A handbook on adult capacity law in Scotland, England & Wales, and in Northern Ireland

For use by judges in operating the Judicial Protocol regulating direct judicial communications between Scotland, England & Wales, and Northern Ireland in adult capacity cases.

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Table of Contents

GLOSSARY OF TERMS

England & Wales	Scotland	Northern Ireland	Meaning
Court of Protection	Sheriff Court	Office of Care and Protection – Family Division	Court authorised to make declarations of capacity, make decisions concerning property and financial affairs and health and welfare, appoint proxy decision makers, and discharge other functions prescribed by statute.
Deputy	Guardian	Controller	Proxy decision maker appointed by the court to make decisions on behalf of a person who lacks capacity.
Deprivation of Liberty Safeguards	Deprivation of Liberty Safeguards	Deprivation of Liberty Safeguards / Inherent Jurisdiction	Administrative framework for authorising deprivation of liberty.
Donor	Granter	Donor	Person who makes a power of attorney.
Enduring Power of Attorney		Enduring Power of Attorney	Power of attorney for finances, which can be used when the maker has mental capacity and/or when they lack mental capacity. In England & Wales, Enduring Powers of Attorney can no longer be made as they have been replaced by Lasting Powers of Attorney.

England & Wales	Scotland	Northern Ireland	Meaning
Lasting Power of Attorney (Health and Welfare)	Welfare Power of Attorney		Power of attorney for health and welfare decisions, which can only be used when the maker lacks mental capacity.
Lasting Power of Attorney (Property and Financial Affairs)	Continuing Power of Attorney	Enduring Power of Attorney	Power of attorney for finances, which can be used when the maker has mental capacity and/or when they lack mental capacity.
	Mental Welfare Commission	Regulation and Quality Improvement Authority	In Scotland, the body which monitors the welfare parts of the AWIA 2000, carries out visits to adults subject to Welfare Guardianship, provides information and advice, and carries out investigations in certain circumstances.
Office of the Public Guardian (England & Wales)	Office of the Public Guardian (Scotland)	Office of Care and Protection – Family Division	Office responsible for the registration of powers of attorney (and in Scotland, orders made by the Sheriff under the AWIA 2000) and supervision of proxy decision makers. In Scotland, supervision by the OPG is of decision-makers with financial powers only.

England & Wales	Scotland	Northern Ireland	Meaning
Official Solicitor and Public Trustee			Officeholder with statutory functions including (for present purposes most relevantly) acting as litigation friend of last resort.
		Controller	A person who shall do all such things in relation to the property and affairs of the patient as the court orders, directs or authorizes.
		Controller ad Interim	At times, in disputes about property or financial affairs of a patient, the court can appoint a Controller ad Interim to conduct an investigation into the financial issues and provide an independent report to the court to assist in the court's decisions about what is in the patients' best interests.

CHAPTER 1.

Adult Capacity Law and Procedure in England & Wales

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Contents

I. Introduction

1. This section of the handbook is divided as follows: (1) the Court of Protection; (2) the core tasks and distinctive features of the court; (3) why applications to the Court of Protection are made; (4) procedure before the Court of Protection; (5) the international jurisdiction of the Court of Protection; and (5) (briefly) the High Court's inherent jurisdiction in relation to 'vulnerable adults.'[1]

II. The Court of Protection

2. The Court of Protection is a statutory court, established under Mental Capacity Act 2005 section 45. It is a superior court of record and is distinct from the High Court. It is based at First Avenue House, 42–49 High Holborn, London WC1V 6NP, but has a number of 'regional hubs.' It has a President, Vice-President, and a resident Senior Judge.

3. Primarily for the purposes of identifying appeal routes, judges are now identified as belonging to one of three tiers, with district judges (and equivalent) being Tier 1, circuit judges (and equivalents) being Tier 2, and High Court judges (and equivalent) being Tier 3.

4. The Senior Judge, who has circuit judge rank and is a Tier 2 judge, is supported by resident judges at First Avenue House in London and by circuit judges and district judges across England and Wales who are nominated ('ticketed') to undertake Court of Protection work as required. In a relatively recent development, it is now possible for deputy district and tribunal judges to be nominated to undertake Court of Protection work.

5. As the Court of Protection is a statutory court, its jurisdiction derives from the Mental Capacity Act 2005 ('MCA 2005'). Its jurisdiction is therefore limited in a number of important ways, set out in the paragraphs immediately following.

Capacity

6. Decision-making capacity is central to the jurisdiction of the Court of Protection and is defined in sections 2 and 3 of the MCA 2005. The test is both issue-and time-specific. As with other actors under the MCA 2005, when determining capacity, the Court of

[1] This section draws ((with the permission of the publishers) from *The Court of Protection Handbook* (5th edition, forthcoming, Legal Action Group).

Protection is bound by the principles relating to capacity contained in section 1(2)-(4).[2] The Supreme Court in *A Local Authority v JB* [2021] UKSC 52 gave detailed guidance as to the operation of ss.2-2 MCA 2005,[3] and clarified that the questions to be asked are:

6.1. Is the person ('P') unable to make a decision for themselves in relation to the matter?

6.2. If P is unable to make a decision for themselves in relation to the matter, is that 'because of' an impairment of or a disturbance in the functioning of, the mind or brain'?

7. In some cases, it will be clear from the outset that, on the balance of probabilities,[4] the person lacks the relevant decision-making capacity. In other cases, the question will require further investigation. Section 48 MCA 2005 (see further Section V below) gives the power to the court to take such steps as are required to secure the gathering of the necessary evidence.

Age

8. The Court of Protection has no welfare jurisdiction over those under 16; it can, however, exercise its jurisdiction in relation to the property and affairs of a person under 16 if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when they reach 18.[5]

Excluded decisions

9. There are a number of excluded decisions, set out in MCA 2005 sections 27-29, governing family matters (such as consenting to sexual relations), matters falling under the Mental Health Act 1983 and voting rights respectively. The Court of Protection cannot make decisions on behalf of P in respect of any such matters, although it can determine whether a person has the requisite decision-making capacity.

[2] Namely (a) a person must be assumed to have capacity unless it is established that they lack capacity; (b) a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success; and (c) a person is not to be treated as unable to make a decision merely because he makes an unwise decision.
[3] *A Local Authority v JB* [2021] UKSC 52, at paras 62-79.
[4] The test applicable in the court setting: MCA 2005, s2(4).
[5] MCA 2005 s18(3), although this does not include making a will on behalf of the person, something which can only be done in relation to a person aged 18 or over (MCA 2005 s18(2)).

Territorial jurisdiction

10. The territorial jurisdiction of the Court of Protection is provided for in Schedule 3 to the MCA 2005: see further Section V below.

III. The core tasks and distinctive features of the Court of Protection

11. The core tasks of the Court of Protection are:

    11.1. To determine whether a person ('P') has or lacks the relevant decision-making capacity;[6] and

    11.2. If they do lack that capacity, and the decision is not an excluded decision (see above), either to take the decision(s) on behalf of P, or to appoint a deputy to do so, in each case in P's best interests.[7] The concept of "best interests" is subject to two statutory principles,[8] and a "checklist."[9] Definitive guidance as to the meaning of the term "best interests," was given by the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67,[10] emphasising the centrality of the person's known wishes, feelings, beliefs and values.

12. The Court of Protection can also grant declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to P.[11] Separately, it has a supervisory jurisdiction over Enduring and Lasting Powers of Attorney (see further para 19 below), and can determine applications relating to the administrative scheme for deprivation of liberty provided for in Schedule A1 to the MCA 2005 (see further para 17 below).[12]

13. The Court of Protection has an inquisitorial jurisdiction, which is reflected in the extensive suite of powers it has to control the evidence that it receives (in Part 14 of the Court of Protection Rules). The court also has the power to call for its own evidence by

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[6] MCA 2005 s15(1)(b).
[7] MCA 2005 s16(2)(a) and (b). It can also grant a declaration as to the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
[8] MCA 2005, ss 1(5) and (6), providing respectively that acts done or decisions made under the MCA 2005 in respect of or on behalf of a person who lacks capacity must be done, or made, in their best interests; and that, before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
[9] MCA 2005, s4.
[10] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, at paras 39 and 45 per Lady Hale.
[11] MCA 2005 s15(1)(c).
[12] Under MCA 2005 s21A.

way of a report under MCA 2005 section 49.[13] However, the court does not have the equivalent of the powers available to the Family Court / Family Division of the High Court to call upon CAFCASS to provide an independent assessment of the position of P. The Official Solicitor, when acting as the litigation friend for P (see further para 36 below) is in consequence called upon to discharge such a function, even if such a task, strictly, falls outside the task of representation.

14. By contrast to the position in Scotland and Northern Ireland, it should be noted that, with limited exceptions, the Court of Protection seeks to hold attended hearings in public subject to reporting restrictions. The practice and procedure relating to transparency can be found in Practice Directions 4A and 4C of the Court of Protection Rules 2017.

IV. Why applications to the Court of Protection are made

Personal welfare and medical treatment cases

15. The MCA 2005 provides a graduated framework which expressly provides a statutory basis for informal decision-making in relation to the care and treatment of people with impaired decision-making capacity. Lady Hale explained the consequences thus in *N v ACCG* [2017] UKSC 22:[14]

> *Section 5 of the 2005 Act gives a general authority, to act in relation to the care or treatment of P, to those caring for him who reasonably believe both that P lacks capacity in relation to the matter and that it will be in P's best interests for the act to be done. This will usually suffice, unless the decision is so serious that the court itself has said it must be taken to court. But if there is a dispute (or if what is to be done amounts to a deprivation of liberty for which there is no authorisation under the "deprivation of liberty safeguards" in Schedule A1 to the 2005 Act) then it may be necessary to bring the case to court, as the authorities did in this case.*

16. There is, therefore, in general, no need in England & Wales for a deputy to be appointed by the court to make ongoing decisions in relation to care and treatment; any appointment will only be made if it is in the best interests of P.[15] This is in particular contrast to the position in Scotland, where no equivalent of MCA 2005 section 5 exists, and there is a much greater need for formal authority to be granted to a person to be able

[13] Which could be from a local authority, an NHS body, from a General Visitor, or a Special Visitor (a psychiatrist).
[14] *N v ACCG* [2017] UKSC 22, at para 38.
[15] See *Re Lawson, Mottram and Hopton, Re (appointment of personal welfare deputies)* [2019] EWCOP 22.

to make relevant decisions.

17. The issues in personal welfare cases in the Court of Protection tend to fall broadly into three categories:

    17.1. Cases involving deprivation of liberty and related questions over where P should live, either arising in consequence of a challenge to the administrative authorisation of deprivation of liberty in a care home or hospital under Schedule A1 to the MCA 2005, or where the court, itself, is being asked to authorise the deprivation of liberty of a person falling outside the scope of Schedule A1;

    17.2. Other, non-medical welfare issues, such as contact, residence, sexual relations,[16] and access to the internet;

    17.3. Medical treatment cases, which are the subject of guidance from the former Vice-President of the Court of Protection, Hayden J: *Applications Relating to Medical Treatment* (January 2020, issued expressly pending the laying before Parliament of a revised version of the Code of Practice to the MCA 2005).

Property and affairs

18. The MCA 2005 provides very limited scope for informal decision-making in relation to property and affairs. In consequence, there is often a need for applications to be made to secure formal authority to make the relevant decisions. For those who have not made either Enduring or Lasting Powers of Attorney[17] granting authority to one or more people in respect of donor's property and affairs, authority is needed by way (most often) of property and affairs deputyship. The vast majority of the court's caseload relates to uncontested applications for deputyship and / or applications from attorneys for authority to take steps which cannot be taken without the authority of the court (such as the sale of a property). The court is also regularly asked to execute so-called statutory wills on behalf of testators who lack capacity (applying MCA 2005 section 2) to do so.

Lasting Powers of Attorney

19. Lasting Powers of Attorney can be granted for personal welfare and/or for property and

[16] In such cases, the question is whether the person has or lacks capacity to decide to engage in sexual relations: if they lack such capacity, no best interests decision can be made on the person's behalf. See *A Local Authority v JB* [2021] UKSC 52.

[17] The former being the predecessor to Lasting Powers of Attorney, and no longer capable of being made after the coming into force of the MCA 2005. Enduring Powers of Attorney can only ever relate to a person's property and affairs.

affairs.[18] For an LPA to be validly created, various requirements set out by MCA 2005 section 10 must be complied with. Applications are frequently brought before the Court of Protection to resolve disputes as to the validity and creation of LPAs, such as whether P had the capacity to execute and/or revoke an LPA at the material time; or in cases where one or more donees of the LPA are alleged to have acted inappropriately; these proceedings may be brought by or on behalf of P, by other interested persons (such as P's relatives), or by the Office of the Public Guardian (England & Wales)

V. Court of Protection procedure

The Court of Protection Rules

20. Proceedings within the Court of Protection are governed by the Court of Protection Rules 2017[19] ('COPR'), and accompanying practice directions.[20] The COPR have the overriding objective of enabling the Court of Protection to deal with cases justly and at proportionate cost, having regard to the principles contained within the MCA.[21] The court will seek to give effect to the overriding objective when it exercises any power under the COPR, or interprets any rule or practice direction.[22] In any case not expressly provided for by either the COPR or the practice directions, the court may apply relevant provisions from either the Civil Procedure Rules 1998 or the Family Procedure Rules 2010, as far as is necessary to further the overriding objective of the COPR.[23]

21. The parties also have a duty to help the court further the overriding objective, a particularly important aspect of which is the requirement actively to ask the court to take steps to manage a case if it appears that an order or direction of the court appears not to deal with an issue, or a new circumstance, issue or dispute arises of which the court is unaware.

Starting proceedings

22. Before issuing proceedings, and then throughout the life of a case, parties are expected, and encouraged, to consider alternative methods of dispute resolution,[24] such as mediation or best interests meetings in cases where this may narrow issues and/or remove the need for the court to determine matters, thereby reducing the costs and

[18] MCA 2005 s9.
[19] MCA 2005 s51.
[20] MCA 2005 s52.
[21] COPR r1.1(1).
[22] COPR r1.1(2).
[23] COPR r2.5(1).
[24] COPR r1.3(3)(h).

potential delays caused by contentious litigation.

23. All applications to the Court of Protection must be made in accordance with Part 9 of the COPR. In order to prevent applications which are frivolous, vexatious, an abuse of process or otherwise an illegitimate interference with the interests and rights of the relevant person, the court's permission is required to make some applications.[25] The permission requirement does not apply in relation to applications made by or on behalf of P,[26] or in relation to recognition and enforcement of foreign protective measures (as to which, see further Section VI below).[27] Reflecting the inquisitorial nature of the court's jurisdiction, once proceedings have been issued in the Court of Protection they may only be withdrawn with the permission of the court.[28]

24. Once the application form has been filed by the applicant, it will be issued by the court, [29] and then the applicant must serve a copy of the issued application form and accompanying documents on all named respondents, within 14 days of the date of issue.[30] A certificate of service must be filed by the applicant within 7 days of the date of service.[31] There are additional rules for service where the application relates to either Lasting Powers of Attorney[32] or Enduring Powers of Attorney.[33] In addition to serving the application on the respondents, there are also detailed rules regarding the notification of P by the applicant, an agent duly appointed by the applicant, or such other person as the court may direct[34] contained within COPR Part 7.

Evidence addressing capacity

25. Capacity is foundational to the exercise of the court's jurisdiction. Where proceedings are to be brought in relation to P, the party seeking to make the application must usually file an assessment of capacity form (COP3) with the application. Where it has not been possible to carry out a capacity assessment, there must be a witness statement filed explaining why it has not been possible to do so, the steps that have been taken to attempt a capacity assessment, and why the applicant knows or believes that P lacks capacity in relation to the matter in question.[35]

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[25] MCA 2005 s50; COPR rr8.1-8.3; the test for permission is set out in MCA 2005 s50(3).
[26] MCA 2005 s50(1)(a).
[27] MCA 2005, Schedule 3, s20.
[28] COPR r13.2(1).
[29] COPR r9.5.
[30] COPR r9.6(1).
[31] COPR r9.6(2).
[32] COPR r9.7.
[33] COPR r9.8.
[34] COPR r7.2(1).
[35] COPR PD 9A, para 14.

26. Where the evidence does not allow the court to make a determination of capacity at the outset, MCA 2005 section 48 gives the power to the court to take such steps as are required to secure the gathering of the necessary evidence for it to be able to make the necessary declaration as to capacity under section 15. The threshold for the exercise of the jurisdiction under MCA 2005 section 48 is that there is reason to believe that P lacks capacity in the material domain(s),[36] and that it is in P's best interests to make the order, or give the directions, without delay.

The Case Pathways

27. COPR r3.9 and PD 3B (Case Pathways) set pathways for health and welfare cases, property and affairs cases and mixed cases. All medical treatment cases are treated as personal welfare case, although in practice have a distinctive approach (set out in the guidance *Applications Relating to Medical Treatment* (January 2020)).

28. The Case Pathways Practice Direction places an obligation on applicants to provide improved analysis of the issues at the start of a case, allowing for more robust case management decisions to be taken at the outset and all issues to be identified at the earliest opportunity in proceedings.

29. In property and affairs cases, once an application is made, the papers are placed before a judge, who will either list the case for a dispute resolution hearing or transfer case to the most appropriate regional court for listing of a dispute resolution hearing (DRH). At this stage, the respondent may also be ordered to file a summary of reasons for opposing the application or seeking a different order, if this is not clear from their COP5. The purpose of the DRH is to enable the court to determine if the case can be resolved and avoid unnecessary litigation, and by extension costs. If the parties are able to reach an agreement at this stage, the court will make a final order if it is in P's best interests to do so. If the parties are unable to reach an agreement at the DRH, the court will make directions for further case management up to the final hearing.

30. In health and welfare cases, a four-stage case management process is set out within the personal welfare pathway namely pre-issue, the point of issue; case management on issue; the case management conference; the final management hearing and the final hearing. The COPR Case Pathways PD 3B specifically provides for judges to make a number of important decisions on the papers at the point of issues, including:

    30.1. Gatekeeping (i.e. allocating the case to the right level of judge);

30.2. Listing for a case management conference within 28 days, unless the matter is urgent, in which case consideration must be given as to whether it is a case which should be allocated to a Tier 3 (i.e. a High Court or equivalent) judge;

30.3. Considering whether it is necessary that P be joined as a party and if so, make decisions about what details of P's estate should be disclosed for funding purposes;

30.4. Considering whether an advocates meeting is required before the case management hearing and ordering such a meeting if appropriate; and

30.5. Ordering the preparation of a core bundle (not usually to exceed 150 pages) for the case management conference.

31. In mixed cases, the judge will on the papers either allocate it to a specific pathway, and give directions accordingly, or give directions as to which elements of each pathway are to apply and the procedure that the case will follow.

32. There will be circumstances in which it is necessary for the court to reach determinations upon contested facts before it is possible for it then to go on to consider where P's best interests lie (or to make other decisions/declarations open to it). It is open to a judge, in the exercise of their case management powers under COPR Part 3, to decide that it is necessary that such a determination of fact take place. Whilst it is not necessary to establish that the adult in question is suffering or is likely to suffer significant harm, as in cases involving children, it may be necessary in the Court of Protection to establish certain disputed facts. In *Re AG* [2015] EWCOP 78,[37] Sir James Munby set down when it is necessary to have fact-finding proceedings in the Court of Protection, which endorsed the approach of Mr Justice Wall in *Re S (adult's lack of capacity: carer and residence)* [2003] EWHC 1909 (Fam)[38] in which Wall J noted that: "*unlike care proceedings under the Children Act 1989, the exercise of the jurisdiction over mentally incapable adults is not dependent upon any threshold criteria apart from the fact of incapacity and the existence of what Dame Elizabeth Butler-Sloss P described in Re F (No 2) [[2001] Fam 38] as 'a serious justiciable issue' which requires the court's adjudication*."

Parties to the proceedings

33. When proceedings are issued, unless the court directs otherwise, the parties to any

[37] *Re AG* [2015] EWCOP 78, at paras 18 and 21.
[38] *Re S (adult's lack of capacity: carer and residence)* [2003] EWHC 1909 (Fam), at para 13.

proceedings are: (a) the applicant; and (b) any person who is named as a respondent in the application form, and who files and acknowledgement of service in respect of the application form.[39]

34. The court may however order one or more persons to be joined as parties to the proceedings if it considers that it is desirable to do so for the purpose of dealing with the application.[40] P is not named as a respondent to any proceedings unless so directed by the court.[41] In practice, in most health and welfare cases, P will be joined as a party to the proceedings.

35. COPR r1.2 is concerned with the participation of P. Having considered the issues raised in the case, whether it is contentious and any response of the person on being notified, the court must always consider making one of a number of directions. These directions include: joining P as a party to the proceedings, appointing an "Accredited Legal Representative[42]" or non-legal representative for them; arranging for them to have an opportunity to address the judge; giving some other appropriate direction or (having considered the matter) making no direction at all.

36. If P is joined as a party to the proceedings, then, unless they have capacity to conduct the proceedings, either a litigation friend or an Accredited Legal Representative has to be appointed before the order joining P takes effect. [43]

    36.1. As to litigation friends, the Official Solicitor describes themself as the litigation friend of last resort. This means that they will only consider acting where no suitable and willing person can be identified to act. Further, and save in the case of serious medical treatment cases, even assuming that there is no other suitable and willing person, the Official Solicitor will only accept an appointment to act subject to being given suitable security for a) the costs of any external solicitors they retain to act for P; or b) where they act as solicitor and conduct the litigation, those costs of so acting. The Official Solicitor has published two Practice Notes setting out important practicalities relating to their appointment as litigation friend of P in the Court of Protection.[44]

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[39] COPR r9.13(1).
[40] COPR r9.13(2).
[41] COPR r9.13(4).
[42] A lawyer who has been accredited under a scheme administered by the Law Society of England & Wales.
[43] COPR r 17.2(1).
[44] Official Solicitor and Public Trustee (9 July 2021) '*Appointment of the Official Solicitor in welfare proceedings: practice note*', Available at www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-welfare-proceedings-practice-note; Official Solicitor and Public Trustee (9 July 2021) '*Appointment of the Official Solicitor in property and affair proceedings: practice note*', Available at

36.2. Accredited Legal Representatives can act without being instructed by a litigation friend, and, in effect combine the role of litigation friend and legal representative.

Final hearings

37. Many applications in the Court of Protection are resolved by consent without the need for a final hearing. Where a consent order has been submitted for approval, the starting position will be that the court will only convene a hearing a) if insufficient notice has been given; or b) there is some specific feature which the court considers it must deal with at an attended hearing.

38. In final hearings, the applicant will usually be required to prepare the bundle for the hearing, although the court may make a different order to vary this if the applicant is unrepresented. The final hearing will proceed in accordance with the directions given at the last case management hearing or following the DRH. In property and affairs cases, final hearings are listed before a different judge to that who heard the DRH.

39. There is an increasing trend for judges to hear from P, and judges are now required specifically to consider whether they should do so as part of determining how P is to participate in the proceedings. *Practice Guidance (Court of Protection: Judicial visits)* [2022] EWCOP 5[45] provides guidance in this regard. Wherever a judge is seeing P other than in the presence of the parties, a proper record should be kept of any discussion, usually by the representative of the Official Solicitor if instructed on P's behalf. A further reason for the judge to see P has nothing, strictly, to do with the gathering of evidence, but is simply to allow P to feel 'connected' to the proceedings.

Costs

40. The COPR currently sets out two very different general rules depending on whether a case is health/welfare or property and affairs. The general rule in cases concerning P's welfare is that there will be no order as to the costs of the proceedings, or of that part of the proceedings that concerns P's welfare.[46] In respect of cases concerning P's property and affairs, the general rule is that all the costs of the proceedings will be met from P's estate.[47] At the time of writing, a consultation has been promised as to whether to amend this general rule. A failure to comply with the provisions of the MCA 2005 or other

www.gov.uk/government/publications/appointment-of-the-official-solicitor-in-property-and-affairs-proceedings-practice-note.

[45] *Practice Guidance (Court of Protection: Judicial visits)* [2022] EWCOP 5.

[46] COPR r19.3.

[47] COPR r19.2.

statutes or guidance may be relevant to the question of costs.[48]

Appeals

41. P, or any party or person affected by an order made without a hearing or without notice to them, has an automatic right to seek a reconsideration of that order.[49] Such a reconsideration is not an appeal.[50]

42. Any decision of the court can be appealed.[51] This means any judicial decision can be appealed, including case management decisions, the grant or refusal of an interim application or a final decision. A decision of an authorised court officer, however, cannot be appealed, and reconsideration must be sought from a judge.[52] Practice Direction 20B of the COPR contains a table setting out the routes of appeal from the different tiers of Judge (including 'internal' appeals within the Court of Protection). The onward route of appeal from the Court of Protection is the Court of Appeal, and then the Supreme Court.

43. With the exception of an appeal against an order for committal to prison, an appeal against a decision of the Court of Protection requires permission.[53] Permission to appeal will be granted only where:

    43.1. The court considers that the appeal would have a real prospect of success (i.e. a realistic, as opposed to a fanciful, prospect of success); or

    43.2. There is some other compelling reason why the appeal should be heard.[54]

44. An appeal judge has all the powers of the first instance judge whose decision is under appeal.[55] The appeal judge can in particular, if they allow the appeal, decide the issue in question themselves, rather than sending it back to the first instance judge (or ordering a new hearing before a first instance judge).

45. In *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, Lady Hale held that, where a judge of the Court of Protection has correctly directed themselves as to the law, an appellate court can only interfere with their decision as to the evaluation of

[48] *AH and others* [2013] EWHC 2410 (COP); *WBC v CP* [2012] EWHC 1944 (COP).
[49] COPR r13.4(2).
[50] *Re S and S* [2008] COPLR Con Vol 1074.
[51] COPR r20.1.
[52] COPR r20.4(3).
[53] Mental Capacity Act (MCA) 2005 s53(4) read together with COPR rr20.5, 20.6(1) and r20.7.
[54] COPR r20.8(1)(a) and (b).
[55] COPR r20.13(1).

best interests if satisfied that it was wrong.[56] Where the appeal lies not against an evaluative decision but against the exercise of a discretion (most obviously in the context of case management decisions), then the test is subtly different as seen in *Re TG (children) (care proceedings: case management: expert evidence)* [2013[EWCA Civ 5: the appellate court should only interfere if "*satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge*."[57]

46. Given the time-specific nature of capacity, and the potential for the best interests evaluation to change given the change of a person's circumstances, in principle it might be said that a decision of the court is only determinative of the position as at the point of delivering judgment. However, *An NHS Trust v AF & Anor* [2020] EWCOP 55, Mr Justice Poole confirmed, that, whilst there is no strict rule of issue estoppel binding on the court, findings should only be re-opened if there has been a material change of circumstances.[58]

Enforcement

47. As noted above, the Court of Protection is a superior court of record,[59] which has by section 47(1) MCA "*in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court*."[60] The Court of Appeal confirmed in *Re G (Court of Protection: Injunction)* EWCA Civ 1312 that: (1) the court may make injunctive orders under section 16(5) MCA 2005, but (2) that, in so doing, it is exercising the power conferred upon it under section 47(1).[61] This means, in turn, that such an injunction can only be granted when it is 'just and convenient,' in other words, where there is an interest which merits protection and a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something.[62]

48. The COPR contain specific provisions relating to the enforcement powers of the Court of Protection. In particular:

    48.1. The court is given a specific power to direct that a penal notice be attached to any order. Such a notice makes clear that any person upon whom a copy of the order

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[56] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, at para 42.
[57] *Re TG (children) (care proceedings: case management: expert evidence)* [2013] EWCA Civ 5, per Munby LJ (as he then was) at para 35.
[58] *An NHS Trust v AF & Anor* [2020] EWCOP 55; the case concerned best interests, but the analogy applies also to determinations of (in)capacity.
[59] MCA 2005 s45(1).
[60] MCA 2005 s47(1). See also *MASM v MMAM and others* [2015] EWCOP 3, at para 13.
[61] *Re G (Court of Protection: Injunction)* [2022] EWCA Civ 1312, at para 82.
[62] *Re G* at para 82.

is served that disobedience would be a contempt of court punishable by imprisonment or a fine.[63]

48.2. If the court does not make a penal notice direction, then a penal notice may not be attached to the order. It should be noted, however, that this does not mean that – in a suitable case – the court cannot consider whether disobedience of the order represents a contempt of court: this flows both from the provisions of the COPR themselves[64] and from the wide powers granted to the court by MCA 2005 section 47.

49. Further, COPR r24.2 imports into the COPR the material provisions of the Civil Procedure Rules (CPR). These provide a suite of tools which are, in practice, relatively infrequently used by the Court of Protection. They enable the party entitled to enforce a judgment or order ('the judgment creditor') to enforce such a judgment or order against another party ('the judgment debtor'). As the use of the terms 'creditor' and 'debtor' suggest, these tools are primarily directed to the enforcement of judgments or orders in relation to property and affairs. They are applicable also to enforce undertakings given to the court.

50. The COPR contains detailed provisions[65] (accompanied by a Practice Direction[66]) relating to the procedure that applies when an application is made to a Court of Protection judge to commit a person for contempt of court. These provisions were entirely overhauled with effect from 1 January 2023,[67] in an attempt to ensure a consistency of approach to contempt proceedings in Civil, Family and Court of Protection proceedings.

51. Such an application can be made in a range of circumstances, including where the person has: a) refused or neglected to do an act required by an order within the specified time; b) disobeyed an order requiring them to abstain from doing a specific act; or c) breached the terms of an undertaking given to the court.[68] It is also possible for an application to be brought for contempt in the face of the court.[69]

52. The provisions of the COPR do not govern the *power* to commit a person who has

[63] COPR r21.9(1).
[64] In particular, COPR r21.2(3).
[65] COPR r21.10.
[66] COPR PD 21A.
[67] Part 21 being substituted in its entirety by the Court of Protection (Amendment) Rules 2022 (SI 2022 No 1192).
[68] COPR r21.4(2)(a).
[69] COPR r21.4(2)(a).

committed contempt (referred to as a 'contemnor') to prison. This power is derived (via MCA 2005 section 47(1)) from the High Court's common law powers in this regard. The crucial features of the committal process in Court of Protection proceedings was reviewed in *Re Whiting* [2013] EWHC B27 (Fam).[70]

VI. The international jurisdiction of the Court of Protection

53. The territorial jurisdiction of the Court of Protection is provided for in Schedule 3 to the MCA 2005. The United Kingdom has not ratified the Hague Convention on the International Protection of Adults 2000 in respect of England & Wales. However, Schedule 3 to the MCA 2005 implements many of the provisions as the law of England & Wales and does so irrespective of the other jurisdiction that may be involved. For purposes of proceedings before the Court of Protection, both Scotland and Northern Ireland count as foreign jurisdictions.

54. Schedule 3 to the MCA 2005 provides that, insofar as it cannot otherwise do so, the Court of Protection has jurisdiction to make declarations and decisions under sections 15-16 MCA 2005 in relation to:

    54.1. An adult[71] habitually resident in England and Wales;

    54.2. An adult's property in England and Wales;

    54.3. An adult present in England and Wales or who has property there, if the matter is urgent; or

    54.4. An adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to them.[72]

55. 'Habitual residence' is not defined in the MCA 2005, but the judicial consideration to date suggests that is a "*question of fact to be determined in the individual circumstances of the*

[70] *Re Whiting* [2013] EWHC B27 (Fam).
[71] An adult is defined for these purposes in Sch 3, para 4 of the MCA 2005 as a person who has reached the age of 16 and is a person who "*as a result of an impairment or insufficiency of his personal faculties*," cannot protect their interests. It does not include a child falling under the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures for the Protection of Children. It will be noted that the definition of an "adult" is wider than the definition of a person lacking the material decision-making capacity for purposes of the main body of the MCA 2005.
[72] MCA 2005 Sch 3 para 1.

case."[73] If an adult has been moved across borders, then a central question in deciding whether their habitual residence has changed will be whether there has been any element of wrongfulness in the move.[74] However, sufficient passage of time can mean that the person's habitual residence has changed, even if the move was wrongful: by contrast to the position in relation to children, there is no doctrine of *perpetuatio fori* to operate to 'freeze' habitual residence at the point of the wrongful removal.[75] That having been said, if a British national adult is no longer habitually resident in England and Wales but requires protection, it may be possible for the High Court to exercise a nationality-based inherent jurisdiction to secure their protection.[76]

Foreign 'protective measures'

56. Schedule 3 MCA provides a mechanism for declarations to be obtained that foreign 'protective measures' be recognised and enforced in England and Wales. Such protective measures will include any measure directed to the protection of the person or property of an adult, who for these purposes is any person over 16[77] who, as a result of an impairment or insufficiency of his personal faculties, cannot protect their interests.[78] The MCA 2005 gives examples of such protective measures.[79] The MCA 2005 gives examples of such protective measures.[80] Examples that have come before the Court of Protection include:

    56.1. An order made by a Californian court requiring the return of an adult to California after her removal from the jurisdiction to England in questionable circumstances;[81]

    56.2. The placement of Irish nationals in an English psychiatric institution by way of an

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[73] *Re MN (recognition and enforcement of foreign protective measures)* [2010] EWHC 1926 (Fam), at para 22. The subsequent case law was reviewed by Poole J in *Aberdeenshire Council v SF & Anor* [2023] EWCOP 28.

[74] See *Re MN* and (by analogy) *HM (vulnerable adult: abduction)* [2010] EWHC 870 (Fam) regarding move in breach of a court order.

[75] *Re PO* [2013] EWHC 3932 (COP), [2014] Fam 197, at para 21.

[76] See *Re Clarke* [2016] EWCOP 46; *Al-Jeffery v Al-Jeffery (Vulnerable adult: British citizen)* [2016] EWHC 2151 (Fam) and *AB v XS* [2021] EWCOP 57.

[77] Except if they are aged 16 or 17 and subject to the provisions of the 1996 Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the previous, further, exclusion in relation to those falling within Council Regulation EC 2201/2003 being repealed upon Britain's exit from the European Union).

[78] MCA 2005 Sch 3 para 4.

[79] MCA 2005 Sch 3 para 5.

[80] MCA 2005 Sch 3 para 5.

[81] *Re MN* (see supra note 75).

order made in the High Court in the Republic of Ireland.[82] In the *Health Service Executive of Ireland v Moorgate* [2020] EWCOP 12, Hayden J considered in some detail the operation of the regime under MCA 2005 Schedule 3 for recognition and enforcement of such placements.[83]

56.3. The placement of a Scottish national in an English care facility in circumstances where the person was subject to a Scottish Guardianship Order.[84]

57. Where a measure has been taken on the ground that an adult is habitually resident in, any foreign jurisdiction (including Scotland), or any interested person can apply to the Court of Protection for a declaration that it is to be recognised in England and Wales.[85] The procedure for making such an application is set down in the COPR and in Practice Direction 23A. Permission to make the application is not required. COPR PD 23A makes clear that an application for recognition and/or enforcement of a protective measure should be dealt with rapidly, and in reviewing the papers the court will consider whether the order sought can be made without holding a hearing.[86] If the protective measure in question either seeks to authorise a deprivation of liberty of the adult or to authorise medical treatment, the application for recognition and/or enforcement will usually be determined after holding a hearing; and be allocated to the Senior Judge or a Tier 3 Judge.[87]

58. A judge of the Court of Protection asked to recognise and/or declare enforceable a foreign protective measure operates within strict limits. They cannot, in particular, conduct their own analysis of where the adult's best interests may lie, although they can – and must – consider the adult's best interests in deciding how the measure is to be implemented.[88] The judge's role is confined, in essence, to scrutinising whether core procedural and substantive rights have been complied with.[89] For an example of a situation in which recognition and enforcement of a foreign (in that case Scottish) protective measure was refused, see *Aberdeenshire Council v SF*[90] (concerns as to the compliance of the provisions of the Scottish Guardianship regime with Article 5 ECHR).

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[82] *Re M* [2010] EWHC 1926 (Fam); *Re PA and others* [2015] EWCOP 38.
[83] *Health Service Executive of Ireland v Moorgate* [2020] EWCOP 12.
[84] *Aberdeenshire Council v SF* [2023] EWCOP 28.
[85] MCA 2005 Sch 3 para 20(1), COPR r23.4.
[86] COP PD 23A para 16.
[87] COP PD 23A para 17. See also Mostyn J in *Re SV* [2022] EWCOP 52 at Annex A in which he sets out a checklist of evidence required, of particular relevance in cases involving deprivation of liberty.
[88] *Re MN* (see supra note 75), at paras 29 and 31; and MCA 2005 Sch 3 para 12.
[89] *Re PA and others* [2015] EWCOP 38, [2016] Fam 47
[90] *Aberdeenshire Council v SF* (see supra note 87).

Foreign powers of attorney

59. A foreign LPA – i.e. a LPA made by someone habitually resident other than in England and Wales at the point of making it – is automatically effective in England and Wales if it satisfies the requirements of the law that applies under the test set out in MCA 2005 Schedule 3, paras 13(1) and (2). It should be noted that – as matters stand – the Office of the Public Guardian does not register foreign LPAs alongside those of English powers. If a bank or other institution is not willing to accept that a foreign LPA is effective, then, assuming that the jurisdictional test set out at paragraph 54 above is met, an application can be made for a declaration under MCA 2005 section 15(1)(c) that the donee of the power is acting lawfully when exercising authority under it.[91]

60. If the foreign power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the Court of Protection can – if it has jurisdiction over the person or their property disapply or modify the power.[92]

VII. The inherent jurisdiction of the High Court

61. There is no equivalent in England & Wales of the Adult Support and Protection Act 2007 in Scotland. It should be noted, however, that the High Court may exercise its inherent jurisdiction in respect of those that have capacity to make relevant decisions applying the MCA 2005 but are in some way vulnerable. It has been has described as "*the great safety net*."[93] The courts have explained that:

> [T]*he inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent*.[94]

62. Any relief sought in such cases will not be being sought from the Court of Protection, but rather from the Family Division of the High Court. Only judges in the Family Division of the High Court (including those holding so-called section 9 tickets[95]) can exercise the

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[91] COPR r23.6.

[92] MCA 2005 Sch 3 para 14(1).

[93] See *DL v A Local Authority* [2012] EWCA Civ 253, at para 61.

[94] A description given originally by Munby J in *Re SA (vulnerable adult with capacity: marriage)* [2005] EWHC 2942 (Fam), at para 77, then endorsed in *DL v A Local Authority* (see supra note 96).

[95] That is, authorised under Senior Courts Act 1981 s9(1) and s9(4).

inherent jurisdiction. This means that if there are doubts as to whether the case is an inherent jurisdiction case or a Court of Protection case, it is important that the judge who hears it is able to sit also as a judge of the High Court if required.

CHAPTER 2.

Adult Capacity Law and Procedure in Scotland

Helen McGinty, Helen McGinty & Company, Edinburgh

Contents

I. Courts and Concepts

1. The Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") is an Act of the Scottish Parliament to make provision as to the property, financial affairs and personal welfare of adults who are incapable by reason of mental disorder or inability to communicate; and for connected purposes. The 2000 Act sought to modernise and to reform means of provision for, and management of, the affairs of adults with incapacity. It stemmed from the report of the Scottish Law Commission on Incapable Adults of 1995 (SLC 151).

2. Judges in Scotland require to take account of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 when hearing adults with incapacity cases. As the court is a public authority (defined in section 6(5)) it must dispense relevant functions (defined in section 6(2)) in a way which is compatible with the UNCRC requirements (section 6(1) of the 2024 Act). That will include functions conferred on the court under the 2000 Act.

Sheriff court

3. **Applications:** Almost all applications under the 2000 Act are made to the sheriff court, and are determined by a sheriff. There are 39 sheriff courts across Scotland, divided into six geographical sheriffdoms. A sheriff principal sits as the administrative head of each sheriffdom. In the largest sheriff courts, including Glasgow and Edinburgh, there are designated sheriffs who hear applications under the 2000 Act. Applications are made using the summary application procedure, with a view to cases being dealt with expeditiously. The procedural rules in relation to applications under the 2000 Act are set out in Part XVI of Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999.[96]

4. **Powers of the sheriff:** In an application under the 2000 Act, a sheriff has wide-ranging discretionary powers. Those powers are largely found in section 3 of the Act. The sheriff may make such consequential or ancillary order as the sheriff considers necessary.[97] Without prejudice to the generality of that power, or any other power conferred by the 2000 Act, the sheriff may:

    a) make any order granted subject to such conditions and restrictions as appear to the sheriff to be appropriate;

    b) order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged;

[96] SI 1999/929

[97] Adults with Incapacity (Scotland) Act, section 3(1)

c) make such further inquiry or call for such further information as appears to the sheriff to be appropriate;

d) make such interim order as appears to the sheriff to be appropriate pending the disposal of the application or proceedings.[98]

4. The sheriff may give directions to any person exercising functions conferred by the Act, or of a like nature conferred by the law of any country, as to the exercise of those functions, and the taking of decisions or action in relation to the adult.[99]

5. In terms of section 3(4), the sheriff shall also consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the adult. That person is commonly known as a safeguarder. The appointment of a safeguarder does not prevent the sheriff from separately appointing a person to represent the interests of the adult in the proceedings.[100] That person would usually be a curator *ad litem*. The distinction drawn between the two roles is that between "safeguarding" the adult's interests, and "representing" those interests; in the case of a *curator ad litem*, that is as *dominus litis*, with authority to pursue, defend, or compromise the proceedings, in the adult's best interests. In addition to safeguarding the interests of the adult, a safeguarder has responsibility to convey the views of the adult to the sheriff, so far as those views are ascertainable.[101] The sheriff shall also take account of the wishes and feelings of the adult so far as those views are expressed by a person providing independent advocacy services.[102]

6. The sheriff (or a Senator of the Court of Session in applications to that court), may also make certain orders in relation to the nearest relative of an adult. Those orders include withholding information, or intimation of an application, from the nearest relative, authorising another person to exercise the functions of the nearest relative, and ordering that no person shall exercise the functions of nearest relative.[103]

7. **Appeals:** Unless otherwise expressly provided for, any decision of the sheriff at first instance in any application to, or in any other proceedings before, the sheriff under the 2000 Act may be appealed to the Sheriff Appeal Court. A decision of the Sheriff Appeal Court may be appealed to the Court of Session, but only with leave.[104] Certain decisions of the sheriff are final, as provided for in the Act.

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[98] Adults with Incapacity (Scotland) Act 2000, section 3(2)
[99] Ibid., section 3(3)
[100] Ibid., section 3(4)(b)
[101] Ibid., section 3(5)
[102] Ibid., section 3(5A)
[103] Adults with Incapacity (Scotland) Act 2000, section 4
[104] Ibid., section 2(3)

Court of Session

8. **Jurisdiction:** The Court of Session is the supreme civil court in Scotland, with an all-Scotland jurisdiction. As well as exercising an appellate function in relation to proceedings under the 2000 Act, the Court of Session may consider certain applications in the first instance. Primarily, those applications relate to medical treatment under Part 5 of the 2000 Act.

9. **The *nobile officium* and the *parens patriae*:** The *nobile officium* is the extraordinary, inherent, equitable jurisdiction of the Court of Session. That jurisdiction allows the court to provide a just remedy where legislation and the common law are silent, or where application of an existing legal rule would be unduly oppressive or burdensome. The *parens patriae* is distinct from the *nobile officium*, and is the inherent jurisdiction of the Court of Session to protect the interests of those who are vulnerable by reason of legal incapacity, including children and those persons who are assessed as incapable by reason of mental disorder.

High Court of Justiciary

10. **Jurisdiction:** The High Court of Justiciary is the supreme criminal court in Scotland, with an all-Scotland jurisdiction. It is both a court of first instance (for the most serious offences), and a court of appeal. In terms of section 58(1A) of the Criminal Procedure (Scotland) Act 1995, where a person is convicted in the High Court, or the Sheriff Court, of an offence punishable by the court with imprisonment, other than an offence the sentence for which is fixed by law, and the court is satisfied as to certain matters, the court may place the offender's personal welfare under the guardianship of a local authority, or such other person approved by a local authority as may be specified in the order. In the Sheriff Court, a guardianship order may also be made without conviction of the person, in summary criminal proceedings where a sheriff is satisfied that a person did an act, or made an omission, as charged, and the requirements of section 58(1A) are met.[105] Further detail as to the imposition of a guardianship order in criminal proceedings can be found in sections 58 and 58A of the Criminal Procedure (Scotland) Act 1995.

Definitions

11. **Adult:** The definition of an "adult" is found in section 1(6) of the 2000 Act. An adult is, simply, a person who has attained the age of 16 years. 16 years is the age, in terms of the Children (Scotland) Act 1995, at which parental responsibilities and rights end, with the exception of the parental responsibility to provide guidance to a person under the age of 18 years, in a manner appropriate to the stage of development of that person.[106] In order

[105] Criminal Procedure (Scotland) Act, section 58(3)
[106] Children (Scotland) Act 1995, sections 1 & 2

to allow a seamless transition of protection for children whose legal incapacity will continue after the age of 16 years, section 79A of the 2000 Act allows an application for guardianship to be made in respect of a child within the three months before their 16th birthday, but no guardianship order made in respect of a child shall have effect before their 16th birthday. When presiding over a case concerning a person aged 16 to 18, judges in Scotland will require to take account of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

12. **Incapacity:** Incapacity is also defined in section 1(6)(6) of the 2000 Act. "Incapable" means incapable of:

    a) acting; or

    b) making decisions; or

    c) communicating decisions; or

    d) understanding decisions; or

    e) retaining the memory of decisions,

    as mentioned in any provision of the Act, by reason of mental disorder or of inability to communicate because of physical disability.

13. A person shall not fall within the definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise). The list of conditions in section 1(6)(6) is one of alternatives, and an assessment of incapacity can be made if only one of the conditions is met.

14. **Mental disorder:** "Mental disorder" is defined with reference to section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act").[107] Section 328(1) of the 2003 Act defines mental disorder as any:

    a) mental illness;

    b) personality disorder; or

    c) learning disability,

[107] Adults with Incapacity (Scotland) Act 2000, section 87

however caused or manifested.

15. Cognate expressions are construed accordingly, and so, for example, "learning disability" may encompass the more recent ICD-11 description of "Disorders of Intellectual Development."[108]

16. Section 328(1) of the 2003 Act is qualified by section 328(2), which provides that a person is not mentally disordered by reason only of any of the following—

    a) sexual orientation;

    b) sexual deviancy;

    c) transsexualism;

    d) transvestism;

    e) dependence on, or use of, alcohol or drugs;

    f) behaviour that causes, or is likely to cause, harassment, alarm or distress to any other person;

    g) acting as no prudent person would act.

17. **Nearest relative:** has the definition provided in section 254 of the 2003 Act, with a hierarchy of, predominantly, family members.

18. **Named person:** is a person nominated by a patient in terms of section 250 of the 2003 Act, and who has particular rights in respect of actions under that legislation.

19. **Primary carer:** is the person or organisation primarily caring for an adult.[109]

General principles

20. The principles set out in section 1 of the 2000 Act are to be given effect in relation to any intervention in the affairs of an adult, under or in pursuance of the 2000 Act.[110] "Any intervention" includes an order made in or for the purpose of any proceedings under the

[108] International Statistical Classification of Diseases 11th Revision (ICD-11)-WHO Version for 2022 at Code 6A00, *et seq*
[109] Adults with Incapacity (Scotland) Act 2000, section 87(1)
[110] Ibid., section 1(1)

2000 Act.[111] The general principles are found in section 1(2) to (4) of the 2000 Act, as follows:

> *(2) there shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention;*
>
> *(3) where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention;*
>
> *(4) in determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—*
>
> *a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;*
>
> *b) the views of the nearest relative, named person and the primary carer of the adult, in so far as it is reasonable and practicable to do so;*
>
> *c) the views of—*
>
> *i. any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and*
>
> *ii. any person whom the sheriff has directed to be consulted,*
>
> *in so far as it is reasonable and practicable to do so; and*
>
> *d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.*

21. Section 1(5) provides, in addition, that any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under the 2000 Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills they have concerning their property, financial affairs or personal welfare, as the case may be, and to develop new such skills.

II. Adults with incapacity (Scotland) act 2000: part 6 orders

Guardianship

22. Guardianship orders are the orders which will be most commonly encountered in other jurisdictions. Provision for the making of guardianship orders is found in Part 6 of the 2000 Act. An application for guardianship may be made in terms of section 57 of the

[111] Ibid.

2000 Act. An application can be made by any person claiming an interest in the property, financial affairs or personal welfare of an adult, including the Adult.[112] A person claiming an interest includes the local authority, the Mental Welfare Commission for Scotland, and the Public Guardian.[113] The local authority has a duty to apply for appointment of a guardian to an adult, where it appears to it that a guardianship order is necessary for the protection of an adult who is incapable of safeguarding or promoting their own interests, but where no application for guardianship has been made, or is likely to be made, by any other person.[114]

23. **Application:** The application is to the sheriff, by summary application.[115] That application must be supported by at least three separate reports, in a prescribed form.[116] Two medical reports are required. In circumstances where the adult's incapacity is by reason of mental disorder, one of those reports must be prepared by a relevant medical practitioner. A relevant medical practitioner is usually a medical practitioner approved by a local health board as having special expertise in the diagnosis and treatment of mental disorder, in terms of section 22 of the 2003 Act.

24. Where the application relates to the personal welfare of the adult, it is necessary to submit a report prepared by a mental health officer as to the general appropriateness of the order sought, and the suitability of the individual nominated in the application to be appointed guardian. A mental health Officer is appointed by the local authority. They are a local authority officer, always in practice a social worker, who satisfies requirements of the Scottish Ministers as to matters including training and experience in relation to persons who have, or have had, a mental disorder.[117] Where the application relates only to the property or financial affairs of the adult, a report is required by a person who has sufficient knowledge to express an opinion as to the general appropriateness of the order sought, and the suitability of the individual nominated in the application to be appointed guardian. In an application for both financial and welfare guardianship, the mental health officer may comment on both financial and welfare matters, and the prescribed form allows for a "combined" report.

25. The application for guardianship requires to be lodged within 30 days of the first examination, or interview, and assessment of the adult, for the purposes of the application. That period is subject to some leeway in respect of the medical reports, where the sheriff is satisfied that there has been no relevant change in the

[112] Adults with Incapacity (Scotland) Act 2000, section 5(1)
[113] Ibid., section 87(1)
[114] Ibid., section 57(2)
[115] Ibid., section 2(2)
[116] Ibid., section 57(3),
[117] Mental Health (Care and Treatment) (Scotland) Act 2003, section 32

circumstances.[118] There is provision for the appointment of an interim Guardian, pending determination of the full application.[119]

26. **Disposal:** An application for guardianship is disposed of in terms of section 58 of the 2000 Act. The sheriff must be satisfied that:
    a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote the adult's interests in, the adult's property, financial affairs or personal welfare, and is likely to continue to be so incapable; and

    b) no other means provided by or under the Act would be sufficient to enable the adult's interests in the adult's property, financial affairs or personal welfare to be safeguarded or promoted.[120]

27. The sheriff may make a guardianship order for a period of three years, or such other period (including an indefinite period) as, on cause shown, the sheriff may determine.[121]

28. The sheriff may appoint joint guardians to the adult, in terms of section 62 of the Act. Joint guardians shall not be appointed to an adult, unless:

    a) the individuals so appointed are parents, siblings or children of the adult; or

    b) the sheriff is satisfied that, in the circumstances, it is appropriate to appoint as joint guardians individuals who are not related to the adult.

29. Where more than one individual or office holder is nominated in the application, the order may, without prejudice to the power to appoint joint guardians, appoint two or more guardians to exercise different powers in relation to the adult.[122] Substitute guardians may also be appointed, in terms of section 63 of the 2000 Act, and may assume office in the result of the death, incapacity or resignation of a guardian.

30. The sheriff may appoint as guardian an individual whom the sheriff considers to be suitable for appointment, and who has consented to being appointed.[123] In cases where the order is to relate only to the personal welfare of an Adult, the sheriff may appoint the chief social work officer of the local authority.[124] The chief social work officer may not be appointed as a financial guardian.[125]

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[118] Adults with Incapacity (Scotland) Act 2000, section 57(3A) & (3B)
[119] Ibid., section 57(5),
[120] Ibid., section 58(1)
[121] Adults with Incapacity (Scotland) Act 2000, section 58(4)
[122] Ibid., section 58(5)
[123] Ibid., section 59(1)(a)
[124] Ibid., section 59(1)(b)
[125] Ibid., section 59(2)

31. The 2000 Act draws a distinction between the "individual", and an "office holder."[126] An "office holder", in relation to a guardian, means the chief social work officer of the local authority.[127] The sheriff does not require to be satisfied as to the suitability of the chief social work officer to be guardian, but must be satisfied as to the suitability of an individual to be appointed as guardian. In terms of section 59(3) of the Act, the sheriff shall not appoint an individual as guardian to an adult unless the sheriff is satisfied that the individual is aware of:

    a) the adult's circumstances and condition and of the needs arising from such circumstances and condition; and

    b) the functions of a guardian.

32. In terms of section 59(4) of the Act, in determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to:

    a) the accessibility of the individual to the adult and to the adult's primary carer;

    b) the ability of the individual to carry out the functions of guardian;

    c) any likely conflict of interest between the adult and the individual;

    d) any undue concentration of power which is likely to arise in the individual over the adult;

    e) any adverse effects which the appointment of the individual would have on the interests of the adult;

    f) any other matters as appear to the sheriff to be appropriate.

33. Paragraphs (c) and (d) of subsection 4 shall not be regarded as applying to an individual by reason only of being a close relative of, or a person residing with, the adult.[128]

34. **Functions and duties:** The functions and duties of a guardian are mostly found in section 64 of the 2000 Act. The first duty of a guardian is to give effect to the general principles of the Act.[129] The remaining duties of a guardian are largely administrative. The functions can include the power to:

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[126] For example, Ibid., section 57(3)(b)(ii) & section 59(1)(b)
[127] Ibid., section 87(1)
[128] Adults with Incapacity (Scotland) Act 2000, section 59(5)
[129] Ibid., section 1(1) – (5)

a) deal with all aspects of the property, financial affairs and personal welfare of the adult;

b) deal with particular aspects of the adult's property, financial affairs and personal welfare;

c) authorise the adult to carry out certain transactions, or categories of transactions;

d) pursue or defend an action of declarator of nullity of marriage, or of divorce, or separation, in the name of the adult;[130]

e) act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order, by virtue of appointment;[131]

f) be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodations so as to enhance the adult's quality of life;[132] and

g) arrange for some or all of their functions to be exercised by one or more persons acting on their behalf, but the guardian shall not be entitled to surrender or transfer any part of their functions to another person.[133]

35. A guardian may not do any of the things listed in section 64(2), which things relate to specific medical interventions.

36. **Effect of Guardianship:** The effect of guardianship is set out in section 67(1) of the 2000 Act. The effect is that the adult shall have no capacity to enter into any transaction in relation to any matter which is within the scope of the authority conferred on the guardian, except in a case where the adult has been authorised by the guardian to carry out certain transactions, or categories of transaction. Nothing in section 67(1) of the 2000 Act shall be taken to affect the capacity of the adult in relation to any other matter. A guardian who has powers relating to the personal welfare of an Adult may exercise those powers whether or not the adult is in Scotland at the time of the exercise of the powers.[134]

37. In relation to the ability of third parties to rely upon the powers granted to a guardian, a transaction for value between a guardian purporting to act as such and a third party acting in good faith shall not be invalid on the ground only that the guardian acted

[130] Ibid., section 64(1)
[131] Ibid., section 64(3)
[132] Ibid., section 64(5)
[133] Adults with Incapacity (Scotland) Act 2000, section 64(6)
[134] Ibid., section 67(3)

outwith the scope of the guardian's authority, or that the guardian failed to observe any requirement imposed upon them, or there was any irregularity, whether substantive or procedural, in the appointment of the guardian.[135] Where a third party enters into a transaction with the adult, knowing that the guardian had authorised the adult to enter into that transaction, or category of transaction, the transaction shall not be void only on the ground that the adult lacked capacity[136]. A guardian shall be personally liable under any transaction entered into by them without disclosing that they are acting as guardian of the Adult, or which falls outwith the scope of their authority, but where only they have acted without disclosing their acting as guardian, and have not breached any other requirements of the 2000 Act, they shall be entitled to be reimbursed from the estate of the adult in respect of any loss in consequence of a claim made upon them personally.[137]

38. **Other Procedure:** A guardianship order will only cease to have effect:

    a) on the death of the adult;[138]

    b) if it is allowed to lapse at the end of the period of the order, without renewal; or

    c) if it is recalled using various of the procedures provided for under the 2000 Act.[139]

39. During the period of the order, application may be made to the sheriff to: vary the order;[140] replace guardians;[141] remove guardians;[142] add guardians[143] or recall the order.[144] The process for renewal of an order is found at section 60 of the 2000 Act. In terms of section 60(1) of the Act, where an application for renewal of a guardianship order is made to the court before the expiry of the period of the order, the order shall continue to have effect, until the application is determined.

Intervention Order

40. The provision for making an intervention order is also found in Part 6 of the 2000 Act. An intervention order may be a less restrictive means of securing the maximum benefit to the adult by authorising focussed intervention, which is limited in scope and duration.

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[135] Ibid., section 67(6)
[136] Ibid, section 67(5)
[137] Adults with Incapacity (Scotland) Act 2000, section 67(4)
[138] Ibid., section 77
[139] For example, Ibid., sections 71, 73 & 73A
[140] Ibid., section 74
[141] Ibid., section 71
[142] Ibid.
[143] Ibid, section 62(1)(b)
[144] Ibid., section 71

In an application for a guardianship order, the sheriff may, instead, make an intervention order.[145] The intervention order may:

a) direct the taking of any action specified in the order.
b) authorise the person nominated in the application to take such action or make such decisions in relation to the property, financial affairs or personal welfare of the adult as is specified in the order.[146]

41. **Application:** The procedure in respect of an application for an intervention order is essentially the same as the procedure in respect of an application for a guardianship order. Any person with an interest in the property, financial affairs and personal welfare of an adult may apply, including the adult.[147] The local authority has the same duty to apply for an intervention order as a guardianship order, where an order is necessary to protect the interests of an adult, but no application has been made, or is likely to be made.[148] The same reports are required to support an application, as are required to support an application for guardianship.[149] There is no provision for an interim intervention order.

42. **Disposal and effect:** The sheriff may make an intervention order when satisfied that the adult is incapable of taking the action, or in relation to a decision about their property, financial affairs and personal welfare, to which the application relates.[150] Anything done under the intervention order will have the same effect as if done by the adult, if they had the capacity to do so.[151] Third parties enjoy similar protections in relation to transactions with the person commonly called an "intervener", as they do with a guardian.[152]

43. **Other procedure:** The sheriff may vary, or recall, the intervention order.[153] Intervention orders may be made for a specific period, or without any time limit. An intervention order which is not made for a specific period will end when the actions authorised are completed, or the decision authorised is made. In practice, the Office of the Public Guardian (Scotland) makes regular enquiries of interveners, as to whether the order is concluded. Once it is informed that the actions authorised are completed, or that the decision authorised is made, the Office of the Public Guardian (Scotland) will remove

[145] Ibid., section 58(3)
[146] Ibid., section 53(5)
[147] Adults with Incapacity (Scotland) Act 2000, section 53(1)
[148] Ibid., section 53(3)
[149] Ibid., section 53(4)
[150] Ibid., section 53(1)
[151] Ibid., section 53(9)
[152] Ibid., section 53(11), (13) & (14)
[153] Ibid., section 53(8)

the intervention order from its register. An intervention order will cease to have effect on the death of the adult.[154] The Act does not specify that an intervention order will end on the death of the intervener (see section 56A of the 2000 Act)., but no provision is made for the appointment of a replacement intervener.

III. Jurisdiction, recognition and enforceability

44. The jurisdiction of the Scottish Courts in relation to an adult with incapacity is found in schedule 3 to the 2000 Act. The schedule is informed by, and makes reference to, the Hague Convention of 13 January 2000 on the International Protection of Adults ("the Convention"). The United Kingdom is a contracting party to the Convention, but the Convention has only been ratified by the United Kingdom in respect of Scotland. The schedule also makes provision for the recognition and enforcement of "international measures" for the personal welfare or protection of property of an adult with incapacity.[155]

45. **Jurisdiction:** The Scottish judicial and administrative authorities have jurisdiction in relation to an adult if:

    a) the adult is habitually resident in Scotland; or

    b) property which is the subject of the application or proceedings or in respect of which functions are carried out under this Act is in Scotland; or

    c) the adult, although not habitually resident in Scotland is there or property belonging to the adult is there and, in either case, it is a matter of urgency that the application is or the proceedings are dealt with; or

    d) the adult is present in Scotland and the intervention sought in the application or proceedings is of a temporary nature and its effect limited to Scotland;[156] or

    e) the adult is a British citizen, has a closer connection with Scotland than with any other part of the United Kingdom, and article 7 of the Convention has been complied with; or

    f) the Scottish Central Authority, having received a request under article 8 of the Convention from an authority of the state in which the adult is habitually resident,

[154] Ibid., section 77
[155] Adults with Incapacity (Scotland) Act 2000, schedule 3, paragraph 7
[156] Ibid., Paragraph 1(1)

and consulted such authorities in Scotland as would, under the 2000 Act, have functions in relation to the adult, have agreed to the request.[157]

46. The Scottish Central Authority is the Central Authority & International Law Team of the Scottish Government.

47. The Convention applies to the exercise of jurisdiction where the adult is habitually resident in a contracting state other than the United Kingdom, or not being habitually resident in Scotland is, or has been, the subject of protective proceedings in such a contracting state[158]. An adult whose habitual residence cannot be ascertained, or who is a refugee or has been internationally displaced by disturbance in the country of the adult's habitual residence, shall be taken to be habitually resident in the state which the adult is in.[159]

48. The sheriff having jurisdiction is the sheriff in whose sheriffdom the adult, or the adult's property, is habitually resident, located, or present.[160] There are other provisions in relation to urgent cases. Where neither the adult, nor their property, are located or present in any sheriffdom, the sheriff having jurisdiction is the sheriff of Lothian and Borders at Edinburgh.[161] The applicable law is the law of Scotland,[162] but that does not prevent a Scottish judicial or administrative authority from applying the law of a country other than Scotland if, in circumstances which demonstrate a substantial connection with that other country, and having regard to the interests of the adult, it appears appropriate to do so.[163] Where a measure for the protection of an adult has been taken in one state, and is implemented in another, the conditions of its implementation are governed by the law of that other state.[164] There are specific rules, in relation to powers of attorney.[165]

49. A "measure for the personal welfare or protection of the property of an adult with incapacity" includes any order, direction or decision affecting or relating to:

    a) the determination of the incapacity and the institution of appropriate measures of protection;

[157] Ibid., Paragraph 1(2)
[158] Adults with Incapacity (Scotland) Act 2000, Schedule 3, Paragraph 1(3)
[159] Ibid., Paragraph 1(5)
[160] Ibid., Paragraph 2(1)
[161] Ibid., Paragraph 2(4)
[162] Ibid., Paragraph 3(1)
[163] Ibid., Paragraph 3(2)
[164] Ibid., Paragraph 3(4)
[165] Ibid., Paragraph 3

b) the placing of the adult under the protection of a judicial or administrative authority;

c) guardianship, curatorship or analogous institutions;

d) the appointment and functions of any person or body having charge of the adult's person or property or otherwise representing the adult;

e) the placement of the adult in an establishment or other place where the personal welfare of the adult is safeguarded;

f) the administration, conservation or disposal of the adult's property; or

g) the authorisation of a specific intervention for the personal welfare or protection of the property of the adult.[166]

50. Paragraphs 5 and 6 of the schedule provide that nothing in the schedule displaces any enactment or rule of law which has mandatory effect for the protection of an adult with incapacity in Scotland, whatever law would otherwise be applicable; or requires or enables the application in Scotland of any provision of the law of a country other than Scotland, so as to produce a result which would be manifestly contrary to public policy.

51. **Recognition:** The provisions as to recognition of any measure taken under the law of a country other than Scotland, for the personal welfare or the protection of property of an adult with incapacity, are found in paragraph 7 of the schedule. Such a measure shall be recognised by the law of Scotland, where the jurisdiction of the authority of the other country was based on the adult's habitual residence there, or where the United Kingdom and the other country were, when the measure was taken, parties to the Convention and the jurisdiction of the authority of the other country was based on a ground of jurisdiction provided for in the Convention.[167] Recognition of a measure may, however, be refused if:

a) except in a case of urgency—
   i. the authority which took it did so without the adult to whom it related being given an opportunity to be heard; and
   ii. these circumstances constituted a breach of natural justice;

b) it would be manifestly contrary to public policy to recognise the measure;

[166] Adults with Incapacity (Scotland) Act 2000, Schedule 3, Paragraph 14
[167] Ibid., Paragraph 7(2)

c) the measure conflicts with any enactment or rule of law of Scotland which is mandatory whatever law would otherwise be applicable;

d) the measure is incompatible with a later measure taken in Scotland or recognised by the law of Scotland;

e) the measure would have the effect of placing the adult in an establishment in Scotland and:

i. the Scottish Central Authority has not previously been provided with a report on the adult and a statement of the reasons for the proposed placement and has not been consulted on the proposed placement; or

ii. where the Scotish Central Authority has been provided with such a report and statement and so consulted, it has, within a reasonable time thereafter, declared that it disapproves of the proposed placement.[168]

52. **Enforcement:** Paragraph 8 of the schedule provides that a measure which is enforceable in the country of origin, and which has been recognised by the law of Scotland, may be registered. A measure so registered shall be as enforceable as a measure having the like effect granted by a court in Scotland.[169] Findings of fact going to jurisdiction made by the authority taking the measure are conclusive of the facts found,[170] and the validity or merits of a measure falling to be recognised by the law of Scotland by virtue of the schedule shall not be questioned in any proceedings except for the purposes of ascertaining its compliance with any provision of the schedule.[171] The Scottish Ministers may also, by order, provide for the recognition and enforcement of orders made and other measures taken by authorities in any part of the United Kingdom other than Scotland, and where that provision is made, the orders and measures shall have no less recognition, and be no less enforceable, than if they had been recognised in terms of the schedule.[172]

IV. Powers of attorney

53. In Scotland, a power of attorney is the means whereby one person (the granter) appoints another person (the attorney) to carry out certain actions on their behalf, either in the

[168] Adults with Incapacity (Scotland) Act 2000, Schedule 3, Paragraph 7(3)
[169] Ibid., Paragraph 8(2)
[170] Ibid., Paragraph 9(1)
[171] Ibid., Paragraph 9(2)
[172] Ibid., Paragraph 10

present or in the future. If certain conditions are fulfilled, the power of attorney will continue to have effect in the event of the granter becoming incapable in relation to decisions about the matter to which the power of attorney relates.[173] The document must be in writing, and it must be subscribed by the granter.[174] There are three different types of power of attorney: continuing powers of attorney; welfare powers of attorney and continuing and welfare powers of attorney.

54. **Continuing power of attorney:** A continuing power of attorney relates to the granter's property and financial affairs. In addition to the requirement that the power of attorney be a written document, subscribed by the granter, if the power of attorney is intended to "continue" to have effect after the incapacity of the granter, it must:

    a) incorporate a statement clearly expressing the granter's intention that the power be a continuing power to which the 2000 Act applies;

    b) where the continuing power of attorney is exercisable only if the granter is determined to be incapable in relation to decisions about the matter to which the power relates, states that the granter has considered how such a determination may be made;

    c) incorporates a certificate in the prescribed form by a practising solicitor, or by a member of another prescribed class (if that individual is not the person to whom the power of attorney has been granted).[175]

55. **Welfare power of attorney:** A welfare power of attorney relates to the personal welfare of an individual. It may only be granted to an individual, which does not include a person acting in their capacity as an officer of a local authority or any other body established by or under an enactment.[176] A welfare power of attorney cannot be exercised unless the granter is incapable in relation to a decision about the matter to which the welfare power of attorney relates, or the welfare attorney reasonably believes that the granter is incapable.[177] A welfare attorney may not place the granter in a hospital for treatment of a mental disorder against the will, or consent on behalf of the granter to any form of treatment expressly excluded by the 2000 Act or by guidelines subsequently issued.[178] In addition to the requirement that the power of attorney be a written document, subscribed by the granter, for a welfare power of attorney to be valid, it must:

[173] Adults with Incapacity (Scotland) Act 2000, section 15(1) & 16(5)(b)
[174] Ibid., section 15(3) & 16(3)
[175] Ibid., section 15(3) & (4)
[176] Ibid., section 16(5)(a)
[177] Ibid., section 16(5)(b)
[178] Ibid., section 16(6)

a) incorporate a statement clearly expressing the granter's intention that the power be a welfare power to which the 2000 Act applies;

b) state that the granter has considered how a determination as to whether they are incapable in relation to decisions about the matter to which the welfare power of attorney relates may be made;

c) incorporates a certificate in the prescribed form by a practising solicitor, or by a member of another prescribed class (if that individual is not the person to whom the power of attorney has been granted).[179]

Some common law powers of nominated attorneys are preserved. An attorney will have no authority to act, until the document conferring the power of attorney has been registered by the Public Guardian.[180] The Public Guardian must be satisfied that the attorney is prepared to act.[181] The document may provide that the Public Guardian shall not register the document, until a specific event has occurred.[182]

56. **Termination:** The granter may revoke the power of attorney, but must follow the same requirements as set out for the document conferring the power of Attorney.[183] An attorney may resign, and where a sole attorney resigns, the power of attorney will end.[184] The power of attorney will also end on the death of the granter.

57. Where the granter and the attorney are married, unless the document conferring it provides otherwise, the power of attorney will come to an end on decree of separation, decree of divorce, or declarator of nullity of marriage.[185] The same applies where the granter and attorney are in civil partnership with each other, and decree of separation, decree of dissolution of the civil partnership, or decree of nullity of the civil partnership, is granted.[186] The authority of an attorney in relation to any matter shall also come to an end on the appointment of a guardian with powers relating to that matter.[187] A continuing power of attorney shall end on the bankruptcy of either the granter, or the attorney.[188]

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[179] Adults with Incapacity (Scotland) Act 2000, section 16(3) & (4)
[180] Ibid., section 19(1)
[181] Ibid., section 19(2)
[182] Ibid., section 19(3)
[183] Ibid., section 22A
[184] Ibid., section 23
[185] Ibid., section 24(1)
[186] Ibid., section 24(1A)
[187] Adults with Incapacity (Scotland) Act 2000, section 24(2)
[188] Ibid., section 15(5)

58. Complaints about the actions of a continuing attorney may be made to the Public Guardian, who also has authority to investigate any circumstances made known to them in which the property and financial affairs of an adult seem to be at risk.[189] The local authority has the same responsibility in relation to the exercise of welfare powers of attorney.[190] If the local authority fails in that duty, the Mental Welfare Commission for Scotland has the authority to investigate.[191]

59. An application may be made to the sheriff in terms of section 20 of the 2000 Act, by any person with an interest in the property, financial affairs and personal welfare of the granter. The sheriff must be satisfied that the granter is incapable in relation to decisions about, or of safeguarding their interests in, their property, financial affairs or personal welfare, insofar as the power of attorney relates to them.[192] If the sheriff is so satisfied, and is satisfied that it is necessary to safeguard or promote those interests, the sheriff may make an order:

    a) ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order;

    b) ordaining the continuing attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian;

    c) ordaining that the welfare attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order;

    d) ordaining the welfare attorney to give a report to the sheriff as to the manner in which the welfare attorney has exercised the attorney's powers during any period specified in the order;

    e) revoking:
        i. any of the powers granted by the continuing or welfare power of attorney; or
        ii. the appointment of an attorney.[193]

V. Medical treatment and research

[189] Ibid., section 6(2)
[190] Ibid., section 10(1)
[191] Ibid., section 9(1)
[192] Ibid., section 20(2)
[193] Ibid., section 20(2)

60. Part 5 of the 2000 Act makes provision for a separate regime in respect of medical treatment of adults with incapacity, and in respect of research involving adults with incapacity.

61. **Medical treatment:** Section 47 of the 2000 Act applies where one of a number of possible practitioners, primarily responsible for medical treatment of the kind in question, is of the opinion that an adult is incapable in relation to a decision about the medical treatment in question and has certified that they are of this opinion.[194] The practitioner issues a certificate of incapacity, which does not exceed one year, or in certain circumstances, three years, from the date of the examination on which the certificate is based.[195] During the period of the certificate the practitioner has authority to do what is reasonable in the circumstances, in relation to the medical treatment in question, to safeguard or promote the physical or mental health of the adult.[196] Treatment may be delegated,[197] and the practitioner can revoke the certificate.[198]

62. **Safeguards:** The authority to provide medical treatment shall not authorise: the use of force or detention, unless it is immediately necessary and only for so long as is necessary in the circumstances; action which would be inconsistent with any decision by a competent court; or placing an adult in a hospital for the treatment of mental disorder against their will.[199]

63. Where any question as to the authority of any person to provide medical treatment is the subject of proceedings in any court, and has not been determined, medical treatment shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or for the prevention of serious deterioration in their medical condition.[200] That caveat does not apply, if an interdict prohibiting the medical treatment has been granted and continues to have effect.[201] Equally, where an application for guardianship, or an intervention order, with power in relation to medical treatment, has been made, and the practitioner is aware of that application, treatment shall not be given, unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or for the prevention of serious deterioration in their medical condition.[202]

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[194] Adults with Incapacity (Scotland) Act 2000, section 47(1) & (1A)
[195] Ibid., section 47(5)
[196] Ibid., section 47()2
[197] Ibid., section 47(3)
[198] Ibid., section 47(6)
[199] Ibid., section 47(7)
[200] Ibid., section 47(9)
[201] Adults with Incapacity (Scotland) Act 2000, section 47(10)
[202] Ibid., section 49

64. There are certain exceptions to the treatment which it is possible to provide,[203] and where a guardian, welfare attorney, or intervener has been appointed, with authority in relation to medical treatment, treatment shall not be provided, unless:

    a) the agreement of the substitute decision-maker has been obtained;[204] or

    b) where there is disagreement, a practitioner nominated by the Mental Welfare Commission for Scotland certifies that the proposed medical treatment should be given.[205]

65. Even where either condition above is met, any person having an interest in the personal welfare of the adult may apply to the Court of Session for a determination as to whether the proposed treatment should be given or not.[206]

66. Where an application has been made to the Court of Session, and has not been determined, the medical treatment shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in their medical condition.[207]

67. Where an interdict has been granted, and continues to have effect of prohibiting the giving of such medical treatment, the medical treatment cannot be provided.[208] The provisions of Part 5 of the 2000 Act do not affect the inherent *parens patriae* jurisdiction of the Court of Session.

68. **Research:** Detailed provisions as to research carried out on any adult who is incapable in relation to a decision about participation in the research can be found in section 51 of the 2000 Act.

VI. Adult support and protection

69. The Adult Support & Protection (Scotland) Act 2007 ("the 2007 Act") sought to make provision for the purposes of protecting adults from harm, but also amended a number of different statutes in relation to social welfare, including the 2000 Act. The 2007 Act places duties on local authorities in respect of adults at risk of harm, and gives them

[203] Ibid., section 48
[204] Ibid., section 50(2) & (3)
[205] Ibid., section 50(5)
[206] Ibid., section 50(3). (5) & (6)
[207] Ibid., section 50(7)
[208] Ibid., ection 50(8)

various powers. In relation to adults with incapacity, the 2007 Act provides for certain additional protective orders.

Definitions

70. "Adults at risk" are persons over the age of 16 years,[209] who:

    a) are unable to safeguard their own well-being, property, rights or other interests;

    b) are at risk of harm; and

    c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.[210]

71. An adult is at risk of harm for the purposes of subsection (1) if:

    a) another person's conduct is causing (or is likely to cause) the adult to be harmed, or

    b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm.[211]

72. "Harm" includes all harmful conduct and, in particular, includes:

    a) conduct which causes physical harm;

    b) conduct which causes psychological harm (for example: by causing fear, alarm or distress);

    c) unlawful conduct which appropriates or adversely affects property, rights or interests (for example: theft, fraud, embezzlement or extortion);

    d) conduct which causes self-harm.[212]

73. The 2007 Act refers to a "council", rather than a "local authority", with the definition as found in section 2 of the Local Government etc. (Scotland) Act 1994. References are to the council for the area "which the person is for the time being in."[213]

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[209] Adult Support and Protection (Scotland) Act 2007, section 53(1)
[210] Ibid., section 3(1)
[211] Ibid., section 3(2)
[212] Ibid., section 53(1)
[213] Adult Support and Protection (Scotland) Act 2007, section 53(1)

General principles

74. An intervention may only be made in an adult's affairs if the person intervening, or authorising an intervention, is satisfied that the intervention:

    a) will provide benefit to the adult which could not reasonably be provided without intervening in the adult's affairs, and

    b) is, of the range of options likely to fulfil the object of the intervention, the least restrictive to the adult's freedom.[214]

75. A public body, or office holder, performing a function under the 2007 Act must have regard to the first two principles, above, as well as:

    a) the adult's ascertainable wishes and feelings (past and present);

    b) any views of—
        i. the adult's nearest relative;
        ii. any primary carer, guardian or attorney of the adult; and
        iii. any other person who has an interest in the adult's well-being or property,

    which are known to the public body or office-holder;

    c) the importance of—
        i. the adult participating as fully as possible in the performance of the function; and
        ii. providing the adult with such information and support as is necessary to enable the adult to so participate;

    d) the importance of ensuring that the adult is not, without justification, treated less favourably than the way in which any other adult (not being an adult at risk) might be treated in a comparable situation; and

    e) the adult's abilities, background and characteristics (including the adult's age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage).[215]

Duties and powers of councils

[214] Ibid, section 1
[215] Ibid., section 2

76. The council has a duty to make inquiries about a person's well-being, property or financial affairs, if it knows or believes that the person is an adult at risk, and that it might need to intervene to protect the person.[216] In pursuit of that duty, the council has the authority to visit any place with the purpose of investigating whether it needs to do anything in order to protect an 'adult at risk of harm.'[217]

77. A council officer may interview, in private, any adult found in that place and may arrange medical examination of that adult. The adult must be told that they are not required to answer any questions at interview and that they may refuse medical examination.[218]

78. The council officer may also require any person holding health, financial or other records relating to an individual, known or believed to be an adult at risk, to give the records or copies of those records to the officer.[219] Health records can be examined to establish that they are health records, but cannot be inspected by a person who is not a health professional.[220]

79. If, after having carried out inquiries, the council determines that it requires to take action in relation to an adult at risk, there are a number of orders for which it can apply. Applications are to the sheriff.

Assessment order

80. This order allows removal of a person for the purposes of interview or medical examination, to allow the council to decide whether the person is an adult at risk and whether it requires to do anything in order to protect that person from harm.[221] An assessment order is valid for a period of seven days[222] and may be granted only if the sheriff is satisfied that the council has reasonable cause to suspect that the person in respect of whom the order is sought is an adult at risk who is being, or is likely to be seriously harmed, that the order is required to establish whether that is the case, and that there is a suitable place available for the person to be interviewed and examined.[223] An assessment order can only be granted if it is not practicable to interview a person or conduct a medical examination of the person in the place where the person is visited.[224]

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[216] Adult Support and Protection (Scotland) Act 2007, section 4
[217] Ibid., section 7
[218] Ibid., sections 8 & 9
[219] Ibid., section 10
[220] Ibid., section 10(5)
[221] Ibid., section 11
[222] Ibid., section 11(3)
[223] Ibid., section 12
[224] Adult Support and Protection (Scotland) Act 2007, section 13

Removal Order

81. A council may apply to the sheriff for an order which authorises the removal of an adult at risk, who is likely to be seriously harmed if not moved to another place, in circumstances where a suitable place is available to which to move the adult.[225] A removal order expires seven days after the adult is moved.[226] A sheriff may vary or recall a removal order if circumstances change during the seven-day period, on the application of the adult, the council or any person who has an interest in the adult's wellbeing or property.[227] The council has a responsibility to prevent any loss or damage of any property owned or controlled by a person who is removed from premises.[228] The council may remove those items also, but cannot recover from a person who has been removed, any expenses which it incurs in doing so.[229] It must return the property to the adult as soon as possible after the removal order ceases to have effect.[230] A sheriff who grants a removal order must also grant a warrant for entry to the premises.[231] An urgent warrant may be granted by a justice of the peace, where it is not practicable to apply to the sheriff, and the adult at risk is likely to be harmed, if there is delay in granting the warrant.[232]

Banning Orders

82. A banning order is an order granted by the sheriff, which bans the subject of the order from being in a specified place[233]. An application for a banning order can be made by an adult, by any other person who is entitled to occupy the place concerned, or by the Council, in circumstances where no-one else is likely to apply[234]. The sheriff must be satisfied that:

    a) that an adult at risk is being, or is likely to be, seriously harmed by another person,

    b) that the adult at risk's well-being or property would be better safeguarded by banning that other person from a place occupied by the adult than it would be by moving the adult from that place, and

    c) that either—
        i. the adult at risk is entitled, or permitted by a third party, or

[225] Ibid, sections 14 & 15
[226] Ibid., section 14(3)
[227] Ibid., section 17
[228] Ibid., section 18
[229] Ibid., section 18(5)
[230] Ibid., section 18(7)
[231] Ibid., section 39
[232] Ibid., section 40
[233] Ibid., section 19(1)
[234] Ibid., section 22

ii. neither the adult at risk nor the subject is entitled, or permitted by a third party,

to occupy the place from which the subject is to be banned.[235]

83. A banning order may also ban the subject of the banning order from being in the vicinity of the property, authorise the summary ejection of the subject from the property, prohibit the subject from moving any specified item from the property and apply such conditions as may be necessary.[236] A banning order will expire six months after the date on which it is granted, if no other date is specified in the order and the order is not recalled.[237] The sheriff can grant a temporary banning order, pending the determination of an application for a banning order.[238] The banning order may be varied, or recalled, on the application of the applicant, the subject of the order, the adult or any other person who has an interest in the adult's wellbeing or property.[239] A power of arrest may be attached to a banning order.[240]

Consent of adult at risk

84. The sheriff must not make an assessment order, a removal order, a banning order or a temporary banning order ("protection orders" for the purposes of section 35 of the 2007 Act[241]) if the sheriff knows that the adult at risk has refused to consent to the granting of the order.[242] Equally, a person authorised to take action for the purposes of carrying out or enforcing a protection order must not do so, if they know that the adult at risk has refused consent.[243]

85. The sheriff, or the authorised person, may ignore a refusal to consent if they reasonably believe that the adult at risk has been unduly pressured to refuse consent and that there are no steps which could reasonably be taken with the adult's consent which would protect the adult from the harm which the order or action is intended to prevent.[244]

86. An adult at risk may be considered to have been unduly pressured to refuse to consent to the granting of an order or the taking of an action if it appears that harm which the order or action is intended to prevent is being, or is likely to be, inflicted by a person in

[235] Adult Support and Protection (Scotland) Act 2007, section 20
[236] Ibid., section 19(2)
[237] Ibid., section 19(5)
[238] Ibid., section 21
[239] Ibid., section 24
[240] Ibid., section 25
[241] Ibid., section 35(7)
[242] Ibid., section 35(1)
[243] Ibid., section 35(2)
[244] Adult Support and Protection (Scotland) Act 2007, section 35(3)

whom the adult at risk has confidence and trust, and that the adult at risk would consent if the adult did not have confidence and trust in that person.[245]

[245] Ibid., section 35(4)

CHAPTER 3.

Adult Capacity Law and Procedure in Northern Ireland

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Contents

I. Introduction

1. Northern Ireland is part of the United Kingdom but has a distinct legal system. Pursuant to the Northern Ireland Act 1998, the Northern Ireland Assembly legislates for Northern Ireland in relation to transferred matters, which include justice, finance and health. Historically there was distinct legislation for Northern Ireland in the field of mental capacity and mental health, both in the Stormont era and subsequently, e.g., the Mental Health Act (NI) 1961 and The Mental Health (NI) Order 1986. In May 2016 the Northern Ireland Assembly enacted the Mental Capacity Act (NI) 2016 [2016 Act]. The intention was to fuse mental capacity and mental health law for those aged 16 years and over into one comprehensive piece of legislation. The 2016 Act makes provision for a Court that closely resembles the Court of Protection England and Wales, with broad jurisdiction encompassing 'property and affairs' and 'care, treatment and personal welfare'. Part of the 2016 Act was brought into force in December 2019, most notably the provisions permitting deprivation of liberty authorisation. Implementation of the rest of the Act does not appear imminent. Consequently, this chapter considers the current legal framework relating to adults who lack capacity which is found in both statute (primarily The Mental Health (NI) Order 1986) and common law.

II. Property and affairs

2. The property and affairs of an adult incapable by reason of a mental disorder, of managing their affairs, is the subject of legal protection. The present legal framework is governed by two key pieces of legislation:

    a) The Mental Health (Northern Ireland) Order 1986 [1986 Order]

    b) The Enduring Powers of Attorney (Northern Ireland) Order 1987 [1987 Order]

The Mental Health (Northern Ireland) Order 1986 – Part VIII

3. The High Court can exercise powers and functions under Article 97(1) of the 1986 Order where, on the basis of medical evidence, it is satisfied that a person is incapable by reason of 'mental disorder' of managing and administering his/her property and affairs. 'Mental Disorder' is defined in Article 3(1) to mean 'mental illness, mental handicap and any other disorder or disability of mind. The person is referred to as 'a patient' and is, by operation, aged 18 years and over. Under Article 97(2), where there is a need for immediate action, and there is a reason to believe that a person may be incapable, the

Court can exercise its functions whilst it awaits the medical evidence. The High Court Master (Care and Protection) makes first instance decisions in respect of Part VIII of the 1986 Order and 1987 Order.

4. With respect to the property and affairs of a patient the general powers of the court are set out in Article 98 of the 1986 Order. The court may do or secure the doing of all such things as appear necessary or expedient:

   a) for the maintenance or other benefit of the patient;

   b) for the maintenance or other benefit of members of the patient's family;

   c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered; or

   d) otherwise for administering the patient's affairs.

5. Article 98(2) states that in exercising these powers, the primary consideration is the requirements of the patient. The court will also take into account the interests of creditors and the patient's obligations (Article 98(2 to 4)).

6. The Court can make orders and give directions and authorities (Article 99). These include the control and management of any property of the patient; the execution for the patient of a will making any provision (whether by way of disposing of property or exercising a power or otherwise) which could be made by a will executed by the patient if he were not mentally disordered; and, the conduct of legal proceedings in the name of the patient or on his behalf. Further powers are contained in subsequent provisions.

7. Article 99 empowers the court, where there is a settlement of property of a patient, to make consequential vesting or other orders as the case may require including any order under the Trustee Act (Northern Ireland) 1958. An example is *Re Petition of Trustees of First Armagh Presbyterian Church* [2022] NICh 4 where McBride J exercised the inherent jurisdiction to permit trustees to remove a trustee who was incapable by reason of mental disorder. The court declared that the patient could not delegate his duties as a trustee to an enduring power of attorney.

8. Article 99(3) gives the court the power to vary a settlement of property of a patient where a material non-disclosure was made or where there has been a substantial change in circumstances. The court can vary and give consequential directions as it thinks fit.

9. Article 99 (1)(e) and 99(4) give the court the power to authorise the execution of a will for a patient if the court has reason to believe the patient is incapable of making a valid will. Just because a person has a mental disorder rendering them incapable of managing their property does not necessarily mean that the person is incapable of making a will, as illustrated in *Sammon v Doherty* [1997] NIJB 119 (Higgins J).

10. Article 100 makes supplementary provisions about wills made under Article 99. The court may give an order, direction or authority to an authorised person to execute a will for a patient and if so, the will must be signed by the authorised person with the name of the patient and their own name and in the presence of two or more witnesses at the same time. It must be attested and subscribed by those witnesses in the presence of the authorised person and then sealed with the seal of the Office of Care and Protection. Article 100 provides that such a will is only valid in so far as it disposes of any immovable property in Northern Ireland.

11. Article 101 of the Order authorises the court to appoint a controller for a patient. Such a person shall do all such things in relation to the property and affairs of the patient as the court orders, directs or authorises. The controller can be discharged by order of the court if the patient recovers capacity to manage his property and affairs, or automatically upon death of the patient. At times, in disputes about property or financial affairs of a patient, the court can appoint a controller ad interim to conduct an investigation into the financial issues and provide an independent report to the court to assist in the court's decisions about what is in the patients' best interests. In *BC v McGilloway, Carmel & Ors: Unreported* [2022] NI FAM 29 the court dismissed an appeal of an Order made by the Master (Care and Protection) relating to a daughter of a patient who contested the appointment of a controller who sought to recoup benefits paid to the patient which the daughter had retained.

12. A controller deals with the day-to-day management of the patient's financial affairs. A controller has no power over the person, rather the role is specific to managing property and affairs. He or she can be a relative, a friend, or a professional adviser. If there is no one else suitable or willing to act, the Official Solicitor can be invited to act as controller of last resort. If the court is satisfied that there is a need for a controller to be appointed and has received medical evidence confirming the patient's incapacity it will make an order appointing a controller. The Controller Order gives details of the specific powers conferred on the controller. Additional orders or authorities may be issued by the court to vary or extend the controller's powers.

13. The controller is required to keep records and only act in accordance with the Order appointing them. If additional authority is required the controller must apply to the Office of Care and Protection setting out the information and issue and await direction

or authority from the court. This process is usually by correspondence unless a formal Form 3 Application and Grounding Affidavit is directed by the Master. There is a Controller Handbook on the NI Direct Website which is a useful guide for those undertaking the role.[246]

14. Article 102 provides that the court can make Orders, directions, and authorities regarding transfers of stock, which is defined in Article 102(2), held by a patient. This power can be exercised even if the stock is outside the jurisdiction of Northern Ireland, but the court must consider the nature of the appointment, the circumstances of the case and whether it is expedient that the court should exercise its powers. The court has the power to transfer the dividends or accrued dividends to another person or give directions about how those funds should be used.

15. Article 103 ensures that the personal or real property of a patient is still preserved for those entitled to receive the benefit of it which the patient intended, either by will or intestacy or gift. Where the court's order, direction or authorisation has been exercised for the best interests of the patient so that property takes a different form upon death, this Article makes clear that the preserved interest in the property remains.

16. Article 104 of the Order creates panels of The Lady Chief Justice's Visitors for Patients. Three panels were intended, but in fact only one panel exists, namely General Visitors. Panel Members are appointed by the Lady Chief Justice for such term and on such conditions as the Chief Justice may determine. Article 105(1) provides that patients shall be visited by the Lady Chief Justice's Visitors in such circumstances and in such manner as may be prescribed by directions of the Master (Care and Protection) with the concurrence of the Lady Chief Justice.

17. Article 107 of the Order places a duty on a Health and Social Care Trust to notify the Office of Care and Protection about any person in its area, or any person in hospital who it believes is incapable of managing his/her property and affairs by reason of a mental disorder. It also places a duty on a nursing home, residential care home, private hospital and the Regulation and Quality Improvement Authority to notify the Office in the same circumstances. The person (or body) making the notification is obliged (where practical) to inform the 'nearest relative' (see definition in Article 32) of the person. Upon receipt of notification the Office of Care and Protection shall, after making such inquiries as it thinks fit, arrange (if it thinks fit) for the institution of proceedings before the court under Part VIII of the 1986 Order, i.e., apply to the Master (Care and Protection) for a controller or controller ad interim to be appointed and for judicial directions.

[246] Available at https://www.justice-ni.gov.uk/publications/handbook-controllers

Mutual recognition of orders

18. This will be achieved when Section 283/Schedule 9 paragraph 5(f) of the 2016 Act is in force. Pending implementation the controller (or deputy or guardian) may have to make an application to the other jurisdiction for a specific order (expedited by good practice working group arrangements between jurisdictions) or by endorsement of an apostille on the court order by the UK Foreign, Commonwealth and Development Officer.

The Enduring Powers of Attorney (Northern Ireland) Order 1987

19. A power of attorney ends when the donor loses their mental capacity. The purpose of an enduring power is to withstand incapacitation. An Enduring Power of Attorney is not registered when created; rather it is registered when the Attorney believes the Donor is or is becoming mentally incapable of managing his property and affairs. The registration process commences by way of notification as set out in Schedule 1 to the 1987 Order. Medical Evidence is not required to substantiate the application for registration but may be directed if there is an objection relating to capacity. Determination of the application for registration is a matter for the court pursuant to Article 8 of the Order. Once an Enduring Power of Attorney is registered, a donee can continue to exercise the power.

20. Registration may be refused where a patient has a controller under Part VIII of the Mental Health Order. This is particularly relevant when a patient has been awarded personal injury compensation; in this jurisdiction the Judge will normally direct personal injury awards for incapacitated adults to be lodged into court under Part VIII of The Mental Health (NI) Order 1986 and invested by the Accountant General for Northern Ireland. Under Article 7 the court can exercise powers for a person who may be or may be becoming mentally incapable, but where the power of attorney has not yet been registered. The authority of the attorney is defined in the instrument creating the power. The power can be broad in scope or more narrowly restricted (See Article 5).

III. Health and Social Care

21. Historically in Northern Ireland, health and social care decision making in respect of adults without decision making capacity largely operated in an informal manner. Broadly speaking, decisions were made by family and professionals on a person's behalf on the basis of what was considered to be necessary and in their best interests. Occasionally, in respect of health decisions of some magnitude, where there was for example uncertainty or disagreement about a decision, the Inherent or Declaratory Jurisdiction of the High Court is utilised. Currently only part of the 2016 Act has been

implemented; provisions within Parts 1 to 3 are in force to facilitate the operation of the deprivation of liberty provisions.[247] Those provisions were brought into force in December 2019 along with the Mental Capacity (Deprivation of Liberty) (No 2) Regulations (Northern Ireland) 2019. The Departments of Health, Justice and Finance have not yet fixed a date for the commencement of the remainder of the provisions.

The Mental Capacity Act (NI) 2016

22. The Mental Capacity Act (NI) 2016 [2016 Act] was enacted in May 2016. The legislation is based on a number of key principles:

    a) a person is presumed to have capacity to make a decision about specific matter unless it is established that the person lacks capacity;

    b) the autonomy of the person concerned is to be actively promoted with practical measures being taken to ensure that, so far as may be reasonably practicable, the person concerned is enabled to make decisions on their own behalf;

    c) Capacity is determined according to a statutory test:

> "*a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain.*"[248]

    d) where it is established that a person is unable to make a decision about a specific matter because they lack capacity, decision-making should be based on the person's best interests.

23. Section 9 is a pivotal provision in the new statutory framework. It provides protection from liability where a person does an act in connection with the care, treatment or personal welfare of an adult (a person of 16 years of age or over) without relevant capacity and is based on the concept of reasonableness. A person may be protected from liability if:

    a) They take reasonable steps to establish if the person has capacity;

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[248] The Mental Capacity (2016 Act) (Commencement No.1)(Amendment) Order Northern Ireland 2019 [2019 No.190 (C.6)].

b) When doing the act they reasonably believe the person lacks capacity; and,

c) They reasonably believe the act is in the person's best interests.

24. Section 9(3 to 4) provides additional safeguard provisions in respect of certain more significant or invasive interventions including deprivation of liberty and medical treatment. For example, except in an emergency, an act amounting to a deprivation of liberty can only be authorised if three additional safeguards are met:

a) A formal assessment of capacity is undertaken by a suitably qualified person, e.g., a medical practitioner or a social worker; (see MCA sections 13-14);

b) There is consultation with the nominated person (MCA section 15);

c) An authorisation is obtained (sections 24-27 and Schedules 1 and 2).

The Inherent Jurisdiction

25. As the 2016 Act is only partially implemented, the inherent jurisdiction of the court remains central to the legal framework. In relation to decisions of significance and import (e.g. irreversible life changing medical treatment) a court may be asked to 'Declare' that a proposed intervention (act or omission) is lawful. This involves the exercise of the Inherent Jurisdiction of the High Court, often known as the declaratory jurisdiction.

26. In *Belfast Health and Social Care Trust v PTY & Anor*[249] McBride J summarised applicable legal principles in respect of the use of the inherent jurisdiction for vulnerable adults:

> *"[25] The following principles can therefore be distilled from the existing jurisprudence relating to the High Court's inherent jurisdiction:*
>
> *(a) The inherent jurisdiction can be invoked in respect of adults who lack capacity. As noted in Re SA [2005] EWHC 2902 it can also be invoked in respect of vulnerable adults who do not lack capacity.*

[249] *Belfast Health and Social Care Trust v PTY & Anor* [2017] NIFam 1.

(b) *The jurisdiction can only be exercised where 'gaps' exist in the legislation. If the matter is covered by legislation then the inherent jurisdiction cannot be invoked. In England and Wales the Mental Capacity Act 2005 now regulates the jurisdiction over persons who lack mental capacity. Similar legislation has not yet been implemented in Northern Ireland. Therefore the inherent jurisdiction of the court continues to be exercised in relation to welfare decisions, in respect of incapacitated adults.*

(c) *The test governing the operation of the inherent jurisdiction is `best interests'.*

(d) *The inherent jurisdiction must be exercised in accordance with law and in particular must be compatible with the Human Rights Act and the European Convention on Human Rights ("ECHR")."*[250]

27. The declaratory jurisdiction is exercised in the Family Division of the High Court. The Office of Care and Protection administers the cases brought before the Court. In NS (Inherent jurisdiction: patient: liberty: medical treatment) [2016] NIFam 9 Keegan J stated that a two-fold test was applicable in declaratory cases, namely: (a) whether or not NS has the capacity to provide a legally valid consent to the proposed care and treatment; and, (b) that the proposed care and treatment is necessary and in her best interests. Where appropriate the court exercises its Jurisdiction to declare that a proposed act or omission is lawful.[251]

28. Most day-to-day interventions do not require a declaratory order. Usually proposed care and treatment can be provided in accordance with the common law principle of necessity where: (a) the person has been assessed as uncapacious as regards the intervention in question; and, (b) there is clarity and consensus that the proposed care and treatment is necessary and in their best interests. Unless the proposed intervention is of a sufficiently significant or serious nature, any disagreement amongst family and carers should be

[250] *Belfast Health And Social Care Trust v PTY & Anor* [2017] NIFam 1 paragraph 25.

[251] See section 23 of the Judicature Act (NI) 1978. The court can also provide injunctive relief where appropriate. See *Re L (Vulnerable Adults with Capacity: Courts Jurisdiction)* [2011] Fam 189 and *A Local Authority v DL* [2012] 3 WLR 1439.

resolvable without recourse to a court, possibly involving consultation with a social worker or the general practitioner.[252]

29. An application for a declaratory order is only warranted in a relatively small number of cases. It will be advisable to bring an application where the intervention is of a serious nature and there is a lack of consensus about the proposed course amongst persons with a valid interest in the decision, e.g., in the medical realm, an irreversible life changing operation, such as amputation of a leg, or the withdrawal of life support. In deciding whether to bring an application, consideration should be given not only to whether a declaratory order should be sought as a matter of good practice, but also whether a declaratory order is legally required. When considering whether an order is required, the Human Rights Act 1998 becomes a central focus. To ensure compliance with the Human Rights Act 1998 and the European Convention on Human Rights, the declaratory jurisdiction can sometimes perform additional functions beyond 'declaring' the law, for example by 'authorising' care and/or treatment and/or supplementing the legal framework.

30. In cases where there is no dispute about the need for the proposed care or treatment, the declaratory jurisdiction performs other important functions in relation to acts and omissions which have a significant impact upon the health and/or welfare of an individual (e.g., amputation of a limb or removal of life support). A court order protects the patient from an intervention which is not in their best interests. And an order protects the public authority and professionals involved in the care and treatment from subsequent adverse criticism or claims.[253] A simple rule of thumb operates: the more significant the intervention the greater the case for seeking a declaratory order.

31. Declaratory applications are usually, though not exclusively, brought by the Health and Social Care Trust responsible for the patient's care and treatment.[254] Practitioners will most frequently encounter such cases where a health and/or social care intervention is proposed in respect of a client or the relative of a client. The procedure for declaratory applications was set down by the House of Lords in <u>*Re F*</u> by Lord Brandon:

> *"(1) Applications for a declaration that a proposed operation on or medical treatment of a patient can lawfully be carried out*

[252] Simon Halliday, Adam Formby and Richard Cookson 'An assessment of the Court's role in the withdrawal of clinically assisted nutrition and hydration from patients in the permanent vegetative state' [2015] Medical Law Review 556-587.

[254] An application could be brought by a patient, on behalf of a patient or by another interested party, e.g., a relative. Legal aid may be available, e.g., for a patient or where a family member is acting as the patient's Next Friend in the litigation.

despite the inability of such patient to consent thereto should be by way of originating summons issuing out of the Family Division of the High Court.

(2) The applicant should normally be those responsible for the care of the patient or those intending to carry out the proposed operation or other treatment, if it is declared to be lawful.

(3) The patient must always be a party and should normally be a respondent. In cases in which the patient is a respondent the patient's guardian ad litem should normally be the Official Solicitor. In any cases in which the Official Solicitor is not either the next friend or the guardian ad litem of the patient or an applicant he shall be a respondent.

(4) With a view to protecting the patient's privacy, but subject always to the judge's discretion, the hearing will be in chambers, but the decision and the reasons for that decision will be given in open court."[255]

32. Current practice in the Family Division (Office of Care and Protection) in Northern Ireland still broadly accords with the procedure established in Re F. It is a flexible procedure which can be adapted to suit the circumstances of the case. The Plaintiff is normally a Health and Social Care Trust. Proceedings are commenced by issuing a summons in the Office of Care and Protection. The patient is the defendant who is either represented by the Official Solicitor in its capacity as Guardian ad Litem or by a Next Friend (usually a family member).[256] Other parties with an interest in the proceedings (e.g., family members, close friends or relevant public authorities) can be named as Notice Parties and the court can grant them permission to participate in the proceedings by giving evidence and making submissions. The summons is supported by affidavit evidence and a draft order is attached to assist the court. The application is premised on reports provided by relevant professionals, e.g., psychiatrists, anaesthetists, surgeons, psychologists and social workers. The relief sought is usually declaratory in nature, but the court can where appropriate also issue injunctive relief.[257]

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[255] *Re F (Mental Patient: Sterilisation)* [1989] 2 AER 545, page 558.

[256] The Official Solicitor may be asked to participate in the proceedings even if not acting on behalf of the patient.

[257] *Re S (Hospital Patient: Courts Jurisdiction)* [1996] Fam 1. See also *Re L (Vulnerable Adults with Capacity: Courts Jurisdiction)* [2011] Fam 189 and *A Local Authority v DL* [2012] 3 WLR 1439. In Northern Ireland in September 2020 in a case brought by the Belfast Health and Social Care Trust, injunctive relief was

33. When appointed, the Official Solicitor files a report addressing the relevant legal and factual issues. The Official Solicitor, or one of her team of solicitors, will attempt to make contact with relevant persons including the patient, close relatives and, where appropriate, friends. A central focus is the patient's perspective and what they would want in the circumstances. The report makes recommendations to the court in relation to the relevant issues including whether the proposed relief is in the patient's best interests.

34. A hearing is arranged as soon as is convenient. In cases of urgency hearings can be arranged at very short notice, e.g., an urgent lifesaving operation. The length of the proceedings will depend upon the complexity of the issues and the extent and degree of dispute between the parties. Witnesses are questioned: examined, cross-examined and re-examined. Submissions are made by the parties. Notice parties can be afforded the opportunity to give evidence, make submissions or otherwise make their views known to the court. The court may give a judgment at the end of the hearing or may reserve judgment to be delivered at a later date. Where the parties are presenting reasonable arguments on valid issues, the civil law principle that the loser pays the winner's costs is not the default principle and will rarely be apposite. Consequently costs are not ordinarily awarded in declaratory cases meaning each side bears their own costs.[258]

35. In *NS (Inherent jurisdiction: patient: liberty: medical treatment)*, relying on the case of *Re MB (Medical Treatment)* [1997] 2 FLR 426, drawing from the England and Wales common law, Keegan J stated the test for capacity in the following terms:

> "*A court should approach the crucial question of competence bearing in mind the following principles - every person is presumed competent to consent to, or to refuse, medical treatment unless and until that presumption is rebutted…… A person lacks capacity if some impairment or disturbance of mental function rendered the person unable to make a decision whether to consent to, or refuse treatment, such an incapacity existed where: a person was unable to comprehend or retain information material to the decision and was unable to use the information and weigh it in the balance as part of the process of making the decision required*."[259]

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granted by the court under the inherent jurisdiction to prevent a relative visiting a patient where the relative had previously harmed the patient. The decision is not reported.

[258] *KW Re (Costs following withdrawal of proceedings)* [2020] NIFam 11 (21 July 2020).

[259] This is a paraphrasing of Lord Justice Butler Sloss's language. At [1997] 2 FLR 426 at 437 she stated: "*(4) A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or to refuse treatment. That inability to make a decision will occur when (a) the patient is unable to comprehend and retain the information which is material to the decision,*

36. In 2019 the 2016 Act was partially brought into force. The new statutory test for capacity, which applies in deprivation of liberty cases, is set out at sections 3-4. Notwithstanding the partial implementation of the 2016 Act, in declaratory cases practitioners and the courts should take cognisance of the statutory test contained in sections 3 and 4.

37. Capacity is issue specific. There is a presumption of capacity in relation to the patient's decision-making capacity about any and all relevant issues. Where there is any doubt about capacity in respect of a particular issue, that is determined on the basis of medical evidence. If capacity is not in dispute, and the court is satisfied that the patient lacks capacity in relation to the specific issue or issues in question, the court will move to consider the proposed care and/or treatment.

38. Where the patient lacks capacity in relation to a relevant issue, the focus moves onto the lawfulness of the proposed care and/or treatment i.e. whether it is necessary and in their best interests. In determining the best interests of a patient, the court must take into account the evidence adduced, and submissions made, i.e. all relevant considerations brought to its attention. In most cases the Trust will be the plaintiff and will adduce evidence and make submissions in support of the proposed option e.g. relevant care and treatment. The Official Solicitor will have provided a report identifying the patient's wishes and perspective, as can best be identified from available sources. The Official Solicitor will express a view on the relief sought and the patient's best interests. Other parties (defendants or notice parties) may lead evidence and/or make submissions in support of either the plaintiff's proposal or alternative options.

39. Since the enactment of the Mental Capacity Act 2005 the courts in England and Wales have developed their jurisprudence on best interests determinations, based on section 4 of the 2005 Act.[260] Commonly stated principles drawn from the England and Wales authorities that accord with current practice in Northern Ireland include the following:

    a) The object of the exercise is to identify the best option for the person concerned. The matter must be decided by the application of an objective approach which involves determining what is the best interests of the patient.

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especially as to the likely consequences of having or not having the treatment in question; (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision."

[260] See for example, *Wyatt v Portsmouth NHS Trust* [2006] 1 FLR 554; *NHS Trust v MB (a child represented by CAFCASS as guardian ad litem)* [2006] 2 FLR 319; *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67; *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2018] 4 WLR 5; *London NHS Foundation Trust v E* [2019] 166 BMLR 185; *Knight (A Child) Re* [2021] EWCA Civ 362. *Fixsler v v Manchester University NHS Foundation Trust* [2021] 4 WLR 5; *London North West University Healthcare NHS Trust v M* [2022] EWCOP 13.

b) Best interests are used in the widest sense and include every kind of consideration capable of impacting on the decision. These include, non-exhaustively, medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations. It is impossible to weigh such considerations mathematically, but the court must do the best it can to balance all the conflicting considerations in a particular case and see where the final balance of the best interests lies.

c) All cases are fact specific depending entirely on the facts of the individual case.

d) The views and opinions of the professional experts who give evidence will be carefully considered. This includes the associated risks and likely outcome of any given option.

e) The court will attempt to ascertain what the patient would have wanted, taking into account: (a) past and present wishes and feelings; and, (b) beliefs and values that would likely influence their decision.

f) The expressed views and opinions of relevant persons, e.g. family members, who have participated in the litigation (including those contained in the Official Solicitor's report) will be taken into account.

g) Relevant human rights considerations will be taken into account, e.g., ECHR article 8 (private and family life).

h) A comprehensive or global approach is required to ensure all relevant considerations are taken into account when arriving at the decision.

i) The court considers all available options brought to its attention. Additionally, the court may enquire into other available options that might be available and worth considering.

j) A balance sheet identifying the considerations that militate for and against each option may be of assistance.

IV. The Official Solicitor for Northern Ireland

40. Currently the Office of the Official Solicitor (OS) for Northern Ireland performs a very important function in relation to adults without capacity. The OS is able to act in proceedings at County Court level and above on behalf of minors (those aged under 18) and persons 'under a disability' – those who suffer from a 'mental disorder' which results in a lack of capacity to provide instructions. In these scenarios, the Official Solicitor may be invited to act by a court to ensure effective representation for those who lack capacity.

41. As is clear from the above, the Official Solicitor's role is a broad one. Cases vary from family proceedings to civil, chancery and medical declaratory cases. The Official Solicitor represents the legal best interests of both adults 'under a disability' and minors, sometimes with different solicitors from the Official Solicitor's Office acting for different parties in the same case, for example, where both parties are either minors, or lack capacity. The Official Solicitor can act as 'Next Friend' or 'Guardian ad Litem' in proceedings.

42. The primary statutory provision in relation to the office of Official Solicitor is section 75 of the Judicature (Northern Ireland) Act 1978 ("the Judicature Act"). Section 75(1) of the Judicature Act permits the Department of Justice, having consulted the Lord Chief Justice, to appoint an Official Solicitor.

43. The appointment of the Official Solicitor as Next Friend (NF) or Guardian ad Litem (GAL) in civil proceedings is governed by: (i) The Rules of the Court of Judicature (Northern Ireland) 1980, Order 80; (ii) The County Court Rules (Northern Ireland)1981, Order 3, Part II. For "family proceedings" the role of the Official Solicitor is set out in the Family Proceedings Rules (Northern Ireland) 1996 ("FPR 1996"), Part VI.

44. Given the above provisions the Official Solicitor is therefore able to act in cases at County Court level and above. The Official Solicitor has no statutory or legal authority to act in any Tribunals or at Magistrates' Court tier. The Official Solicitor is also unable to act in any criminal cases. By way of comparison, the role of the Official Solicitor in England and Wales is narrower in practice than in Northern Ireland. In England and Wales, the Official Solicitor will only act where his/her costs are secured, and he/she does not undertake work representing children, which is handled by the Children and Family Court Advisory and Support System (CAFCASS).

45. The Official Solicitor's Office (OSO) has a close working relationship with the Office of Care and Protection (OCP). OCP is however a distinct and separate Office within the Family Division of the High Court. The Official Solicitor is regularly involved in acting for 'patients' who lack capacity involved in proceedings before the Master (Care and Protection). On occasions, the Official Solicitor is appointed to act in a Controller ad

Interim role. Such an appointment would arise when a specific issue has arisen around the proper management of the property and affairs of a Person under Disability or those of a Minor. It is the role of the Official Solicitor as Controller ad Interim to independently ensure the safeguarding and protection of the legal interests of any such vulnerable person, particularly in circumstances where a possible conflict has arisen.

46. The Official Solicitor is on occasions appointed by Direction/Order of the court to undertake such investigations and enquiries as are necessary to ensure that the affairs of a person under disability or vulnerable young person are being properly protected. Enquiries can be historic in nature. The Official Solicitor will report her findings to the court, usually in writing. In addition, the Official Solicitor acts, at the request of OCP, as financial controller for a limited number of individuals. The appointment of the Official Solicitor as Full Controller tends to occur only in circumstances where no other willing/suitable person is available to act. The OCP has an oversight role in relation to all controller cases. Controllers, including the Official Solicitor, are appointed under Article 101 of the Mental Health (Northern Ireland) Order 1986.

47. In law there is a presumption of capacity. For the Official Solicitor to act on behalf of a person, their lack of decision-making capacity in relation to the issue or issues in question must be established. The Official Solicitor may also act in proceedings where the person concerned is deemed to have relevant decision-making capacity but lacks the capacity to provide instruction in the proceedings. To establish on the balance of probabilities that the person concerned lacks capacity, the Official Solicitor may obtain a report from a relevant expert, e.g., a psychiatrist specialising in the psychiatry of old age. A report must address the applicable legal criteria. For example, in respect of cases under Part VIII of the Mental Health (Northern Ireland) Order 1986), the report must indicate that the person is suffering from a 'mental disorder' as defined within the 1986 Order and that, because of that mental disorder, they lack the relevant decision-making capacity.

48. Cases come to the Official Solicitor by way of invitation from a court, usually by way of a referral from the Office of Care and Protection or by court order. Early notice from the solicitors in the case is always welcome, as it can take some time for the Official Solicitor's Office to receive the Order and, until that time, the Official Solicitor's Office may be unaware that an invitation has issued. A copy of the relevant papers and, most importantly, any capacity assessment, is required to enable the Official Solicitor to accept and allocate a case to one of the lawyers in Official Solicitor's Office. Once notification of an invitation and relevant papers have been received, the Official Solicitor will consider the case to assess whether it is one in which it is appropriate for the Official Solicitor to assist. As the Office is publicly funded it is important that the scarce resources are used

appropriately and to best effect. The Office is one of last resort and where there is another person who can act other than the Official Solicitor, then they should do so.

49. The Official Solicitor can act in proceedings when invited to do so by the court. This can span the full range of civil legal proceedings in the higher courts. The court can invite the Official Solicitor to act on behalf of someone lacking capacity in cases as diverse as Chancery, personal injury, judicial review, non-molestation order applications and declaratory cases. The Official Solicitor is also appointed to act as GAL or NF in Divorce and Ancillary Relief proceedings before the court. In all these roles the Official Solicitor is charged with representing the vulnerable person's best legal interests, effectively standing in his or her shoes and taking decisions on his or her behalf, with the approval of the court.

50. "Declaratory" cases may arise where invasive medical treatment is deemed by medical professionals to be in the best interests of a patient who lacks capacity. In these circumstances, the Health Trust will seek relief from the High Court, under its inherent jurisdiction, to confirm the proposed treatment is in the patient's best interests. In these cases, the Official Solicitor is appointed to act on behalf of the patient. Enquiries will be undertaken by the solicitor from the Official Solicitor's Office to include discussion with relevant medical personnel, and where relevant, family members, and a report will be provided to the court to assist with the court's analysis of the best interests test. These cases often need to be progressed by the Office urgently and in such circumstances are prioritised upon receipt.

51. On occasion, the Official Solicitor can be requested to assist the court on a legal issue by undertaking the role of amicus curiae, meaning "friend of the court". A court may seek the assistance of an amicus curiae where there is a risk of a complex and difficult point of law being decided without the court hearing relevant argument. It is important to bear in mind that an amicus to the court represents no-one. Their function is to give to the court such assistance and guidance as they are able on the relevant law and its application to the facts of the case. As such, they will not normally be instructed to lead evidence, cross-examine witnesses, or investigate the facts. The Official Solicitor may be invited to take on this role where the issue is one in which their experience of representing children and adults under disability gives rise to special expertise which may be of assistance to the court.

52. Within the work of the Official Solicitor there are a number of difficult situations involving particular complexity:

Fluctuating capacity

53. An issue which occasionally arises is that of 'fluctuating capacity'. With certain medical conditions a person who previously lacked capacity may regain capacity, in which case it is no longer appropriate for the Official Solicitor to act. Where there is a reasonable belief that someone has regained capacity a further capacity assessment will be required to establish this. Should their condition deteriorate, the instructing solicitor should arrange for a further capacity assessment to establish whether their client now lacks capacity in order to enable the Official Solicitor to assist, if appropriate.

Litigants in person

54. Occasionally a court may harbour concerns about the capacity of a litigant in person. Where the litigant is not willing to submit to a psychiatric assessment this places the court in a difficult position as it strives to ensure a fair hearing. Where there are serious concerns regarding the capacity of a litigant in person to conduct the litigation, the question of that capacity must be determined either by way of a medical assessment, or by the court itself, before any substantive orders are made.

55. The Official Solicitor of course cannot act on someone's behalf in the absence of incapacity having been established; however, there are options available to the court to progress matters. In some circumstances, it may be possible to obtain a medical assessment based on the litigant's medical notes and records alone. Although the question of mental capacity to conduct litigation is ordinarily determined with expert medical evidence the requirement in the authorities that medical evidence is "ordinarily" required means that, in the absence of this, the court is required to make a determination of capacity on the evidence which is before it.

Vulnerable adults

56. The inherent jurisdiction of the High Court has been extended to vulnerable adults by virtue of the Re SA decision. However, the Official Solicitor can only act where the vulnerable adult lacks litigation capacity (as per the test for capacity above). Capacity can be a very complicated matter. It is conceivable that an adult may have capacity to make an underlying decision but not be capable of dealing with the complexities of the legal proceedings addressing that decision. In such circumstances, a capacity report would be required to establish the lack of capacity in relation to the proceedings in order for the Official Solicitor to be able to assist.

Personality Disorder

57. The Mental Health (Northern Ireland) Order 1986 has an express exemption for personality disorder under Article 3(2). As a result, personality disorder is not classified as a "mental disorder" under the 1986 Order. This meant that when the Official Solicitor

received a request to act for someone whose incapacity was as result of their personality disorder the Office was unable to act. This situation arose on a number of occasions in family proceedings where the person was assessed as lacking the capacity to litigate. To rectify this anomaly and allow the office to act for people who lacked capacity as a result of a personality disorder the LCJ issued a direction to enable the Official Solicitor to do so in family proceedings.

V. Transfer of Patients Between Jurisdictions

58. Historically involuntary detention in hospital lay at the epicentre of mental health legislation: i.e. criterion governing admission to hospital, detention in hospital and discharge from hospital. This section considers the transfer of patients between Northern Ireland and other parts of the United Kingdom. It may be helpful to provide an overview of the relevant parts of the 1986 Order before focusing on the law governing transfers. The overview focuses upon Part II of the 1986 Order which concerns civil detention and guardianship; and, Part III which concerns patients involved in criminal proceedings, under sentence or otherwise in custody.

Admission for assessment and detention for treatment

59. Initially a person can be compulsorily admitted to hospital for 14 days for a period of assessment. The criteria for admission for assessment is contained in Article 4: (a) a patient is suffering from mental disorder of a nature or degree which warrants the patient's detention in a hospital for assessment (or for assessment followed by medical treatment); and, (b) failure to so detain the patient would create a substantial likelihood of serious physical harm to the patient or to other persons. During the period of assessment consideration must be given to whether the patient should be detained for treatment or discharged. The criteria for detention for treatment is contained in Article 12(1). It only differs from the admission for assessment criteria insofar as only patients suffering from "mental illness or severe mental impairment" can be detained for treatment. Notably people suffering from personality disorder cannot be admitted for assessment unless they are diagnosed as suffering from mental disorder, and cannot be detained for treatment unless they are suffering from mental illness or severe mental impairment (Article 3).

60. Detention in hospital is premised on a medical report by a Doctor appointed for the purposes of discharging this statutory function – also known as a Part II Doctor. A patient is initially detained for two periods of six months. Thereafter the detention period is annual. A patient can only be detained whilst the relevant criteria are met, otherwise there

is no legal authority for detainment and the patient must be discharged (Article 14)[261]. The Review Tribunal is the judicial body established by the 1986 Order to adjudicate upon the lawfulness of detentions. Cases are brought before the Tribunal by application and referral. The detaining authority, i.e. the relevant health and social care Trust, discharges the burden of proof in Tribunal proceedings.

Guardianship

61. In mental health law, guardianship comprises a legal framework which requires a patient to reside in a particular place and make themselves available for medical treatment, occupation, education or training. It is based on cooperation as much as constraint, and a lack of cooperation on the part of the patient will potentially make guardianship unworkable. A patient can be admitted to guardianship on the grounds that (a) the patient is suffering from mental illness or severe mental handicap of a nature or degree which warrants the patient's reception into guardianship; and (b) it is necessary in the interests of the welfare of the patient that the patient should be so received (Article 19(2)).

62. A guardianship application is based on a medical report and a welfare report provided by a social worker. The welfare report will address the question of the patient's suitability for guardianship including their preparedness to cooperate with the arrangement and make it workable. Guardianship can only continue as long as the criteria is met, and there is recourse by application or referral to the Review Tribunal for adjudication of the lawfulness of a Guardianship Order.

Hospital Orders

63. Part III of the Order concerns patients involved in criminal proceedings or under sentence as well as other persons in custody. Persons convicted of a criminal offence and sentenced to imprisonment may, instead of being sent to prison, be committed to the care of the Department of Health and admitted to hospital by a Hospital Order (Article 44). A court can make a Hospital Order if the following criteria are met:

    a) the court is satisfied on the oral evidence of a medical practitioner appointed for the purposes of Part II by **[**RQIA**]** and on the written or oral evidence of one other medical practitioner that the offender is suffering from mental illness or severe mental impairment of a nature or degree which warrants his detention in hospital for medical treatment; and,

[261] In conditional discharge cases, discharge can be delayed e.g. if there is no suitable accommodation. However detailed consideration of the law in cases such as *Johnson v UK* 27 EHHR 296 goes beyond the purview of this Handbook.

b) the court is of opinion, having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable means of dealing with the case is by means of a hospital order. (Article 44(2)).

64. A patient subject to a hospital order is treated as if they were detained for treatment under Part II of the 1986 Order, subject to the modifications contained in Schedule 2 Part I. A person can be discharged from the Hospital Order by the Responsible Medical Officer under Article 14, or by the Review Tribunal under Article 77.

65. Before making a Hospital Order a court can make an interim Hospital Order for the purpose of determining the suitability of this way of dealing with the offender, which can last for a period of up to six months (Article 45). It is also possible to make a guardianship order under Article 44 placing the offender under the guardianship of a responsible authority, a Health and Social Services Board, a Health and Social Care Trust or someone authorised by a Board or Trust. Guardianship Orders are rarely made. Prior to a person's trial they can be remanded to a psychiatric hospital for the purposes of obtaining a report, and/or for treatment (Articles 42 and 43).

Restriction Orders

66. When a court makes a Hospital Order it may at the same time make a restriction order. The purpose of restriction orders is to protect the public from harm. They restrict the patient's discharge either without limit of time or for a specified period. The Department of Justice plays a pivotal role. Article 47(1) provides as follows:

> *"Where— (a) a court makes a hospital order in respect of any person; and (b) it appears to the court, having regard to the nature of the offence, the antecedents of the person and the risk of his committing further offences if set at large, that it is necessary for the protection of the public from serious harm to do so, the court may, subject to paragraphs (2) to (5), further order that the person shall be subject to the special restrictions set out in this Article, either without limit of time or during such period as may be specified in the order; and an order under this Article shall be known as "a restriction order".*

67. The Department of Justice has broad power in respect of a restriction order. Under a restriction order the consent of the Department of Justice is required for the exercise of the following powers: (a) granting of leave of absence; (b) transferring the patient to another hospital; (c) recalling a patient who has been granted leave of absence at any time. If the

Department is satisfied that a restriction order is no longer required for the protection of the public from serious harm it can direct that the patient is no longer subject to the restriction order. From that point in time the patient continues to be detained as if they had been detained pursuant to a Hospital Order from the date when the restriction order ends (See Articles 48(1) and 47(4)). Further the Department of Justice can absolutely or conditionally discharge the patient 'if it thinks fit' (Article 48(2)). A patient absolutely discharged ceases to be liable to be detained by the relevant Hospital Order and the Restriction Order ceases to have effect. The Review Tribunal exercises its jurisdiction under Articles 78 and 80. The Tribunal can absolutely or conditionally discharge a person under a restriction order. The Department of Justice can recall a conditionally discharged patient back to hospital, vary the conditions imposed or defer a direction for a conditional discharge pending arrangements being put in place for the patient's discharge to its satisfaction (Articles 48 and 78).

Transfer and Restriction Directions

68. The Department of Justice can direct that a person serving a sentence of imprisonment be transferred to a psychiatric hospital for treatment by way of a Transfer Direction (Article 53). A transfer direction can also be made in respect of prisoners who are not serving a prison sentence. This includes persons remanded in custody, civil prisoners who fall outside Article 53 and persons detained under the immigration legislation (Article 54(2)). Restrictions can be placed on prisoners so transferred in the form of a restriction direction (Articles 55-56). The Review Tribunal cannot discharge a patient subject to a restriction direction without the consent of the Department of Justice (Article 79).

Transfer between jurisdictions under mental health legislation

69. Sometimes it is necessary and appropriate for patients to be transferred between jurisdictions, for example from Northern Ireland to England or from Scotland to Northern Ireland.[262] There is Department of Health Guidance on the Transfer of Patients Detained under Mental Health Legislation between Hospitals in Northern Ireland and Great Britain,

[262] In respect of transfers between Northern Ireland and England and Wales, the primary sources of the relevant statutory provisions are the Mental Health Act 1983 sections 81-82A and the Mental Health Order (NI) 1986. In respect of transfers between Northern Ireland and Scotland, the primary sources of the relevant statutory provisions are the Crime and Punishment (Scotland) Act 1997 (the 1997 Act); the Mental Health (Care and Treatment) (Scotland) Act 2003 (the 2003 Act); the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (the 2005 Order); the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 as amended (the 2005 Regulations); and the Mental Health (Cross border transfer: patients subject to requirements other than detention) (Scotland) Regulations 2008 as amended (the 2008 Regulations); and the Mental Health Order (NI) 1986.

published in June 2017.[263] This section falls into four parts: transfer of patients from England and Wales to Northern Ireland; transfer of patients from Northern Ireland to England and Wales; transfer / removal of patients from Scotland to Northern Ireland; and transfer / removal of patients from Northern Ireland to Scotland.

Transfer of patients from England and Wales to Northern Ireland

70. Patients liable to be detained or subject to guardianship under the Mental Health Act 1983 (1983 Act) can be removed to Northern Ireland (1983 Act, Section 81). A patient can be removed where: (a) it is in the interests of the patient to be removed to Northern Ireland; and, (b) arrangements have been made for admitting the patient to hospital or receiving the patient into guardianship. The power does not apply to patients detained under sections 35, 36 or 38 i.e. patients remanded to hospital for a report and or treatment or subject to an interim hospital order. The Secretary of State (or for certain categories of case the Welsh Government) is the decision maker and may authorise removal (1983 Act, section 81(1)). Where a removal order is made the Secretary of State (or in certain cases the Welsh Government) may give any necessary directions for the patient's conveyance to the destination.

71. Where a patient is removed to Northern Ireland, the patient is treated for statutory purposes as if they had been admitted to hospital or received into guardianship under the corresponding enactment in force in Northern Ireland (section 81(2)). The legislation provides further clarity as follows:

a) A patient admitted for assessment under the 1983 Act on removal is treated as if they had been admitted for assessment under the 1986 Order on the date of admission to the hospital in Northern Ireland (section 81(4));

b) A patient admitted for treatment under the 1983 Act on removal is treated as if they had been detained for treatment under the 1986 Order on the date of admission to the hospital in Northern Ireland (section 81(5));

c) A patient subject to guardianship under the 1983 Act on removal is treated as if they had been received into guardianship on the date of admission to the place of residence in Northern Ireland (section 81(3));

[263] The Mental Welfare Commission for Scotland has published Advice Notes on 'Cross border transfers, cross border absconding and cross border visits under mental health law', June 2021.

d) A patient who was serving a prison sentence who was liable to be detained by virtue of a transfer direction under the 1983 Act on removal is treated as if the sentence had been imposed by a court in Northern Ireland (section 81(6));

e) Where a person was subject to a restriction direction of limited duration, removal does not change the date of expiry imposed in the original Order (section 81(7)).

72. Section 81A provides for the transfer of responsibility for patients who have been conditionally discharged from the Secretary of State to the relevant Minister in Northern Ireland (i.e. the Minister for Health or the Minister for Justice). There are two pre-conditions: (a) the transfer of responsibility from the Secretary of State the relevant Minister in Northern Ireland must be in the interests of the patient; (b) the relevant Minister in Northern Ireland (i.e. the Minister for Health or the Minister for Justice) must consent. If those preconditions are met the Secretary of State may authorise the transfer. Where responsibility is so transferred for a conditionally discharged patient, the patient is treated as if the relevant orders / directions were made under the 1986 Order. Where a person was subject to a restriction direction of limited duration, removal does not change the date of expiry imposed in the original Order (section 81A(2 to3)).

Transfer of patients from Northern Ireland to England and Wales

73. Patients liable to be detained or subject to guardianship under the 1986 Order can be removed to England and Wales (1983 Act, section 82). A patient can be removed where: (a) it is in the interests of the patient to be removed to England and Wales; (b) arrangements have been made for admitting the patient to hospital or receiving the patient into guardianship. The decision maker is the responsible authority, i.e. the Department of Health in Northern Ireland, or, in respect of a patient who is subject to a restriction order or restriction direction, the Department of Justice in Northern Ireland (1983 Act, section 82(7)). Where a removal order is made the responsible authority in Northern Ireland may give any necessary directions for the patient's conveyance to the destination.

74. Where a patient is removed to England and Wales, the patient is treated for statutory purposes as if they had been admitted to hospital or received into guardianship under the corresponding enactment in force in England and Wales (section 82(2)). The legislation provides further clarity as follows:

a) A patient admitted for assessment under the 1986 Order on removal is treated as if they had been admitted for assessment under the 1983 Act on the date of admission to a hospital in England or Wales (section 82(4A));

b) A patient detained for treatment under the 1986 Order on removal is treated as if they had been detained for treatment under the 1983 Act on the date of admission (Section 82(4));

c) A patient subject to guardianship under the 1986 Order on removal is treated as if they had been received into guardianship under the 1983 Act on the date of admission to the place of residence in England or Wales (section 82(3));

d) A patient who was serving a prison sentence imposed by a court in Northern Ireland who was liable to be detained by virtue of a transfer direction under Article 53 of the 1986 Order, on removal is treated as if the sentence had been imposed by a court in England and Wales (section 82(5));

e) Where a person was subject to a restriction order or direction of limited duration, removal does not change the date of expiry imposed in the original Order made in Northern Ireland (section 82(6)).

75. Section 82A of the 1983 Act provides for the transfer of responsibility for patients subject to a restriction order or restriction direction who have been conditionally discharged in Northern Ireland. There are two preconditions: (a) the transfer of responsibility from the Department for Justice in Northern Ireland to the Secretary of State must be in the interests of the patient; (b) the Secretary of State must consent. If those preconditions are met the Department for Justice in Northern Ireland may authorise the transfer. Where responsibility for a conditionally discharged patient is so transferred, the patient is treated as if the relevant order or direction was made under the 1983 Act. Where a person was subject to a restriction order or direction of limited duration, removal does not change the date of expiry imposed in the original order or direction (section 82A (2 to 3)).

Transfer/removal of patients from Scotland to Northern Ireland

76. In Scotland removal is done by warrant. (See the Mental Health (Cross border transfer: patients subject to detention requirement or otherwise in hospital) (Scotland) Regulations 2005 as amended, and regulation 10 thereof.) An application is made by the responsible medical officer. The decision maker is 'the Scottish Ministers'. The following factors are taken into account:

a) the best interests of the patient;

b) the existence, in the place to which a patient is to go after being removed from Scotland, of arrangements which will secure for the patient–

(i) in the case of paragraph (2)(a) of regulation 2, measures, treatment, care or services corresponding or similar to those to which the patient is subject or is receiving by virtue of the 2003 Act or, as the case may be, the 1995 Act; or

(ii) in the case of paragraph (2)(b) of regulation 2, treatment for mental disorder corresponding or similar to that which the patient is receiving in hospital;

c) any wish or preference as to the patient's removal from Scotland of which the patient has given notice to the Scottish Ministers; and

d) any risk to the safety of any person (Regulation 8 of the 2005 regulations).

77. No removal decision can be taken without the consent of the receiving jurisdiction, i.e. the Department of Health in Northern Ireland or the Department of Justice in Northern Ireland as relevant (Regulation 10(2) of the 2005 Regulations). Where a patient is removed to Northern Ireland, they are treated as if they had been admitted to hospital on that date under the statutory provisions in the 1986 Order that most closely correspond to the Scottish legislation to which they were subject prior to removal (Article 4(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005 (the 2005 Order)). In respect of patients subject to restrictions, Article 4(2) of the 2005 Order provides that on removal the patient shall be treated: "where he is subject to a measure under any enactment in force in Scotland restricting his discharge, as if he were subject to a restriction order or a restriction direction under the enactment in force in Northern Ireland which most closely corresponds to the enactment restricting his discharge to which he was subject immediately before his removal". And currently that enactment is the 1986 Order.

78. The 2005 Order provides further clarity as follows:

a) A patient detained by virtue of a compulsory treatment order under the 2003 Act, on removal is treated as if they had been detained for treatment under the 1986 Order on the date of admission to hospital in Northern Ireland (Article 4(3));

b) A patient who was serving a prison sentence and was liable to be detained by virtue of a transfer for treatment direction under the 2003 Act, on removal is treated as if the sentence had been imposed by a court in Northern Ireland (Article 4(4));

c) Where a person was subject to a restriction direction of limited duration, removal does not change the date of expiry imposed in the original Order (Article 4(5));

d) Where a patient was subject to a hospital direction, the patient is treated as if the sentence was imposed by a court in Northern Ireland and removal does not change the date of expiry imposed in the original Order (Article 4(6));

e) Any directions given by the Scottish Ministers under regulations made under section 290 of the 2003 Act as to removal of the patient to a hospital in Northern Ireland shall have effect as if they had been given under the Mental Health (Northern Ireland) Order 1986 (Article 4(7)).

79. Under Article 7 of the 2005 Order, patients who have been conditionally discharged in Scotland can be transferred under the provisions of the 2005 Regulations if it is in their interests and the Department of Justice in Northern Ireland consents to the transfer (See also Article 12 of the 2005 Order).

Transfer of patients from Northern Ireland to Scotland

80. Patients liable to be detained or subject to guardianship under the 1986 Order can be removed to Scotland (2005 Order, Article 6). A patient can be removed where: (a) it is in the interests of the patient to be removed to Scotland; and (b) arrangements have been made for admitting the patient to hospital or authorising his detention pursuant to Scottish legislation; or, receiving the patient into guardianship. The power does not apply to patients detained under Articles 42, 43 or 45, i.e. patients remanded to hospital for a report, remanded to hospital for treatment or subject to an interim hospital order. The decision maker is the responsible authority, i.e. the Department of Health in Northern Ireland, or in respect of a patient who is subject to a restriction order or restriction direction, the Department of Justice in Northern Ireland (2005 Order, Article 6). Where a removal order is made the responsible authority In Northern Ireland may give any necessary directions for the patient's conveyance to the destination. (The DOH Guidance on the Transfer of Patients Detained under Mental Health Legislation between Hospitals in Northern Ireland and Great Britain, published in June 2017, provides practical guidance in respect of these matters.) Articles 5 and 7 of the 2005 Order provides for the transfer of patients who have been conditionally discharged in Northern Ireland. There are two preconditions: (a) transfer must be in the interests of the patient; and, (b) the Scottish Ministers must consent. If those preconditions are met responsibility the Department for Justice in Northern Ireland may authorise the transfer.

Transfer between jurisdictions outwith Mental Health Legislation

81. From time to time in Northern Ireland the question of jurisdictional transfer arises in cases outwith mental health legislation (e.g. in cases involving personality disorder but not a 'mental disorder'). Where mental health legislation does not apply, there is currently no

specific legislative provision regulating the transfer of adult patients lacking relevant decision-making capacity to another jurisdiction.[264] Such patients may be subject to a deprivation of liberty authorisation, or not as the case may be. Patients could be living at home, in a care facility or in a hospital. By way of contrast, for example, in England these cases engage such statutory provisions as the Mental Capacity Act 2005 and the Care Act 2014, which contain specific regulatory provision.

82. In such cases of potential jurisdictional transfer, the relevant health and social care trust in Northern Ireland will almost invariably be involved. It is to be expected that the relevant health and social care authorities in each jurisdiction would liaise closely in making any arrangements. Funding will often be an issue to be resolved between the relevant authorities. In Northern Ireland the inherent jurisdiction can be utilised to clarify and confirm the lawfulness of any proposed arrangements. Where a person is subject to a deprivation of liberty authorisation, transfer must be compliant with the 2016 Act. In determining how to proceed the relevant authorities and the court could take into account principles that apply to the transfer of patients under mental health legislation as outlined above: e.g. that the transfer is in the patient's best interests; and, there are suitable arrangements in place for the patient in the recipient jurisdiction.

VI. Inherent Protection of adults

83. The leading sources of International Law and Standards on the protection of adults with a mental disorder, mental disability or mental impairment include:

    a) The principles for the protection of persons with mental illness and the improvement of mental health care (1991) [the Mental Health Care Principles];

    b) The Convention on the International Protection of Adults (2000); and,

    c) The Convention on the rights of persons with disabilities (2007).

84. These sources of international law and standards are not directly applicable or effective in Northern Ireland courts and tribunals but may be taken into account where relevant and appropriate.

85. The Convention on the International Protection of Adults (2000) (CIPA) is particularly relevant in respect of mental incapacity. Section 63 and Schedule 3 of the Mental Capacity

[264] In Northern Ireland the social care legislative framework primarily comprises the Health and Personal Social Services Order (Northern Ireland) 1972; the Chronically Sick and Disabled Persons (Northern Ireland) Act 1978; and the Health and Social Care (Reform) Act (Northern Ireland) 2009.

Act 2005 have brought CIPA into effect in that jurisdiction. Section 283 and Schedule 9 of the 2016 Act seek to similarly bring the provisions of CIPA into effect in Northern Ireland, however the provisions are not yet in force.