

*These notes refer to the Mental Capacity Act (Northern Ireland)
2016 (c.18) which received Royal Assent on 9 May 2016*

Mental Capacity Act (Northern Ireland) 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 – High Court Powers: Decisions and Deputies

Part 6 of the Act makes provision for High Court powers to make decisions and appoint deputies in respect of individuals who lack capacity to make decisions in respect of their care, treatment, personal welfare, property and affairs, as well as making provision for the various rules of court which may be made in respect of this Part of the Act.

Section 112 – The court’s power to make declarations

This section provides that the High Court has a power to make declarations in relation to persons aged 16 or over regarding whether that person has or lacks capacity to make a certain decision; whether the person has or lacks capacity to make decisions relating to certain matters; and the lawfulness of any act done, or yet to be done, in relation to the person.

Section 113 – The court’s powers to make decisions and appoint deputies: general

This section applies if P lacks capacity to make decisions about a matter or matters concerning his or her care, treatment or personal welfare or property and affairs.

If P lacks capacity to make such decisions, the High Court may, by order, make a decision or decisions on P’s behalf in relation to those matters or appoint a deputy to make decisions on P’s behalf in relation to those matters.

The section provides that the powers of the High Court are subject to the provisions of the Act, in particular sections 1, 2, 5 and 7 (principles and best interests).

When the court is deciding whether to appoint a deputy, the section provides that the court, as well as having regard to P’s best interests, must have regard to the principles that a decision by the court is the preferred option and the powers that are conferred to a deputy should be as limited as possible in terms of scope and duration.

The section also provides that the court may make further orders or give directions or impose or confer powers and duties on a deputy as it considers appropriate. Any order of the court may be varied or discharged by a subsequent order and may in particular revoke the appointment of a deputy or vary the powers conferred on him or her, if the deputy has behaved, is behaving, or proposes to behave in a way which is out-with the deputy's powers or not in P's best interests.

Section 114 – Section 113 powers: care, treatment and personal welfare

This section provides that the powers created in section 113 extend in particular to decisions about where P is to live; deciding what contact P has with particular persons; giving or refusing consent to treatment; and giving a direction that someone takes over responsibility for P's healthcare. The section also provides that these powers are subject to section 117 which makes provision for restrictions about matters that can be delegated to deputies.

Section 115 – Section 113 powers: property and affairs

This section provides that the High Court's powers under section 113 as they relate to P's property and affairs extend in particular to a number of areas, for example, control and management of P's property, carrying out a contract entered into by P, discharging P's debts and executing a will for P. However, a will cannot be executed unless P has reached the age of 18. The section also provides that any powers regarding P's property and affairs, except the power to execute a will, can be exercised even though P is not yet aged 16, if the court considers that it is likely that P will still lack capacity to make decisions about that issue when he or she reaches 18 years of age.

The section also provides that these powers are subject to section 117 which makes provision for restrictions about matters that can be delegated to deputies.

Schedule 5 makes provision for the execution of a will on behalf of P under section 115. It provides that a will may make any provision which could be made by a will which was executed by P if he or she had capacity to do so.

The Schedule also provides that any will executed in pursuance of a court order or direction must state that it is signed by the authorised person on behalf of P; be signed by the authorised person with P's name and the authorised person's name in the presence of two or more witnesses who are present at the same time; be attested and subscribed by those witnesses in the presence of the authorised person and must be sealed with the official seal of the court.

Where a will is executed in accordance with the Schedule, the Wills and Administration Proceedings (Northern Ireland) Order 1994 will have effect, subject to modifications to references in the Order to formalities for executing a will. The will has the same effect as if P had capacity to make a valid will and that will had been executed in accordance with the Order. However, a will executed in accordance with the Schedule will not have effect in so far as it disposes of immovable property outside Northern Ireland, nor will it have effect

in so far as it relates to any property or matter other than immovable property if P is domiciled outside of Northern Ireland when the will is executed and the question of P's testamentary capacity would fall to be determined in accordance with the law of a place outside Northern Ireland.

The Schedule also provides that if, under section 115, provision is made for the settlement of any of P's property or the exercise of P's power to appoint trustees or retire from a trust, the court can also make a consequential vesting order or such other order as may be required.

Additionally, the Schedule makes provision for the court to vary or revoke a settlement in various circumstances if a settlement has been made under section 115, and to transfer stock or dividends in certain circumstances.

The Schedule also provides that an individual who would have benefitted from P's property under a will or intestacy, but the property has been disposed of under section 115, that individual can take the same interest, in so far as possible, in the property that represents the property that was disposed of. Provision is also made that where the court has ordered or directed the expenditure of money for carrying out permanent improvements on P's property or for the permanent benefit of the property, the court may order that all the expenditure or part of it can be a charge on the property. However, any such charge does not confer a right of sale or foreclosure during the lifetime of P.

Section 116 – Appointment of deputies

This section provides that a deputy who has been appointed by the court must be aged 18 or over and in relation to property and affairs can either be such a person, or a trust corporation. A person cannot be appointed as a deputy without his or her consent.

The section also provides that the court may appoint two or more deputies to act jointly; jointly and severally; or jointly in some matters and severally in others. When appointing deputies, the court may also appoint one or more other persons to replace them in specified circumstances or for a certain period of time.

A deputy is to be treated as P's agent and he or she is entitled to be reimbursed from P's property for reasonable expenses incurred in discharging his or her functions and if the court directs, to remuneration for discharging those functions.

The section provides that the court may confer powers on the deputy to take possession and control of all or part of P's property and exercise all or specified powers in relation to it, including powers of investment as determined by the court. The court may require a deputy to give the Public Guardian such security as the court considers is appropriate for the proper performance of his or her functions and to submit reports to the Public Guardian.

Section 117 – Restrictions on deputies

This section provides that a deputy does not have power to make a decision on behalf of P unless P lacks capacity to make that decision, or the deputy reasonably believes that P lacks capacity. The deputy is subject to the provisions of the Act, in particular provisions relating to principles (sections 1, 2 and 5) and best interests (section 7).

The section provides that a deputy is not permitted to be given power to prohibit a person from having contact with P or to direct that a different person takes over responsibility for P's healthcare. A deputy is also not permitted to be given powers relating to the settlement of P's property, the execution of a will for P or the exercise of a power vested in P whether beneficially or as a trustee or otherwise. Additionally, a deputy may not be given a power to make a decision on behalf of P which is inconsistent with a decision that was made by an attorney under a lasting power of attorney or an enduring power of attorney. Also, a deputy cannot refuse consent to life-sustaining treatment for P or deprive him or her of his or her liberty. A deputy cannot restrain P unless the court has given the deputy scope to do so and the deputy reasonably believes that: P lacks capacity in relation to the matter; there is a risk of harm to P if the deputy does not carry out or authorise the act of restraint; and that carrying out or authorising the act is a proportionate response to the likelihood of harm to P and the seriousness of the harm concerned. Finally, a deputy cannot authorise psychosurgery for P.

The section provides that the Department may, by regulations, extend the types of treatment in respect of which the deputy cannot give consent.

Section 118 – Reliance on authority of deputy in relation to treatment etc

This section provides protection from liability for a person where he or she does an act in connection with P's care, treatment or personal welfare with the consent of a person purporting to be P's deputy ("C") and C is, in fact, either not P's deputy or the giving of consent to the matter in question is not within the scope of C's authority.

In those circumstances, the person will not be liable if, before doing the act, he or she had taken reasonable steps to establish whether C was P's deputy and it was within the scope of C's authority to consent to the matter in question and the person reasonably believed, when doing the act, that C was P's deputy and had authority to consent.

Section 119 – Interim orders and directions

This section allows the Court to make orders or give directions pending any determination of an application that has been made to it if there is reason for the Court to believe that the person lacks capacity in respect of a particular matter, that matter is one which falls within the court's powers to consider and it is in his or her best interests for the Court to act without delay.

Section 120 – Power to call for reports

This section provides that the court may require reports about P to be made to it by the Public Guardian or by a Court Visitor and may require a HSC trust, the Regional Board or the RQIA to arrange for a report to be made by its officers or such other persons as may be appropriate. The report must deal with such matters relating to P as the court may direct.

Section 121 - Powers of Public Guardian or Court Visitor in respect of reports under section 120(2)

This section sets out the powers of the Public Guardian or Court visitor in respect of reports made under section 120(2).

The section provides that in order to comply with the court's wishes, the Public Guardian or a Court Visitor may at all reasonable times require the production of, examine and take copies of any health record, any court record or any record relating to P's care, treatment or personal welfare which is held by a HSC trust, the Regional Board or the RQIA, a Northern Ireland Department, or the managing authority of an independent hospital or care home.

If the Public Guardian or a Court Visitor is visiting P in the course of compiling a report for the court, he or she may interview P in private. The section also provides that if a Court Visitor is also a Special Visitor, he or she may, if the court directs, carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.

Section 122 – Applications to the court

This section provides that no leave to apply to the court is required by P; anyone with parental responsibility for a person under the age of 18; a donor of a lasting power of attorney or an enduring power of attorney; an attorney under a lasting power of attorney or an enduring power of attorney; a deputy appointed by the court; or a person named in an existing court order if the application relates to that order. Nor is leave required for an application to the court under Schedule 9 paragraph 21(2) which relates to a declaration as to whether a measure taken to protect a person or his or her property in another jurisdiction is to be recognised in Northern Ireland.

Subject to court rules, any other application will require the leave of the court. In deciding whether to grant leave, the court must have regard to various factors, in particular, the applicant's connection with the person who is the subject of the application, the reasons for the application, the benefit to the person to whom the application relates, and whether that benefit can be achieved in another way.

Section 123– Duty to notify Attorney General

This section provides that a person who makes an application to the court under Part 6 must notify the Attorney General of the application. This notification must

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be in accordance with Rules of Court. The Attorney General may intervene in the proceedings in such a way as the Attorney considers appropriate.

Section 124 – Rules of court

This section lists matters in relation to which court rules may be made.