



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1

#### PERSONS WHO LACK CAPACITY

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

**C1** 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.
- (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.

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

#### 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)

- C2** 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)

#### 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—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or

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- (d) 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—
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

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

- C3** 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—
  - (a) the 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 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—
  - (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),

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- (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.

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

- C4** 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**)
- C5** 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)**

#### **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)**

### **[<sup>F1</sup>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

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- (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) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

#### Textual Amendments

- F1 Ss. 4A, 4B inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50(2), 56; S.I. 2009/139, art. 2(b) (with art. 3)

### 4B Deprivation of liberty necessary for life-sustaining treatment etc

- (1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.
- (2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.
- (3) The second condition is that the deprivation of liberty—
- (a) is wholly or partly for the purpose of—
    - (i) giving P life-sustaining treatment, or
    - (ii) doing any vital act, or
  - (b) consists wholly or partly of—
    - (i) giving P life-sustaining treatment, or
    - (ii) doing any vital act.
- (4) The third condition is that the deprivation of liberty is necessary in order to—
- (a) give the life-sustaining treatment, or
  - (b) do the vital act.
- (5) 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.]

#### Textual Amendments

- F1 Ss. 4A, 4B inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50(2), 56; S.I. 2009/139, art. 2(b) (with art. 3)

### 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—

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- (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>F2</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.

### Textual Amendments

**F2** 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.

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- (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
  - (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.

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

- C6** 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>F3</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.

#### Textual Amendments

- F3** 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)



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## 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>F4</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

- F4** 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) 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,

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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>[F5]</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>[F6]</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>[F7]</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.
- (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.

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- (8) The bankruptcy of a donee<sup>F8</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>F9</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

- F5** 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)
- F6** 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)
- F7** 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)
- F8** 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)
- F9** 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
  - (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).

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- (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.
- (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

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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.

#### [<sup>F10</sup>16A Section 16 powers: Mental Health Act patients etc

- (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).]

#### Textual Amendments

**F10** S. 16A inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), [ss. 50\(3\)](#), 56; [S.I. 2009/139](#), [art. 2\(b\)](#) (with [art. 3](#))

#### 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;

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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
- (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.

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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,
  - (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

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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>F11</sup>and<sup>F11</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>F12</sup> .....

#### Textual Amendments

**F11** 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

**F12** 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>F13</sup>(1<sup>F13</sup>) The <sup>F14</sup>Lord Chief Justice, with the concurrence of the Lord Chancellor,<sup>F14</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.

<sup>F15</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>F15</sup>



*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

#### Textual Amendments

- F13** 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)**
- F14** 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)**
- F15** 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>F16</sup>Powers of the court in relation to Schedule A1*

#### Textual Amendments

- F16** S. 21A and preceding cross-heading inserted (1.4.2009) by [Mental Health Act 2007](#) (c. 12), ss. 50, 56, **Sch. 9 para. 2**; S.I. 2009/139, **art. 2(e)** (with art. 3)

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

- (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.

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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.
- (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.

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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.
- (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

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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
  - (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,

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

while a decision as respects any relevant issue is sought from the court.

### *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>F17</sup>(i) giving a consent under the Human Fertilisation and Embryology Act 2008.]

<sup>F17</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**

**F17** 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)**

**C7** S. 27(1)(g) restricted (1.9.2014) by [The Special Educational Needs and Disability Regulations 2014 \(S.I. 2014/1530\)](#), regs. 1, [65](#)

**C8** 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](#)

## **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.

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- [<sup>F18</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>F19F18</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>F19</sup>(2) “Medical treatment”, “mental disorder” and “patient” have the same meaning as in that Act.

#### Textual Amendments

- F18** 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.)
- F19** 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>F20</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 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- <sup>F20</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

**F20** 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 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (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 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (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.

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (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

- I8** 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

- I9** 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 [F21responsible authority] must make such arrangements as it considers reasonable to enable persons (“independent mental capacity advocates”) to be available to represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate [F22or persons who fall within section 39A, 39C or 39D]F22.
- (2) The appropriate authority may make regulations as to the appointment of independent mental capacity advocates.
- (3) The regulations may, in particular, provide—

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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>F23</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>F24</sup>or Chapter 2 of Part 1 of the Health and Social Care Act 2008]<sup>F24</sup>,  
which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.
- [<sup>F25</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>F25</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

- F21** 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)
- F22** Words in s. 35(1) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\), ss. 50, 56, Sch. 9 para. 3](#); [S.I. 2009/139, art. 2\(e\)](#) (with art. 3)
- F23** 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)
- F24** Words in s. 35(6)(b)(iii) inserted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\), art. 17\(2\)](#)

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

**F25** 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)**

**C9** 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 (“P”) so that P may participate as fully as possible in any relevant decision;
  - (b) obtaining and evaluating relevant information;
  - (c) ascertaining what P's wishes and feelings 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;
  - (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.

**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—
  - (a) 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
  - (b) 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>F26</sup>or 4A]<sup>F26</sup> of the Mental Health Act.

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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—
  - (a) the Secretary of State, in relation to bodies in England, or
  - (b) the National Assembly for Wales, in relation to bodies in Wales.

#### Textual Amendments

**F26** 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.](#))

#### 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.

[<sup>F27</sup>(2A) And this section does not apply if—

- (a) an independent mental capacity advocate must be appointed under section 39A or 39C (whether or not by the NHS body) to represent P, and
- (b) the hospital or care home in which P is to be accommodated under the arrangements referred to in this section is the relevant hospital or care home under the authorisation referred to in that section.]

<sup>F27</sup>(3) Before making the arrangements, the NHS body must instruct an independent mental capacity advocate to represent P unless it is satisfied that—

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*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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.
- (6) “Care home” has the meaning given in section 3 of the Care Standards Act 2000 (c. 14).
- [<sup>F28</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.]
- <sup>F28</sup>(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.
- [<sup>F29</sup>(10) 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.<sup>F29</sup>]

#### Textual Amendments

**F27** S. 38(2A) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 4\(2\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

**F28** 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\(3\)](#)

**F29** S. 38(10) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 4\(3\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

### 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—
- for the provision of residential accommodation for a person (“P”) who lacks capacity to agree to the arrangements, or
  - 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.

[<sup>F30</sup>(1A) But this section applies only if—

- in the case of a local authority in England, subsection (1B) applies;
- in the case of a local authority in Wales, subsection (2) applies.]

[<sup>F31</sup>(1B) This subsection applies if the accommodation is to be provided in accordance with—

- Part 1 of the Care Act 2014, or
- section 117 of the Mental Health Act.]

- (2) [<sup>F32</sup>This subsection applies] if the accommodation is to be provided in accordance with—

- [<sup>F33</sup>(a) Part 4 of the Social Services and Well-being (Wales) Act 2014; or]
- section 117 of the Mental Health Act,

<sup>F34</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.

[<sup>F35</sup>(3A) And this section does not apply if—

- an independent mental capacity advocate must be appointed under section 39A or 39C (whether or not by the local authority) to represent P, and
- the place in which P is to be accommodated under the arrangements referred to in this section is the relevant hospital or care home under the authorisation referred to in that section.]

<sup>F35</sup>(4) Before making the arrangements, the local authority must instruct an independent mental capacity advocate to represent P unless they are satisfied that—

- the accommodation is likely to be provided for a continuous period of less than 8 weeks, or
- the arrangements need to be made as a matter of urgency.

(5) If the local authority—

- 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
- 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

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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.

[<sup>F36</sup>(7) 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

- F30** 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)
- F31** 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)
- F32** 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)
- F33** 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)**
- F34** 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)**
- F35** 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)
- F36** S. 39(7) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, **Sch. 9 para. 5(3)**; [S.I. 2009/139](#), **art. 2(e)** (with art. 3)

#### 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**

#### [<sup>F37</sup>39A Person becomes subject to Schedule A1

- (1) This section applies if—
- a person (“P”) becomes subject to Schedule A1, and
  - 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.



*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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.

#### Textual Amendments

**F37** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### **39B Section 39A: supplementary provision**

- (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

**F37** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

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

- (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

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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) 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

**F37** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); [S.I. 2009/139](#), [art. 2\(e\)](#) (with [art. 3](#))

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

- (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—

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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;
  - (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.

#### Textual Amendments

**F37** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

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

- (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 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

#### Textual Amendments

**F37** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

#### [<sup>F38</sup>40 Exceptions

[<sup>F39</sup>(1<sup>F39</sup>)] The duty imposed by section 37(3), 38(3) or (4) [<sup>F40</sup>, 39(4) or (5), 39A(3), 39C(3) or 39D(2)]<sup>F40</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.

[<sup>F41</sup>(2)] 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.<sup>F41F38</sup>]]

#### Textual Amendments

**F38** S. 40 substituted (1.10.2007) by [Mental Health Act 2007 \(c. 12\)](#), ss. 49, 56; S.I. 2007/2798, [art. 2\(h\)](#)

**F39** 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](#))

**F40** 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](#))

**F41** S. 40(2) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(4\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

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

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

### Commencement Information

**116** 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,
  - <sup>F42</sup>(fa) for the guidance of persons exercising functions under Schedule A1,
  - (fb) for the guidance of representatives appointed under Part 10 of Schedule A1,
  - <sup>F42</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.
- (2) The Lord Chancellor may from time to time revise a code.
- (3) The Lord Chancellor may delegate the preparation or revision of the whole or any part of a code so far as he considers expedient.
- (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,
  - <sup>F43</sup>(da) in the exercise of functions under Schedule A1,
  - (db) as a representative appointed under Part 10 of Schedule A1,
  - <sup>F43</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.

*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

- (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

- F42** 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\(b\)](#)
- F43** 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\(2\)\(e\)](#)

### 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,

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*Status: Point in time view as at 01/12/2017.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1. (See end of Document for details)*

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- (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 01/12/2017.

**Changes to legislation:**

There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 1.