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STATUTORY INSTRUMENTS

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**2008 No. 1315**

**The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008**

**PART 1**

Selection of representatives

**Selection of a person to be a representative - general**

**3.—(1)** In addition to any requirements in regulations 6 to 9 and 11, a person can only be selected to be a representative if they are—

- (a) 18 years of age or over;
- (b) able to keep in contact with the relevant person;
- (c) willing to be the relevant person's representative;
- (d) not financially interested in the relevant person's managing authority<sup>(1)</sup>;
- (e) not a relative of a person who is financially interested in the managing authority;
- (f) not employed by, or providing services to, the relevant person's managing authority, where the relevant person's managing authority is a care home<sup>(2)</sup>;
- (g) not employed to work in the relevant person's managing authority in a role that is, or could be, related to the relevant person's case, where the relevant person's managing authority is a hospital<sup>(3)</sup>; and
- (h) not employed to work in the supervisory body<sup>(4)</sup> that is appointing the representative in a role that is, or could be, related to the relevant person's case.

(2) For the purposes of this regulation a "relative" means—

- (a) a spouse, ex-spouse, civil partner or ex-civil partner;
- (b) a person living with the relevant person as if they were a spouse or a civil partner;
- (c) a parent or child;
- (d) a brother or sister;
- (e) a child of a person falling within sub-paragraphs (a), (b) or (d);
- (f) a grandparent or grandchild;
- (g) a grandparent-in-law or grandchild-in-law;
- (h) an uncle or aunt;
- (i) a brother-in-law or sister-in-law;

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(1) The identity of the managing authority is determined in accordance with paragraphs 176, 177 and 179 of Schedule A1 to the Act.

(2) "care home" is defined in paragraph 178 of Schedule A1 to the Act.

(3) "hospital" is defined in paragraph 175 of Schedule A1 to the Act.

(4) The identity of the supervisory body is determined in accordance with paragraphs 128, 180 and 182 of Schedule A1 to the Act.

- (j) a son-in-law or daughter-in-law;
  - (k) a first cousin; or
  - (l) a half-brother or half-sister.
- (3) For the purposes of this regulation—
- (a) the relationships in paragraph (2)(c) to (k) include step relationships;
  - (b) references to step relationships and in-laws in paragraph (2) are to be read in accordance with section 246 of the Civil Partnership Act 2004<sup>(5)</sup>;
  - (c) a person has a financial interest in a managing authority where—
    - (i) that person is a partner, director, other office-holder or major shareholder of the managing authority that has made the application for a standard authorisation, and
    - (ii) the managing authority is a care home or independent hospital<sup>(6)</sup>; and
  - (d) a major shareholder means—
    - (i) any person holding one tenth or more of the issued shares in the managing authority, where the managing authority is a company limited by shares, and
    - (ii) in all other cases, any of the owners of the managing authority.

#### **Determination of capacity**

4. The best interests assessor must determine whether the relevant person has capacity to select a representative.

#### **Selection by the relevant person**

5.—(1) Where the best interests assessor determines that the relevant person has capacity, the relevant person may select a family member, friend or carer.

(2) Where the relevant person does not wish to make a selection under paragraph (1), regulation 8 applies.

#### **Selection by a donee or deputy**

6.—(1) Where—

- (a) the best interests assessor determines that the relevant person lacks capacity to select a representative; and
- (b) the relevant person has a donee or deputy<sup>(7)</sup> and the donee's or deputy's scope of authority permits the selection of a family member, friend or carer of the relevant person,

the donee or deputy may select such a person.

(2) A donee or deputy may select himself or herself to be the relevant person's representative.

(3) Where a donee or deputy does not wish to make a selection under paragraph (1) or (2), regulation 8 applies.

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<sup>(5)</sup> 2004 (c.33).

<sup>(6)</sup> "independent hospital" is defined in paragraph 175(3) of Schedule A1 to the Act.

<sup>(7)</sup> "deputy" is defined in section 64(1) of the Act.

### **Confirmation of eligibility of family member, friend or carer and recommendation to the supervisory body**

7.—(1) The best interests assessor must confirm that a person selected under regulation 5(1) or 6(1) or (2) is eligible to be a representative.

(2) Where the best interests assessor confirms the selected person's eligibility under paragraph (1), the assessor must recommend the appointment of that person as a representative to the supervisory body.

(3) Where the best interests assessor is unable to confirm the selected person's eligibility under paragraph (1), the assessor must—

- (a) advise the person who made the selection of that decision and give the reasons for it; and
- (b) invite them to make a further selection.

### **Selection by the best interests assessor**

8.—(1) The best interests assessor may select a family member, friend or carer as a representative where paragraph (2) applies.

(2) The best interests assessor may make a selection where—

- (a) the relevant person has the capacity to make a selection under regulation 5(1) but does not wish to do so;
- (b) the relevant person's donee or deputy does not wish to make a selection under regulation 6(1) or (2); or
- (c) the relevant person lacks the capacity to make a selection and—
  - (i) does not have a donee or deputy, or
  - (ii) has a donee or deputy but the donee's or deputy's scope of authority does not permit the selection of a representative.

(3) Where the best interests assessor selects a person in accordance with paragraph (2), the assessor must recommend that person for appointment as a representative to the supervisory body.

(4) But the best interests assessor must not select a person under paragraph (2) where the relevant person, donee or deputy objects to that selection.

(5) The best interests assessor must notify the supervisory body if they do not select a person who is eligible to be a representative.

### **Selection by the supervisory body**

9.—(1) Where a supervisory body is given notice under regulation 8(5), it may select a person to be the representative, who—

- (a) would be performing the role in a professional capacity;
- (b) has satisfactory skills and experience to perform the role;
- (c) is not a family member, friend or carer of the relevant person;
- (d) is not employed by, or providing services to, the relevant person's managing authority, where the relevant person's managing authority is a care home;
- (e) is not employed to work in the relevant person's managing authority in a role that is, or could be, related to the relevant person's case, where the relevant person's managing authority is a hospital; and
- (f) is not employed to work in the supervisory body that is appointing the representative in a role that is, or could be, related to the relevant person's case.

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**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

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- (2) The supervisory body must be satisfied that there is in respect of the person—
- (a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997<sup>(8)</sup>(enhanced criminal record certificates);or
  - (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of that Act<sup>(9)</sup> (criminal record certificates).

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<sup>(8)</sup> 1997 (c.50). Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c.15).

<sup>(9)</sup> Section 113A was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005.