

Making decisions for incapable adults 3: protection, guardians and advocates

Richard Griffith

Richard Griffith is Lecturer in Health Law, School of Health Science, Swansea University Email: richard.griffith@swan.ac.uk

Last month's article considered how the Mental Capacity Act 2005 will allow people in England and Wales to make advanced provision for the management of their personal welfare and finances. As the title suggested, advanced decisions refusing health care will allow a person to set out in advance treatments they wish to refuse when incapable, even where their life is at risk. Lasting powers of attorney (LPAs) will allow a person to nominate another person or persons and give them decision-making powers concerning their personal welfare and finances.

Both these provisions will give considerable authority to others over the person and finances of an incapable adult and there is a concern that the provisions may be abused. To minimize the risk of abuse, the Mental Capacity Act 2005 reforms the Court of Protection and introduces a Public Guardian and Independent Advocates to supervise the implementation of the Act.

Reform of the Court of Protection

District nurses will be familiar with the Court of Protection as the office of the superior court that currently appoints receivers and supervises the management of an incapable patient's property and affairs under Part VII of the Mental Health Act 1983. It does not hear cases and cannot have any influence over an incapable adult's personal welfare; for example, it cannot decide where an incapable adult should

live or what medical treatment an incapable adult should receive in their best interests.

Under the Mental Capacity Act 2005 a reformed Court of Protection will have a new jurisdiction to deal with decision-making for adults who lack capacity. While it will continue to manage the property and financial affairs of people lacking capacity, it will also be able to deal with serious decisions affecting the health and personal welfare of incapable adults that were previously dealt with by the High Court. For example, if there is a dispute between a patient and health professionals, such as GPs and district nurses, over whether a person lacks decision-making capacity then the Court of Protection will decide the issue.

To do this effectively and to create a degree of certainty in the application of the provisions of the Mental Capacity Act 2005, the new Court of Protection will become a superior court of record, providing a judicial forum to deal with particularly complex decisions or difficult disputes relating to incapable adults. It will – like the other 'major' courts – hear cases and establish precedent by building up a body of case law and expertise in all matters affecting people who lack capacity.

Making an application to the court

The 2005 Act is flexible about who can make an application to the Court of Protection, as it will depend on the type and circumstances of the case under consideration. For example, where there is a dispute between family members over the care of an incapable relative, then it will be the aggrieved family member's decision to bring the matter before the court. If the dispute relates to the medical treatment of an incapable adult and all attempts to come to an agreement have failed, then the NHS trust or other body responsible for the patient's care will be able to make an application to the court. Similarly a local authority wishing to intervene in decisions affecting the personal welfare of a person lacking capacity will be able to make an application.

Permission to apply to the Court of Protection

As a general rule, the court's permission must be sought before an application can be made. However, some categories of person (Table 1) can apply without the need to obtain prior permission from the court.

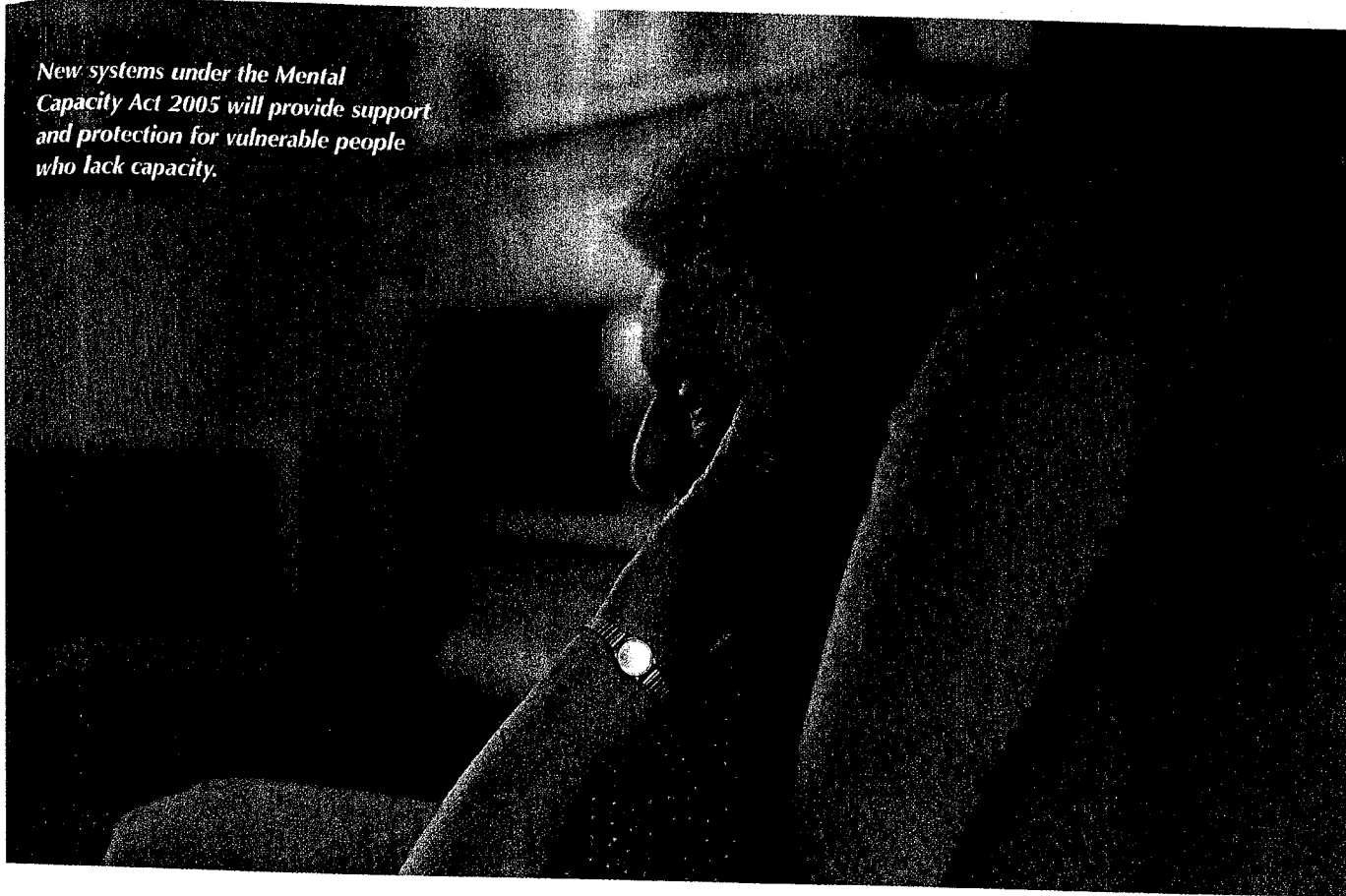
ABSTRACT

District nurse Jane Simmons has concerns about a patient in an incident who she suspects of being abused by her son. The patient has been left paralysed and unable to communicate by a stroke and is now in the district nurse's suspicions. Both the nurse and the GP feel that the patient would be better managed in a care home, but the son refuses to consider the possibility. A vulnerable adult case conference concludes that this is probably because of the patient's considerable personal wealth and property. When the police confirm that there is sufficient evidence to prosecute the son, the care team wonder if the provisions of the Mental Capacity Act 2005 can be used to protect the patient.

KEY WORDS

Mental Capacity Act 2005 • Court of Protection • Court appointed deputies • Public Guardian • Independent Mental Capacity Advocates

New systems under the Mental Capacity Act 2005 will provide support and protection for vulnerable people who lack capacity.



Karen Brett / Science Photo Library

In all other cases, permission will be required before an application can be made and when deciding whether to grant permission, the court must take account of a number of factors designed to promote the interests of the person lacking capacity. These will include:

- The applicant's connection with the person lacking capacity to whom the application relates
 - The reasons for the application
 - The benefit to the person lacking capacity to whom the application relates of any proposed order or direction of the court
 - Whether that benefit can be achieved in any other way
- In our case study, the NHS trust or local authority caring for the patient would need to seek the court's permission to make an application. Given the concerns of the district nurse and GP and the benefit to the patient of an order from the court, this permission is likely to be granted in this case.

Powers of the Court of Protection

The Court of Protection will have a wide range of powers to make declarations, decisions and orders affecting people who lack capacity.

Power to make declarations

Declarations are an administrative legal remedy where the court literally declares that what is being proposed is valid. The courts have frequently used declarations as a remedy in cases concerning incapable adults. For example, in *Re MB (Caesarean Section)* [1997], the Court of Appeal

used the remedy to declare that it would be lawful to treat a patient with acute needle phobia and refusing a caesarean section as she did not have capacity. In *F (Adult: Court's Jurisdiction)* [2001], the Court of Appeal held that a court could use a declaration to state where an incapable adult could live.

Under the Mental Capacity Act 2005 the reformed Court of Protection will have the power to make declarations. It is very likely that the Court will make considerable use of this type of relief as the guiding principles of the 2005 Act require, among other things, that before an act is done, or a decision 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 (Mental Capacity Act 2005, section 1). In other words, a single declaration resolv-

Table 1. Category of individual who can apply to the Court of Protection as of right

A person who lacks, or who is alleged to lack, capacity
Any person with parental responsibility if the person is under 18 years
The donor of a lasting power of attorney to which the application relates
An attorney appointed under a lasting power of attorney
A court-appointed deputy acting for the person concerned
A person named in an existing court order to which the application relates

'The appointment of a deputy to make personal welfare or health-care decisions is likely to be needed only in the most difficult of cases, where the necessary action cannot be taken without formal powers or there is no other way of making a decision...'

ing a matter before the Court is to be preferred to an order that would give the Court or other person continued powers over the incapable adult.

It can be seen that the ability to make declarations as to the lawfulness of an act will particularly apply to major medical treatment cases where there

is doubt or disagreement. In such circumstances the 2005 Act will allow a district nurse to continue life-sustaining treatment, such as artificial nutrition and hydration, or other actions taken to prevent the serious deterioration of a person's condition while this decision is sought from the court.

Treatment decisions that must be decided by the court

The courts have ruled that some decisions relating to the provision of medical treatment for incapable adults are so contentious or sensitive that an application should be made to the court for a declaration that the proposed action is lawful before it can be put into effect. This allows the court to develop a body of case law and expertise in that area (*F v West Berkshire HA [1990]*).

It is very likely that these cases, which generally concern non-therapeutic interventions, should continue to be brought before the court. District nurses need to be aware that these cases include:

- ♦ The proposed withholding or withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state
- ♦ Cases involving organ or bone marrow donation by a person lacking capacity to consent
- ♦ The proposed non-therapeutic or contraceptive sterilization of a person lacking capacity to consent to this
- ♦ Some termination of pregnancy cases
- ♦ Other cases where there is a doubt or dispute about whether a particular treatment will be in a person's best interests or where there are irresolvable conflicts between professionals, or between professionals and family members.

Power to make decisions and appoint deputies

In addition to the power to make declarations, the Court of Protection will also be able to make decisions concerning incapable adults as a way of settling irresolvable disputes. The court will have the power to make a single order to settle the matter or, where there is a need for on-going decision-making powers and the person lacking capacity has not previously made an LPA authorizing a person to make such decisions, the court may appoint a person called

a deputy to make those decisions on their behalf.

In deciding what type of order to make, the court must again apply the Act's principles and the best interests checklist, but it must also have regard to two further principles intended to make any intervention as limited as possible:

- 1) Where possible a single court order should be made in preference to the appointment of a deputy; and
- 2) If a deputy needs to be appointed, their appointment should be as limited in scope and duration as possible.

Single orders of the court

There are some cases where the Court of Protection must deal with the application because only they have the authority to act. These cases include:

- ♦ The need for formal authority to deal with a one-off significant financial decision for a person lacking capacity to manage financial affairs, such as paying a costly bill for house repairs or selling a valuable item of property but where there is no need for on-going financial powers or the need to make a will, or amend an existing will on behalf of a person lacking capacity.
- ♦ Other cases where the court may decide that a single order or declaration would be appropriate would include those where there is genuine doubt or disagreement about the existence, validity or applicability of an advance decision to refuse treatment, or where there is a major dispute regarding a serious decision, for example about where a person lacking capacity should live.

Single orders can also be used by the court where it is suspected that a person lacking capacity is at risk of harm or abuse from a named individual. In such a case the court could be asked to make an order prohibiting that individual from having contact with the person who lacks capacity.

In our case study, the Court of Protection may decide to issue a single order stating that the patient must live and be cared for in a named care home. It may even decide that it is in the patient's best interests to issue an order prohibiting her son having contact with her. However, given her considerable wealth and property interests, the court is unlikely to be able to deal with the patient's financial affairs by way of a single order, as this will require on-going decision-making.

Powers in relation to lasting powers of attorney

The Court of Protection will have a range of powers to determine the validity of an LPA and to give directions to how it should be operated if, for example, the attorney was not acting in the best interests of the person lacking capacity.

Where the donor no longer has capacity, the court will also have the power to revoke an LPA terminating the attorney's appointment.

Where there are concerns about the validity of an LPA the court will be able to decide whether the requirements for making an LPA have been met or whether the LPA has been revoked or otherwise come to an end.

court will also have the power to direct that an LPA should not be registered, or that it should be revoked if it was made as a result of undue pressure or fraud or if the attorney has behaved in a way that contravenes the law or public policy. A summary of the Court of Protection's powers in relation to LPAs are provided in *Table 2*.

Court-appointed deputies

The Court of Protection believes that there is a need for on-going decision-making powers for a person lacking capacity it may appoint a deputy to act for and make decisions on behalf of the person (Mental Capacity Act 2005, section 16(2)).

Requirements to become a deputy

Deputies appointed by the court must be individuals who are at least 18 years of age who have agreed to take the role (Mental Capacity Act 2005, section 19). Where appointed to make decisions in relation to property and affairs, a deputy can be either an individual or a trust corporation, which is often part of a bank or other financial institution.

Although paid carers should not usually be appointed as deputies because of the possible conflict of interest, it is possible for the court to appoint someone who holds a specified office or position, such as a director of social services.

Two or more deputies may be appointed and the court can specify whether they should act jointly or jointly and severally. Joint deputies must always act together and the agreement and the signature of all deputies must be obtained before a decision can be made or an act carried out. Joint and several deputies can act together but may also act independently if they wish, so that any action taken by any deputy alone would be as valid as if they were the sole deputy. When appointing a deputy the court will also have the power to appoint a successor.

Appointment of deputies

It is entirely up to the court to decide who to appoint as a deputy. The court will consider whether the proposed deputy is reliable and trustworthy and has an appropriate level of skill and competence to carry out the necessary tasks on behalf of the incapable adult. Different skills may be required according to whether the deputy is appointed to make welfare decisions (that can include health-care decisions) or financial decisions or both.

In deciding what order is in the best interests of a person lacking capacity, the court must consider the principle that a single decision on the matter is preferred to the appointment of a deputy. The need for a deputy to be appointed will therefore depend on what future or on-going decisions are likely to be necessary and whether these relate to property and affairs or personal welfare matters.

In our case study, the Court of Protection is likely to want to appoint a deputy to manage the patient's property and affairs. Although in many cases the court is likely to appoint relatives to act as deputies, it is unlikely in this case given the suspicion of abuse. Given the likely complex nature of the patient's financial affairs, the court may choose to appoint a bank or solicitor as a deputy, with powers to invest the patient's money and manage her property.

Property and affairs

The appointment of a deputy to manage a person's property and financial affairs is likely to be needed in similar circumstances to those that previously governed the appointment of a receiver under Part VII of the Mental Health Act 1983 (which will be repealed by the Mental Capacity Act 2005) and where the person who lacks capacity has not made their own arrangements through an LPA.

This might arise where, for example, there is a significant amount of cash assets to be dealt with after any debts have been paid, or there is property to be sold or the person has

Table 2. Summary of the powers of the Court of Protection in relation to lasting powers of attorney

The Court of Protection can:	Prevent a lasting power of attorney (LPA) being registered
	Revoke an LPA
	Remove an attorney
	Decide on the validity of an LPA
	Clarify the meaning or effect of the LPA
	Give specific directions to attorneys as to how an LPA should be operated
	Grant an extension of powers to an attorney where the donor no longer has capacity to grant authority for such an extension
	Authorize the making of gifts of the donor's property which attorneys are not otherwise permitted to make
	Require attorneys to produce records, such as financial accounts and to provide specific reports, information or documentation as directed by the court
	Resolve concerns raised about any remuneration or expenses claimed by attorneys in carrying out their duties

LEGAL ISSUES IN NURSING

a level of income or capital that the court considers needs to be managed by a deputy.

When making an application to the court, the proposed deputy will need to sign a declaration giving details of their own personal circumstances and their ability to manage the person's financial affairs. This declaration will include details of the tasks and duties the deputy will be required to carry out and the deputy will be required to give a personal undertaking that they have the skills, knowledge and time to perform and complete each task and to carry out their duties as a deputy.

Personal welfare (including healthcare)

The appointment of a deputy to make personal welfare or health-care decisions is likely to be needed only in the most difficult of cases, where the necessary action cannot be taken without formal powers or there is no other way of making a decision that is in the best interests of the person lacking capacity. Where possible the court will be obliged to seek to resolve such issues through the use of a single order or declaration. However, the court may decide to appoint a personal welfare deputy for a person lacking capacity where, for example, there is a history of acrimonious family disputes that could have a detrimental effect on decisions about the person's future care and where the person's best interests are best met by a deputy consulting with everyone concerned and having the final authority to make the necessary decisions.

In exceptional cases where the person is felt to be at risk of serious harm if left in the care of family members, a local authority officer or other independent person could be appointed as deputy to make personal care decisions, and this could be combined with a court order prohibiting those family members from having contact with the person.

Authority of court-appointed deputies

The court will decide the extent of the authority it wishes to confer on a deputy and the order of appointment will specify the particular decisions or actions the deputy is authorised to take, the powers available to them and the duration of the appointment.

Restrictions on deputies

A deputy will have no authority to make decisions in the following circumstances:

- ◆ Where the deputy does an act that is intended to restrain the person concerned, except if certain conditions set out in section 6 of the Mental Capacity Act 2005 are satisfied
- ◆ If the deputy knows or has reason to believe that the person concerned has capacity to make the decision or do the act in question
- ◆ Where the deputy's decisions are inconsistent with a decision made by the attorney acting under an LPA granted by the person before losing capacity
- ◆ A deputy cannot refuse consent to the carrying out of

lacking capacity.

If a deputy considers the authority they have been given by the court to be inadequate for carrying out their duties then they will have to apply to the court either to make the decision in question or for a variation of their powers.

Requirement to give security

The court will be able to require a deputy to give security to the Public Guardian whatever type of security the court considers appropriate. For example, deputies appointed to deal with property and affairs may be required to purchase insurance to cover any loss to the person lacking capacity as a result of their mismanagement. The court may also require accounts and other reports to be submitted to the Public Guardian on behalf of the incapable person.

Duties and responsibilities of deputies

Once the deputy's powers have been set out by a court order, the deputy will assume a number of duties and responsibilities and will be required to act in accordance with standards set out in the Act and its code of practice. The role of deputy is a formal position granted by the Court of Protection and failure to comply could result in the order being revoked and, in some circumstances, the deputy being held personally liable to claims for negligence or criminal charges of fraud.

In order to make their position clear deputies should always notify any third party with whom they are dealing, such as banks or health professionals, that they have been appointed by the Court of Protection to act as deputy on behalf of the person lacking capacity.

Duty to act

An order appointing a deputy imposes a duty to act where necessary and to take decisions on behalf of the person lacking capacity as required under the order. If a deputy fails to act at all when a decision is called for they would be in breach of duty.

Duty to apply the Mental Capacity Act's principles

In common with any other person who operates under the provisions of the 2005 Act deputies must apply the Act's principles set out in section 1 in making a decision on behalf of the incapable adult. Deputies must always act in the best interests of the person.

Duty to have regard to the Code of Practice

Deputies must have regard to the Code of Practice of the 2005 Act and take into account its guidance on how to apply the principles of the Act, the definition and assessment of capacity and how to determine the person's best interests in relation to any particular decision.

Duties as an attorney

Table 3. Summary of a deputy's duties under the law of agency

Duty to act within the scope of the authority granted by the court
A deputy can act only within the scope of the actual powers conferred by the court and set out in the order of appointment. Where a deputy considers that additional powers are needed, an application must be made to the Court of Protection for the order to be varied.
Duty to act with due care and skill
A deputy must act with due care and skill to the person lacking capacity in carrying out their functions. Deputies who are not skilled and are not being paid must act with due care, skill and diligence, as they would in making their own decisions and conducting their own affairs. Deputies paid for their services will be expected to exercise a degree of care or skill commensurate with the proper performance of their duties. Deputies who undertake their duties in the course of their professional work such as solicitors or accountants must display normal professional competence and abide by their own professional rules and standards.
Duty to discharge a fiduciary duty
A fiduciary duty gives rise to a relationship of trust between the deputy and person lacking capacity, and the deputy must ensure that they do not put themselves in a position where their personal interests and duty as a deputy conflict.
Duty not to delegate
A basic principle of agency law is that an agent cannot delegate authority unless permitted by the express authority of the principal or statutory authority. Deputies appointed by the court to undertake specific functions on behalf of the person lacking capacity, they must generally carry out those functions personally and cannot delegate those functions to anyone else.
Duty of good faith
Acting in good faith requires a deputy to act with honesty, integrity and due diligence. For example, a deputy would not be able to change a previous decision made by the person with the capacity while they were still competent.
Duty of confidentiality
Deputies have a duty to keep the person's affairs confidential, unless the person, before losing capacity, consented to the disclosure of personal or financial information, or unless there is some other good reason to release it, such as the public interest or the best interests of the person lacking capacity, that overrides the duty of confidentiality.

ty in relation to anything done or decided by them the scope of their appointment. The law of agency is several obligations and duties on the deputy to the person lacking capacity. The standard of conduct expected of deputies involves compliance with the duties as an agent and statutory provisions under the 2005 Act as summarized in

Duty to keep the person's money and property separate from their own
Deputies should, in general, keep the person's money and property separate from their own or anyone else's except where there is good reason not to do so, for example where a husband is acting as his wife's deputy and they have, for many years, had a shared bank account in both their names.
In most circumstances, deputies must keep everything separate to avoid any possibility of mistakes or confusion in handling the person's affairs.

to comply with the directions of the Court of Protection
The Court of Protection may give specific directions to deputies as to how they should exercise their powers. The court may also require deputies to submit to the Public Guardian specific reports (such as financial accounts or reports on the welfare of the person lacking capacity), at regular intervals or at such intervals as the court directs. Deputies have a duty to comply with any direction given by the court and the Public Guardian.

Supervision of deputies
The Court of Protection appoints deputies and they remain accountable to the court for their actions in carrying out their duties during their appointment. The court has power to discharge the order appointing a deputy at any time if it decides the appointment is no longer in the best interests of the person lacking capacity.
To assist the Court of Protection a new public office called the Public Guardian will be created and will have responsibility for the supervision of deputies.

to keep accounts
A deputy appointed to manage property and affairs is required to keep, and periodically submit to the Public Guardian, correct accounts of the person's property and

The role and functions of the Public Guardian

The Public Guardian has a range of functions that contribute to the protection of people who lack capacity, as set out in *Table 4*.

The way in which the Public Guardian carries out these functions is overseen and reviewed by the Public Guardian Board. The Board may make recommendations to the Lord Chancellor suggesting ways in which the work of the Office of the Public Guardian can be improved.

It can be seen from *Table 4* that the Public Guardian has a role in protecting people subject to the court's powers from possible abuse or exploitation. If a district nurse has any concerns or suspicions of abuse by deputies they should be raised immediately with the Public Guardian. The Public Guardian may direct a Court of Protection Visitor to visit a deputy to investigate any matter of concern. Court of Protection Visitors are individuals who have been appointed by the Lord Chancellor to a panel either of Special Visitors (who are approved health-care practitioners with relevant expertise) or General Visitors. Their role is to provide independent advice to the court and the Public Guardian on matters relating to the exercise of powers under the Act.

The Public Guardian will consider carefully any concerns or complaints against deputies. Where district nurses suspect physical abuse or serious fraud, the matter should also be referred directly to the police and social services as well as the Public Guardian.

The protection of vulnerable people from the risk of abuse, ill treatment or neglect is strengthened by a new criminal offence introduced by the Mental Capacity Act 2005, section 44.

Independent mental capacity advocates

The Mental Capacity Act 2005 will create a new scheme designed to provide the input of an independent mental capacity advocate (IMCA) where certain decisions need to be taken for vulnerable people who lack capacity and have no other person, such as a relative or close friend to look out for their interests. This may include older people with dementia who have lost contact with all friends and fam-

ily, or people with severe learning disabilities or long-term mental health problems who have been in residential institutions for long periods and lack outside contacts.

The 2005 Act places a duty on the secretary of state for health in England and the Welsh Assembly to make arrangements for the provision of a new independent mental capacity advocacy service and make regulations setting out what qualifications and training will be required of independent advocates and how they will be appointed. These arrangements may include provision for payments to be made to, or in relation to, the IMCA.

As far as practicable, the IMCA should be independent of the person who is making the decision concerned and they will have the right to meet the person concerned in private and see relevant health, social services and care home records.

Functions of IMCAs

The appropriate authority will make regulations setting out the functions of IMCAs. These steps should ensure that the IMCA supports the person to participate as fully as possible in the decision by obtaining and evaluating relevant information, ascertaining and representing the person's wishes, feelings, beliefs and values and discovering the options available to the person. If necessary the advocate will be able to seek a second medical opinion on behalf of the person. The regulations may also set out the circumstances in which the IMCA may challenge the decision-maker on behalf of the person.

The draft code of practice to the 2005 Act suggests that an IMCA may be asked to resolve informally a dispute concerning a person with incapacity, so avoiding the need to go to court for a formal order (Department for Constitutional Affairs, 2005). It gives the example of a young woman with learning difficulties whose parents are going through a bitter divorce and are arguing about whether she should continue to care for their daughter. She cannot understand what is happening but attempts are made to help her if she can give some indication of where she would prefer to live. An independent advocate is appointed to work with her to help her understand the situation and to find out her likes and dislikes and matters which are important to her. With the independent advocate's help, she is able to participate in decisions about her future care.

While this form of informal intervention will be crucial to resolving disputes concerning people with incapacity the Mental Capacity Act 2005 will require an IMCA to be formally consulted:

- ♦ Where decisions are to be made relating to providing or withholding or withdrawing serious medical treatment
- ♦ Where it is proposed to move a person into long-term care in a hospital or care home or a long-term move to a different hospital or care home is proposed.

Provision of serious medical treatment by an NHS body

Where serious medical treatment is to be provided or arranged by the NHS for a person who lacks capacity, at

Table 4. Functions of the Public Guardian

Establishing and maintaining a register of lasting powers of attorney (LPAs)
Establishing and maintaining a register of orders appointing deputies
Supervising deputies appointed by the court, in co-operation with other relevant authorities such as social services if the person who lacks capacity is receiving social care
Directing Court of Protection visitors to visit people lacking capacity and those who have formal powers to act on their behalf
Receiving reports from attorneys acting under LPAs and from deputies
Providing reports to the court as requested
Dealing with representations, including complaints about the way in which attorneys or deputies exercise their powers

no one for the treatment-provider to discuss it with an attorney under an LPA or deputy appointed by or a non-professional carer or friend whom it is appropriate to consult then an IMCA must be instructed.

The role of the IMCA will be to represent and to support the person in accordance with the regulations. The information and submissions provided by the IMCA must be taken into account by the decision-maker.

Where the person's treatment is regulated under Part 4 of the Mental Health Act 1983 (Mental Capacity Act 2005, s. 37(2)), the IMCA does not need to be instructed, as the Mental Health Act 1983 already contains its own safeguards.

Types of serious medical treatment to be covered will be set out in regulations.

Consent to or change of accommodation

The requirement applies where NHS bodies or local authorities propose to place in long stay accommodation a person lacking capacity and who also qualifies for the national safeguards of an IMCA.

The duty will be triggered where:

NHS body proposes to place a person, who lacks capacity to agree, in a hospital for a period likely to exceed 28 days or care home for a period likely to exceed 8 weeks; or

NHS body proposes to move the person to another hospital for a period likely to exceed 28 days or another care home for a period likely to exceed 8 weeks; or

Following an assessment under the NHS and Community Care Act 1990 of a person who lacks the capacity to consent to accommodation arrangements, a local authority proposes to provide community care services in the form of residential accommodation and to place the person in that accommodation for a period likely to exceed 8 weeks where a local authority proposes to move the person from another care home for a period likely to exceed 8 weeks.

It can be seen that the duty applies to long-stay accommodation in a hospital or care home, or a move between forms of accommodation where that accommodation is provided or arranged by the NHS. It also applies to residential accommodation provided in accordance with the National Care Act 1948. This may be accommodation in a care home, nursing home, ordinary and sheltered housing, housing association or other registered social housing, or in residential sector housing provided by a local authority or in residential care accommodation.

Once again the role of the IMCA is to support and to represent the person concerned and any information or submissions from the IMCA must be taken into account by the NHS body or local authority.

Where the person concerned is detained in hospital under the Mental Health Act 1983, the IMCA does not need to be instructed, as that Act already contains its own safeguards.

Conclusion

A new Court of Protection that will be introduced

KEY POINTS

- The new Court of Protection will have jurisdiction to deal with decision-making for adults who lack capacity.
- It will hear cases and establish precedent by and for the courts, as well as law and expertise in all matters affecting people who lack capacity.
- The Court of Protection will have a wide range of powers to make declarations, decisions and orders affecting people who lack capacity.
- Where there is a need for on-going decision-making powers, the court may appoint a person called a deputy to make those decisions on behalf of the incapable persons benefit.
- Deputies will assume a number of duties and responsibilities when appointed and will be required to act in accordance with standards set out in the Mental Capacity Act and its code of practice.
- A new public officer called the Public Guardian will be created and will have responsibility for the supervision of deputies.
- An independent mental capacity advocate service will be established to support vulnerable people who lack capacity and have no other person, such as a relative or close friend, to look out for their interests.

when the Mental Capacity Act 2005 comes into force will have considerable powers to make decisions in relation to incapable persons. The court will have the power to make declarations and issue single orders to resolve disputes in the best interests of the incapable person.

Where continued decision-making authority is required, the Court of Protection will be able to appoint a deputy and may grant the deputy powers to make financial and personal welfare decisions in relation to the incapable person. Where a deputy is given authority for personal welfare decisions that includes consent to medical treatment, then a district nurse will need to consult with the deputy and obtain their consent before proceeding with treatment for the incapable patient in their care.

In our case study the concerns of the district nurse and GP are likely to be brought to the attention of the Court of Protection by way of an application to the court. The court is likely to use its power to issue a single order requiring the patient to be cared for in a named care home. It may also decide to issue an order prohibiting the patient's son from having contact with his mother. The need for on-going management of the patient's property and affairs is likely to lead to the Court of Protection appointing a suitable deputy to handle those financial matters.

Deputies will have considerable obligations to the incapable person and the court. They will be accountable to the court and subject to supervision by the Public Guardian.

The Mental Capacity Act 2005 will give considerable powers to the Court of Protection aided by the Public Guardian to ensure that decisions about incapable persons are made in their best interests and that these vulnerable persons are protected from abuse. BJC/N

Department for Constitutional Affairs (2005). Mental Capacity Act, Draft Code of Practice. London: DCA

F (Adult: Court's Jurisdiction) [2001] 3 WLR 1740

F v West Berkshire HA [1990] 2 A.C. 1

R v MB (Caesarean Section) [1997] 2 F.L.R. 426