-paragraph (1)(b).
- (7) The “appropriate authority” means—

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (a) where the determination or assessment is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the determination or assessment is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.
- (8) An assessment may be one carried out for an earlier authorisation or for any other purpose, provided that it appears to the relevant person that it is reasonable to rely on the assessment.
- (9) The relevant person must have regard to—
- (a) the length of time since the assessment was carried out;
  - (b) the purpose for which the assessment was carried out;
  - (c) whether there has been a change in the cared-for person’s condition that is likely to affect the determination made on the assessment.
- (10) In this paragraph “relevant person” means—
- (a) the care home manager, if the arrangements are care home arrangements and authorisation is being determined under paragraph 19, or
  - (b) the responsible body, in any other case.

#### *Determination that arrangements are necessary and proportionate*

- 22 (1) The determination required by this paragraph is a determination by a person, who meets requirements prescribed by regulations made by the appropriate authority, made on an assessment by that person that the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.
- (2) When making a determination under this paragraph regard must be had (amongst other matters) to the cared-for person’s wishes and feelings in relation to the arrangements.
- (3) If the arrangements are care home arrangements and authorisation is being determined under paragraph 19, a determination may not be made by a person who has a connection, of a kind prescribed by regulations, with a care home.
- (4) Regulations made by the appropriate authority under sub-paragraph (3) may make provision about a connection of any kind (financial or otherwise).
- (5) The “appropriate authority” means—
- (a) where the determination is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the determination is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.

#### *Consultation*

- 23 (1) Consultation under this paragraph must be carried out—
- (a) if the arrangements are care home arrangements and—
    - (i) authorisation is being determined under paragraph 19, or
    - (ii) renewal is being determined under paragraph 35,by the care home manager;
  - (b) otherwise, by the responsible body.

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) The following must be consulted—
- (a) the cared-for person,
  - (b) anyone named by the cared-for person as someone to be consulted about arrangements of the kind in question,
  - (c) anyone engaged in caring for the cared-for person or interested in the cared-for person's welfare,
  - (d) any donee of a lasting power of attorney or an enduring power of attorney (within the meaning of Schedule 4) granted by the cared-for person,
  - (e) any deputy appointed for the cared-for person by the court, and
  - (f) any appropriate person and any independent mental capacity advocate concerned (see Part 5).
- (3) The main purpose of the consultation required by sub-paragraph (2) is to try to ascertain the cared-for person's wishes or feelings in relation to the arrangements.
- (4) If it is not practicable or appropriate to consult a particular person falling within sub-paragraph (2) the duty to consult that person does not apply.

*Pre-authorisation review*

- 24 (1) A pre-authorisation review for the purposes of paragraph 18(e) or 19(d) must not be by—
- (a) a person who is involved—
    - (i) in the day-to-day care of the cared-for person, or
    - (ii) in providing any treatment to the cared-for person, or
  - (b) a person who has a connection, of a kind prescribed by regulations, with a care home.
- (2) The review must be by an Approved Mental Capacity Professional if—
- (a) the arrangements provide for the cared-for person to reside in a particular place, and it is reasonable to believe that the cared-for person does not wish to reside in that place,
  - (b) the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place,
  - (c) the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or
  - (d) the case is referred by the responsible body to an Approved Mental Capacity Professional and that person accepts the referral.
- (3) In determining whether either of paragraph (a) or (b) of sub-paragraph (2) applies, the responsible body must consider the views of any relevant person about the wishes of the cared-for person that are brought to the responsible body's attention.
- (4) In sub-paragraph (3) "relevant person" means a person engaged in caring for the cared-for person or a person interested in the cared-for person's welfare.
- (5) Regulations made by the appropriate authority under sub-paragraph (1)(b) may make provision about a connection of any kind (financial or otherwise).
- (6) The "appropriate authority" means—

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (a) where the pre-authorisation review is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the pre-authorisation review is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.
- 25 (1) If the review is by an Approved Mental Capacity Professional, the Approved Mental Capacity Professional must—
- (a) review the information on which the responsible body relies, and
  - (b) determine whether the authorisation conditions are met.
- (2) Before making the determination the Approved Mental Capacity Professional must—
- (a) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and
  - (b) consult any other person listed in paragraph 23(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.
- 26 If the review is not by an Approved Mental Capacity Professional, the person carrying out the review must—
- (a) review the information on which the responsible body relies, and
  - (b) determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

#### *Authorisation record*

- 27 (1) An authorisation record is a record relating to a cared-for person, specifying all arrangements authorised for the time being, and the responsible body for the time being, for that person, and specifying in relation to any arrangements—
- (a) the time from which the authorisation has effect, and when it is to cease to have effect under paragraph 29(1), (2) or (3),
  - (b) the programme for reviewing the authorisation,
  - (c) how the requirements of Part 5 are complied with, and
  - (d) anything else this Schedule requires to be specified.
- (2) An authorisation record may include any other information.
- (3) When the responsible body authorises arrangements the draft authorisation record required by paragraph 18(g) or 20(2)(b)(iii)—
- (a) becomes the authorisation record, and
  - (b) supersedes any earlier authorisation record.
- (4) The responsible body must revise the authorisation record if there is any change in any of the matters that are specified or required to be specified in it.

*Status: Point in time view as at 31/12/2020.*

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### PART 3

#### DURATION, RENEWAL, VARIATION AND REVIEW OF AUTHORISATION

##### *Time for which authorisation has effect*

- 28 (1) An authorisation has effect from the time at which the responsible body gives the authorisation, unless at that time the responsible body specifies a later time.
- (2) The time specified must not be later than the end of the period of 28 days beginning with the day on which the responsible body gives the authorisation.
- 29 (1) An authorisation ceases to have effect (if not renewed)—
- (a) at the end of the period of 12 months beginning with the day it first has effect, or
  - (b) at the end of any shorter period specified by the responsible body at the time it gives the authorisation.
- (2) If the authorisation is renewed in accordance with paragraph 32, it ceases to have effect at the end of the renewal period.
- (3) If the responsible body at any time determines that an authorisation is to cease to have effect from any earlier day, it ceases to have effect from that day.
- (4) An authorisation ceases to have effect if, at any time, the responsible body believes or ought reasonably to suspect that any of the authorisation conditions are not met.
- (5) An authorisation ceases to have effect in relation to arrangements so far as at any time they are not in accordance with mental health requirements.

##### *Notification that arrangements have ceased to have effect*

- 30 If an authorisation of arrangements ceases to have effect (in whole or in part) under paragraph 29(4) or (5), the responsible body must take reasonable steps to ensure any person likely to be carrying out the arrangements is notified.

##### *Authorisation coming to an end early: arrangements to be treated as authorised*

- 31 (1) This paragraph applies if an authorisation ceases to have effect (in whole or in part) under paragraph 29(4) or (5).
- (2) For the purposes of section 4C (carrying out of authorised arrangements: restriction of liability) the arrangements are to be treated as authorised unless the person carrying out the arrangements knows or ought to know that—
- (a) the arrangements are no longer authorised,
  - (b) any of the authorisation conditions are not met, or
  - (c) the arrangements are not in accordance with mental health requirements.

##### *Renewal*

- 32 (1) The responsible body may, on one or more occasions, renew an authorisation in accordance with paragraph 34 or 35 for a specified period (“the renewal period”) of—
- (a) 12 months or less, on the first renewal, and
  - (b) 3 years or less, on any subsequent renewal.



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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) An authorisation which has ceased to have effect cannot be renewed.
- 33 The responsible body may renew an authorisation—
- (a) under paragraph 34, if the conditions in that paragraph are met, or
  - (b) under paragraph 35 if—
    - (i) the authorisation relates to care home arrangements,
    - (ii) the responsible body decides that renewal should be determined under that paragraph instead of under paragraph 34, and
    - (iii) the conditions in paragraph 35 are met.
- 34 The conditions in this paragraph are that—
- (a) the responsible body is satisfied—
    - (i) that the authorisation conditions continue to be met, and
    - (ii) that it is unlikely that there will be any significant change in the cared-for person’s condition during the renewal period which would affect whether those conditions are met, and
  - (b) the responsible body has carried out consultation under paragraph 23.
- 35 The conditions in this paragraph are that—
- (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 36, and
  - (b) having regard to the statement (and the accompanying material), the responsible body is satisfied—
    - (i) that the authorisation conditions continue to be met,
    - (ii) that it is unlikely that there will be any significant change in the cared-for person’s condition during the renewal period which would affect whether those conditions are met, and
    - (iii) that the care home manager has carried out consultation under paragraph 23.
- 36 (1) A statement for the purposes of paragraph 35(a) is a statement in writing by the care home manager—
- (a) that the authorisation conditions continue to be met,
  - (b) that it is unlikely that there will be any significant change in the cared-for person’s condition during the renewal period which would affect whether those conditions are met, and
  - (c) that the care home manager has carried out consultation under paragraph 23.
- (2) The statement must be accompanied by evidence of the consultation.

#### *Variation*

- 37 The responsible body may vary an authorisation if the responsible body is satisfied—
- (a) that consultation under paragraph 23 has been carried out, and
  - (b) that it is reasonable to make the variation.

#### *Reviews*

- 38 (1) In this paragraph “the reviewer” means the responsible body unless, in relation to care home arrangements, the responsible body decides the care home manager should be the reviewer for the purposes of this paragraph.

*Status: Point in time view as at 31/12/2020.*

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- (2) For any authorisation the responsible body must specify a programme of regular reviews that the reviewer must carry out.
- (3) The reviewer must also carry out a review—
  - (a) on a variation under paragraph 37;
  - (b) if a reasonable request is made by a person with an interest in the arrangements;
  - (c) if the cared-for person becomes subject to mental health arrangements;
  - (d) if the cared-for person becomes subject to mental health requirements;
  - (e) if sub-paragraph (5) or (7) applies;
  - (f) if (in any other case) the reviewer becomes aware of a significant change in the cared-for person’s condition or circumstances.
- (4) A review under sub-paragraph (3)(a) must be carried out before the authorisation is varied or, if that is not practicable or appropriate, as soon as practicable afterwards.
- (5) This sub-paragraph applies where—
  - (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,
  - (b) the reviewer becomes aware that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and
  - (c) the pre-authorisation review under paragraph 24—
    - (i) was not by an Approved Mental Capacity Professional, or
    - (ii) was by an Approved Mental Capacity Professional solely because paragraph 24(2)(c) or (d) applied.
- (6) For the purposes of sub-paragraph (5)(b)—
  - (a) the reviewer must consider all the circumstances so far as they are reasonably ascertainable, including the cared-for person’s behaviour, wishes, feelings, views, beliefs and values, but
  - (b) circumstances from the past are to be considered only so far as it is still appropriate to consider them.
- (7) This sub-paragraph applies where sub-paragraph (5) does not apply and—
  - (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,
  - (b) a relevant person informs the reviewer or (if the reviewer is not the responsible body) the responsible body that they believe that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and
  - (c) the relevant person makes a reasonable request to the person informed under paragraph (b) for a review to be carried out.
- (8) In sub-paragraph (7) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person’s welfare.
- (9) The care home manager must report to the responsible body on any review the manager carries out.
- (10) On any review where sub-paragraph (5) applies, the reviewer must refer the authorisation to an Approved Mental Capacity Professional for a determination as to whether the authorisation conditions are met.

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- (11) On any review where sub-paragraph (7) applies, the reviewer or (if the reviewer is not the responsible body) the responsible body may refer the authorisation to an Approved Mental Capacity Professional and, if the Approved Mental Capacity Professional accepts the referral, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.
- (12) Before making the determination mentioned in sub-paragraph (10) or (11), the Approved Mental Capacity Professional must—
- (a) review the authorisation,
  - (b) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and
  - (c) consult any other person listed in paragraph 23(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.

## PART 4

### APPROVED MENTAL CAPACITY PROFESSIONALS

- 39 Each local authority must make arrangements—
- (a) for persons to be approved as Approved Mental Capacity Professionals, and
  - (b) to ensure that enough Approved Mental Capacity Professionals are available for its area.
- 40 (1) The appropriate authority may by regulations—
- (a) prescribe the criteria which must be met for a person to be eligible for approval as an Approved Mental Capacity Professional;
  - (b) prescribe matters which a local authority must or may take into account when deciding whether to approve a person as an Approved Mental Capacity Professional;
  - (c) provide for a prescribed body to approve training for persons who are, or who wish to become, Approved Mental Capacity Professionals.
- (2) Regulations under sub-paragraph (1)(a) may include criteria relating to qualifications, training or experience.
- (3) If regulations made by the Secretary of State under sub-paragraph (1)(c) provide for Social Work England to approve training, the regulations may—
- (a) give Social Work England power to charge fees for approval;
  - (b) give Social Work England power to make rules in relation to the charging of fees;
  - (c) make provision in connection with the procedure for making those rules (including provision requiring Social Work England to obtain the Secretary of State's approval before making rules).
- (4) Section 50(2) to (7) of the Children and Social Work Act 2017 apply for the purposes of sub-paragraph (3) as they apply for the purposes of that section.
- (5) “Prescribed” means prescribed by the regulations.
- (6) The “appropriate authority” means—

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) the Secretary of State, in relation to the approval of a person by, or a person approved by, a local authority whose area is in England, and
- (b) the Welsh Ministers, in relation to the approval of a person by, or a person approved by, a local authority whose area is in Wales.

## PART 5

### APPOINTMENT OF IMCA

#### *Appointment of Independent Mental Capacity Advocate*

- 41 (1) Paragraphs 42 and 43 apply to the responsible body at all times while arrangements are authorised or are being proposed.
- (2) In those paragraphs “IMCA” means an independent mental capacity advocate.
- 42 (1) The responsible body must take all reasonable steps to appoint an IMCA to represent and support the cared-for person if—
- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and
  - (b) sub-paragraphs (4) and (5) do not apply.
- (2) An IMCA should be appointed if the cared-for person—
- (a) has capacity to consent to being represented and supported by an IMCA, and
  - (b) makes a request to the responsible body for an IMCA to be appointed.
- (3) An IMCA should be appointed if—
- (a) the cared-for person lacks capacity to consent to being represented and supported by an IMCA, unless
  - (b) the responsible body is satisfied that being represented and supported by an IMCA would not be in the cared-for person’s best interests.
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect.
- (5) This paragraph does not apply if the responsible body is satisfied that there is a person (an “appropriate person”) who—
- (a) would be a suitable person to represent and support the cared-for person,
  - (b) consents to representing and supporting the cared-for person, and
  - (c) is not engaged in providing care or treatment for the cared-for person in a professional capacity.
- (6) A person is not to be regarded as a suitable person unless—
- (a) where the cared-for person has capacity to consent to being represented and supported by that person, the cared-for person does consent, or
  - (b) where the cared-for person lacks capacity to consent to being represented and supported by that person, the responsible body is satisfied that being represented and supported by that person would be in the cared-for person’s best interests.
- 43 (1) If the cared-for person has an appropriate person, the responsible body must take all reasonable steps to appoint an IMCA to support the appropriate person if—
- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and

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- (b) sub-paragraph (4) does not apply.
- (2) An IMCA should be appointed if the appropriate person—
  - (a) has capacity to consent to being supported by an IMCA, and
  - (b) makes a request to the responsible body for an IMCA to be appointed.
- (3) An IMCA should be appointed if—
  - (a) the appropriate person lacks capacity to consent to being supported by an IMCA, and
  - (b) the responsible body is satisfied the appropriate person’s being supported by an IMCA would be in the cared-for person’s best interests.
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect.

## PART 6

### MONITORING AND REPORTING

- 44
- (1) The appropriate authority may by regulations make provision for, and in connection with, requiring one or more bodies prescribed by the regulations to monitor, and report on, the operation of this Schedule.
  - (2) The regulations may include provision giving a prescribed body authority—
    - (a) to visit any place where arrangements authorised under this Schedule are carried out;
    - (b) to meet with cared-for persons;
    - (c) to require the production of, and to inspect, records relating to the care or treatment of persons.
  - (3) The “appropriate authority” means—
    - (a) in relation to the operation of this Schedule in relation to England, the Secretary of State, and
    - (b) in relation to the operation of this Schedule in relation to Wales, the Welsh Ministers.

## PART 7

### EXCLUDED ARRANGEMENTS: MENTAL HEALTH

#### *Excluded arrangements*

- 45
- This Schedule does not apply to arrangements if—
    - (a) they are mental health arrangements (see paragraphs 46 to 56), or
    - (b) they are not in accordance with mental health requirements (see paragraph 57).

#### *Kinds of mental health arrangements*

- 46
- For the purposes of this Schedule arrangements in relation to a person (“P”) are “mental health arrangements” if paragraph 47, 48, 49, 50 or 51 applies.

*Status: Point in time view as at 31/12/2020.*

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- 47 This paragraph applies if—
- (a) P is subject to the hospital treatment regime, and
  - (b) P is detained in a hospital under that regime.
- 48 This paragraph applies if—
- (a) P is subject to the hospital treatment regime,
  - (b) P is not detained in a hospital under that regime, and
  - (c) the arrangements are for enabling medical treatment for mental disorder in a hospital.
- 49 This paragraph applies if P is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) anything which has the same effect, under another England and Wales enactment,
- and the arrangements are for enabling medical treatment for mental disorder in a hospital.
- 50 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that P is subject to—
    - (a) a guardianship application under section 7 of the Mental Health Act,
    - (b) a guardianship order under section 37 of that Act, or
    - (c) anything which has the same effect as something within paragraph (a) or (b), under another England and Wales enactment.
  - (3) Condition 2 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder.
  - (4) Condition 3 is that P objects—
    - (a) to being accommodated in a hospital for that purpose, or
    - (b) to being given some or all of that treatment.
  - (5) Condition 4 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
  - (6) For provision about determining whether P objects see paragraph 52.
- 51 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that—
    - (a) an application in respect of P could be made under section 2 or 3 of the Mental Health Act, and
    - (b) P could be detained in a hospital in pursuance of such an application, were one made.
  - (3) Condition 2 is that P is not subject to any of these—
    - (a) the hospital treatment regime;
    - (b) a community treatment order under section 17A of the Mental Health Act;
    - (c) a guardianship application under section 7 of the Mental Health Act;
    - (d) a guardianship order under section 37 of the Mental Health Act;
    - (e) anything which has the same effect as something within paragraph (b), (c) or (d), under another England and Wales enactment.

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- (4) Condition 3 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder.
- (5) Condition 4 is that P objects—
- (a) to being accommodated in a hospital for that purpose, or
  - (b) to being given some or all of that treatment.
- (6) Condition 5 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
- (7) For provision about determining whether P objects see paragraph 52.
- 52 (1) In determining whether P objects, regard must be had to all the circumstances (so far as they are reasonably ascertainable), including the following—
- (a) P's behaviour;
  - (b) P's wishes and feelings;
  - (c) P's views, beliefs and values.
- (2) But regard is to be had to circumstances from the past only so far as it is still appropriate to have regard to them.

*Mental health arrangements: the hospital treatment regime*

- 53 (1) P is subject to the hospital treatment regime if P is subject to—
- (a) an application, order or direction listed in column 1 of the Table, under the section of the Mental Health Act listed in column 2, or
  - (b) anything that has the same effect as any of those, under another England and Wales enactment,
- subject to sub-paragraph (2).
- (2) P is not subject to the hospital treatment regime during any period for which P is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) anything which has the same effect, under another England and Wales enactment.

<i>Obligation</i>	<i>Mental Health Act section</i>
Application for admission for assessment	Section 2
Application for admission for assessment	Section 4
Application for admission for treatment	Section 3
Order for remand to hospital	Section 35
Order for remand to hospital	Section 36
Hospital order	Section 37
Interim hospital order	Section 38
Order for detention in hospital	Section 44
Hospital direction	Section 45A

*Status: Point in time view as at 31/12/2020.*

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<i>Obligation</i>	<i>Mental Health Act section</i>
Transfer direction	Section 47
Transfer direction	Section 48
Hospital order	Section 51

*Mental health arrangements: other definitions*

- 54 In this Part—
- “donee” means a donee of a lasting power of attorney granted by P;
  - “England and Wales enactment” means an enactment, in the Mental Health Act or elsewhere, which extends to England and Wales (whether or not it also extends elsewhere);
  - “hospital” has the same meaning as in Part 2 of the Mental Health Act;
  - “learning disability” has the meaning given by section 1(4) of the Mental Health Act;
  - “medical treatment” is to be read in accordance with paragraph 55.
- 55 In “medical treatment for mental disorder”—
- (a) “medical treatment” has the same meaning as in the Mental Health Act (see section 145(1) and (4)), but
  - (b) in the case of a person with learning disability, the medical treatment is not to be considered by reason of that disability to be for mental disorder unless the disability is associated with abnormally aggressive or seriously irresponsible conduct by that person.
- 56 A decision of a donee or deputy is valid if it is made—
- (a) within the scope of the person’s authority as donee or deputy, and
  - (b) in accordance with Part 1 of this Act.

*Mental health requirements*

- 57 (1) In this Schedule “mental health requirements” means any of the following—
- (a) a requirement imposed in respect of a person by a guardian exercising the power under section 8 of the Mental Health Act;
  - (b) a condition or direction imposed or given in respect of a person by a responsible clinician exercising the power under section 17 of the Mental Health Act (leave of absence from hospital);
  - (c) a condition specified by a responsible clinician in a community treatment order made in respect of a person under section 17A of the Mental Health Act (for the imposition of conditions, see section 17B of that Act);
  - (d) a requirement imposed by a guardian in respect of a person who is the subject of a guardianship order under section 37 of the Mental Health Act (see section 40 of and Part 1 of Schedule 1 to that Act);
  - (e) a condition imposed by the Secretary of State on the discharge from hospital of a person subject to a restriction order under section 42 of the Mental Health Act;



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- (f) a condition imposed by any of the persons or bodies listed in sub-paragraph (3) when a person is conditionally discharged under section 73 of the Mental Health Act;
  - (g) anything which has the same effect as something within any of paragraphs (a) to (f), under another England and Wales enactment.
- (2) And, for the purposes of this Schedule, arrangements which relate to a person are “not in accordance with mental health requirements” if the person is subject to mental health requirements and the arrangements are not in accordance with them.
- (3) The persons or bodies for the purpose of sub-paragraph (1)(f) are—
- (a) the First-tier Tribunal;
  - (b) the Mental Health Review Tribunal for Wales;
  - (c) the Secretary of State;
  - (d) the Welsh Ministers.

## PART 8

### TRANSITORY PROVISION

- 58 Until the repeal of section 324 of the Education Act 1996 made by paragraph 4(1) and (9) of Schedule 1 to the [Additional Learning Needs and Education Tribunal \(Wales\) Act 2018 \(anaw 2\)](#) comes fully into force—
- (a) paragraph [10\(1\)\(b\)](#) has effect as if there were substituted—
    - “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
      - (i) the local authority responsible for maintaining that plan or statement, or
      - (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”
  - (b) paragraph [10\(5\)\(b\)](#) has effect as if there were substituted—
    - “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
      - (i) the local authority responsible for maintaining that plan or statement, or
      - (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”, and
  - (c) paragraph [10\(8\)](#) has effect as if at the end there were inserted—
    - ““statement of special educational needs” means a statement within the meaning of section 324 of the Education Act 1996.””]

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## SCHEDULE 1

Section 9

## LASTING POWERS OF ATTORNEY: FORMALITIES

## PART 1

## MAKING INSTRUMENTS

*General requirements as to making instruments*

- 1 (1) An instrument is not made in accordance with this Schedule unless—
- (a) it is in the prescribed form,
  - (b) it complies with paragraph 2, and
  - (c) any prescribed requirements in connection with its execution are satisfied.
- (2) Regulations may make different provision according to whether—
- (a) the instrument relates to personal welfare or to property and affairs (or to both);
  - (b) only one or more than one donee is to be appointed (and if more than one, whether jointly or jointly and severally).
- (3) In this Schedule—
- (a) “prescribed” means prescribed by regulations, and
  - (b) “regulations” means regulations made for the purposes of this Schedule by the Lord Chancellor.

*Requirements as to content of instruments*

- 2 (1) The instrument must include—
- (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,
  - (b) a statement by the donor to the effect that he—
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
    - (ii) intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity,
  - (c) a statement by the donor—
    - (i) naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument, or
    - (ii) stating that there are no persons whom he wishes to be notified of any such application,
  - (d) a statement by the donee (or, if more than one, each of them) to the effect that he—
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
    - (ii) understands the duties imposed on a donee of a lasting power of attorney under sections 1 (the principles) and 4 (best interests), and

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- (e) a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument—
  - (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,
  - (ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and
  - (iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.
- (2) Regulations may—
  - (a) prescribe a maximum number of named persons;
  - (b) provide that, where the instrument includes a statement under sub-paragraph (1)(c)(ii), two persons of a prescribed description must each give a certificate under sub-paragraph (1)(e).
- (3) The persons who may be named persons do not include a person who is appointed as donee under the instrument.
- (4) In this Schedule, “named person” means a person named under sub-paragraph (1)(c).
- (5) A certificate under sub-paragraph (1)(e)—
  - (a) must be made in the prescribed form, and
  - (b) must include any prescribed information.
- (6) The certificate may not be given by a person appointed as donee under the instrument.

*Failure to comply with prescribed form*

- 3 (1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression.
- (2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

**PART 2**

REGISTRATION

*Applications and procedure for registration*

- 4 (1) An application to the Public Guardian for the registration of an instrument intended to create a lasting power of attorney—
  - (a) must be made in the prescribed form, and
  - (b) must include any prescribed information.
- (2) The application may be made—
  - (a) by the donor,
  - (b) by the donee or donees, or
  - (c) if the instrument appoints two or more donees to act jointly and severally in respect of any matter, by any of the donees.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) The application must be accompanied by—
- (a) the instrument, and
  - (b) any fee provided for under section 58(4)(b).
- (4) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- 5 Subject to paragraphs 11 to 14, the Public Guardian must register the instrument as a lasting power of attorney at the end of the prescribed period.

*Notification requirements*

- 6 (1) A donor about to make an application under paragraph 4(2)(a) must notify any named persons that he is about to do so.
- (2) The donee (or donees) about to make an application under paragraph 4(2)(b) or (c) must notify any named persons that he is (or they are) about to do so.
- 7 As soon as is practicable after receiving an application by the donor under paragraph 4(2)(a), the Public Guardian must notify the donee (or donees) that the application has been received.
- 8 (1) As soon as is practicable after receiving an application by a donee (or donees) under paragraph 4(2)(b), the Public Guardian must notify the donor that the application has been received.
- (2) As soon as is practicable after receiving an application by a donee under paragraph 4(2)(c), the Public Guardian must notify—
- (a) the donor, and
  - (b) the donee or donees who did not join in making the application,
- that the application has been received.
- 9 (1) A notice under paragraph 6 must be made in the prescribed form.
- (2) A notice under paragraph 6, 7 or 8 must include such information, if any, as may be prescribed.

*Power to dispense with notification requirements*

- 10 The court may—
- (a) on the application of the donor, dispense with the requirement to notify under paragraph 6(1), or
  - (b) on the application of the donee or donees concerned, dispense with the requirement to notify under paragraph 6(2),
- if satisfied that no useful purpose would be served by giving the notice.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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*Instrument not made properly or containing ineffective provision*

- 11 (1) If it appears to the Public Guardian that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, he must not register the instrument unless the court directs him to do so.
- (2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which—
- (a) would be ineffective as part of a lasting power of attorney, or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (3) The Public Guardian—
- (a) must apply to the court for it to determine the matter under section 23(1), and
  - (b) pending the determination by the court, must not register the instrument.
- (4) Sub-paragraph (5) applies if the court determines under section 23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which—
- (a) would be ineffective as part of a lasting power of attorney, or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (5) The court must—
- (a) notify the Public Guardian that it has severed the provision, or
  - (b) direct him not to register the instrument.
- (6) Where the court notifies the Public Guardian that it has severed a provision, he must register the instrument with a note to that effect attached to it.

*Deputy already appointed*

- 12 (1) Sub-paragraph (2) applies if it appears to the Public Guardian that—
- (a) there is a deputy appointed by the court for the donor, and
  - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney.
- (2) The Public Guardian must not register the instrument unless the court directs him to do so.

*Objection by donee or named person*

- 13 (1) Sub-paragraph (2) applies if a donee or a named person—
- (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and
  - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration on the ground that an event mentioned in section 13(3) or (6)(a) to (d) has occurred which has revoked the instrument.
- (2) If the Public Guardian is satisfied that the ground for making the objection is established, he must not register the instrument unless the court, on the application of the person applying for the registration—
- (a) is satisfied that the ground is not established, and

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) directs the Public Guardian to register the instrument.
- (3) Sub-paragraph (4) applies if a donee or a named person—
  - (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and
  - (b) before the end of the prescribed period—
    - (i) makes an application to the court objecting to the registration on a prescribed ground, and
    - (ii) notifies the Public Guardian of the application.
- (4) The Public Guardian must not register the instrument unless the court directs him to do so.

*Objection by donor*

- 14 (1) This paragraph applies if the donor—
  - (a) receives a notice under paragraph 8 of an application for the registration of an instrument, and
  - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration.
- (2) The Public Guardian must not register the instrument unless the court, on the application of the donee or, if more than one, any of them—
  - (a) is satisfied that the donor lacks capacity to object to the registration, and
  - (b) directs the Public Guardian to register the instrument.

*Notification of registration*

- 15 Where an instrument is registered under this Schedule, the Public Guardian must give notice of the fact in the prescribed form to—
  - (a) the donor, and
  - (b) the donee or, if more than one, each of them.

*Evidence of registration*

- 16 (1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of—
  - (a) the contents of the instrument, and
  - (b) the fact that it has been registered.
- (2) Sub-paragraph (1) is without prejudice to—
  - (a) section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copy), and
  - (b) any other method of proof authorised by law.

**PART 3**

CANCELLATION OF REGISTRATION AND NOTIFICATION OF SEVERANCE

- 17 (1) The Public Guardian must cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) as a result of the donor's bankruptcy<sup>F132</sup> or a debt relief order (under Part 7A of the Insolvency Act 1986) having been made in respect of the donor], or
  - (b) on the occurrence of an event mentioned in section 13(6)(a) to (d).
- (2) If the Public Guardian cancels the registration of an instrument he must notify—
- (a) the donor, and
  - (b) the donee or, if more than one, each of them.

#### Textual Amendments

**F132** Words in Sch. 1 para. 17(1)(a) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(5\)](#) (with art. 5)

- 18 The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it—
- (a) determines under section 22(2)(a) that a requirement for creating the power was not met,
  - (b) determines under section 22(2)(b) that the power has been revoked or has otherwise come to an end, or
  - (c) revokes the power under section 22(4)(b) (fraud etc.).
- 19 (1) Sub-paragraph (2) applies if the court determines under section 23(1) that a lasting power of attorney contains a provision which—
- (a) is ineffective as part of a lasting power of attorney, or
  - (b) prevents the instrument from operating as a valid lasting power of attorney.
- (2) The court must—
- (a) notify the Public Guardian that it has severed the provision, or
  - (b) direct him to cancel the registration of the instrument as a lasting power of attorney.
- 20 On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled.

## PART 4

### RECORDS OF ALTERATIONS IN REGISTERED POWERS

#### *Partial revocation or suspension of power as a result of bankruptcy*

- 21 If in the case of a registered instrument it appears to the Public Guardian that under section 13 a lasting power of attorney is revoked, or suspended, in relation to the donor's property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect.

#### *Termination of appointment of donee which does not revoke power*

- 22 If in the case of a registered instrument it appears to the Public Guardian that an event has occurred—
- (a) which has terminated the appointment of the donee, but
  - (b) which has not revoked the instrument,

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

the Public Guardian must attach to the instrument a note to that effect.

*Replacement of donee*

- 23 If in the case of a registered instrument it appears to the Public Guardian that the donee has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect.

*Severance of ineffective provisions*

- 24 If in the case of a registered instrument the court notifies the Public Guardian under paragraph 19(2)(a) that it has severed a provision of the instrument, the Public Guardian must attach to it a note to that effect.

*Notification of alterations*

- 25 If the Public Guardian attaches a note to an instrument under paragraph 21, 22, 23 or 24 he must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power).

SCHEDULE 1A

[<sup>F133</sup>PERSONS INELIGIBLE TO BE DEPRIVED OF LIBERTY BY THIS ACT]

**Textual Amendments**

**F133** Sch. 1A omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019](#) (c. 18), s. 6(3), [Sch. 2 para. 2\(c\)](#)

[<sup>F133</sup>PART 1

INELIGIBLE PERSONS

*Application*

- 1 This Schedule applies for the purposes of—
- (a) section 16A, and
  - (b) paragraph 17 of Schedule A1.

*Determining ineligibility*

- 2 A person (“P”) is ineligible to be deprived of liberty by this Act (“ineligible”) if—
- (a) P falls within one of the cases set out in the second column of the following table, and
  - (b) the corresponding entry in the third column of the table —or the provision, or one of the provisions, referred to in that entry — provides that he is ineligible.



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

	<b><i>Status of P</i></b>	<b><i>Determination of ineligibility</i></b>
<i>Case A</i>	P is— (a) subject to the hospital treatment regime, and (b) detained in a hospital under that regime.	P is ineligible.
<i>Case B</i>	P is— (a) subject to the hospital treatment regime, but (b) not detained in a hospital under that regime.	See paragraphs 3 and 4.
<i>Case C</i>	P is subject to the community treatment regime.	See paragraphs 3 and 4.
<i>Case D</i>	P is subject to the guardianship regime.	See paragraphs 3 and 5.
<i>Case E</i>	P is— (a) within the scope of the Mental Health Act, but (b) not subject to any of the mental health regimes.	See paragraph 5.

*Authorised course of action not in accordance with regime*

- 3
- (1) This paragraph applies in cases B, C and D in the table in paragraph 2.
  - (2) P is ineligible if the authorised course of action is not in accordance with a requirement which the relevant regime imposes.
  - (3) That includes any requirement as to where P is, or is not, to reside.
  - (4) The relevant regime is the mental health regime to which P is subject.

*Treatment for mental disorder in a hospital*

- 4
- (1) This paragraph applies in cases B and C in the table in paragraph 2.
  - (2) P is ineligible if the relevant care or treatment consists in whole or in part of medical treatment for mental disorder in a hospital.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*P objects to being a mental health patient etc*

- 5 (1) This paragraph applies in cases D and E in the table in paragraph 2.
- (2) P is ineligible if the following conditions are met.
- (3) The first condition is that the relevant instrument authorises P to be a mental health patient.
- (4) The second condition is that P objects—
- (a) to being a mental health patient, or
  - (b) to being given some or all of the mental health treatment.
- (5) The third condition is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
- (6) In determining whether or not P objects to something, regard must be had to all the circumstances (so far as they are reasonably ascertainable), including the following—
- (a) P's behaviour;
  - (b) P's wishes and feelings;
  - (c) P's views, beliefs and values.
- (7) But regard is to be had to circumstances from the past only so far as it is still appropriate to have regard to them.

**PART 2**

INTERPRETATION

*Application*

- 6 This Part applies for the purposes of this Schedule.

*Mental health regimes*

- 7 The mental health regimes are—
- (a) the hospital treatment regime,
  - (b) the community treatment regime, and
  - (c) the guardianship regime.

*Hospital treatment regime*

- 8 (1) P is subject to the hospital treatment regime if he is subject to—
- (a) a hospital treatment obligation under the relevant enactment, or
  - (b) an obligation under another England and Wales enactment which has the same effect as a hospital treatment obligation.
- (2) But where P is subject to any such obligation, he is to be regarded as not subject to the hospital treatment regime during any period when he is subject to the community treatment regime.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (3) A hospital treatment obligation is an application, order or direction of a kind listed in the first column of the following table.
- (4) In relation to a hospital treatment obligation, the relevant enactment is the enactment in the Mental Health Act which is referred to in the corresponding entry in the second column of the following table.

<i>Hospital treatment obligation</i>	<i>Relevant enactment</i>
Application for admission for assessment	Section 2
Application for admission for assessment	Section 4
Application for admission for treatment	Section 3
Order for remand to hospital	Section 35
Order for remand to hospital	Section 36
Hospital order	Section 37
Interim hospital order	Section 38
Order for detention in hospital	Section 44
Hospital direction	Section 45A
Transfer direction	Section 47
Transfer direction	Section 48
Hospital order	Section 51

*Community treatment regime*

- 9 P is subject to the community treatment regime if he is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) an obligation under another England and Wales enactment which has the same effect as a community treatment order.

*Guardianship regime*

- 10 P is subject to the guardianship regime if he is subject to—
- (a) a guardianship application under section 7 of the Mental Health Act,
  - (b) a guardianship order under section 37 of the Mental Health Act, or
  - (c) an obligation under another England and Wales enactment which has the same effect as a guardianship application or guardianship order.

*England and Wales enactments*

- 11 (1) An England and Wales enactment is an enactment which extends to England and Wales (whether or not it also extends elsewhere).
- (2) It does not matter if the enactment is in the Mental Health Act or not.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*P within scope of Mental Health Act*

- 12 (1) P is within the scope of the Mental Health Act if—
- (a) an application in respect of P could be made under section 2 or 3 of the Mental Health Act, and
  - (b) P could be detained in a hospital in pursuance of such an application, were one made.
- (2) The following provisions of this paragraph apply when determining whether an application in respect of P could be made under section 2 or 3 of the Mental Health Act.
- (3) If the grounds in section 2(2) of the Mental Health Act are met in P's case, it is to be assumed that the recommendations referred to in section 2(3) of that Act have been given.
- (4) If the grounds in section 3(2) of the Mental Health Act are met in P's case, it is to be assumed that the recommendations referred to in section 3(3) of that Act have been given.
- (5) In determining whether the ground in section 3(2)(c) of the Mental Health Act is met in P's case, it is to be assumed that the treatment referred to in section 3(2)(c) cannot be provided under this Act.

*Authorised course of action, relevant care or treatment & relevant instrument*

- 13 In a case where this Schedule applies for the purposes of section 16A—
- “authorised course of action” means any course of action amounting to deprivation of liberty which the order under section 16(2)(a) authorises;
- “relevant care or treatment” means any care or treatment which—
- (a) comprises, or forms part of, the authorised course of action, or
  - (b) is to be given in connection with the authorised course of action;
- “relevant instrument” means the order under section 16(2)(a).
- 14 In a case where this Schedule applies for the purposes of paragraph 17 of Schedule A1—
- “authorised course of action” means the accommodation of the relevant person in the relevant hospital or care home for the purpose of being given the relevant care or treatment;
- “relevant care or treatment” has the same meaning as in Schedule A1;
- “relevant instrument” means the standard authorisation under Schedule A1.
- 15 (1) This paragraph applies where the question whether a person is ineligible to be deprived of liberty by this Act is relevant to either of these decisions—
- (a) whether or not to include particular provision (“the proposed provision”) in an order under section 16(2)(a);
  - (b) whether or not to give a standard authorisation under Schedule A1.
- (2) A reference in this Schedule to the authorised course of action or the relevant care or treatment is to be read as a reference to that thing as it would be if—
- (a) the proposed provision were included in the order, or
  - (b) the standard authorisation were given.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (3) A reference in this Schedule to the relevant instrument is to be read as follows—
- (a) where the relevant instrument is an order under section 16(2)(a): as a reference to the order as it would be if the proposed provision were included in it;
  - (b) where the relevant instrument is a standard authorisation: as a reference to the standard authorisation as it would be if it were given.

*Expressions used in paragraph 5*

- 16 (1) These expressions have the meanings given—
- “donee” means a donee of a lasting power of attorney granted by P;
  - “mental health patient” means a person accommodated in a hospital for the purpose of being given medical treatment for mental disorder;
  - “mental health treatment” means the medical treatment for mental disorder referred to in the definition of “mental health patient”.
- (2) A decision of a donee or deputy is valid if it is made—
- (a) within the scope of his authority as donee or deputy, and
  - (b) in accordance with Part 1 of this Act.

*Expressions with same meaning as in Mental Health Act*

- 17 (1) “Hospital” has the same meaning as in Part 2 of the Mental Health Act.
- (2) “Medical treatment” has the same meaning as in the Mental Health Act.
- (3) “Mental disorder” has the same meaning as in Schedule A1 (see paragraph 14).]

SCHEDULE 2

Section 18(4)

PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS

*Wills: general*

- 1 Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P.

*Provision that may be made in will*

- 2 The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

*Wills: requirements relating to execution*

- 3 (1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person (“the authorised person”) to execute a will on behalf of P.
- (2) Any will executed in pursuance of the order or direction—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) must state that it is signed by P acting by the authorised person,
- (b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time,
- (c) must be attested and subscribed by those witnesses in the presence of the authorised person, and
- (d) must be sealed with the official seal of the court.

*Wills: effect of execution*

- 4 (1) This paragraph applies where a will is executed in accordance with paragraph 3.
- (2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that—
- (a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and
  - (b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3.
- (3) The will has the same effect for all purposes as if—
- (a) P had had the capacity to make a valid will, and
  - (b) the will had been executed by him in the manner required by the 1837 Act.
- (4) But sub-paragraph (3) does not have effect in relation to the will—
- (a) in so far as it disposes of immovable property outside England and Wales, or
  - (b) in so far as it relates to any other property or matter if, when the will is executed—
    - (i) P is domiciled outside England and Wales, and
    - (ii) the condition in sub-paragraph (5) is met.
- (5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

*Vesting orders ancillary to settlement etc.*

- 5 (1) If provision is made by virtue of section 18 for—
- (a) the settlement of any property of P, or
  - (b) the exercise of a power vested in him of appointing trustees or retiring from a trust,
- the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require.
- (2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19).

*Variation of settlements*

- 6 (1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if—
- (a) the settlement makes provision for its variation or revocation,

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the court is satisfied that a material fact was not disclosed when the settlement was made, or
- (c) the court is satisfied that there has been a substantial change of circumstances.

(2) Any such order may give such consequential directions as the court thinks fit.

*Vesting of stock in curator appointed outside England and Wales*

- 7 (1) Sub-paragraph (2) applies if the court is satisfied—
- (a) that under the law prevailing in a place outside England and Wales a person (“M”) has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of his property and affairs, and
  - (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph.
- (2) The court may direct—
- (a) any stocks standing in the name of P, or
  - (b) the right to receive dividends from the stocks,
- to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.
- (3) “Stocks” includes—
- (a) shares, and
  - (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,
- and “dividends” is to be construed accordingly.

*Preservation of interests in property disposed of on behalf of person lacking capacity*

- 8 (1) Sub-paragraphs (2) and (3) apply if—
- (a) P's property has been disposed of by virtue of section 18,
  - (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
  - (c) on P's death, any property belonging to P's estate represents the property disposed of.
- (2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.
- (3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.
- (4) The court may direct that, on a disposal of P's property—
- (a) which is made by virtue of section 18, and

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) which would apart from this paragraph result in the conversion of personal property into real property,  
 property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.
- (5) References in sub-paragraphs (1) to (4) to the disposal of property are to—
- (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;
  - (b) the removal of property from one place to another;
  - (c) the application of money in acquiring property;
  - (d) the transfer of money from one account to another;
- and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.
- (6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.
- 9 (1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money—
- (a) for carrying out permanent improvements on any of P's property, or
  - (b) otherwise for the permanent benefit of any of P's property.
- (2) The court may order that—
- (a) the whole of the money expended or to be expended, or
  - (b) any part of it,
- is to be a charge on the property either without interest or with interest at a specified rate.
- (3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).
- (4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.
- (5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

*Powers as patron of benefice*

- 10 (1) Any functions which P has as patron of a benefice may be discharged only by a person (“R”) appointed by the court.
- (2) R must be an individual capable of appointment under section 8(1)(b) of the 1986 Measure (which provides for an individual able to make a declaration of communicant status, a clerk in Holy Orders, etc. to be appointed to discharge a registered patron's functions).
- (3) The 1986 Measure applies to R as it applies to an individual appointed by the registered patron of the benefice under section 8(1)(b) or (3) of that Measure to discharge his functions as patron.



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) “The 1986 Measure” means the Patronage (Benefices) Measure 1986 (No. 3).

## SCHEDULE 3

Section 63

### INTERNATIONAL PROTECTION OF ADULTS

#### PART 1

##### PRELIMINARY

###### *Introduction*

- 1 This Part applies for the purposes of this Schedule.

###### *The Convention*

- 2 (1) “Convention” means the Convention referred to in section 63.  
(2) “Convention country” means a country in which the Convention is in force.  
(3) A reference to an Article or Chapter is to an Article or Chapter of the Convention.  
(4) An expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention.

###### *Countries, territories and nationals*

- 3 (1) “Country” includes a territory which has its own system of law.  
(2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection.

###### *Adults with incapacity*

- 4 <sup>F134</sup>(1) “Adult” means <sup>F135</sup>subject to sub-paragraph (2)] a person who—  
(a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and  
(b) has reached 16.
- <sup>F136</sup>(2) But “adult” does not include a child to whom <sup>F137</sup>... the following applies—  
(a) the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children that was signed at The Hague on 19 October 1996;  
<sup>F138</sup>(b) .....

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### Textual Amendments

- F134** Sch. 3 para. 4 renumbered as Sch. 3 para. 4(1) (coming into force in accordance with reg. 1(2) of the amending S.I.) by virtue of [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(b)**
- F135** Words in Sch. 3 para. 4 inserted (coming into force in accordance with reg. 1(2) of the amending S.I.) by [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(a)**
- F136** Sch. 3 para. 4(2) inserted (coming into force in accordance with reg. 1(2) of the amending S.I.) by [The Parental Responsibility and Measures for the Protection of Children \(International Obligations\) \(England and Wales and Northern Ireland\) Regulations 2010 \(S.I. 2010/1898\)](#), reg. 17, **Sch. para. 10(b)**
- F137** Words in Sch. 3 para. 4(2) omitted (31.12.2020) by virtue of [The Jurisdiction and Judgments \(Family\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/519\)](#), reg. 1(1), **Sch. para. 26(a)** (with reg. 8) (as amended by S.I. 2020/1574, regs. 1, 5(2)); 2020 c. 1, Sch. 5 para. 1(1)
- F138** Sch. 3 para. 4(2)(b) omitted (31.12.2020) by virtue of [The Jurisdiction and Judgments \(Family\) \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(S.I. 2019/519\)](#), reg. 1(1), **Sch. para. 26(b)** (with reg. 8) (as amended by S.I. 2020/1574, regs. 1, 5(2)); 2020 c. 1, Sch. 5 para. 1(1)

### *Protective measures*

- 5 (1) “Protective measure” means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following—
- (a) the determination of incapacity and the institution of a protective regime,
  - (b) placing the adult under the protection of an appropriate authority,
  - (c) guardianship, curatorship or any corresponding system,
  - (d) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him,
  - (e) placing the adult in a place where protection can be provided,
  - (f) administering, conserving or disposing of the adult's property,
  - (g) authorising a specific intervention for the protection of the person or property of the adult.
- (2) Where a measure of like effect to a protective measure has been taken in relation to a person before he reaches 16, this Schedule applies to the measure in so far as it has effect in relation to him once he has reached 16.

### *Central Authority*

- 6 (1) Any function under the Convention of a Central Authority is exercisable in England and Wales by the Lord Chancellor.
- (2) A communication may be sent to the Central Authority in relation to England and Wales by sending it to the Lord Chancellor.

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

## PART 2

### JURISDICTION OF COMPETENT AUTHORITY

#### *Scope of jurisdiction*

- 7 (1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to—
- (a) an adult habitually resident in England and Wales,
  - (b) an adult's property in England and Wales,
  - (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
  - (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.
- (2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if—
- (a) his habitual residence cannot be ascertained,
  - (b) he is a refugee, or
  - (c) he has been displaced as a result of disturbance in the country of his habitual residence.
- 8 (1) The court may also exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to an adult if sub-paragraph (2) or (3) applies in relation to him.
- (2) This sub-paragraph applies in relation to an adult if—
- (a) he is a British citizen,
  - (b) he has a closer connection with England and Wales than with Scotland or Northern Ireland, and
  - (c) Article 7 has, in relation to the matter concerned, been complied with.
- (3) This sub-paragraph applies in relation to an adult if the Lord Chancellor, having consulted such persons as he considers appropriate, agrees to a request under Article 8 in relation to the adult.

#### *Exercise of jurisdiction*

- 9 (1) This paragraph applies where jurisdiction is exercisable under this Schedule in connection with a matter which involves a Convention country other than England and Wales.
- (2) Any Article on which the jurisdiction is based applies in relation to the matter in so far as it involves the other country (and the court must, accordingly, comply with any duty conferred on it as a result).
- (3) Article 12 also applies, so far as its provisions allow, in relation to the matter in so far as it involves the other country.
- 10 A reference in this Schedule to the exercise of jurisdiction under this Schedule is to the exercise of functions under this Act as a result of this Part of this Schedule.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

### PART 3

#### APPLICABLE LAW

##### *Applicable law*

- 11 In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country.
- 12 Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

##### *Lasting powers of attorney, etc.*

- 13 (1) If the donor of a lasting power is habitually resident in England and Wales at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is—
- (a) the law of England and Wales, or
  - (b) if he specifies in writing the law of a connected country for the purpose, that law.
- (2) If he is habitually resident in another country at that time, but England and Wales is a connected country, the law applicable in that respect is—
- (a) the law of the other country, or
  - (b) if he specifies in writing the law of England and Wales for the purpose, that law.
- (3) A country is connected, in relation to the donor, if it is a country—
- (a) of which he is a national,
  - (b) in which he was habitually resident, or
  - (c) in which he has property.
- (4) Where this paragraph applies as a result of sub-paragraph (3)(c), it applies only in relation to the property which the donor has in the connected country.
- (5) The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised.
- (6) In this Part of this Schedule, “lasting power” means—
- (a) a lasting power of attorney (see section 9),
  - (b) an enduring power of attorney within the meaning of Schedule 4, or
  - (c) any other power of like effect.

#### **Modifications etc. (not altering text)**

**C13** Sch. 3 para. 13(6) excluded (1.12.2017) by [The Court of Protection Rules 2017 \(S.I. 2017/1035\)](#), [rules 23.2, 24.6\(1\)](#)

- 14 (1) Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under this Schedule, may disapply or modify the power.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (2) Where, in accordance with this Part of this Schedule, the law applicable to the power is, in one or more respects, that of a country other than England and Wales, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects).
- 15 Regulations may provide for Schedule 1 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within paragraph 13(6)(c) above.

#### *Protection of third parties*

- 16 (1) This paragraph applies where a person (a “representative”) in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party.
- (2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because—
- (a) where the representative and third party are in England and Wales when entering into the transaction, sub-paragraph (3) applies;
  - (b) where they are in another country at that time, sub-paragraph (4) applies.
- (3) This sub-paragraph applies if—
- (a) the law applicable to the authority in one or more respects is, as a result of this Schedule, the law of a country other than England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.
- (4) This sub-paragraph applies if—
- (a) the law applicable to the authority in one or more respects is, as a result of this Part of this Schedule, the law of England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under that law.
- (5) This paragraph does not apply if the third party knew or ought to have known that the applicable law was—
- (a) in a case within sub-paragraph (3), the law of the other country;
  - (b) in a case within sub-paragraph (4), the law of England and Wales.

#### *Mandatory rules*

- 17 Where the court is entitled to exercise jurisdiction under this Schedule, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter.

#### *Public policy*

- 18 Nothing in this Part of this Schedule requires or enables the application in England and Wales of a provision of the law of another country if its application would be manifestly contrary to public policy.

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*Status: Point in time view as at 31/12/2020.*

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## PART 4

### RECOGNITION AND ENFORCEMENT

#### *Recognition*

- 19 (1) A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country.
- (2) A protective measure taken in relation to an adult under the law of a Convention country other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 (jurisdiction).
- (3) But the court may disapply this paragraph in relation to a measure if it thinks that—
- (a) the case in which the measure was taken was not urgent,
  - (b) the adult was not given an opportunity to be heard, and
  - (c) that omission amounted to a breach of natural justice.
- (4) It may also disapply this paragraph in relation to a measure if it thinks that—
- (a) recognition of the measure would be manifestly contrary to public policy,
  - (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or
  - (c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.
- (5) And the court may disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court thinks that that Article has not been complied with in connection with that matter.
- 20 (1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.
- (2) No permission is required for an application to the court under this paragraph.
- 21 For the purposes of paragraphs 19 and 20, any finding of fact relied on when the measure was taken is conclusive.

#### *Enforcement*

- 22 (1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules.
- (2) The court must make the declaration if—
- (a) the measure comes within sub-paragraph (1) or (2) of paragraph 19, and
  - (b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5).
- (3) A measure to which a declaration under this paragraph relates is enforceable in England and Wales as if it were a measure of like effect taken by the court.

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*Measures taken in relation to those aged under 16*

- 23 (1) This paragraph applies where—
- (a) provision giving effect to, or otherwise deriving from, the Convention in a country other than England and Wales applies in relation to a person who has not reached 16, and
  - (b) a measure is taken in relation to that person in reliance on that provision.
- (2) This Part of this Schedule applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than England and Wales.

*Supplementary*

- 24 The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.
- 25 Court of Protection Rules may make provision about an application under paragraph 20 or 22.

**PART 5**

CO-OPERATION

*Proposal for cross-border placement*

- 26 (1) This paragraph applies where a public authority proposes to place an adult in an establishment in a Convention country other than England and Wales.
- (2) The public authority must consult an appropriate authority in that other country about the proposed placement and, for that purpose, must send it—
- (a) a report on the adult, and
  - (b) a statement of its reasons for the proposed placement.
- (3) If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it.
- 27 A proposal received by a public authority under Article 33 in relation to an adult is to proceed unless the authority opposes it within a reasonable time.

*Adult in danger etc.*

- 28 (1) This paragraph applies if a public authority is told that an adult—
- (a) who is in serious danger, and
  - (b) in relation to whom the public authority has taken, or is considering taking, protective measures,
- is, or has become resident, in a Convention country other than England and Wales.
- (2) The public authority must tell an appropriate authority in that other country about—
- (a) the danger, and
  - (b) the measures taken or under consideration.

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*Status: Point in time view as at 31/12/2020.*

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- 29 A public authority may not request from, or send to, an appropriate authority in a Convention country information in accordance with Chapter 5 (co-operation) in relation to an adult if it thinks that doing so—
- (a) would be likely to endanger the adult or his property, or
  - (b) would amount to a serious threat to the liberty or life of a member of the adult's family.

## PART 6

### GENERAL

#### *Certificates*

- 30 A certificate given under Article 38 by an authority in a Convention country other than England and Wales is, unless the contrary is shown, proof of the matters contained in it.

#### *Powers to make further provision as to private international law*

- 31 Her Majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority functions for enabling the Convention to be given effect in England and Wales.
- 32 (1) Regulations may make provision—
- (a) giving further effect to the Convention, or
  - (b) otherwise about the private international law of England and Wales in relation to the protection of adults.
- (2) The regulations may—
- (a) confer functions on the court or another public authority;
  - (b) amend this Schedule;
  - (c) provide for this Schedule to apply with specified modifications;
  - (d) make provision about countries other than Convention countries.

#### *Exceptions*

- 33 Nothing in this Schedule applies, and no provision made under paragraph 32 is to apply, to any matter to which the Convention, as a result of Article 4, does not apply.

#### *Regulations and orders*

- 34 A reference in this Schedule to regulations or an order (other than an Order in Council) is to regulations or an order made for the purposes of this Schedule by the Lord Chancellor.

#### *Commencement*

- 35 The following provisions of this Schedule have effect only if the Convention is in force in accordance with Article 57—
- (a) paragraph 8,
  - (b) paragraph 9,



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (c) paragraph 19(2) and (5),
- (d) Part 5,
- (e) paragraph 30.

## SCHEDULE 4

Section 66(3)

### PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY

#### PART 1

##### ENDURING POWERS OF ATTORNEY

###### *Enduring power of attorney to survive mental incapacity of donor*

- 1 (1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule—
- (a) the power is not revoked by any subsequent mental incapacity of his,
  - (b) upon such incapacity supervening, the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or until the instrument creating the power is registered under paragraph 13, and
  - (c) if and so long as paragraph (b) operates to suspend the donee's authority to act under the power, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity,
- and, accordingly, section 1 of this Act does not apply.
- (2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power—
- (a) to maintain the donor or prevent loss to his estate, or
  - (b) to maintain himself or other persons in so far as paragraph 3(2) permits him to do so.
- (3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b).

###### *Characteristics of an enduring power of attorney*

- 2 (1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—
- (a) is in the prescribed form,
  - (b) was executed in the prescribed manner by the donor and the attorney, and
  - (c) incorporated at the time of execution by the donor the prescribed explanatory information.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) In this paragraph, “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed—
- (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
  - (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612),
  - (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376),
  - (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).
- (3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.
- (4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.
- (5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is—
- (a) an individual who has reached 18 and is not bankrupt<sup>F139</sup> or is not subject to a debt relief order (under Part 7A of the Insolvency Act 1986)], or
  - (b) a trust corporation.
- (6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.
- (7) An enduring power is revoked by the bankruptcy of the donor or attorney<sup>F140</sup> or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of the donor or attorney].
- (8) But where the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him<sup>F141</sup> or where the donor or attorney is subject to an interim debt relief restrictions order], the power is suspended for so long as the order has effect.
- (9) An enduring power is revoked if the court—
- (a) exercises a power under sections 16 to 20 in relation to the donor, and
  - (b) directs that the enduring power is to be revoked.
- (10) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 15(1) applies, to the Public Guardian.

#### Textual Amendments

**F139** Words in Sch. 4 para. 2(5)(a) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(6)(a)** (with art. 5)

**F140** Words in Sch. 4 para. 2(7) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, **Sch. 2 para. 53(6)(b)** (with art. 5)

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**F141** Words in Sch. 4 para. 2(8) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(6\)\(c\)](#) (with art. 5)

*Scope of authority etc. of attorney under enduring power*

- 3 (1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to—
- (a) the restriction imposed by sub-paragraph (3), and
  - (b) any conditions or restrictions contained in the instrument,
- authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.
- (2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further—
- (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and
  - (b) he may do whatever the donor might be expected to do to meet those needs.
- (3) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further—
- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor, and
  - (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,
- provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

**PART 2**

**ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR**

*Duties of attorney in event of actual or impending incapacity of donor*

- 4 (1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable.
- (2) The attorney must, as soon as practicable, make an application to the Public Guardian for the registration of the instrument creating the power.
- (3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.
- (4) An application for registration—
- (a) must be made in the prescribed form, and
  - (b) must contain such statements as may be prescribed.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (5) The attorney—
- (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and
  - (b) must comply with any direction given to him by the court on that determination.
- (6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; and the Public Guardian must notify the donor if he receives a notice under this sub-paragraph.
- (7) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- (8) In this paragraph, “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

### PART 3

#### NOTIFICATION PRIOR TO REGISTRATION

##### *Duty to give notice to relatives*

- 5 Subject to paragraph 7, before making an application for registration the attorney must give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 6.
- 6 (1) Subject to sub-paragraphs (2) to (4), persons of the following classes (“relatives”) are entitled to receive notice under paragraph 5—
- (a) the donor's spouse or civil partner,
  - (b) the donor's children,
  - (c) the donor's parents,
  - (d) the donor's brothers and sisters, whether of the whole or half blood,
  - (e) the widow, widower or surviving civil partner of a child of the donor,
  - (f) the donor's grandchildren,
  - (g) the children of the donor's brothers and sisters of the whole blood,
  - (h) the children of the donor's brothers and sisters of the half blood,
  - (i) the donor's uncles and aunts of the whole blood,
  - (j) the children of the donor's uncles and aunts of the whole blood.
- (2) A person is not entitled to receive notice under paragraph 5 if—
- (a) his name or address is not known to the attorney and cannot be reasonably ascertained by him, or
  - (b) the attorney has reason to believe that he has not reached 18 or is mentally incapable.
- (3) Except where sub-paragraph (4) applies—

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- (a) no more than 3 persons are entitled to receive notice under paragraph 5, and
  - (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on.
- (4) Despite the limit of 3 specified in sub-paragraph (3), where—
- (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1), and
  - (b) at least one of those persons would be entitled to receive notice under paragraph 5,
- then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 5.
- 7 (1) An attorney is not required to give notice under paragraph 5—
- (a) to himself, or
  - (b) to any other attorney under the power who is joining in making the application,
- even though he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 6.
- (2) In the case of any person who is entitled to receive notice by virtue of paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give him notice; and the court must grant the application if it is satisfied—
- (a) that it would be undesirable or impracticable for the attorney to give him notice, or
  - (b) that no useful purpose is likely to be served by giving him notice.

#### *Duty to give notice to donor*

- 8 (1) Subject to sub-paragraph (2), before making an application for registration the attorney must give notice of his intention to do so to the donor.
- (2) Paragraph 7(2) applies in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 5.

#### *Contents of notices*

- 9 A notice to relatives under this Part of this Schedule must—
- (a) be in the prescribed form,
  - (b) state that the attorney proposes to make an application to the Public Guardian for the registration of the instrument creating the enduring power in question,
  - (c) inform the person to whom it is given of his right to object to the registration under paragraph 13(4), and
  - (d) specify, as the grounds on which an objection to registration may be made, the grounds set out in paragraph 13(9).
- 10 A notice to the donor under this Part of this Schedule—
- (a) must be in the prescribed form,

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (b) must contain the statement mentioned in paragraph 9(b), and
- (c) must inform the donor that, while the instrument remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the court.

*Duty to give notice to other attorneys*

- 11 (1) Subject to sub-paragraph (2), before making an application for registration an attorney under a joint and several power must give notice of his intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 7(2) and 9 apply in relation to attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 6.
- (2) An attorney is not entitled to receive notice by virtue of this paragraph if—
- (a) his address is not known to the applying attorney and cannot reasonably be ascertained by him, or
  - (b) the applying attorney has reason to believe that he has not reached 18 or is mentally incapable.

*Supplementary*

- 12 Despite section 7 of the Interpretation Act 1978 (c. 30) (construction of references to service by post), for the purposes of this Part of this Schedule a notice given by post is to be regarded as given on the date on which it was posted.

## PART 4

### REGISTRATION

*Registration of instrument creating power*

- 13 (1) If an application is made in accordance with paragraph 4(3) and (4) the Public Guardian must, subject to the provisions of this paragraph, register the instrument to which the application relates.
- (2) If it appears to the Public Guardian that—
- (a) there is a deputy appointed for the donor of the power created by the instrument, and
  - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney,
- the Public Guardian must not register the instrument except in accordance with the court's directions.
- (3) The court may, on the application of the attorney, direct the Public Guardian to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied—
- (a) that it was undesirable or impracticable for the attorney to give notice to that person, or
  - (b) that no useful purpose is likely to be served by giving him notice.

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*Status: Point in time view as at 31/12/2020.*

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- (4) Sub-paragraph (5) applies if, before the end of the period of 5 weeks beginning with the date (or the latest date) on which the attorney gave notice under paragraph 5 of an application for registration, the Public Guardian receives a valid notice of objection to the registration from a person entitled to notice of the application.
- (5) The Public Guardian must not register the instrument except in accordance with the court's directions.
- (6) Sub-paragraph (7) applies if, in the case of an application for registration—
  - (a) it appears from the application that there is no one to whom notice has been given under paragraph 5, or
  - (b) the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the grounds of objection set out in sub-paragraph (9) was established.
- (7) The Public Guardian—
  - (a) must not register the instrument, and
  - (b) must undertake such inquiries as he thinks appropriate in all the circumstances.
- (8) If, having complied with sub-paragraph (7)(b), the Public Guardian is satisfied that one of the grounds of objection set out in sub-paragraph (9) is established—
  - (a) the attorney may apply to the court for directions, and
  - (b) the Public Guardian must not register the instrument except in accordance with the court's directions.
- (9) A notice of objection under this paragraph is valid if made on one or more of the following grounds—
  - (a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney,
  - (b) that the power created by the instrument no longer subsists,
  - (c) that the application is premature because the donor is not yet becoming mentally incapable,
  - (d) that fraud or undue pressure was used to induce the donor to create the power,
  - (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (10) If any of those grounds is established to the satisfaction of the court it must direct the Public Guardian not to register the instrument, but if not so satisfied it must direct its registration.
- (11) If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in sub-paragraph (9)(d) or (e) is established, it must by order revoke the power created by the instrument.
- (12) If the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in sub-paragraph (9) except that in paragraph (c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs.

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### *Register of enduring powers*

- 14 The Public Guardian has the function of establishing and maintaining a register of enduring powers for the purposes of this Schedule.

## PART 5

### LEGAL POSITION AFTER REGISTRATION

#### *Effect and proof of registration*

- 15 (1) The effect of the registration of an instrument under paragraph 13 is that—
- (a) no revocation of the power by the donor is valid unless and until the court confirms the revocation under paragraph 16(3);
  - (b) no disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian;
  - (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration, in the case of a consent, confers any right and, in the case of an instruction, imposes or confers any obligation or right on or creates any liability of the attorney or other persons having notice of the instruction or consent.
- (2) Sub-paragraph (1) applies for so long as the instrument is registered under paragraph 13 whether or not the donor is for the time being mentally incapable.
- (3) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of—
- (a) the contents of the instrument, and
  - (b) the fact that it has been so registered.
- (4) Sub-paragraph (3) is without prejudice to section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copies) and to any other method of proof authorised by law.

#### *Functions of court with regard to registered power*

- 16 (1) Where an instrument has been registered under paragraph 13, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power.
- (2) The court may—
- (a) determine any question as to the meaning or effect of the instrument;
  - (b) give directions with respect to—
    - (i) the management or disposal by the attorney of the property and affairs of the donor;
    - (ii) the rendering of accounts by the attorney and the production of the records kept by him for the purpose;
    - (iii) the remuneration or expenses of the attorney whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive or the payment of additional remuneration;



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- (c) require the attorney to supply information or produce documents or things in his possession as attorney;
  - (d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;
  - (e) authorise the attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with paragraph 3(2) and (3) (but subject to any conditions or restrictions contained in the instrument);
  - (f) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney.
- (3) On application made for the purpose by or on behalf of the donor, the court must confirm the revocation of the power if satisfied that the donor—
- (a) has done whatever is necessary in law to effect an express revocation of the power, and
  - (b) was mentally capable of revoking a power of attorney when he did so (whether or not he is so when the court considers the application).
- (4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances—
- (a) on confirming the revocation of the power under sub-paragraph (3),
  - (b) on directing under paragraph 2(9)(b) that the power is to be revoked,
  - (c) on being satisfied that the donor is and is likely to remain mentally capable,
  - (d) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney,
  - (e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected,
  - (f) on being satisfied that fraud or undue pressure was used to induce the donor to create the power,
  - (g) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.
- (6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (c) the instrument must be delivered up to the Public Guardian to be cancelled, unless the court otherwise directs.

#### *Cancellation of registration by Public Guardian*

- 17 The Public Guardian must cancel the registration of an instrument creating an enduring power of attorney—
- (a) on receipt of a disclaimer signed by the attorney;
  - (b) if satisfied that the power has been revoked by the death or bankruptcy of the donor or attorney<sup>F142</sup> or the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of the donor or attorney] or, if the attorney is a body corporate, by its winding up or dissolution;
  - (c) on receipt of notification from the court that the court has revoked the power;

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (d) on confirmation from the court that the donor has revoked the power.

#### **Textual Amendments**

**F142** Words in Sch. 4 para. 17(b) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(6\)\(d\)](#) (with art. 5)

## **PART 6**

### PROTECTION OF ATTORNEY AND THIRD PARTIES

#### *Protection of attorney and third persons where power is invalid or revoked*

- 18 (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 13 (whether or not the registration has been cancelled at the time of the act or transaction in question).
- (2) An attorney who acts in pursuance of the power does not incur any liability (either to the donor or to any other person) because of the non-existence of the power unless at the time of acting he knows—
- (a) that the instrument did not create a valid enduring power,
  - (b) that an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power, or
  - (c) that, if the instrument had created a valid enduring power, the power would have expired before that time.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters mentioned in sub-paragraph (2).
- (4) If the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of sub-paragraph (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—
- (a) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered, or
  - (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction.
- (5) For the purposes of section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) in its application to an enduring power the revocation of which by the donor is by virtue of paragraph 15 invalid unless and until confirmed by the court under paragraph 16—
- (a) knowledge of the confirmation of the revocation is knowledge of the revocation of the power, but
  - (b) knowledge of the unconfirmed revocation is not.

#### *Further protection of attorney and third persons*

- 19 (1) If—

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (a) an instrument framed in a form prescribed as mentioned in paragraph 2(2) creates a power which is not a valid enduring power, and
  - (b) the power is revoked by the mental incapacity of the donor,
- sub-paragraphs (2) and (3) apply, whether or not the instrument has been registered.
- (2) An attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability (either to the donor or to any other person) unless at the time of acting he knows—
    - (a) that the instrument did not create a valid enduring power, and
    - (b) that the donor has become mentally incapable.
  - (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person knows—
    - (a) that the instrument did not create a valid enduring power, and
    - (b) that the donor has become mentally incapable.
  - (4) Paragraph 18(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the purpose of determining whether a transaction was valid by virtue of paragraph 18(3).

## PART 7

### JOINT AND JOINT AND SEVERAL ATTORNEYS

#### *Application to joint and joint and several attorneys*

- 20
- (1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act—
    - (a) jointly, or
    - (b) jointly and severally.
  - (2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 21.
  - (3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 22.
  - (4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers—
    - (a) prevents the instrument from creating such a power in his case, but
    - (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.
  - (5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—
    - (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2),
    - (b) notice of the application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant.
- (6) The Public Guardian is not precluded by paragraph 13(5) or (8) from registering an instrument and the court must not direct him not to do so under paragraph 13(10) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Public Guardian registers an instrument in that case, he must make against the registration an entry in the prescribed form.
- (7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 13(9)(d) or (e) is established; and where any ground in paragraph 13(9) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in the prescribed form.
- (8) In sub-paragraph (4), “the requirements for the creation of enduring powers” means the provisions of—
- (a) paragraph 2 other than sub-paragraphs (8) and (9), and
  - (b) the regulations mentioned in paragraph 2.

#### *Joint attorneys*

- 21 (1) In paragraph 2(5), the reference to the time when the attorney executes the instrument is to be read as a reference to the time when the second or last attorney executes the instrument.
- (2) In paragraph 2(6) to (8), the reference to the attorney is to be read as a reference to any attorney under the power.
- (3) Paragraph 13 has effect as if the ground of objection to the registration of the instrument specified in sub-paragraph (9)(e) applied to any attorney under the power.
- (4) In paragraph 16(2), references to the attorney are to be read as including references to any attorney under the power.
- (5) In paragraph 16(4), references to the attorney are to be read as including references to any attorney under the power.
- (6) In paragraph 17, references to the attorney are to be read as including references to any attorney under the power.

#### *Joint and several attorneys*

- 22 (1) In paragraph 2(7), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power causes that person to cease to be an attorney under the power.
- [<sup>F143</sup>(1A) In paragraph 2(7), the reference to the making of a debt relief order (under Part 7A of the Insolvency Act 1986) in respect of the attorney is to be read as a reference to the making of a debt relief order in respect of the last remaining attorney under the power; and the making of a debt relief order in respect of any other attorney under the power causes that person to cease to be an attorney under the power.]

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) In paragraph 2(8), the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim bankruptcy restrictions order has effect.
- [<sup>F144</sup>(2A) In paragraph 2(8), the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim debt relief restrictions order has effect.]
- (3) The restriction upon disclaimer imposed by paragraph 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable.

#### Textual Amendments

- F143** Sch. 4 para. 22(1A) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(6\)\(e\)\(i\)](#) (with art. 5)
- F144** Sch. 4 para. 22(2A) inserted (1.10.2012) by [The Tribunals, Courts and Enforcement Act 2007 \(Consequential Amendments\) Order 2012 \(S.I. 2012/2404\)](#), art. 1, [Sch. 2 para. 53\(6\)\(e\)\(ii\)](#) (with art. 5)

## PART 8

### INTERPRETATION

- 23 (1) In this Schedule—
- “enduring power” is to be construed in accordance with paragraph 2,
- “mentally incapable” or “mental incapacity”, except where it refers to revocation at common law, means in relation to any person, that he is incapable by reason of mental disorder<sup>F145</sup> ... of managing and administering his property and affairs and “mentally capable” and “mental capacity” are to be construed accordingly,
- “notice” means notice in writing, and
- “prescribed”, except for the purposes of paragraph 2, means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.
- [<sup>F146</sup>(1A) In sub-paragraph (1), “mental disorder” has the same meaning as in the Mental Health Act but disregarding the amendments made to that Act by the Mental Health Act 2007.]
- <sup>F146</sup>(2) Any question arising under or for the purposes of this Schedule as to what the donor of the power might at any time be expected to do is to be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

#### Textual Amendments

- F145** Words in Sch. 4 para. 23(1) repealed (3.11.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 1, 55, 56, [Sch. 1 para. 23\(1\)\(2\)](#), [Sch. 11 Pt. 1](#); [S.I. 2008/1900](#), [art. 2\(a\)\(p\)](#) (with art. 3, Sch.)
- F146** Sch. 4 para. 23(1A) inserted (3.11.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 1, 56, [Sch. 1 para. 23\(1\)\(3\)](#); [S.I. 2008/1900](#), [art. 2\(a\)](#) (with art. 3, Sch.)

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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## SCHEDULE 5

Section 66(4)

## TRANSITIONAL PROVISIONS AND SAVINGS

## PART 1

## REPEAL OF PART 7 OF THE MENTAL HEALTH ACT 1983

*Existing receivers*

- 1 (1) This paragraph applies where, immediately before the commencement day, there is a receiver (“R”) for a person (“P”) appointed under section 99 of the Mental Health Act.
- (2) On and after that day—
- (a) this Act applies as if R were a deputy appointed for P by the court, but with the functions that R had as receiver immediately before that day, and
  - (b) a reference in any other enactment to a deputy appointed by the court includes a person appointed as a deputy as a result of paragraph (a).
- (3) On any application to it by R, the court may end R's appointment as P's deputy.
- (4) Where, as a result of section 20(1), R may not make a decision on behalf of P in relation to a relevant matter, R must apply to the court.
- (5) If, on the application, the court is satisfied that P is capable of managing his property and affairs in relation to the relevant matter—
- (a) it must make an order ending R's appointment as P's deputy in relation to that matter, but
  - (b) it may, in relation to any other matter, exercise in relation to P any of the powers which it has under sections 15 to 19.
- (6) If it is not satisfied, the court may exercise in relation to P any of the powers which it has under sections 15 to 19.
- (7) R's appointment as P's deputy ceases to have effect if P dies.
- (8) “Relevant matter” means a matter in relation to which, immediately before the commencement day, R was authorised to act as P's receiver.
- (9) In sub-paragraph (1), the reference to a receiver appointed under section 99 of the Mental Health Act includes a reference to a person who by virtue of Schedule 5 to that Act was deemed to be a receiver appointed under that section.

*Orders, appointments etc.*

- 2 (1) Any order or appointment made, direction or authority given or other thing done which has, or by virtue of Schedule 5 to the Mental Health Act was deemed to have, effect under Part 7 of the Act immediately before the commencement day is to continue to have effect despite the repeal of Part 7.
- (2) In so far as any such order, appointment, direction, authority or thing could have been made, given or done under sections 15 to 20 if those sections had then been in force—
- (a) it is to be treated as made, given or done under those sections, and

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (b) the powers of variation and discharge conferred by section 16(7) apply accordingly.
- (3) Sub-paragraph (1)—
  - (a) does not apply to nominations under section 93(1) or (4) of the Mental Health Act, and
  - (b) as respects receivers, has effect subject to paragraph 1.
- (4) This Act does not affect the operation of section 109 of the Mental Health Act (effect and proof of orders etc.) in relation to orders made and directions given under Part 7 of that Act.
- (5) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

#### *Pending proceedings*

- 3 (1) Any application for the exercise of a power under Part 7 of the Mental Health Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under sections 16 to 20, as an application for the exercise of that power.
- (2) For the purposes of sub-paragraph (1) an application for the appointment of a receiver is to be treated as an application for the appointment of a deputy.

#### *Appeals*

- 4 (1) Part 7 of the Mental Health Act and the rules made under it are to continue to apply to any appeal brought by virtue of section 105 of that Act which has not been determined before the commencement day.
- (2) If in the case of an appeal brought by virtue of section 105(1) (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise it is to be heard by a puisne judge of the High Court nominated under section 46.

#### *Fees*

- 5 All fees and other payments which, having become due, have not been paid to the former Court of Protection before the commencement day, are to be paid to the new Court of Protection.

#### *Court records*

- 6 (1) The records of the former Court of Protection are to be treated, on and after the commencement day, as records of the new Court of Protection and are to be dealt with accordingly under the Public Records Act 1958 (c. 51).
- (2) On and after the commencement day, the Public Guardian is, for the purpose of exercising any of his functions, to be given such access as he may require to such of the records mentioned in sub-paragraph (1) as relate to the appointment of receivers under section 99 of the Mental Health Act.

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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*Existing charges*

- 7 This Act does not affect the operation in relation to a charge created before the commencement day of—
- (a) so much of section 101(6) of the Mental Health Act as precludes a charge created under section 101(5) from conferring a right of sale or foreclosure during the lifetime of the patient, or
  - (b) section 106(6) of the Mental Health Act (charge created by virtue of section 106(5) not to cause interest to fail etc.).

*Preservation of interests on disposal of property*

- 8 Paragraph 8(1) of Schedule 2 applies in relation to any disposal of property (within the meaning of that provision) by a person living on 1st November 1960, being a disposal effected under the Lunacy Act 1890 (c. 5) as it applies in relation to the disposal of property effected under sections 16 to 20.

*Accounts*

- 9 Court of Protection Rules may provide that, in a case where paragraph 1 applies, R is to have a duty to render accounts—
- (a) while he is receiver;
  - (b) after he is discharged.

*Interpretation*

- 10 In this Part of this Schedule—
- (a) “the commencement day” means the day on which section 66(1)(a) (repeal of Part 7 of the Mental Health Act) comes into force,
  - (b) “the former Court of Protection” means the office abolished by section 45, and
  - (c) “the new Court of Protection” means the court established by that section.

**PART 2**

REPEAL OF THE ENDURING POWERS OF ATTORNEY ACT 1985

*Orders, determinations, etc.*

- 11 (1) Any order or determination made, or other thing done, under the 1985 Act which has effect immediately before the commencement day continues to have effect despite the repeal of that Act.
- (2) In so far as any such order, determination or thing could have been made or done under Schedule 4 if it had then been in force—
- (a) it is to be treated as made or done under that Schedule, and
  - (b) the powers of variation and discharge exercisable by the court apply accordingly.
- (3) Any instrument registered under the 1985 Act is to be treated as having been registered by the Public Guardian under Schedule 4.



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (4) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

*Pending proceedings*

- 12 (1) An application for the exercise of a power under the 1985 Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under Schedule 4, as an application for the exercise of that power.
- (2) For the purposes of sub-paragraph (1)—
- (a) a pending application under section 4(2) of the 1985 Act for the registration of an instrument is to be treated as an application to the Public Guardian under paragraph 4 of Schedule 4 and any notice given in connection with that application under Schedule 1 to the 1985 Act is to be treated as given under Part 3 of Schedule 4,
  - (b) a notice of objection to the registration of an instrument is to be treated as a notice of objection under paragraph 13 of Schedule 4, and
  - (c) pending proceedings under section 5 of the 1985 Act are to be treated as proceedings on an application for the exercise by the court of a power which would become exercisable in relation to an instrument under paragraph 16(2) of Schedule 4 on its registration.

*Appeals*

- 13 (1) The 1985 Act and, so far as relevant, the provisions of Part 7 of the Mental Health Act and the rules made under it as applied by section 10 of the 1985 Act are to continue to have effect in relation to any appeal brought by virtue of section 10(1)(c) of the 1985 Act which has not been determined before the commencement day.
- (2) If, in the case of an appeal brought by virtue of section 105(1) of the Mental Health Act as applied by section 10(1)(c) of the 1985 Act (appeal to nominated judge), the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise the appeal is to be heard by a puisne judge of the High Court nominated under section 46.

*Exercise of powers of donor as trustee*

- 14 (1) Section 2(8) of the 1985 Act (which prevents a power of attorney under section 25 of the Trustee Act 1925 (c. 19) as enacted from being an enduring power) is to continue to apply to any enduring power—
- (a) created before 1st March 2000, and
  - (b) having effect immediately before the commencement day.
- (2) Section 3(3) of the 1985 Act (which entitles the donee of an enduring power to exercise the donor's powers as trustee) is to continue to apply to any enduring power to which, as a result of the provision mentioned in sub-paragraph (3), it applies immediately before the commencement day.
- (3) The provision is section 4(3)(a) of the Trustee Delegation Act 1999 (c. 15) (which provides for section 3(3) of the 1985 Act to cease to apply to an enduring power when its registration is cancelled, if it was registered in response to an application made before 1st March 2001).

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (4) Even though section 4 of the 1999 Act is repealed by this Act, that section is to continue to apply in relation to an enduring power—
- (a) to which section 3(3) of the 1985 Act applies as a result of sub-paragraph (2), or
  - (b) to which, immediately before the repeal of section 4 of the 1999 Act, section 1 of that Act applies as a result of section 4 of it.
- (5) The reference in section 1(9) of the 1999 Act to section 4(6) of that Act is to be read with sub-paragraphs (2) to (4).

#### *Interpretation*

- 15 In this Part of this Schedule, “the commencement day” means the day on which section 66(1)(b) (repeal of the 1985 Act) comes into force.

### SCHEDULE 6

Section 67(1)

#### MINOR AND CONSEQUENTIAL AMENDMENTS

##### *Fines and Recoveries Act 1833 (c. 74)*

- 1 (1) The Fines and Recoveries Act 1833 (c. 74) is amended as follows.
- (2) In section 33 (case where protector of settlement lacks capacity to act), for the words from “shall be incapable” to “is incapable as aforesaid” substitute “ lacks capacity (within the meaning of the Mental Capacity Act 2005) to manage his property and affairs, the Court of Protection is to take his place as protector of the settlement while he lacks capacity ”.
  - (3) In sections 48 and 49 (mental health jurisdiction), for each reference to the judge having jurisdiction under Part 7 of the Mental Health Act substitute a reference to the Court of Protection.

##### *Improvement of Land Act 1864 (c. 114)*

- 2 In section 68 of the Improvement of Land Act 1864 (c. 114) (apportionment of rentcharges)—
- (a) for “, curator, or receiver of” substitute “ or curator of, or a deputy with powers in relation to property and affairs appointed by the Court of Protection for, ”, and
  - (b) for “or patient within the meaning of Part VII of the Mental Health Act 1983” substitute “ person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to receive the notice ”.

##### *Trustee Act 1925 (c. 19)*

- 3 (1) The Trustee Act 1925 (c. 19) is amended as follows.
- (2) In section 36 (appointment of new trustee)—

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (a) in subsection (6C), for the words from “a power of attorney” to the end, substitute “ an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005 ”, and
- (b) in subsection (9)—
  - (i) for the words from “is incapable” to “exercising” substitute “ lacks capacity to exercise ”, and
  - (ii) for the words from “the authority” to the end substitute “ the Court of Protection ”.
- (3) In section 41(1) (power of court to appoint new trustee) for the words from “is incapable” to “exercising” substitute “ lacks capacity to exercise ”.
- (4) In section 54 (mental health jurisdiction)—
  - (a) for subsection (1) substitute—

“(1) Subject to subsection (2), the Court of Protection may not make an order, or give a direction or authority, in relation to a person who lacks capacity to exercise his functions as trustee, if the High Court may make an order to that effect under this Act.”,
  - (b) in subsection (2)—
    - (i) for the words from the beginning to “of a receiver” substitute “ Where a person lacks capacity to exercise his functions as a trustee and a deputy is appointed for him by the Court of Protection or an application for the appointment of a deputy ”,
    - (ii) for “the said authority”, in each place, substitute “ the Court of Protection ”, and
    - (iii) for “the patient”, in each place, substitute “ the person concerned ”, and
  - (c) omit subsection (3).
- (5) In section 55 (order made on particular allegation to be conclusive evidence of it)—
  - (a) for the words from “Part VII” to “Northern Ireland” substitute “ sections 15 to 20 of the Mental Capacity Act 2005 or any corresponding provisions having effect in Northern Ireland ”, and
  - (b) for paragraph (a) substitute—

“(a) that a trustee or mortgagee lacks capacity in relation to the matter in question;”.
- (6) In section 68 (definitions), at the end add—

“(3) Any reference in this Act to a person who lacks capacity in relation to a matter is to a person—

  - (a) who lacks capacity within the meaning of the Mental Capacity Act 2005 in relation to that matter, or
  - (b) in respect of whom the powers conferred by section 48 of that Act are exercisable and have been exercised in relation to that matter.”.

*Law of Property Act 1925 (c. 20)*

- 4 (1) The Law of Property Act 1925 (c. 20) is amended as follows.
- (2) In section 22 (conveyances on behalf of persons who lack capacity)—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) in subsection (1)—
  - (i) for the words from “in a person suffering” to “is acting” substitute “, either solely or jointly with any other person or persons, in a person lacking capacity (within the meaning of the Mental Capacity Act 2005) to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed ”, and
  - (ii) for “the authority having jurisdiction under Part VII of the Mental Health Act 1983” substitute “ the Court of Protection ”,
- (b) in subsection (2), for “is incapable, by reason of mental disorder, of exercising” substitute “ lacks capacity (within the meaning of that Act) to exercise ”, and
- (c) in subsection (3), for the words from “an enduring power” to the end substitute “ an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act) is entitled to act for the trustee who lacks capacity in relation to the dealing. ”.

(3) In section 205(1) (interpretation), omit paragraph (xiii).

*Administration of Estates Act 1925 (c. 23)*

- 5 (1) The Administration of Estates Act 1925 (c. 23) is amended as follows.
- (2) In section 41(1) (powers of personal representatives to appropriate), in the proviso—
  - (a) in paragraph (ii)—
    - (i) for the words from “is incapable” to “the consent” substitute “ lacks capacity (within the meaning of the Mental Capacity Act 2005) to give the consent, it ”, and
    - (ii) for “or receiver” substitute “ or a person appointed as deputy for him by the Court of Protection ”, and
  - (b) in paragraph (iv), for “no receiver is acting for a person suffering from mental disorder” substitute “ no deputy is appointed for a person who lacks capacity to consent ”.
- (3) Omit section 55(1)(viii) (definitions of “person of unsound mind” and “defective”).

*National Assistance Act 1948 (c. 29)*

- 6 In section 49 of the National Assistance Act 1948 (c. 29) (expenses of council officers acting for persons who lack capacity)—
  - (a) for the words from “applies” to “affairs of a patient” substitute “ applies for appointment by the Court of Protection as a deputy ”, and
  - (b) for “such functions” substitute “ his functions as deputy ”.

*U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45)*

- 7 In section 1 of the U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45) (administration of pensions)—
  - (a) in subsection (4), omit the words from “or for whom” to “1983”, and
  - (b) after subsection (4), insert—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

“(4A) An agreement under subsection (1) is not to be made in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) for the purposes of this Act if—

- (a) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for the person by the Court of Protection, and
- (b) the donee or deputy has power in relation to the person for the purposes of this Act.

(4B) The proviso at the end of subsection (4) also applies in relation to subsection (4A).”.

*Intestates' Estates Act 1952 (c. 64)*

8 In Schedule 2 to the Intestates' Estates Act 1952 (c. 64) (rights of surviving spouse or civil partner in relation to home), for paragraph 6(1) substitute—

“(1) Where the surviving spouse or civil partner lacks capacity (within the meaning of the Mental Capacity Act 2005) to make a requirement or give a consent under this Schedule, the requirement or consent may be made or given by a deputy appointed by the Court of Protection with power in that respect or, if no deputy has that power, by that court.”.

*Variation of Trusts Act 1958 (c. 53)*

9 In section 1 of the Variation of Trusts Act 1958 (c. 53) (jurisdiction of courts to vary trusts)—

- (a) in subsection (3), for the words from “shall be determined” to the end substitute “ who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection ”, and
- (b) in subsection (6), for the words from “the powers” to the end substitute “ the powers of the Court of Protection ”.

*Administration of Justice Act 1960 (c. 65)*

10 In section 12(1)(b) of the Administration of Justice Act 1960 (c. 65) (contempt of court to publish information about proceedings in private relating to persons with incapacity) for the words from “under Part VIII” to “that Act” substitute “ under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 ”.

*Industrial and Provident Societies Act 1965 (c. 12)*

F147 11 .....

**Textual Amendments**

F147 Sch. 6 para. 11 repealed (1.8.2014) by [Co-operative and Community Benefit Societies Act 2014 \(c. 14\)](#), s. 154, [Sch. 7](#) (with [Sch. 5](#))

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*Compulsory Purchase Act 1965 (c. 56)*

- 12 In Schedule 1 to the Compulsory Purchase Act 1965 (c. 56) (persons without power to sell their interests), for paragraph 1(2)(b) substitute—

“(b) do not have effect in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) for the purposes of this Act if—

- (i) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for the person by the Court of Protection, and
- (ii) the donee or deputy has power in relation to the person for the purposes of this Act.”.

*Leasehold Reform Act 1967 (c. 88)*

- 13 (1) For section 26(2) of the Leasehold Reform Act 1967 (c. 88) (landlord lacking capacity) substitute—

“(2) Where a landlord lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise his functions as a landlord, those functions are to be exercised—

- (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or
- (b) if no donee or deputy has that power, by a person authorised in that respect by that court.”.

- (2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act is acting on behalf of the landlord.

*Medicines Act 1968 (c. 67)*

- 14 In section 72 of the Medicines Act 1968 (c. 67) (pharmacist lacking capacity)—

- (a) in subsection (1)(c), for the words from “a receiver” to “1959” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to carry on the business ”,
- (b) after subsection (1) insert—

“(1A) In subsection (1)(c), the reference to a person who lacks capacity to carry on the business is to a person—

- (a) in respect of whom there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the Mental Capacity Act 2005), or
- (b) for whom a deputy is appointed by the Court of Protection, and in relation to whom the donee or deputy has power for the purposes of this Act.”,

- (c) in subsection (3)(d)—

- (i) for “receiver” substitute “ deputy ”, and

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (ii) after “guardian” insert “ or from the date of registration of the instrument appointing the donee ”, and
- (d) in subsection (4)(c), for “receiver” substitute “ donee, deputy ”.

*Family Law Reform Act 1969 (c. 46)*

- 15 For section 21(4) of the Family Law Reform Act 1969 (c. 46) (consent required for taking of bodily sample from person lacking capacity), substitute—

“(4) A bodily sample may be taken from a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his consent, if consent is given by the court giving the direction under section 20 or by—

- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
- (b) a deputy appointed, or any other person authorised, by the Court of Protection,

with power in that respect.”.

*Local Authority Social Services Act 1970 (c. 42)*

- 16 (1) Schedule 1 to the Local Authority Social Services Act 1970 (c. 42) (enactments conferring functions assigned to social services committee) is amended as follows.
- (2) In the entry for section 49 of the National Assistance Act 1948 (expenses of local authority officer appointed for person who lacks capacity) for “receiver” substitute “ deputy ”.
- (3) At the end, insert—

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“Mental Capacity Act 2005

Section 39	Instructing independent mental capacity advocate before providing accommodation for person lacking capacity.
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Section 49	Reports in proceedings.”.
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*Courts Act 1971 (c. 23)*

- 17 In Part 1A of Schedule 2 to the Courts Act 1971 (c. 23) (office-holders eligible for appointment as circuit judges), omit the reference to a Master of the Court of Protection.

*Local Government Act 1972 (c. 70)*

- 18 (1) Omit section 118 of the Local Government Act 1972 (c. 70) (payment of pension etc. where recipient lacks capacity).
- (2) Sub-paragraph (3) applies where, before the commencement of this paragraph, a local authority has, in respect of a person referred to in that section as “the patient”, made payments under that section—
- (a) to an institution or person having the care of the patient, or

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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(b) in accordance with subsection (1)(a) or (b) of that section.

- (3) The local authority may, in respect of the patient, continue to make payments under that section to that institution or person, or in accordance with subsection (1)(a) or (b) of that section, despite the repeal made by sub-paragraph (1).

*Matrimonial Causes Act 1973 (c. 18)*

19 In section 40 of the Matrimonial Causes Act 1973 (c. 18) (payments to person who lacks capacity) (which becomes subsection (1))—

- (a) for the words from “is incapable” to “affairs” substitute “ (“P”) lacks capacity (within the meaning of the Mental Capacity Act 2005) in relation to the provisions of the order ”,
- (b) for “that person under Part VIII of that Act” substitute “ P under that Act ”,
- (c) for the words from “such persons” to the end substitute “ such person (“D”) as it may direct ”, and
- (d) at the end insert—

“(2) In carrying out any functions of his in relation to an order made under subsection (1), D must act in P's best interests (within the meaning of that Act).”.

*Juries Act 1974 (c. 23)*

20 In Schedule 1 to the Juries Act 1974 (c. 23) (disqualification for jury service), for paragraph 3 substitute—

- “3 A person who lacks capacity, within the meaning of the Mental Capacity Act 2005, to serve as a juror.”.

*Consumer Credit Act 1974 (c. 39)*

21 For section 37(1)(c) of the Consumer Credit Act 1974 (c. 39) (termination of consumer credit licence if holder lacks capacity) substitute—

- “(c) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to carry on the activities covered by the licence.”.

*Solicitors Act 1974 (c. 47)*

22 (1) The Solicitors Act 1974 (c. 47) is amended as follows.

(2) <sup>F148</sup> .....

(3) In section 62(4) (contentious business agreements made by clients) for paragraphs (c) and (d) substitute—

- “(c) as a deputy for him appointed by the Court of Protection with powers in relation to his property and affairs, or
- (d) as another person authorised under that Act to act on his behalf.”.

(4) In paragraph 1(1) of Schedule 1 (circumstances in which Law Society may intervene in solicitor's practice), for paragraph (f) substitute—



*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

“(f) a solicitor lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as a solicitor and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to him;”.

#### Textual Amendments

**F148** Sch. 6 para. 22(2) repealed (1.10.2010) by [Legal Services Act 2007 \(c. 29\)](#), ss. 210, 211, [Sch. 23](#) (with ss. 29, 192, 193) (as amended by [2009 c. 25](#), [Sch. 21 para. 97](#), [Sch. 23 Pt. 9](#)); S.I. 2009/3250, [art. 2\(i\)](#) ([xii](#)) (with [art. 9](#))

#### *Local Government (Miscellaneous Provisions) Act 1976 (c. 57)*

23 In section 31 of the Local Government (Miscellaneous Provisions) Act 1976 (c. 57) (the title to which becomes “Indemnities for local authority officers appointed as deputies or administrators”), for the words from “as a receiver” to “1959” substitute “ as a deputy for a person by the Court of Protection ”.

#### *Sale of Goods Act 1979 (c. 54)*

24 In section 3(2) of the Sale of Goods Act 1979 (c. 54) (capacity to buy and sell) the words “mental incapacity or” cease to have effect in England and Wales.

#### *Limitation Act 1980 (c. 58)*

25 In section 38 of the Limitation Act 1980 (c. 58) (interpretation) substitute—  
(a) in subsection (2) for “of unsound mind” substitute “ lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings ”, and  
(b) omit subsections (3) and (4).

#### *Public Passenger Vehicles Act 1981 (c. 14)*

26 In section 57(2)(c) of the Public Passenger Vehicles Act 1981 (c. 14) (termination of public service vehicle licence if holder lacks capacity) for the words from “becomes a patient” to “or” substitute “ becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence, or ”.

#### *Judicial Pensions Act 1981 (c. 20)*

27 In Schedule 1 to the Judicial Pensions Act 1981 (c. 20) (pensions of Supreme Court officers, etc.), in paragraph 1, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this paragraph or who had previously retired from that office or died.

#### *Supreme Court Act 1981 (c. 54)*

28 In Schedule 2 to the Supreme Court Act 1981 (c. 54) (qualifications for appointment to office in Supreme Court), omit paragraph 11 (Master of the Court of Protection).

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

*Mental Health Act 1983 (c. 20)*

- 29 (1) The Mental Health Act is amended as follows.
- (2) In section 134(3) (cases where correspondence of detained patients may not be withheld) for paragraph (b) substitute—
- “(b) any judge or officer of the Court of Protection, any of the Court of Protection Visitors or any person asked by that Court for a report under section 49 of the Mental Capacity Act 2005 concerning the patient;”.
- (3) In section 139 (protection for acts done in pursuance of 1983 Act), in subsection (1), omit from “or in, or in pursuance” to “Part VII of this Act,”.
- (4) Section 142 (payment of pension etc. where recipient lacks capacity) ceases to have effect in England and Wales.
- (5) Sub-paragraph (6) applies where, before the commencement of sub-paragraph (4), an authority has, in respect of a person referred to in that section as “the patient”, made payments under that section—
- (a) to an institution or person having the care of the patient, or
- (b) in accordance with subsection (2)(a) or (b) of that section.
- (6) The authority may, in respect of the patient, continue to make payments under that section to that institution or person, or in accordance with subsection (2)(a) or (b) of that section, despite the amendment made by sub-paragraph (4).
- (7) In section 145(1) (interpretation), in the definition of “patient”, omit “(except in Part VII of this Act)”.
- (8) In section 146 (provisions having effect in Scotland), omit from “104(4)” to “section),”.
- (9) In section 147 (provisions having effect in Northern Ireland), omit from “104(4)” to “section),”.

*Administration of Justice Act 1985 (c. 61)*

- 30 In section 18(3) of the Administration of Justice Act 1985 (c. 61) (licensed conveyancer who lacks capacity), for the words from “that person” to the end substitute “ he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to practise as a licensed conveyancer. ”.

*Insolvency Act 1986 (c. 45)*

- 31 (1) The Insolvency Act 1986 (c. 45) is amended as follows.
- <sup>F149</sup>(2) .....
- (3) In section 390 (people not qualified to be insolvency practitioners), in subsection (4)
- (a) omit the “or” immediately after paragraph (b),
- (b) in paragraph (c), omit “Part VII of the Mental Health Act 1983 or”, and
- (c) after that paragraph, insert “, or

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (d) he lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as an insolvency practitioner.”.

#### Textual Amendments

**F149** Sch. 6 para. 31(2) omitted (1.10.2015) by virtue of [Deregulation Act 2015 \(c. 20\)](#), s. 115(7), [Sch. 6 para. 20\(4\)](#); S.I. 2015/1732, art. 2(e)(vi)

#### *Building Societies Act 1986 (c. 53)*

32 In section 102D(9) of the Building Societies Act 1986 (c. 53) (references to a person holding an account on trust for another)—

(a) in paragraph (a), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2005”, and

(b) for paragraph (b) substitute—

“(b) to an attorney holding an account for another person under—

(i) an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005, or

(ii) an enduring power registered under the Enduring Powers of Attorney (Northern Ireland) Order 1987.”.

#### *Public Trustee and Administration of Funds Act 1986 (c. 57)*

33 In section 3 of the Public Trustee and Administration of Funds Act 1986 (c. 57) (functions of the Public Trustee)—

(a) for subsections (1) to (5) substitute—

“(1) The Public Trustee may exercise the functions of a deputy appointed by the Court of Protection.”,

(b) in subsection (6), for “the 1906 Act” substitute “the Public Trustee Act 1906”, and

(c) omit subsection (7).

#### *Patronage (Benefices) Measure 1986 (No.3)*

34 (1) The Patronage (Benefices) Measure 1986 (No. 3) is amended as follows.

(2) In section 5 (rights of patronage exercisable otherwise than by registered patron), after subsection (3) insert—

“(3A) The reference in subsection (3) to a power of attorney does not include an enduring power of attorney or lasting power of attorney (within the meaning of the Mental Capacity Act 2005).”

(3) In section 9 (information to be sent to designated officer when benefice becomes vacant), after subsection (5) insert—

“(5A) Subsections (5B) and (5C) apply where the functions of a registered patron are, as a result of paragraph 10 of Schedule 2 to the Mental Capacity Act

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

2005 (patron's loss of capacity to discharge functions), to be discharged by an individual appointed by the Court of Protection.

(5B) If the individual is a clerk in Holy Orders, subsection (5) applies to him as it applies to the registered patron.

(5C) If the individual is not a clerk in Holy Orders, subsection (1) (other than paragraph (b)) applies to him as it applies to the registered patron.”

*Courts and Legal Services Act 1990 (c. 41)*

- 35 (1) The Courts and Legal Services Act 1990 (c. 41) is amended as follows.
- (2) In Schedule 11 (judges etc. barred from legal practice), for the reference to a Master of the Court of Protection substitute a reference to each of the following—
- (a) Senior Judge of the Court of Protection
  - (b) President of the Court of Protection
  - (c) Vice-President of the Court of Protection
- (3) In paragraph 5(3) of Schedule 14 (exercise of powers of intervention in registered foreign lawyer's practice), for paragraph (f) substitute—
- “(f) he lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as a registered foreign lawyer and powers under sections 15 to 20 or section 48 are exercisable in relation to him;”

*Child Support Act 1991 (c. 48)*

- 36 In section 50 of the Child Support Act 1991 (c. 48) (unauthorised disclosure of information)—
- (a) in subsection (8)—
    - (i) immediately after paragraph (a), insert “ or ”,
    - (ii) omit paragraphs (b) and (d) and the “or” immediately after paragraph (c), and
    - (iii) for “, receiver, custodian or appointee” substitute “ or custodian ”, and
  - (b) after that subsection, insert—
 

“(9) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2005) to consent to its disclosure, the appropriate person is—

    - (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
    - (b) a deputy appointed for him, or any other person authorised, by the Court of Protection,

with power in that respect.”

*Social Security Administration Act 1992 (c. 5)*

- 37 In section 123 of the Social Security Administration Act 1992 (c. 5) (unauthorised disclosure of information)—
- (a) in subsection (10), omit—

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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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- (i) in paragraph (b), “a receiver appointed under section 99 of the Mental Health Act 1983 or”,
  - (ii) in paragraph (d)(i), “sub-paragraph (a) of rule 41(1) of the Court of Protection Rules 1984 or”,
  - (iii) in paragraph (d)(ii), “a receiver ad interim appointed under sub-paragraph (b) of the said rule 41(1) or”, and
  - (iv) “receiver,”, and
- (b) after that subsection, insert—
- “(11) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2005) to consent to its disclosure, the appropriate person is—
- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
  - (b) a deputy appointed for him, or any other person authorised, by the Court of Protection,
- with power in that respect.”.

*Judicial Pensions and Retirement Act 1993 (c. 8)*

- 38 (1) The Judicial Pensions and Retirement Act 1993 (c. 8) is amended as follows.
- (2) In Schedule 1 (qualifying judicial offices), in Part 2, under the cross-heading “Court officers”, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this sub-paragraph or who had previously retired from that office or died.
  - (3) In Schedule 5 (retirement: the relevant offices), omit the entries relating to the Master and Deputy or temporary Master of the Court of Protection, except in the case of a person holding any of those offices immediately before the commencement of this sub-paragraph.
  - (4) In Schedule 7 (retirement: transitional provisions), omit paragraph 5(5)(i)(g) except in the case of a person holding office as a deputy or temporary Master of the Court of Protection immediately before the commencement of this sub-paragraph.

*Leasehold Reform, Housing and Urban Development Act 1993 (c. 28)*

- 39 (1) For paragraph 4 of Schedule 2 to the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28) (landlord under a disability), substitute—
- “4 (1) This paragraph applies where a Chapter I or Chapter II landlord lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise his functions as a landlord.
- (2) For the purposes of the Chapter concerned, the landlord's place is to be taken—
- (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or
  - (b) if no deputy or donee has that power, by a person authorised in that respect by that court.”.

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act 1983 (c. 20) is acting on behalf of the landlord.

*Goods Vehicles (Licensing of Operators) Act 1995 (c. 23)*

- 40 (1) The Goods Vehicles (Licensing of Operators) Act 1995 (c. 23) is amended as follows.
- (2) In section 16(5) (termination of licence), for “he becomes a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence”.
- (3) In section 48 (licence not to be transferable, etc.)—
- (a) in subsection (2)—
- (i) for “or become a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “, or become a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence, ”, and
- (ii) in paragraph (a), for “became a patient” substitute “became a person who lacked capacity in that respect ”, and
- (b) in subsection (5), for “a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “a person lacking capacity”.

*Disability Discrimination Act 1995 (c. 50)*

- 41 In section 20(7) of the Disability Discrimination Act 1995 (c. 50) (regulations to disapply provisions about incapacity), in paragraph (b), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2005”.

*Trusts of Land and Appointment of Trustees Act 1996 (c. 47)*

- 42 (1) The Trusts of Land and Appointment of Trustees Act 1996 (c. 47) is amended as follows.
- (2) In section 9 (delegation by trustees), in subsection (6), for the words from “an enduring power” to the end substitute “an enduring power of attorney or lasting power of attorney within the meaning of the Mental Capacity Act 2005”.
- (3) In section 20 (the title to which becomes “Appointment of substitute for trustee who lacks capacity”)—
- (a) in subsection (1)(a), for “is incapable by reason of mental disorder of exercising” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise”, and
- (b) in subsection (2)—
- (i) for paragraph (a) substitute—
- “(a) a deputy appointed for the trustee by the Court of Protection,”,
- (ii) in paragraph (b), for the words from “a power of attorney” to the end substitute “an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005”, and

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

(iii) in paragraph (c), for the words from “the authority” to the end substitute “ the Court of Protection ”.

*Human Rights Act 1998 (c. 42)*

43 In section 4(5) of the Human Rights Act 1998 (c. 42) (courts which may make declarations of incompatibility), after paragraph (e) insert—

“(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.”

*Access to Justice Act 1999 (c. 22)*

F150 44 .....

**Textual Amendments**

**F150** Sch. 6 para. 44 repealed (1.4.2013) by [Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) (c. 10), s. 151(1), [Sch. 5 Pt. 2](#); S.I. 2013/453, art. 3(h) (with savings and transitional provisions in S.I. 2013/534, art. 6)

*Adoption and Children Act 2002 (c. 38)*

45 In section 52(1)(a) of the Adoption and Children Act 2002 (c. 38) (parental consent to adoption), for “is incapable of giving consent” substitute “ lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent ”.

*Licensing Act 2003 (c. 17)*

46 (1) The Licensing Act 2003 (c. 17) is amended as follows.

(2) In section 27(1) (lapse of premises licence), for paragraph (b) substitute—

“(b) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to hold the licence,”.

(3) In section 47 (interim authority notice in relation to premises licence)—

(a) in subsection (5), for paragraph (b) substitute—

“(b) the former holder lacks capacity (within the meaning of the Mental Capacity Act 2005) to hold the licence and that person acts for him under an enduring power of attorney or lasting power of attorney registered under that Act,” and

(b) in subsection (10), omit the definition of “mentally incapable”.

*Courts Act 2003 (c. 39)*

47 (1) The Courts Act 2003 (c. 39) is amended as follows.

(2) In section 1(1) (the courts in relation to which the Lord Chancellor must discharge his general duty), after paragraph (a) insert—

“(aa) the Court of Protection,”.

(3) In section 64(2) (judicial titles which the Lord Chancellor may by order alter)—

*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

- (a) omit the reference to a Master of the Court of Protection, and
- (b) at the appropriate place insert a reference to each of the following—
  - (i) Senior Judge of the Court of Protection,
  - (ii) President of the Court of Protection,
  - (iii) Vice-president of the Court of Protection.

## SCHEDULE 7

Section 67(2)

## REPEALS

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Trustee Act 1925 (c. 19)	Section 54(3).
Law of Property Act 1925 (c. 20)	Section 205(1)(xiii).
Administration of Estates Act 1925 (c. 23)	Section 55(1)(viii)
U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45)	In section 1(4), the words from “or for whom” to “1983”.
Mental Health Act 1959 (c. 72)	In Schedule 7, in Part 1, the entries relating to— section 33 of the Fines and Recoveries Act 1833, section 68 of the Improvement of Land Act 1864, section 55 of the Trustee Act 1925, section 205(1) of the Law of Property Act 1925, section 49 of the National Assistance Act 1948, and section 1 of the Variation of Trusts Act 1958.
Courts Act 1971 (c. 23)	In Schedule 2, in Part 1A, the words “Master of the Court of Protection”.
Local Government Act 1972 (c. 70)	Section 118.
Limitation Act 1980 (c. 58)	Section 38(3) and (4).
Supreme Court Act 1981 (c. 54)	In Schedule 2, in Part 2, paragraph 11.
Mental Health Act 1983 (c. 20)	Part 7. In section 139(1) the words from “or in, or in pursuance” to “Part VII of this Act,”. In section 145(1), in the definition of “patient” the words “(except in Part VII of this Act)”. In sections 146 and 147 the words from “104(4)” to “section),”. Schedule 3. In Schedule 4, paragraphs 1, 2, 4, 5, 7, 9, 14, 20, 22, 25, 32, 38, 55 and 56.



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*Status: Point in time view as at 31/12/2020.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005. (See end of Document for details)*

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	In Schedule 5, paragraphs 26, 43, 44 and 45.
Enduring Powers of Attorney Act 1985 (c. 29)	The whole Act.
Insolvency Act 1986 (c. 45)	In section 389A(3)— the “or” immediately after paragraph (b), and in paragraph (c), the words “Part VII of the Mental Health Act 1983 or”. In section 390(4)— the “or” immediately after paragraph (b), and in paragraph (c), the words “Part VII of the Mental Health Act 1983 or”.
Public Trustee and Administration of Funds Act 1986 (c. 57)	Section 2. Section 3(7).
Child Support Act 1991 (c. 48)	In section 50(8)— paragraphs (b) and (d), and the “or” immediately after paragraph (c).
Social Security Administration Act 1992 (c. 5)	In section 123(10)— in paragraph (b), “a receiver appointed under section 99 of the Mental Health Act 1983 or”, in paragraph (d)(i), “sub-paragraph (a) of rule 41(1) of the Court of Protection Rules Act 1984 or”, in paragraph (d)(ii), “a receiver ad interim appointed under sub- paragraph (b) of the said rule 41(1) or”, and “receiver,”.
Trustee Delegation Act 1999 (c. 15)	Section 4. Section 6. In section 7(3), the words “in accordance with section 4 above”.
Care Standards Act 2000 (c. 14)	In Schedule 4, paragraph 8.
Licensing Act 2003 (c. 17)	In section 47(10), the definition of “mentally incapable”.
Courts Act 2003 (c. 64)	In section 64(2), the words “Master of the Court of Protection”.

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**Status:**

Point in time view as at 31/12/2020.

**Changes to legislation:**

There are currently no known outstanding effects for the Mental Capacity Act 2005.