



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 2

#### THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN

##### *The Court of Protection*

#### **45 The Court of Protection**

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

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

- (1) Subject to Court of Protection Rules under section 51(2)(d), the jurisdiction of the court is exercisable by a judge nominated for that purpose by—
  - (a) the Lord Chancellor, or
  - (b) a person acting on the Lord Chancellor's behalf.
- (2) To be nominated, a judge must be—
  - (a) the President of the Family Division,
  - (b) the Vice-Chancellor,
  - (c) a puisne judge of the High Court,

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- (d) a circuit judge, or
  - (e) a district judge.
- (3) The Lord Chancellor must—
- (a) appoint one of the judges nominated by virtue of subsection (2)(a) to (c) to be President of the Court of Protection, and
  - (b) appoint another of those judges to be Vice-President of the Court of Protection.
- (4) The Lord Chancellor must appoint one of the judges nominated by virtue of subsection (2)(d) or (e) to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor may direct.

### *Supplementary powers*

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

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

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

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

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

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

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

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- (6) The report may be made in writing or orally, as the court may direct.
- (7) In complying with a requirement, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of—
  - (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),so far as the record relates to P.
- (8) If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement, he may interview P in private.
- (9) If a Court of Protection Visitor who is a Special Visitor is making a visit in the course of complying with a requirement, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.
- (10) "NHS body" has the meaning given in section 148 of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43).
- (11) "Requirement" means a requirement imposed under subsection (2) or (3).

#### *Practice and procedure*

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

- (1) No permission is required for an application to the court for the exercise of any of its powers under this Act—
  - (a) by a person who lacks, or is alleged to lack, capacity,
  - (b) if such a person has not reached 18, by anyone with parental responsibility for him,
  - (c) by the donor or a donee of a lasting power of attorney to which the application relates,
  - (d) by a deputy appointed by the court for a person to whom the application relates, or
  - (e) by a person named in an existing order of the court, if the application relates to the order.
- (2) But, subject to Court of Protection Rules and to paragraph 20(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.
- (3) In deciding whether to grant permission the court must, in particular, have regard to—
  - (a) the applicant's connection with the person to whom the application relates,
  - (b) the reasons for the application,
  - (c) the benefit to the person to whom the application relates of a proposed order or directions, and
  - (d) whether the benefit can be achieved in any other way.
- (4) "Parental responsibility" has the same meaning as in the Children Act 1989 (c. 41).

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## **51 Court of Protection Rules**

- (1) The Lord Chancellor may make rules of court (to be called “Court of Protection Rules”) with respect to the practice and procedure of the court.
- (2) Court of Protection Rules may, in particular, make provision—
  - (a) as to the manner and form in which proceedings are to be commenced;
  - (b) as to the persons entitled to be notified of, and be made parties to, the proceedings;
  - (c) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges;
  - (d) for the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its officers or other staff;
  - (e) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate;
  - (f) for enabling an application to the court to be disposed of without a hearing;
  - (g) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
  - (h) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
  - (i) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented;
  - (j) for the enforcement of orders made and directions given in the proceedings.
- (3) Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.
- (4) Court of Protection Rules may make different provision for different areas.

## **52 Practice directions**

- (1) The President of the Court of Protection may, with the concurrence of the Lord Chancellor, give directions as to the practice and procedure of the court.
- (2) Directions as to the practice and procedure of the court may not be given by anyone other than the President of the Court of Protection without the approval of the President of the Court of Protection and the Lord Chancellor.
- (3) Nothing in this section prevents the President of the Court of Protection, without the concurrence of the Lord Chancellor, giving directions which contain guidance as to law or making judicial decisions.

## **53 Rights of appeal**

- (1) Subject to the provisions of this section, an appeal lies to the Court of Appeal from any decision of the court.
- (2) Court of Protection Rules may provide that where a decision of the court is made by—
  - (a) a person exercising the jurisdiction of the court by virtue of rules made under section 51(2)(d),

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- (b) a district judge, or
  - (c) a circuit judge,
- an appeal from that decision lies to a prescribed higher judge of the court and not to the Court of Appeal.
- (3) For the purposes of this section the higher judges of the court are—
- (a) in relation to a person mentioned in subsection (2)(a), a circuit judge or a district judge;
  - (b) in relation to a person mentioned in subsection (2)(b), a circuit judge;
  - (c) in relation to any person mentioned in subsection (2), one of the judges nominated by virtue of section 46(2)(a) to (c).
- (4) Court of Protection Rules may make provision—
- (a) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission;
  - (b) as to the person or persons entitled to grant permission to appeal;
  - (c) as to any requirements to be satisfied before permission is granted;
  - (d) that where a higher judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—
    - (i) the appeal would raise an important point of principle or practice, or
    - (ii) there is some other compelling reason for the Court of Appeal to hear it;
  - (e) as to any considerations to be taken into account in relation to granting or refusing permission to appeal.

#### *Fees and costs*

## **54 Fees**

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

## **55 Costs**

- (1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.
- (2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.
- (3) The court has full power to determine by whom and to what extent the costs are to be paid.
- (4) The court may, in any proceedings—
  - (a) disallow, or
  - (b) order the legal or other representatives concerned to meet,
 the whole of any wasted costs or such part of them as may be determined in accordance with the rules.
- (5) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.
- (6) “Wasted costs” means any costs incurred by a party—
  - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

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

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

### *The Public Guardian*

## **57 The Public Guardian**

- (1) For the purposes of this Act, there is to be an officer, to be known as the Public Guardian.
- (2) The Public Guardian is to be appointed by the Lord Chancellor.
- (3) There is to be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine.
- (4) The Lord Chancellor may, after consulting the Public Guardian—

- (a) provide him with such officers and staff, or
  - (b) enter into such contracts with other persons for the provision (by them or their sub-contractors) of officers, staff or services,
- as the Lord Chancellor thinks necessary for the proper discharge of the Public Guardian's functions.
- (5) Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers.

## **58 Functions of the Public Guardian**

- (1) The Public Guardian has the following functions—
- (a) establishing and maintaining a register of lasting powers of attorney,
  - (b) establishing and maintaining a register of orders appointing deputies,
  - (c) supervising deputies appointed by the court,
  - (d) directing a Court of Protection Visitor to visit—
    - (i) a donee of a lasting power of attorney,
    - (ii) a deputy appointed by the court, or
    - (iii) the person granting the power of attorney or for whom the deputy is appointed (“P”),and to make a report to the Public Guardian on such matters as he may direct,
  - (e) receiving security which the court requires a person to give for the discharge of his functions,
  - (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court,
  - (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
  - (h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,
  - (i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.
- (2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.
- (3) The Lord Chancellor may by regulations make provision—
- (a) conferring on the Public Guardian other functions in connection with this Act;
  - (b) in connection with the discharge by the Public Guardian of his functions.
- (4) Regulations made under subsection (3)(b) may in particular make provision as to—
- (a) the giving of security by deputies appointed by the court and the enforcement and discharge of security so given;
  - (b) the fees which may be charged by the Public Guardian;
  - (c) the way in which, and funds from which, such fees are to be paid;
  - (d) exemptions from and reductions in such fees;
  - (e) remission of such fees in whole or in part;

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- (f) the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity.
- (5) For the purpose of enabling him to carry out his functions, the Public Guardian may, at all reasonable times, examine and take copies of—
- (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),
- so far as the record relates to P.
- (6) The Public Guardian may also for that purpose interview P in private.

## **59 Public Guardian Board**

- (1) There is to be a body, to be known as the Public Guardian Board.
- (2) The Board's duty is to scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate.
- (3) The Lord Chancellor must, in discharging his functions under sections 57 and 58, give due consideration to recommendations made by the Board.
- (4) The members of the Board are to be appointed by the Lord Chancellor.
- (5) The Board must have—
  - (a) at least one member who is a judge of the court, and
  - (b) at least four members who are persons appearing to the Lord Chancellor to have appropriate knowledge or experience of the work of the Public Guardian.
- (6) The Lord Chancellor may by regulations make provision as to—
  - (a) the appointment of members of the Board (and, in particular, the procedures to be followed in connection with appointments);
  - (b) the selection of one of the members to be the chairman;
  - (c) the term of office of the chairman and members;
  - (d) their resignation, suspension or removal;
  - (e) the procedure of the Board (including quorum);
  - (f) the validation of proceedings in the event of a vacancy among the members or a defect in the appointment of a member.
- (7) Subject to any provision made in reliance on subsection (6)(c) or (d), a person is to hold and vacate office as a member of the Board in accordance with the terms of the instrument appointing him.
- (8) The Lord Chancellor may make such payments to or in respect of members of the Board by way of reimbursement of expenses, allowances and remuneration as he may determine.
- (9) The Board must make an annual report to the Lord Chancellor about the discharge of its functions.



## **60 Annual report**

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

### *Court of Protection Visitors*

## **61 Court of Protection Visitors**

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