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## 2016 CHAPTER 18

PROSPECTIVE

### **PART 6**

#### **HIGH COURT POWERS: DECISIONS AND DEPUTIES**

##### *Declarations*

##### **The court's power to make declarations**

**112.**—(1) The court may make declarations in relation to a person who is 16 or over as to—

- (a) whether the person has or lacks capacity to make a decision specified in the declaration;
  - (b) whether the person has or lacks capacity to make decisions on a matter described in the declaration;
  - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to the person.
- (2) In this section “act” includes an omission and a course of conduct.

##### *Decisions and deputies*

##### **The court's powers to make decisions and appoint deputies: general**

**113.**—(1) This section applies if—

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- (a) a person (“P”) lacks capacity in relation to a matter or matters concerning—
    - (i) P's care, treatment or personal welfare, or
    - (ii) P's property and affairs; and
  - (b) P is 16 or over or section 115(3) applies.
- (2) The court may—
- (a) by making an order, make on P's behalf a decision or decisions that P lacks capacity to make in relation to the matter or matters; or
  - (b) appoint a person (a “deputy”) to make decisions on P's behalf in relation to the matter or matters (see further sections 116 and 117).
- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1, 2, 5 and 7 (principles, best interests).
- (4) When deciding whether it would be in P's best interests to appoint a deputy, the court must (in addition to complying with section 7) have regard to the principles that—
- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision; and
  - (b) the powers conferred on a deputy should be as limited in scope and duration as is practicable in the circumstances.
- (5) The court may—
- (a) make such further orders,
  - (b) give such directions, and
  - (c) confer on a deputy such powers or impose on a deputy such duties,
- as it considers appropriate for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
- (6) The court may make an order or appointment under any provision of this section, or give a direction under subsection (5), on such terms as it considers are in P's best interests (even where no application is before the court for an order, appointment or direction on those terms).
- (7) An order of the court may be varied or discharged by a subsequent order.
- (8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on a deputy if it is satisfied that the deputy—
- (a) has behaved, or is behaving, in a way that contravenes the authority conferred on the deputy by the court or is not in P's best interests; or
  - (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

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### **Section 113 powers: care, treatment and personal welfare**

**114.**—(1) The powers under section 113 as respects P's care, treatment and personal welfare extend in particular to—

- (a) deciding where P is to live;
  - (b) deciding what contact, if any, P is to have with any specified persons;
  - (c) making an order prohibiting a specified person from having contact with P;
  - (d) giving or refusing consent to the provision of a treatment by a person providing health care for P;
  - (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.
- (2) In this section “specified” means specified by the court.
- (3) Subsection (1) is subject to section 117 (restrictions on deputies).

### **Section 113 powers: property and affairs**

**115.**—(1) The powers under section 113 as respects P's property and affairs extend in particular to—

- (a) the control and management of P's property;
  - (b) the sale, exchange, charging, gift or other disposition of P's property;
  - (c) the acquisition of property in P's name or on P's behalf;
  - (d) the carrying on, on P's behalf, of any profession, trade or business;
  - (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
  - (f) the carrying out of any contract entered into by P;
  - (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
  - (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
  - (i) the execution for P of a will;
  - (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
  - (k) the conduct of legal proceedings in P's name or on P's behalf.
- (2) No will may be executed by virtue of subsection (1)(i) at a time when P is under 18.
- (3) The powers under section 113 as respects any matter concerning P's property and affairs (except the power to execute a will for P) may be exercised

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even if P is under 16 if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when P reaches 18.

(4) Schedule 5 supplements the provisions of this section.

(5) Subsection (1) is subject to section 117 (restrictions on deputies).

### **Appointment of deputies**

**116.**—(1) A deputy appointed by the court must be—

(a) an individual who is 18 or over; or

(b) as respects powers concerning property and affairs, either such an individual or a trust corporation.

(2) The court may appoint an individual by appointing the holder for the time being of a specified office or position.

(3) A person may be appointed as a deputy only with that person's consent.

(4) The court may appoint two or more deputies to act—

(a) jointly;

(b) jointly and severally; or

(c) jointly in respect of some matters and jointly and severally in respect of others.

(5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies—

(a) in specified circumstances or on the happening of specified events;

(b) for a specified period.

(6) A deputy is to be treated as P's agent in relation to anything done or decided by the deputy within the scope of the deputy's appointment and in accordance with this Act.

(7) The deputy is entitled—

(a) to be reimbursed out of P's property for the deputy's reasonable expenses in discharging the deputy's functions; and

(b) if the court so directs when appointing the deputy, to remuneration out of P's property for discharging them.

(8) The court may confer on a deputy powers to—

(a) take possession or control of all or any specified part of P's property;

(b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.

(9) The court may require a deputy—

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- (a) to give to the Public Guardian such security as the court considers appropriate for the proper performance of the deputy's functions; and
  - (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.
- (10) In this section “specified” means specified by the court.

### **Restrictions on deputies**

**117.—**(1) A deputy does not have power to make a decision on behalf of P in relation to a matter unless P lacks capacity, or the deputy reasonably believes that P lacks capacity, in relation to the matter.

(2) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, sections 1, 2, 5 and 7 (principles, best interests).

(3) Nothing in section 113 or 114 permits a deputy to be given power—

- (a) to prohibit a specified person from having contact with P;
- (b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.

(4) Nothing in section 113 or 115 permits a deputy to be given powers with respect to—

- (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
- (b) the execution for P of a will; or
- (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.

(5) A deputy may not be given power to make a decision on behalf of P which is inconsistent with—

- (a) a decision that is made in accordance with this Act by an attorney under a lasting power of attorney granted by P, and is within the scope of the attorney's authority; or
- (b) a decision that is made in accordance with the Enduring Powers of Attorney (Northern Ireland) Order 1987 by an attorney under an enduring power of attorney granted by P, and is within the scope of the attorney's authority.

(6) A deputy may not refuse consent to the provision of life-sustaining treatment to P.

(7) A deputy may not deprive P of his or her liberty or authorise another person to deprive P of his or her liberty.

(8) A deputy may not do, or authorise another person to do, an act restraining P unless in doing so the deputy is acting within the scope of an authority

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expressly conferred on the deputy by the court and the deputy reasonably believes—

- (a) that P lacks capacity in relation to the matter in question;
- (b) that there is a risk of harm to P if the deputy does not do or (as the case may be) authorise the act restraining P; and
- (c) that doing or authorising that act is a proportionate response to—
  - (i) the likelihood of harm to P; and
  - (ii) the seriousness of the harm concerned.

(9) In this section an “act restraining P” means an act (other than a deprivation of P's liberty) which—

- (a) is intended to restrict P's liberty of movement, whether or not P resists; or
- (b) is a use of force or a threat to use force and is done with the intention of securing the doing of an act which P resists.

(10) A deputy may not give consent to psychosurgery in respect of P.

(11) The Department may by regulations amend subsection (10) so as to extend the descriptions of treatment to which a deputy may not give consent.

#### **Reliance on authority of deputy in relation to treatment etc**

**118.**—(1) This section applies if—

- (a) an order has been made under section 113(2)(b) appointing a deputy for a person (“P”);
- (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
- (c) D does the act with the consent of a person (“C”) purporting to be P's deputy; and
- (d) either C is not P's deputy, or it is not within the scope of C's authority to consent in relation to the matter in question.

(2) If—

- (a) before doing the act, D takes reasonable steps to establish whether—
  - (i) C is P's deputy, and
  - (ii) it is within the scope of C's authority to consent in relation to the matter in question, and
- (b) when doing the act, D reasonably believes that C is P's deputy and has authority to consent in relation to the matter,

D does not incur any liability in relation to the act because C was not P's deputy or (as the case may be) did not have such authority.

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### *Ancillary powers of the court*

#### **Interim orders and directions**

**119** The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

- (a) there is reason to believe that P lacks capacity in relation to the matter;
- (b) the matter is one to which the court's powers under this Part extend; and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

#### **Power to call for reports**

**120.**—(1) This section applies where, in proceedings brought in respect of a person (“P”) under this Part, the court is considering a question relating to P.

(2) The court may require a report to be made to it by the Public Guardian or by a Court Visitor.

(3) The court may require an HSC trust, [<sup>F1</sup>the Department] or RQIA to arrange for a report to be made—

- (a) by one of its officers or employees; or
- (b) by such other person (other than the Public Guardian or a Court Visitor) as that body considers appropriate.

(4) The report must deal with such matters relating to P as the court may direct.

(5) Rules of court may specify matters which, unless the court directs otherwise, must also be dealt with in the report.

(6) The report may be made in writing or orally, as the court may direct.

#### **Textual Amendments**

**F1** Words in s. 120(3) substituted (1.4.2022) by [Health and Social Care Act \(Northern Ireland\) 2022 \(c. 3\)](#), s. 8(1)(b), [Sch. 1 para. 252\(2\)](#); S.R. 2022/102, art. 2(b)

#### **Powers of Public Guardian or Court Visitor in respect of reports under section 120(2)**

**121.**—(1) This section applies where, in proceedings brought in respect of a person (“P”) under this Part, the court imposes a requirement to make a report under section 120(2).

(2) If the Public Guardian or a Court Visitor is making a visit in the course of complying with the requirement, he or she may interview P in private.

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(3) If a Court Visitor who is a Special Visitor is making a visit in the course of complying with the requirement, he or she may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.

(4) For the purpose of complying with the requirement, the Public Guardian or a Court Visitor may at all reasonable times require the production of, examine and take copies of—

- (a) any health record (as defined by section 306),
- (b) any relevant record, or
- (c) any court record,

so far as the record relates to P.

(5) But if P has capacity in relation to whether the power under subsection (4) should be exercised, the power may be exercised only with P's consent.

(6) In this section—

“court record” means documentation held by the court relating to the proceedings mentioned in subsection (1);

“relevant record” means a record relating to P's care, treatment or personal welfare which is a record of or held by—

- (a) an HSC trust;
- (b) <sup>F2</sup> ...
- (c) RQIA;
- (d) a Northern Ireland department or its employees or agents;
- (e) the managing authority of an independent hospital; or
- (f) the managing authority of a care home.

#### Textual Amendments

**F2** Words in s. 121(6) omitted (1.4.2022) by virtue of [Health and Social Care Act \(Northern Ireland\) 2022 \(c. 3\)](#), s. 8(1)(b), [Sch. 1 para. 252\(3\)](#); S.R. 2022/102, art. 2(b)

### *Practice and procedure*

#### **Applications to the court**

**122.**—(1) No leave is required for an application to the court for the exercise of any of its powers under this Part—

- (a) by a person who lacks, or is alleged to lack, capacity;



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- (b) if such a person is under 18, by anyone with parental responsibility for that person;
- (c) where the application relates to a lasting power of attorney or enduring power of attorney and the application is made by the donor or any person who is an attorney under the power;
- (d) by a deputy appointed by the court for a person to whom the application relates;
- (e) by a person named in an existing order of the court, if the application relates to the order; or
- (f) where the application is made by virtue of section 129 (proceedings following inquiry by Public Guardian).

(2) But, subject to rules of court and to paragraph 21(2) of Schedule 9 (declarations relating to private international law), leave is required for any other application to the court for the exercise of any of its powers under this Act.

(3) In deciding whether to grant leave the court must (in particular) have regard to—

- (a) the applicant's connection with the person to whom the application relates;
- (b) the reasons for the application;
- (c) the benefit to the person to whom the application relates of a proposed order or directions; and
- (d) whether the benefit can be achieved in any other way.

#### **Duty to notify Attorney General**

**123.**—(1) A person who makes an application to the court under this Part must notify the Attorney General of that fact.

(2) The notification must be made in accordance with rules of court.

(3) The Attorney General may intervene in the proceedings on the application in such way as the Attorney General considers appropriate.

#### **Rules of court**

**124.**—(1) In this section “proceedings” means proceedings before the court with respect to a person who lacks, or is alleged to lack, capacity (“P”).

(2) Rules of court may make provision as to the conduct of such proceedings including provision—

- (a) as to the carrying out of preliminary or incidental inquiries;

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- (b) as to the way and form in which proceedings are to be commenced and carried on;
- (c) as to the persons by whom proceedings may be commenced and carried on;
- (d) as to the persons who are to be entitled to be notified of, to attend, or to take part in proceedings;
- (e) as to the evidence which may be authorised or required to be given in proceedings and the way (whether on oath or otherwise and whether orally or in writing) in which it is to be given;
- (f) as to the administration of oaths and taking of affidavits for the purposes of proceedings;
- (g) for the allocation, in specified circumstances, of any specified description of proceedings to a specified judge or to specified descriptions of judges;
- (h) for the exercise of the jurisdiction of the court, in specified circumstances, by its officers or other staff;
- (i) for enabling the court to appoint a suitable person (who may, with his or her consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent P;
- (j) for enabling an application to the court to be disposed of without a hearing;
- (k) as to authorising or requiring—
  - (i) the attendance and examination of persons who lack, or are alleged to lack capacity;
  - (ii) the provision of information; and
  - (iii) the production of documents;
- (l) for enabling the court to proceed with, or with any part of, a hearing in the absence of P;
- (m) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
- (n) as to what may be received as evidence (whether or not admissible apart from the rules) and the way in which it is to be presented;
- (o) for the enforcement of orders made and directions given in the proceedings;
- (p) as to—
  - (i) the making of orders for the payment of costs to or by persons attending, as well as persons taking part in, proceedings; and

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- (ii) the way in which and funds out of which any such costs are to be paid;
  - (q) the way in which, and funds from which, fees are to be paid;
  - (r) as to the termination of proceedings, whether on the death or recovery of P or otherwise, and the exercise, pending the termination of the proceedings, of powers exercisable under this Part in relation to P's—
    - (i) care, treatment or personal welfare; or
    - (ii) property or affairs;
  - (s) for charging fees and costs upon P's estate;
  - (t) for the payment of fees and costs within a specified time of P's death or the conclusion of the proceedings.
- (3) Rules of court may also make provision as to appeals from decisions of the court in such proceedings, including provision—
- (a) that where a decision of the court is made by a person exercising the jurisdiction of the court by virtue of rules made under subsection (2)(h), an appeal from that decision lies to a judge of the court of a specified description and not to the Court of Appeal;
  - (b) that, in specified cases, an appeal from a decision of the court may not be made without leave;
  - (c) as to the person or persons entitled to grant leave to appeal;
  - (d) as to any requirements to be met before leave is granted;
  - (e) that where a judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—
    - (i) the appeal would raise an important point of principle or practice; or
    - (ii) there is some other compelling reason for the Court of Appeal to hear it;
  - (f) as to any considerations to be taken into account in relation to granting or refusing leave to appeal.
- (4) A charge, created by virtue of subsection (2)(s), upon the estate of a person is not to cause any interest of that person in any property to fail or determine or to be prevented from recommencing.
- (5) In this section “specified” means specified by the rules.

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**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. 285(2)(a)-(c) substituted for s. 285(2)(a)(b) by [2022 c. 18 \(N.I.\) Sch. 3 para. 77\(b\)](#)