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Mental Capacity Act 2005

2005 CHAPTER 9

PART 1 **E+W**

PERSONS WHO LACK CAPACITY

General powers of the court and appointment of deputies

15 Power to make declarations **E+W**

- (1) The court may make declarations as to—
 - (a) whether a person has or lacks capacity to make a decision specified in the declaration;
 - (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
 - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
- (2) “Act” includes an omission and a course of conduct.

16 Powers to make decisions and appoint deputies: general **E+W**

- (1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning—
 - (a) P's personal welfare, or
 - (b) P's property and affairs.
- (2) The court may—
 - (a) by making an order, make the decision or decisions on P's behalf 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.

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- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
- (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) 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 reasonably practicable in the circumstances.
- (5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
- (6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment 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 him if it is satisfied that the deputy—
 - (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him 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.

VALID FROM 01/04/2009

[^{F1}16A Section 16 powers: Mental Health Act patients etc E+W

- (1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.
- (2) If—
 - (a) a welfare order includes provision which authorises a person to be deprived of his liberty, and
 - (b) that person becomes ineligible to be deprived of liberty by this Act, the provision ceases to have effect for as long as the person remains ineligible.
- (3) Nothing in subsection (2) affects the power of the court under section 16(7) to vary or discharge the welfare order.
- (4) For the purposes of this section—
 - (a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;
 - (b) “welfare order” means an order under section 16(2)(a).]

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Textual Amendments

- F1** S. 16A inserted (1.4.2009) by **Mental Health Act 2007 (c. 12), ss. 50(3), 56; S.I. 2009/139, art. 2(b)** (with art. 3)

17 Section 16 powers: personal welfare **E+W**

- (1) The powers under section 16 as respects P's 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 named person from having contact with P;
 - (d) giving or refusing consent to the carrying out or continuation 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) Subsection (1) is subject to section 20 (restrictions on deputies).

18 Section 16 powers: property and affairs **E+W**

- (1) The powers under section 16 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 made under subsection (1)(i) at a time when P has not reached 18.
- (3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.
- (4) Schedule 2 supplements the provisions of this section.
- (5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.
- (6) Subsection (1) is subject to section 20 (restrictions on deputies).

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19 Appointment of deputies **E+W**

- (1) A deputy appointed by the court must be—
 - (a) an individual who has reached 18, or
 - (b) as respects powers in relation to property and affairs, an individual who has reached 18 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 not be appointed as a deputy without his 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 such circumstances, or on the happening of such events, as may be specified by the court;
 - (b) for such period as may be so specified.
- (6) A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.
- (7) The deputy is entitled—
 - (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and
 - (b) if the court so directs when appointing him, 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—
 - (a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
 - (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

20 Restrictions on deputies **E+W**

- (1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter.
- (2) Nothing in section 16(5) or 17 permits a deputy to be given power—
 - (a) to prohibit a named 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.

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- (3) A deputy may not 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.
- (4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).
- (5) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P.
- (6) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests).
- (7) A deputy may not do an act that is intended to restrain P unless four conditions are satisfied.
- (8) The first condition is that, in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court.
- (9) The second is that P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question.
- (10) The third is that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (11) The fourth is that the act is a proportionate response to—
 - (a) the likelihood of P's suffering harm, [F2andF2]
 - (b) the seriousness of that harm.
- (12) For the purposes of this section, a deputy restrains P if he—
 - (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
 - (b) restricts P's liberty of movement, whether or not P resists,or if he authorises another person to do any of those things.
- (13) But a deputy does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention (whether or not the deputy is a public authority).

Textual Amendments

- F2** Word in s. 20(11)(a) substituted (1.10.2007) by [Mental Health Act 2007 \(c. 12\), ss. 51, 56; S.I. 2007/2635, art. 2](#)

21 Transfer of proceedings relating to people under 18 **E+W**

- [F3(1F3)] The [F4Lord Chief Justice, with the concurrence of the Lord Chancellor,]F4 may by order make provision as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order—

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- (a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or
- (b) from a court having jurisdiction under that Act to the Court of Protection.

[^{F5}(2) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).^{F5}]

Textual Amendments

- F3** S. 21 renumbered as s. 21(1) (3.4.2006) by virtue of The Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006 (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(2)**
- F4** Words in s. 21(1) substituted (3.4.2006) by The Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006 (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(3)**
- F5** S. 21(2) inserted (3.4.2006) by The Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006 (S.I. 2006/1016), arts. 1, 2, **Sch. 1 para. 31(4)**

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