

EXPLANATORY MEMORANDUM TO
THE MENTAL CAPACITY ACT 2005(TRANSFER OF PROCEEDINGS)
ORDER 2007

2007 No. 1899

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Description

2.1. This Order provides for transfers of proceedings between the Court of Protection and a court having jurisdiction under the Children Act 1989.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. None.

4. Legislative Background

4.1. The Mental Capacity Act 2005 (“the Act”) provides the framework for making decisions and acting on behalf of individuals who lack capacity to make those decisions for themselves. This Order is made under sections 21 and 65(5) of the Act.

5. Extent

5.1. This Order applies to England and Wales only.

6. European Convention on Human Rights

6.1. As the Order is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1. The Act establishes a new specialist court, to be known as the Court of Protection (“the new court”), with a new jurisdiction to make decisions and to appoint people (deputies) to make decisions on behalf of people who lack capacity to make decisions for themselves. The current Court of Protection (“the current court”) has jurisdiction over the property and financial affairs of people lacking capacity, while the new court will also have jurisdiction to make decisions in relation to their personal welfare. Personal welfare decisions are currently made under the inherent jurisdiction of the High Court.

- 7.2. The new court's powers under the Act, for the most part, arise where the person lacking capacity is 16 or over. However, powers in relation to a person's property and financial affairs may be exercised in relation to a younger person if the new court considers it likely that the person will continue to lack capacity in relation to that matter when they become an adult (see section 18(3) of the Act).
- 7.3. The Children Act 1989 ("the Children Act") provides the jurisdiction for certain courts to make decisions in relation to people under 18, primarily in relation to who they should reside and have contact with. There may be instances when it would be beneficial to transfer cases from the court having jurisdiction under the Children Act to the new Court of Protection, or vice versa, and the Lord Chief Justice (or his judicial nominee) with the agreement of the Lord Chancellor is given the power by section 21 of the Act to make an Order as to when such transfers may take place. The Lord Chief Justice has nominated the President of the Family Division (who has also been appointed President Designate of the new court) to make the new Order.
- 7.4. It is intended that a case should be transferred to the court most suitable to deal with the issue. For example, if the parents of a 17 year old with profound learning difficulties are in dispute about residence and contact then it may be more appropriate for the new court to deal with the case, since an order made under the Children Act would expire on the child's 18th birthday whereas the new court has the ability to make orders in respect of those matters for as long as the person continues to lack capacity to make those decisions himself or herself.
- 7.5. A group comprising members of the judiciary and legal profession with experience of the operation of the current court and the family courts, under the auspices of the President Designate of the new court, has provided regular advice on the development of the Order. The Order has also been shared with the Family Procedure Rules Committee.
- 7.6. It is anticipated that the number of cases transferred pursuant to this Order annually will be small.
- 7.7. The Office of the Public Guardian ("the OPG"), an executive agency of the department, will provide a customer service unit, which will be the first point of contact and advice for anyone who needs information, help or guidance regarding the practice and procedure of the new court, including in relation to transfers pursuant to this Order.

8. Impact

- 8.1. A full Regulatory Impact Assessment (RIA) was produced for the passage of the Act, considering the benefits, cost and risks of setting up a statutory framework for decision making. The RIA is available at <http://www.dca.gov.uk/risk/mcbria.pdf>. The department has also produced an

Equality Impact Assessment to cover the Act and its implementation, which is available at <http://www.justice.gov.uk/whatwedo/mc-equality-impact.htm>.

9. Contact

- 9.1. Any enquiries about the contents of this memorandum should be addressed to: Ben Luscombe, Mental Capacity Implementation Programme, Ministry of Justice, email: Ben.Luscombe@justice.gsi.gov.uk tel: 020 7210 0051.