

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

General powers of the court and appointment of deputies

Section 15: Power to make declarations

65. This gives the court power to make declarations, if necessary, about whether an individual has capacity, either in relation to a specific decision that needs to be made, or in relation to decisions on such matters as are described in the declaration. It also gives the court power to make declarations about whether an act or proposed act was or would be lawful. The Court of Protection would have this latter power as a superior court of record which, under *section 47*, has the same powers, rights, privileges and authority as the High Court, but it is considered helpful to spell this out. *Subsection (2)* confirms that the court can be asked to adjudicate on omissions to act (for example, the withholding or withdrawing of medical treatment) and a course of conduct.

Section 16: Powers to make decisions and appoint deputies: general

66. This sets out the core jurisdiction of the court, which is to make decisions about personal welfare or property and affairs for persons lacking capacity or to appoint a deputy to do so.
67. *Subsection (3)* confirms that the principles in *section 1* and the best interests checklist will govern the court's exercise of its powers.
68. *Subsection (4)* requires the court to consider two additional principles, further emphasising the "least restrictive intervention" principle mentioned in *section 1(6)*. The first additional principle is that a decision of the court is preferable to the appointment of a deputy and the second is that, if a deputy is appointed, the appointment should be as limited in scope and duration as is reasonably practicable in the circumstances. In welfare (including health care) matters a deputy is never required in order for care or treatment to be given to a person because *section 5* provides sufficient scope for carers and professionals to act. Nevertheless, a deputy may be particularly helpful in cases of dispute. For matters concerning property and affairs, a deputy may be needed in order to provide the authority to deal with contractual matters and where there is an on-going need for such decisions to be taken. *Subsection (5)* enables the court to grant the deputy powers or impose duties on him as it thinks necessary to avoid repeated applications to the court. However, it also enables the court to require the deputy to seek consent before taking certain actions. *Subsection (6)* gives the court an "own motion" power to make whatever order is in the person's best interests.
69. The court can always vary or discharge its orders and *subsection (8)* provides that it has power to take away or alter a deputy's powers if the deputy is overstepping his powers or not adhering to his best interests obligations.

Section 17: Section 16 powers: personal welfare

70. The powers created by *section 16* in relation to making orders and appointing deputies will extend to a wide range of personal welfare issues. Particular mention is made in this section of issues which have arisen in the past and been dealt with by the High Court in the exercise of its inherent jurisdiction and may be most likely to arise in future. This is not an exhaustive, merely an indicative, list. It is not a list of decisions that must always go to court, rather it provides examples of where the court can act if it would be appropriate, and beneficial to the person, for the court to do so. There are restrictions on what may be delegated to a deputy, set out in *section 20(2)*.

Section 18: Section 16 powers: property and affairs

71. *Subsection (1)* indicates the extent of the court's powers with regard to property and affairs. Again it provides a non-exhaustive, indicative list of the matters within the powers relating to property and affairs. This largely reproduces the list which applies to the original Court of Protection in section 96 of the Mental Health Act 1983. Again, this is not a list of matters which must always go to the new Court of Protection but rather an indication of the types of order the court might make if an application were made. Where property and financial matters are concerned the effect of the general law relating to contract and property will often be to create a need for formal powers. So if the person concerned has lost capacity to enter into a contract for the sale of his house no purchaser is going to accept a contract or Land Registry transfer document signed by someone who is not the registered owner, unless the proposed purchaser sees a document proving that someone else has formal authority to contract to sell and transfer the property on his behalf. Equally, the person's bank will be bound by the terms of its contract with him not to hand his money over to someone else. If he can no longer give a valid instruction or valid receipt to the bank then his money will have to be held by the bank until formal authority is provided. If a valid power of attorney exists then this would probably remove any need for the Court of Protection to make orders. Again, not all of the powers can be given to deputies (see *section 20(3)*). These correspond to matters which, under the current law, always have to be dealt with by the court itself.

Section 19: Appointment of deputies

72. This deals with deputies appointed by the court. The general rule is that a deputy must be at least 18 years of age. If a trust corporation is appointed deputy it can only act in respect of property and affairs. The court may appoint the holder of a specified office as deputy (this is different to LPAs where the attorney must be an individual). Before being appointed deputy, a person must consent to being appointed. The court will be able to appoint more than one deputy to act on behalf of an individual who lacks capacity and these deputies can act jointly, jointly and severally, or jointly for some matters and jointly and severally for other matters. That is, the court can specify that they must all act together, that each can act independently of the other or that they can act either way, depending on the matter in question. When appointing a deputy, the court will also have the power to appoint a successor or successors to the original appointees. The court will specify the circumstances under which this could occur.
73. *Subsection (6)* provides that a deputy will be treated as an "agent" of the adult who lacks capacity. The law of agency imposes a range of duties on those who act as agents for someone else. For example, an agent must act with "due care and skill" and is bound by fiduciary duties amongst other duties. Case law has established that receivers appointed by the original Court of Protection under Part 7 of the Mental Health Act 1983 are agents but it is considered helpful to make statutory provision to that effect in relation to deputies.
74. All deputies will be able to claim reasonable expenses from the estate of the adult lacking capacity and if the court directs, the deputy can be paid for his services from the estate. The court will be able to give a deputy the power to deal with all

matters concerning the control and management of any property belonging to the adult lacking capacity, including being able to invest. The court will also be able to require a deputy to give the Public Guardian security against misbehaviour (that is, either a deposit of money or a guarantee bond) and to direct the deputy to file with the Public Guardian reports and accounts as it sees fit. These provisions are broadly in line with arrangements in the original Court of Protection (Mental Health Act 1983, Part 7).

Section 20: Restrictions on deputies

75. This sets a number of limitations on the powers of deputies. *Subsection (1)* specifies that a deputy cannot act where the person concerned is able to act for himself. In some cases the person may have fluctuating capacity, for example as a result of mental health problems, and it is not acceptable for a deputy to carry on making substitute decisions when the person concerned has in fact recovered. *Subsection (6)* reiterates that a deputy must act in accordance with *section 1* (principles) and *section 4* (best interests).
76. *Subsections (2) and (3)* relate back to *sections 16 to 17* and list certain matters which must always be dealt with by the court, not a deputy. The powers to prohibit a person from having contact with an adult lacking capacity or to direct a person responsible for his health care to allow a different person to take over are, of course, powers which have to be exercised by the court itself. As under the current law, deputies will also be restricted from making certain financial decisions in connection with wills and trusts.
77. *Subsection (4)* makes it clear that a deputy cannot be given power to “trump” an attorney (who will have been chosen by the donor himself, at a time when he had capacity). If there is a concern or a dispute about the way an attorney is behaving the court must use its powers in *sections 22 and 23*, rather than seeking to appoint a deputy.
- Subsection (5)* restricts deputies from refusing consent to the carrying out or continuation of treatment that is necessary to sustain life. *Subsection (6)* clarifies that the principles in *section 1* and the considerations as to best interests as set out in *section 4* apply to deputies.
78. *Subsections (7) to (11)* impose limitations on deputies in relation to restraint, matching those imposed in relation to “section 5 acts” by *section 6* and on attorneys by *section 11*. A deputy will have to be acting within the scope of an authority expressly conferred on him by the court. Restraint can only be used to prevent harm and must be proportionate. *Subsection (13)* makes clear that for *section 20* a deprivation of liberty within the ECHR meaning amounts to more than mere restraint.

Section 21: Transfer of proceedings relating to people under 18

79. The Act deals with people aged 16 and over (and with the property of younger children – see *section 18(3)*), while the Children Act 1989 deals with people under the age of 18. There will be some overlap between the jurisdictions and the Lord Chancellor is therefore given power by this section to make transfer of proceedings orders. It is intended that the order will indicate that a case should be transferred to the court most suitable to deal with the issues. One factor is likely to be the prospect of a person under 18 who is the subject of a dispute still lacking capacity when an adult. For example, if the parents of a 17-year old with profound learning difficulties are in dispute about residence or contact then it may be more appropriate for the Court of Protection to deal with the case, since an order made under the Children Act 1989 would expire on the child’s 18th birthday at the latest.