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2016 CHAPTER 18

PROSPECTIVE

PART 4

INDEPENDENT MENTAL CAPACITY ADVOCATES

Independent mental capacity advocates

Independent mental capacity advocates

86.—(1) Each HSC trust must make arrangements to secure that, where the trust is required by section 91 to instruct an independent mental capacity advocate to represent and provide support to a person (“P”) in the determination of whether a particular act in relation to which P lacks capacity would be in P’s best interests, an independent mental capacity advocate is available to be instructed by the trust to represent and provide support to P in that determination.

(2) Arrangements under subsection (1) may include provision for payments to be made to, or in relation to, persons carrying out functions by virtue of the arrangements.

(3) In making arrangements under subsection (1), and instructing an independent mental capacity advocate under section 91, an HSC trust must have regard to the principle that a person to whom a proposed act would relate should be represented by someone who is independent of any person who will be responsible for the act if it is done.

(4) In this Act “independent mental capacity advocate” means a person who has been appointed by an HSC trust, in accordance with regulations under the

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following provisions of this section, to be a person to whom the trust may from time to time offer instructions under section 91.

(5) The Department may make regulations about the arrangements that may be entered into by HSC trusts for the purposes of this section.

(6) The regulations may in particular—

- (a) provide that a person may be appointed as mentioned in subsection (4) only if the person meets prescribed conditions;
- (b) provide for the appointment of a person to be subject to prescribed conditions;
- (c) enable an appointment to be such that the person appointed will only be offered instructions of a description specified by the appointment.

(7) The conditions that may be prescribed under subsection (6)(a) include—

- (a) a condition that the person is approved, or belongs to a description of persons approved, in accordance with the regulations;
- (b) a condition that the person has prescribed qualifications or skills or has undertaken prescribed training.

Functions of independent mental capacity advocates: provision of support, etc

87.—(1) The Department may make regulations about the functions of independent mental capacity advocates.

(2) The regulations may in particular require prescribed steps to be taken by an independent mental capacity advocate who has been instructed under section 91 to represent and provide support to a person (“P”) in the determination of whether a particular act in relation to which P lacks capacity would be in P's best interests.

(3) The steps that may be prescribed under subsection (2) include steps for the purpose of—

- (a) providing support to P so that P may participate as fully as possible in any relevant decision;
- (b) obtaining and evaluating relevant information;
- (c) ascertaining P's past and present wishes and feelings, and the beliefs and values that would be likely to influence P's decision if P had capacity;
- (d) ascertaining what alternative courses of action are available in relation to P;
- (e) informing persons responsible for determining what would be in P's best interests of the independent mental capacity advocate's conclusions;
- (f) informing P's nominated person (if any) of matters relevant to the nominated person.

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(4) The regulations may also make provision as to circumstances in which an independent mental capacity advocate may challenge, or provide assistance for the purposes of challenging, any relevant decision.

*Procedure for ensuring that an independent
mental capacity advocate is instructed*

Request for independent mental capacity advocate to be instructed

88.—(1) This section applies where it reasonably appears to an appropriate healthcare professional—

- (a) that a determination needs to be made of whether a particular act would be in the best interests of a person (“P”) who is 16 or over and lacks capacity in relation to the matter; and
- (b) that by reason of section 35 or 55, an independent mental capacity advocate needs to be instructed to represent and provide support to P in that determination.

(2) The appropriate healthcare professional may request the relevant trust to instruct an independent mental capacity advocate to represent and provide support to P in the determination of whether the act would be in P's best interests.

(3) A request under this section may be made only if the steps required by section 89 have been taken so far as practicable.

(4) A request under this section must be in a prescribed form and include prescribed information.

(5) In this section—

“appropriate healthcare professional” means a person of a prescribed description.

“the relevant trust” means the HSC trust in whose area the act would be carried out.

Steps to be taken before independent mental capacity advocate may be requested

89.—(1) The steps referred to in section 88(3) are as follows.

(2) P must be given prescribed information relating to independent mental capacity advocates.

(3) P must be given an opportunity to decide whether to make a declaration under section 90 (refusal by P of independent mental capacity advocate).

(4) If P's decision is to make such a declaration, P must be given an opportunity to make that declaration.

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(5) But the steps in subsections (3) and (4) need not be taken where P does not have capacity to make a declaration under section 90.

(6) The information prescribed under subsection (2) must include notice that, if an independent mental capacity advocate is instructed, this may result in information about P (including sensitive personal information) being disclosed by virtue of this Act to the independent mental capacity advocate.

Right to declare that no independent mental capacity advocate to be instructed

90.—(1) Where the steps in section 89 have been taken, P may (at any time when P has capacity to do so) declare that he or she does not wish an independent mental capacity advocate to be instructed to represent and provide support to him or her in the matter in question.

(2) A declaration may be revoked by P at any time when P has capacity to do so.

(3) A declaration, or a revocation of a declaration, is valid only if it is in writing and the conditions of section 95 (formalities) are met.

(4) Where a declaration has been made (and not revoked)—

(a) no request may be made under section 88 for an independent mental capacity advocate to be instructed to represent and provide support to P in the matter in question; and

(b) accordingly, no such instruction may be given under section 91.

(5) In this section “declaration” means a declaration under this section.

Instruction of independent mental capacity advocate

91. Where—

(a) an HSC trust receives a request duly made under section 88 for the trust to instruct an independent mental capacity advocate to represent and provide support to a person (“P”) in the determination of whether a particular act would be in P’s best interests, and

(b) no declaration has been made by P under section 90 in relation to the matter (or a declaration has been made but revoked),

the trust must instruct an independent mental capacity advocate to represent and provide support to P in the determination of whether the act would be in P’s best interests.

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Powers of independent mental capacity advocates

92.—(1) This section applies where an independent mental capacity advocate has been instructed as mentioned in section 91 to represent and provide support to a person (“P”).

(2) The independent mental capacity advocate may do anything within subsection (3) or (4) for the purpose of exercising any of his or her functions.

(3) The independent mental capacity advocate may, at any reasonable time, visit P and interview P in private.

(4) The independent mental capacity advocate may, at any reasonable time, require the production of, examine and take copies of—

(a) any health records relating to P, or

(b) any records relating to P's care, treatment or personal welfare,

that the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.

Procedure after instruction of independent mental capacity advocate

Right of person to discontinue involvement of independent mental capacity advocate

93.—(1) Where an independent mental capacity advocate has been instructed under section 91 to represent and provide support to a person in a matter, the person may (at any time when the person has capacity to do so) declare that he or she does not wish to continue to have the services of an independent mental capacity advocate in the matter.

(2) Where a declaration is made, the HSC trust that instructed the independent mental capacity advocate must withdraw the instruction.

(3) A declaration may be revoked by the person at any time when the person has capacity to do so.

(4) A declaration, or a revocation of a declaration, is valid only if it is in writing and the conditions of section 95 (formalities) are met.

(5) In this section “declaration” means a declaration under this section.

Continuing duty of trust in relation to independent mental capacity advocate

94.—(1) The duty of an HSC trust under section 91 is to be taken to include a duty to instruct a new independent mental capacity advocate to represent and provide support to P in the matter in question if for any reason an independent mental capacity advocate previously instructed under that section to represent and provide support to P in that matter ceases to be able to do so.

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- (2) But this does not apply where—
- (a) the reason why the independent mental capacity advocate previously instructed is no longer able to represent and provide support to P in the matter is that P has made a declaration under section 93; and
 - (b) that declaration has not been revoked.

Formalities

Formalities for declarations under Part 4

95.—(1) This section applies to the making or revocation of a declaration under section 90 or 93.

(2) For the purposes of section 90(3) or 93(4), the conditions of this section are met if—

- (a) the document containing the declaration or revocation is signed by the person making the declaration or revocation (“P”);
- (b) P’s signature is witnessed by a person of a prescribed description; and
- (c) the person witnessing the signature certifies that, in his or her opinion, P—
 - (i) understands the effect of the declaration or revocation; and
 - (ii) has not been subjected to any undue pressure in relation to the declaration or revocation.

(3) Regulations may make provision for subsection (2) to have effect with prescribed modifications where the person making or revoking the declaration is physically unable to make a signature.

Power to adjust role of independent mental capacity advocates

Power to adjust role of independent mental capacity advocates

96.—(1) The Department may by regulations—

- (a) expand the role of independent mental capacity advocates in relation to persons who are 16 or over and lack capacity;
- (b) adjust the obligation to make arrangements imposed by section 86.

(2) The regulations may in particular—

- (a) prescribe circumstances in which an independent mental capacity advocate must be instructed by a person of a prescribed description to represent and provide support to a person who lacks capacity;
- (b) prescribe circumstances in which an independent mental capacity advocate may be so instructed;

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- (c) contain provision about the making of requests for independent mental capacity advocates to be instructed in prescribed circumstances;
 - (d) contain provision about the functions of independent mental capacity advocates instructed in prescribed circumstances.
- (3) The regulations may make provision in any way that the Department considers appropriate and may in particular—
- (a) apply, or make provision corresponding to, any provision within subsection (4) (with or without modifications);
 - (b) amend any provision of this Part.
- (4) The provisions are—
- (a) any provision of this Part;
 - (b) any provision of regulations made under this Part;
 - (c) any provision that could be made by regulations under this Part.

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Changes and effects yet to be applied to :

- [Pt. 4 power to apply by 1986 SI595 \(N.I.\) art. 3C\(6\)\(7\)\(a\) as inserted by 2016 c. 18 \(N.I.\) Sch. 8 para. 4](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- [s. 288\(1\)\(a\)-\(c\)s. 288\(1\)\(e\)\(i\)\(2\)-\(8\) coming into force by S.R. 2019/163 art. 2\(3\)Sch. Pt. 3](#)