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Making the most of the Court of Protection

A guide to the law relating to the Court of Protection and on making use of the Court's services

EDITED BY DAVID CARSON

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MAKING THE MOST OF THE COURT OF PROTECTION

A Guide to the law relating to the
Court of Protection and on making use
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Edited by: **David Carson**

King's Fund Centre

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PREFACE

This document is the result of a conference held at the King's Fund Centre on 3rd October 1986, based on an idea from David Carson, University of Southampton. The idea was to produce a guide, primarily for concerned mental health workers, but also for use by families and service users to help them make full and appropriate use of the Court of Protection.

I would like to thank the speakers at the conference for their time and efforts both on the day, and in submitting the papers that are contained herein. I would also like to thank the participants who willingly worked on the draft papers at the conference and whose comments have been usefully incorporated.

This document owes its existence to David Carson, whose enthusiasm for an accessible guide to the Court was the driving force behind both the conference and this project paper.

Helen Smith
Senior Project Officer
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Long Term and Community Care Team
June 1987

THE COURT OF PROTECTION AND MANAGING THE PROPERTY AND AFFAIRS OF PEOPLE WITH A MENTAL DISORDER

Introduction

This document arose out of a concern that people working in the health and social services might not be making the most of the law relating to the Court of Protection. They could not be blamed because the law is complicated and there are few useful books and articles about it that are readily available. Also the Court of Protection has been changing. The short procedure order has been more widely encouraged to deal less expensively with uncomplicated cases. The Master of the Court, **Mrs Macfarlane,** has been encouraging people to use the Court's services more imaginatively. And, finally, in 1985 the Enduring Powers of Attorney Act came into force. This enables people to prepare themselves for the possibility of becoming both mentally disordered and incapable of managing their property and affairs. They can specify who is to do what, and with what, whenever they become incapable. Although the Court is involved with this legislation it will be, in the vast majority of cases, a formality. The Act will allow people to avoid many of the costs associated with the Court. Despite the attractiveness of this legislation there is concern that people in the health and social services might not be aware of the legislation and the importance of getting people to consider making an enduring power of attorney before they become mentally disordered and therefore legally incapable of making one. There is also concern that, unless people are careful in the way they prepared their powers, abuses could occur, with the appointed attorneys using wide powers with few people able to check that they are not misusing their position of trust.

So it was decided to invite a number of people to produce brief, clear outlines of the law on a number of related topics and to publish these papers. The King's Fund Centre organised a day conference where an invited audience, representing the broad range of people who become involved with this area of the law, discussed the draft sections of this document. The conference recommended a chart to provide an overview of the subject and this has been added. This project paper is directed at people employed to provide services to people who are or may become mentally disordered and it is hoped that the document will be useful to them. Information and advice ought also to be designed for service users and I hope this document will be of use to those people and their families.

A second objective has been to argue that more attention should be paid to the Court, its procedures and the legal problems faced by people with mental disorders. Thus **Tony Whitehead** argues that doctors should be careful when signing certificates to say that people are mentally incapable of managing their property and affairs. It is almost as important as signing documents which lead to peoples' detention in hospital. Yet the law and procedures are nowhere near as strict; there are no similar safeguards or provision for regular review. **Lydia Sinclair** agrees and suggests other reforms, arising from MIND's extensive experience in providing legal advice to people with a mental disorder. Mrs. Macfarlane, Master of the Court, has demonstrated her willingness to investigate criticisms and to consider alternative procedures. However, many of the recommended changes would require legislation.

In particular there are the proposals for special 'guardianship of the person' laws that have been introduced in many Commonwealth and common law countries. These laws allow someone to be appointed to take legal decisions, not just financial decisions, about the individual. At the moment such decisions are taken by health and social services staff but without formal legal authority. This document has therefore, reproduced a draft Bill prepared by Michael Whelton of Royal MENCAP and Lydia Sinclair. It is hoped that attention will be paid to these problems as well as the financial and property problems. The Bill forms a basis for discussion. We hope that the Government or a Member of Parliament will adopt it, suitably amended.

David Gent has outlined the law and procedures involved whenever an appointee is appointed to deal with social security claims by people with a mental disorder. As he states benefit officers do not have the resources to monitor appointees closely and they rely heavily upon members of the public, and the caring professions, advising them of any appointee who might not be using the social security they receive for another person, for that person. **John Ripley** indicates how local authorities can benefit from deciding to use the Court positively to aid their own policies.

The Authors

David Carson	- Lecturer in Law, Southampton University
David Gent	- Principal, DHSS
Mrs A B Macfarlane	- Master of the Court of Protection
John Ripley	- Administration Officer for Receiverships Hampshire Social Services
Lydia Sinclair	- Legal Officer, MIND
Dr. Tony Whitehead	- Consultant Psychiatrist, Bevendean Hospital, Brighton

I am most grateful to all the speakers for giving their knowledge and time. I trust that their reward will be in seeing this area of law and practice being better known and appreciated. I am also grateful to **Helen Smith** and the King's Fund Centre for organising the Conference and producing this project paper.

David Carson
June 1987

OVERVIEW OF WAYS OF MANAGING THE PROPERTY AND AFFAIRS OF MENTALLY DISORDERED PERSONS

The aim of this diagram is to provide an overview and introduction to the many areas of law and problems involved. It is only a brief guide. It should not be relied upon too much because the categories and definitions are not as precise or complete as the following brief questions may suggest. Nevertheless they should act as a quick guide and checklist.

1. Is the client mentally disordered?

YES

Then he or she can do so but it could still be wise to investigate his or her ability to make an EPA.

- YES -

2a. Is he or she nevertheless still able to manage his or her property and affairs?

NO

Consider (a) applying for an emergency order from the Court of Protection, and (b) advising that other party that the client is mentally disordered so that the gift or contract may be invalid.

- YES -

3a. Is he or she about to act in a way that will leave him or her with less money or property?

NO

Then ask the Paymaster General or Ministry of Defence to make it payable to someone else.

- YES -

4a. Does he or she obtain a civil service or military pension?

NO

Then approach the local DHSS to have an appointee appointed.

- YES -

5a. Does he or she obtain any social security?

NO

Then consider applying to the CoP for a short procedure order.

- YES -

6a. Are the client's finances and property relatively easy to collect together and administer and around £5,000 or less?

NO

Consider applying to the CoP for a receivership order. Note the medical and legal tests.

NO

2b. Is there concern that he or she may become mentally disturbed?

- NO -

Then no action seems necessary, though the client may wish to create an ordinary general power of attorney

YES

3b. Does he or she want to and agree to having his or her property and finances reorganised so that he or she is likely to be able to manage even if mentally disordered?

- YES -

Then make such arrangements. But also consider 4b.

NO

4b. Does the client or someone else wish to create a trust for a trustee to adminster and 'own' the property?

- YES -

Then make such arrangements but note that trust property often still belongs to the people it benefits when calculating their charges for Part III accommodation and supplementary benefit.

NO

5b. Does he or she wish to appoint someone to look after his or her property should he or she become mentally disordered?

- YES -

Then he or she should make an enduring power of attorney being careful to specify what he or she wants done.

NO

6b. Then no action is appropriate although the client should be warned that if he or she becomes mentally disordered then any ordinary power of attorney will be invalid and an expensive application to the CoP may be necessary.

MAKING THE MOST OF THE COURT OF PROTECTION

Mrs. A. Macfarlane

How the Court works and how to approach it

The Court of Protection is an office of the Supreme Court whose task it is in England and Wales, to administer and manage the property and affairs of people who, because of mental disorder cannot manage for themselves. The 'mental disorder' which needs to be present before the Court can become involved is defined by the Mental Health Act 1983, section 1.

> "mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind and 'mentally disordered' shall be construed accordingly;"

The expression 'mental illness' is not defined or explained any further in the Act. The expression 'arrested or incomplete development of mind' is sub-divided into 'severe mental impairment' and 'mental impairment'. These expressions only cover some people with mental handicaps because of the additional tests about the effects the handicap must produce.

> "severe mental impairment means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'severely mentally impaired' shall be construed accordingly;"

> "mental impairment means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and 'mentally impaired' shall be construed accordingly;"

Note that these tests refer to both impaired intelligence and social functioning. Both tests must be considered. Note also that the impaired intelligence and social functioning must be 'associated with' abnormally aggressive or seriously irresponsible behaviour. In contrast, in the definition of 'psychopathic' disorder, that sort of behaviour must be the 'result' of the disorder;

> "psychopathic disorder' means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;"

If someone cannot properly be described as having a mental illness, mental impairment or psychopathic disorder, he or she may still come within the meaning of 'mentally disordered' under section 1 if they have 'any other disorder or disability of mind'. This would cover many people who have a mental handicap which is not associated with inappropriate behaviour. It might also cover some very confused people. However section 1(3) of the Act contains the important proviso that nothing in the definitions quoted shall be construed as implying that a person may be considered to be suffering from mental disorder described in the Act, by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

The Act defines 'patient' as meaning (except for Part VII of the Act) a person suffering or appearing to be suffering from a mental disorder. It is Part VII of the Act which provides the framework of the Court of Protection's powers. Part VII is excluded in the main definition of 'patient' because there is a slightly different definition, in section 94, for the purpose of the Court of Protection. Section 94(2) provides that 'the functions of the judge under (Part VII) shall be exercisable where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs; and a person as to whom the judge is so satisfied is referred to in (Part VII) as a patient'. In other words, for the Court to have jurisdiction over a person, that person must not only be suffering from mental disorder but must also be incapable, for that reason, of managing his financial affairs.

There is one other important rule as to jurisdiction: Section 98 of the Act allows the Court to take steps in an emergency to protect the property of a person who may only later be decided to be incapable, and then only pending the decision as to incapacity. However, this is a procedure followed only in unusual circumstances and usually requires very strong or obvious evidence of urgency and incapacity.

The Court, whose address is 25 Store Street, London WC1E 7BP, decides any contested matters at hearings and issues orders, directions and authorities relating to patients' affairs. The administrative work of the Court is now carried out by the Public Trust Office, established following the Public Trustee and Administration of Funds Act 1986, headed by the Public Trustee. The Receivership Division of the Public Trust Office (which is at Stewart House, 24 Kingsway, London WC2B 6HD) acts where it is necessary for a receiver within the organisation to be appointed; in those cases, the Public Trustee fulfils the role of receiver. The Protection Division of the Public Trust Office, whose address is also at 25 Store Street, manages the larger number of cases where external receivers are appointed. Other divisions of the Public Trust Office provide investment and banking services for patients.

Most of the staff of the Protection and Receivership Divisions are case-workers, working in a group or section handling the day-to-day problems arising in a particular group of patients' affairs. In the Protection Division, for example, the patients' names are divided alphabetically by their initial letter into eight groups, which again are sub-divided into sections. This system means that (barring promotions, resignations, retirements and other unavoidable changes) each case-worker is involved with the affairs of a group of patients for a few years and gets to know those cases, and those receivers, fairly well. This continuity, when it can be achieved, is appreciated by receivers and patients, who like to have familiar voices, conversant with their particular problems, to talk to.

The Court's work is usually conducted by letter or by telephone. There is seldom any need for patients or receivers to visit the Court, unless they wish to do so.

Most of the Court's work is concerned with elderly patients, most of them women, whose physical health may be quite good and who may live for many years, but whose mental condition is confused or irrational. A recent study within the Court has shown that 82% of all patients are over 55. The popular view is that the Court deals mainly with patients who have acute, and perhaps dangerous, mental illnesses, but that is not so. Of course, there are some such patients, but nothing like the numbers who are suffering from senile dementia. There are also patients who have been mentally impaired all their lives and a sadly high number of patients who have been severely injured in road accidents, or other accidents, and who have been so injured as to be incapable of managing the compensation (often large amounts) awarded to them.

Receivership

The usual way for the Court to work is through the appointment of a receiver, who is often a close relation, or sometimes a friend or neighbour, of the patient's. If there are no suitable relatives or friends, or if the estate (the property and money) is a particularly complicated one, a receiver such as a solicitor, accountant or bank manager can be appointed. Such a professional receiver will usually be allowed suitable fees for acting. Sometimes the local authority's Director of Social Services, or some other officer, is willing to act as receiver. In cases of doubt as to who should be receiver, an enquiry to the Court may help.

More occasionally still, there will be no one suitable for appointment; perhaps the patient has no near relations, no friends and no solicitor willing to take on the receivership, and the local authority may not take on receivership work. Sometimes there is an unusual feature in the estate making it a case unsuitable for private receivership. In these circumstances, and very much as a last resort, the Court of Protection can appoint the Public Trustee as receiver.

Most applications for the appointment of a receiver are made through solicitors, although some come direct from local authorities or members of

the public. In any case, the application is made by filing a written application (form CP1) with a certificate about the family and property of the proposed patient (form CP5), a medical certificate in form CP3 (see Appendix 2) from a doctor who has recently attended the patient and the commencement fee of £50 (or, in a case where the Public Trustee is to be appointed as receiver, £200). The fee will come from the proposed patient's funds, eventually.

If you are concerned about a person who is suffering from mental disorder and the financial consequences, your best move in the first place is to find out if there are any near relatives who ought to be aware of the position and who may be able to apply to the Court. If not, you, a neighbour, a business adviser, a social worker or anyone else worried about the situation can write to the Public Trust Office at 25 Store Street and the forms mentioned above will be sent to you.

Making an application for a receivership order

The application form is easily completed. The medical certificate is essential so that the Court can be sure that it is right for it to become involved. As regards the certificate of family and property, the Court appreciates that, in the early stages, it is not always possible to give precise answers to all the questions asked. But so long as the person applying makes it clear that he or she is giving all the information which is at present available, the form will be accepted, and the gaps may be able to be filled in later when the receiver has been appointed. If the person applying has no money of the patient's under his or her control when the application is made, a request can be made for the commencement fee to be postponed until money becomes available.

The person applying needs to give the name, address and occupation of a person to whom the Court can write for a reference as to the applicant's fitness to act as receiver.

To make sure the receiver does not mishandle the patient's assets, a security bond is usually called for. This is rather like an insurance policy, with an annual premium payable out of the patient's money. There are also annual administration fees payable to the Court. These are calculated on a sliding scale depending on the patient's clear annual income. These charges are a source of criticism but they have been laid down by Parliament. In cases of hardship the Court has power to cancel or postpone fees.

'Short procedure' orders

If a patient's estate (money, funds and other property) is simple and straightforward, of comparatively low value and can be administered without a receiver, then it may be possible for the Court to make a 'one-off' order, containing only a few directions. If, for example, the patient is living at home and has only a building society account, which needs to be used for the patient's day-to-day living expenses, then an order could be made authorising the closing of the account and the use of the proceeds for the general benefit of the patient. The person given the authority would normally be the person making the application. Of course, the Court will usually need to see the certificate of family and property before deciding that the case is one where a short procedure order would be the best way to proceed.

The medical requirements

In every case, as already mentioned, medical evidence will be needed and it will have to show that the patient is not capable of managing and administering his or her property and affairs and that this is by reason of mental disorder (as already defined). Many people cannot manage, but not as a result of mental disorder. Many other people suffer from mental disorder but are capable of managing. Both elements are needed for the Court to have any power to intervene.

Usually the patient's regular doctor supplies the evidence on the form CP3. Notes for the guidance of doctors, prepared in consultation with the Royal College of Psychiatrists and the British Medical Association, are sent out by the Court when the other forms are issued. (These notes are discussed in Dr. Whitehead's section, below).

If it is impossible to obtain recent medical evidence from one of the usual sources (for example, if the patient is not in hospital and is not willing to go to see his or her own doctor, or has no regular doctor), the Court can ask one of the Lord Chancellor's Medical Visitors to interview the patient and report to the Court about his or her capacity. The medical visitors are consultant psychiatrists with special experience in acting for the Court in this way. Their help can also be sought by the Court when there is a conflict of medical evidence, when there is a dispute about the patient's ability to make a valid will, or when the Court needs information about a patient's readiness to be restored to the management of his or her own affairs.

Notifying the patient

It is particularly important to notify patients when an application is made to the Court affecting them, since it may give them the last real opportunity to influence the course of events during their incapacity. For that reason, the Court has reworded its letter of notification to try to explain to patients why the application has been made, by whom, and what steps are proposed. The letter encourages the patient to write to the Court or telephone if he or she has any objection to the proposals, for example, on the grounds that he or she is capable of managing or is not suffering from mental disorder or because the person whom it is suggested should be appointed receiver is not acceptable. The application is normally decided by the Court four weeks after it first reaches the Court. This allows time for objections to be made and received. The letter has to be given personally to the patient in nearly all cases, at least 10 days before a decision is made.

The obligations of the receiver

Once appointed, the receiver steps into the financial shoes of the patient and must act in the patient's best financial interests. The Court issues a handbook for receivers to help them understand their duties. The receiver's powers are set out in the order by which he or she is appointed (the 'first general order'). In general terms, the receiver is in charge of

the patient's income and must collect it from all sources. He or she must then use it to pay the patient's maintenance costs (at home, in Part III accommodation or in the nursing home or rest home, as the case may be) and use any surplus for the patient's benefit. A receiver is required, in most cases, to send the Court an annual account of his or her dealings with the patient's estate, although in some more straightforward cases, the Court agrees to accept, instead, answers to a questionnaire sent out annually.

If the patient's capital is involved, then all transactions need to have the prior approval of the Court. The receiver will need to write to the Court explaining what is needed (for example, the sale of the patient's house) and why he or she thinks it is in the patient's interests. The Court will make a decision, if necessary after further investigations, and issue any order or authority needed to carry out the transaction lawfully.

Receivers should try to be aware of their patient's wider needs and wishes. Of course, it can be very disheartening to be faced with an unresponsive or extremely confused elderly person, with no apparent contact with the world around. Nevertheless, there are very few patients, even the most seriously disorientated, who do not appreciate creature comforts such as fresh flowers or fruit, chocolates, an occasional glass of sherry, or new warm slippers or a new dressing-gown. These things are all within the means of long-stay hospital patients. It is pointless building up balances in hospital funds for patients who could derive pleasure from having their money spent regularly on themselves.

Many patients would benefit from larger or more unusual things: a fishtank, the installation of a chair-lift, a special chair, and many people could afford them. The receiver ought to do everything possible to use the patient's money for the patient's benefit (in the widest sense) during the patient's lifetime. The Court will always try to support the receiver in this aim.

How to obtain consent for the use of larger sums

The receiver should first identify the patient's needs and discuss them with the patient as far as that is possible. This may be more difficult with older patients, but even then, with the help of nursing staff or a social worker, it is often possible to find out the patient's own wishes. The receiver should then obtain quotes or provisional costings for the scheme, and should decide whether, in the receiver's opinion, the patient can afford what is proposed. If it means resorting to the patient's capital, the receiver should be able to work out, depending on the patient's age and life expectancy, whether it would still be worth pursuing the proposals. When the receiver has decided more or less precisely what the suggestion would entail financially, it should be put to the Court, who may ask the receiver to call in for a discussion before reaching a final decision. All sorts of ideas have been approved in this way. For example, patients have been able to have holidays abroad, accompanied by the receiver or by other friends or helpers. Receivers have been lent money by the patient, under the Court's supervision, which has been used to build a 'granny-wing' on to the receiver's house so that the patient has been able to live at home again. Although it is sometimes dangerous to generalise, it should be remembered that the overwhelming majority of receivers are not out to 'feather their nests' at the expense of the patient. Proposals they put forward are often extremely beneficial to the patient, even when they have some element of benefit to the receiver as well. There is a much greater problem in helping receivers to be imaginative and creative in managing a patient's assets, than in restraining them from misuse of the estate; the receiver often thinks it easier and safer to let things go on as they have been and by taking a passive role to avoid any risk of criticism for self-interest. It is interesting that this passivity is not normally characteristic of receivers who are parents of children who have suffered in accidents or while undergoing medical treatment, perhaps because as parents they feel less inhibited, and are eager to put every effort into imaginative provisions for their children. So often older people seem to be discounted as people too easily.

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BEING PREPARED

David Carson

Introduction

The object of this section is to indicate some of the legal steps that may be taken before someone becomes mentally disordered and incapable of managing their financial affairs. It is about preventing problems and trying to organise a more individualistic response. It will concentrate upon the Enduring Powers of Attorney Act 1985. This Act allows us to anticipate becoming mentally disordered and incapable of administering our property affairs and it allows us to choose who we want to look after these affairs and specify what is, and is not, to be done with our money and other property.

Do Nothing

The first approach to consider is doing nothing. Just because a person has a mental illness or handicap it does not follow that he or she is incapable of managing their property. The law recognises this, mentally disordered people can, perfectly legally, deal with their property. As was clearly shown in the section on the Court of Protection, it can only become involved on being satisfied that the person is incapable of managing and administering his/her property because of mental disorder.

Many people with a mental illness or handicap should be allowed to continue administering their own property. However, some people will feel that this is risky and apply to the Court of Protection to become involved. Whilst it is impossible to prevent the Court from becoming involved, where that is appropriate, it is possible to both help and train the person to be capable and to demonstrate that he or she is legally capable.

In devising training programmes and demonstrations of capacity it should be worth remembering the following points:

1. The test of incapacity refers to the individual's property and affairs and not to some general standard. Many of us are incapable of properly managing stocks and shares. The problems of managing could be simplified if the person concerned puts his or her money into a building society, for example. However, be careful about this advice in case it causes financial loss through reduced interest rates, to which the individual has not fully consented.

2. The test is about being 'incapable'. It is not about being incompetent in the sense of making foolish or unwise decisions. But it will always be tempting to presume that a decision we consider unwise or foolish was due to another's mental illness or handicap. To demonstrate that it was not, the person might show that there were reasons for the decision. We should not seek to evaluate those reasons in terms of their wisdom or sufficiency in our eyes but consider whether they are adequately reasoned in the sense of being linked in a broadly rational way.

3. The test requires that the incapacity is due to a mental disorder. Neither being incapable or being mentally disordered is enough; the disorder must cause the incapacity.

4. The meaning of 'incapacity' is not very clear but in demonstrating that an individual is capable it should be useful to show that he or she has a practical understanding of the concept of value and of the value of his or her property. Value is, of course, relative to the individual. One method could be for the person to show that they can describe the practical consequences of doing different things with the property. Can they describe the practical consequences of, for example, giving away a certain sum?

5. The individual should know, broadly, what property he or she owns. This can be demonstrated by describing it.

6. The individual should have a basic understanding of any legal concepts involved such as contract. Being able to freely explain the binding effect of a contract and to describe the obligations of the particular contract should convince most people of their capacity in that respect. However this is a difficult test - many people would not recognise a contract.

7. These tests should be demonstrably free of pressure from relatives, friends and carers such as social services or health services personnel. Thus the individual should not require any prompting.

As has been suggested it is wrong to assume that a person is incapable just because they have a mental illness or handicap. We can make it easier for individuals to be capable of managing by simplifying the problems they face, also we can teach them how to be capable. We can discourage others from presuming incapacity and encourage training by devising practical and individual tests of incapacity. However if the person is, or may become legally incapable of managing, the following legal devices could be considered.

Trusts

In a trust one person gives another person, called the trustee, some money or other property. What makes it a trust, rather than a gift, is that the trustee is put under an obligation to deal with the money and property in a particular way for the benefit of someone, who is called the beneficiary. But whilst the trustee is the legal owner of the property, the courts will recognise the rights of the beneficiary and require the trustee to deal with the money and property in the way that he or she has been entrusted to do.

Money and other property could be given to a trustee with an obligation to manage it on behalf of someone who is mentally disordered. This can avoid problems of the disordered person being unable to manage it properly. But a trust involves parting with the property, giving it up, (also a person with mental illness or handicap who is legally incapable of managing is not legally able to create a trust).

A trust may appear to have some advantages when applying for social security. Someone could pass their savings to a trustee with an obligation to manage them for his or her benefit. Then they could claim social security claiming that they have no savings. However, our social security legislation is wise to this and states that money held in most trusts is to be treated, for the purposes of claims for social security, as if it were owned by the beneficiary. (For similar rules with regard to local authorities services, for example Part III accommodation, see the section by John Ripley).

Agency

If you want someone to make decisions on your behalf, say arrange your travel, you can appoint an agent. You have given someone the authority to make decisions on your behalf and you will be bound by those decisions. They need not be paid to do this. Provided their actions are within what you have actually authorised or apparently authorised, you are bound by those decisions.

Power of Attorney

A particular form of agency is a power of attorney. Here one person, called the donor, gives another, the donee or attorney, the right to make legal decisions on his or her behalf. Someone leaving the country may give a friend, solicitor or bank manager, a power of attorney to sell the house, settle debts and make provision for remaining relatives. Unlike a trust, the donor remains the owner of the property. However, the attorney can continue making decisions until told otherwise.

Powers of attorney could be extremely useful in preventing problems when someone is concerned about becoming mentally disordered and incapable. He or she would simply have to prepare a document, which could give wide or narrow powers to the attorney, which could come into force immediately or only whenever he or she became mentally disordered. But it is of no use! The courts regard the relationship between donors and attorneys as personal. So they have insisted that if the donor becomes mentally disordered he or she is no longer able to personally supervise or direct the attorney. Thus all ordinary powers of attorney come to an end

immediately the donor becomes mentally disordered. This is so, irrespective of the wishes of the donor who may want it to continue.

Enduring Powers of Attorney

The Enduring Powers of Attorney Act 1985, which came into force on March 10 1986, changed the law so that an enduring power of attorney (EPA) will continue even though the donor becomes mentally disordered. The EPA must be made in a special document, in a special way. It can come into effect as soon as it is made or later, but, as soon as the attorney believes that the donor is becoming mentally disordered, he, she or they, must apply to the Court of Protection to have it registered. If the Court is satisfied that it is a genuine EPA, and there are no valid objections, (see below), it must register the EPA. Then the attorney can make binding decisions about the donor's property until the donor recovers and formally rescinds the EPA or someone gets the Court of Protection to end it for a good reason. The Court's role is to register EPAs and consider complaints about their administration. It does not positively monitor the EPAs; it relies on others, such as health and social services personnel, to bring abuses to its attention. The Court received no additional funding or staffing to implement the Act. The widespread use of EPAs should, eventually, reduce the Court's workload because EPAs enable individuals to appoint the people of their choice to administer the property of their choice in the way that they choose. As long as the EPA is administered properly there will be no need to ask the Court to use its receivership powers, under the Mental Health Act 1983. (See the section by Mrs Macfarlane above).

The opportunity for choice and individuality that EPAs offer should be stressed. However, those opportunities could be entirely missed and abuses facilitated if donors and their advisers do not write protections into their EPAs. Many will just complete the minimum necessary on the special forms. This will give their attorneys very wide powers which the donor will not be able to change whilst disordered. Even if the attorney exceeds his or her powers there will often be nobody available to notice or complain. For example, someone may appoint their only child to be their attorney and give them full powers. They may enter hospital only to find their house and personal possessions sold and applied for the child's benefit. Who is to know if there has been an abuse of the EPA?

The following description suggests some useful protections against such abuses.

Making an Enduring Power of Attorney

Only certain people can make EPAs and be attorneys. Most importantly, the donor must be legally competent to make it. It had been argued that he or she must have contractual capacity. This broadly means understanding the nature and effect of the document being signed. But the Master has been ruling that the test of capacity is the same as the test of incapacity - that is capacity to manage one's property and affairs. (This test is discussed by Mrs Macfarlane and Dr Whitehead). This test is important because a person who is already very disordered may be unable to appoint an attorney to deal with their problems, however useful that might be. It is not enough that people caring for disordered people appreciate this rule; they need to ensure that their colleagues appreciate it and are able to advise people to make an EPA before it is too late. Whilst someone could make an EPA one day and register it the next day, the Court would, at the very least, be suspicious.

EPAs must be made on special forms; whereas most forms are available from the Court, these forms however, are not. They can be obtained from law stationers. The forms are designed to ensure that both donor and attorney appreciate that it is a power which is to endure through mental disorder, and to enable the donor to specify the attorney's powers. Attorneys must be at least eighteen when the EPA is executed by them. They must not be bankrupt and must themselves be legally competent. One or more attorneys may be appointed provided they are to act jointly or separately. The attorney could be a friend or relative acting out of kindness or someone with special financial skills acting for a fee. But the attorney may not delegate the powers. Donors should therefore consider the age of the proposed attorney, so that they are outlived; the complexity of the work they want the attorney to undertake, to ensure the attorney is up to the task; and they should consider the burden being imposed upon the attorney and the payment if any, being offered. Even if the EPA is registered the attorney only has to inform the Court in order to disclaim it. Donors need to be practical or they may find that all their plans fail because their attorney loses interest and retires. In such an event the Court may have to make a receivership order which the donor was trying to avoid.

Whilst their attorney will owe them a duty of care when administering their property, the donor should note that by paying someone to act as an attorney they will be entitled to a higher standard of care, and anyone professing special skills will have to demonstrate them. People should be careful about becoming attorneys where their motives might be suspect. Health and social services staff might be suspected of becoming attorneys in order to get their patient or client into different accommodation. Relatives might be suspected especially when they are allowed, as attorneys, to benefit from the donor's property. Attorneys who know they are going to benefit under the donor's will may be suspected of using up the property which would otherwise go to other people before that which he or she is due to get. An EPA can be declared invalid if the Court is satisfied that it was induced by fraud or undue pressure. If this might be suspected it could be wise to ensure that the donor is separately legally advised at the time of making the EPA. Having a paid or professional person and a relative or friend as attorneys might encourage a mixture of skills and sensitivity. And having two or more attorneys allows them to check up on each other, if they are appointed to act jointly.

Upon becoming Mentally Disordered

The EPA may come into force immediately or await a specified occasion. However the attorney must, as soon as he or she has reason to believe that the donor is - according to the Act - 'becoming mentally incapable', apply to the Court of Protection to have the EPA registered. The Act specifies that 'mentally incapable' means 'incapable by reason of mental disorder of managing and administering his property and affairs'. 'Mental disorder' has the same very wide meaning as laid down in section 1 of the Mental Health Act 1983. They are the same tests as apply to the Court of Protection. (They are discussed in Mrs MacFarlane's section above.) But the word 'becoming' is new. It allows attorneys to apply and the Court to register EPAs before the donor is actually mentally disordered. The Court can refuse to register the EPA because it is premature, but that refers to the donor not becoming, rather than not actually being, mentally disordered.

The attorneys must send out official notices, that they are applying for registration to any other attorneys, to the donor and to three relatives. Which relatives are to be informed is decided by working through the categories in the statutory list, in Schedule 1 of the Act, which is in an order of closeness to the donor. The list is the donor's spouse, children, parents, brothers and sisters of either whole or half-blood, the widow or widower of a child, grandchildren, children of the brothers and sisters of first the whole blood and then the half blood, uncles and aunts of the whole blood and then their children. This list is distinctly different from the list of nearest relatives specified in the Mental Health Act 1983. If a new category of relative is entered, in order to get the third person, then everyone in that category must be notified. There are ways of dispensing with notification to relatives and the Court may allow the attorney not to notify even the donor, but that would be rare.

Five weeks after the last notice was given the Court will consider whether there have been any valid objections. The valid grounds for objection are that the EPA is invalid, it no longer subsists, application is premature (as discussed above), fraud or undue pressure was used on the donor to create it, or '...having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable...'. If there are no objections and the Court has no reason to believe that there might be if inquiries were made, the Court must register the EPA. There is no requirement that the objections only be made by those notified. Anyone could inform the Court of their concerns and this could be the grounds upon which the Court orders further investigations. The Court is currently paid £30 upon application for registration. There are no charges for reporting a concern.

The Effect of Registration

Once the EPA is registered the attorney may exercise the powers it gives him or her. It does not require action but a duty of care is required just as soon as any power is exercised. If emergencies occur during the time allowed for objections or earlier the Court is allowed to exercise any of the powers given in the EPA. The attorney is only allowed, during this period, to prevent loss to the donor's property, to maintain the donor or to maintain themselves and others to a limited extent.

The donor can quite easily revoke an EPA up until it is registered. Thereafter the Court can only confirm a revocation by the donor effected whilst mentally capable. The Court must cancel the registration if satisfied that '...the donor is and is likely to remain mentally capable; .....'. Up until application for registration the attorney can disclaim the EPA just by giving notice to the donor. After registration he or she must also inform the Court who must accept it.

The attorney's powers are limited by what is lawful and what the EPA authorises. The attorney may benefit himself or herself and others, but only to the extent that the donor could be expected to have done. And the attorney may make gifts of the donor's property but only of a seasonal or anniversary nature, of a reasonable amount, to charities, relatives, or people connected to the donor. The individual EPA may allow more than this such as authorise payments to political or pressure groups. And the EPA may restrict the attorney considerably. The Court is authorised to officially interpret the EPA, to monitor it and to give instructions as to how it is managed. It may allow the attorney pay and other benefits from the donor's property even if the EPA prohibits it. It may also forgive any breach of duty by the attorney so preventing the donor from sueing. The existence of these powers may encourage disillusioned attorneys to continue in post.

The Court must also deregister the EPA if it is satisfied that it has expired, on the death or bankruptcy of the donor, on the death, bankruptcy or mental incapacity of the attorney, upon being satisfied that the EPA was invalid, was induced by fraud or undue pressure, or that the attorney is an unsuitable person. These criteria reflect the grounds for objecting to registration.

Putting in the Detail

The potential of EPAs for providing an individualised response has been stressed. To maximise this, and to allow the donor to discourage abuses which could occur with very broadly drafted EPAs, he or she might consider the following suggestions:

1. Limit the property covered by the EPA. For example the donor's house could be excluded.

2. Limit the transactions which might be undertaken. For example the EPA might allow the home to be mortgaged but not sold.

3. Limit the purposes for which the property may be used.

4. The donor should consider all the people or causes he or she would like to support so that they may be specifically authorised.

5. To ensure that people will be able to know whether an attorney is exceeding his or her powers the donor could require that copies of the EPA are deposited with certain friends or, for example, the Director of Social Services.

6. The donor is entitled to require that certain people are regularly notified of the attorney's acts such as by providing accounts.

7. The Act does not require, at any stage, any medical or psychiatric examination. To avoid fears of being subject to an EPA whilst still mentally capable, the donor could require in the EPA, that he or she is regularly medically examined with the results being submitted to someone who would act on them if appropriate.

8. The EPA could require the attorney to consult certain people. This might lead to a more personalised service and discourage abuse.

9. The EPA could require the attorney to take steps to enable the donor to be able to manage again. This could involve making the management task easier as well as instructing the donor.

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MEDICAL CERTIFICATION

Tony Whitehead

I cannot remember when I first heard of the Court of Protection but I suspect it was a little time after entering psychiatry as a trainee. I had heard of the Board of Control which has already departed and The Mental Health Act of 1959 but not of the Court of Protection. I hope things have changed since I was a student and junior doctor but experience suggests that the change has not been a dramatic one. I still meet many relatively young doctors who have either not heard of the Court or, if they have, know little if anything about it and its function.

The significance of all this relates to the fact that any registered medical practitioner can be asked, and may provide a medical certificate for the Court. Form CP3 (See Appendix 2) is used for the medical certificate and is accompanied by notes for the doctor that have been prepared in consultation with The Royal College of Psychiatrists and The British Medical Association. These notes spell out fairly clearly the present procedure.

The Present Procedure

1. Doctors should be aware that if a person owning real or personal property becomes incapable, by reason of mental disorder, of safeguarding and managing his/her affairs, an application should be made to the Court of Protection for the appointment of a receiver. This procedure applies equally to those cases in which a patient has given power of attorney, because the power ceases to be valid when the patient, by virtue of such disorder, is no longer capable of withdrawing it, (this of course, does not apply to Enduring Power of Attorney; see the section by David Carson above).

2. An application to the Court of Protection for the appointment of a receiver must be supported by a medical certificate stating "that", in the doctor's opinion, the patient is incapable of managing and administering his property and affairs by virtue of mental disorder (as defined in Section 1 of the Mental Health Act 1983)."

3. Criteria for assessing incapacity are not identical with those for assessing the need for compulsory admission to hospital. The fact that a person is suffering from mental disorder within the meaning of the Mental Health Act 1983, whether living in the community or resident in hospital, detained or informal, is not of itself evidence of incapacity to manage their affairs. On the other hand, a person may be so incapable and yet not be liable to compulsory admission to hospital.

4. The certifying doctor may be either the person's general practitioner or any other registered medical practitioner who has examined the patient.

5. The certificate is given on form CP3 which requires the doctor to state in paragraph 3 the grounds on which s/he bases his/her opinion of incapacity. It is this part of the certificate which appears to give the doctor the most difficulty. What is required is not merely a diagnosis (although this may be included) but a simple statement giving clear evidence of incapacity which an intelligent lay person could understand, eg. reference to defect of short-term memory, of spatial and temporal orientation or of reasoning ability, or to reckless spending (sometimes periodic as in mania) without regard for the future, or evidence of vulnerability to exploitation.

6. In many cases of senile dementia, severe brain damage, acute or chronic psychiatric disorder and severe mental impairment the assessment of incapacity should present little difficulty. Cases of functional and personality disorders may give more problems and assessment may depend on the individual doctor's interpretation of mental disorder. The Court tends towards the view that these conditions render a person liable to its jurisdiction where there appears to be a real danger that they will lead to dissipation of considerable capital assets.

7. A person may not be dealt with under the Mental Health Act 1983, and may not be the subject of an application to the Court of Protection by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

8. The Court attaches considerable importance to receipt by the patient of notice of the proposed proceedings for the appointment of a receiver, since the patient may have an objection, though irrational, to the appointment of a particular person or may, even unwittingly, contribute information of assistance to the Court. The Court is reluctant to exercise its power to dispense with notification, unless it could be injurious to the patient's health, because it is considered that a person has a right to know - or at least be given an opportunity to understand - if the management of their affairs is to be taken out of their hands and thereafter dealt with by someone on their behalf; if s/he has no understanding at all, then notification cannot affect them adversely, and a patient who has sufficient insight to appreciate the significance of the Court's proceedings may need reassurance that they are for his/her benefit. If the certifying doctor believes that, in a particular case, notification of the proceedings by or under the supervision of the doctor is advisable, s/he should say so when completing the form CP3.

In paragraph 3 it is clearly stated that assessing incapacity is not the same as assessing the need for compulsory admission to hospital. This is a very important point, since having a mental disorder and requiring treatment in or out of hospital, informally or formally, does not necessarily mean that the individual is incapable of handling his or her own affairs. It is equally important to remember that the Court of Protection only deals with an individual's financial affairs and can in no way influence an individual's treatment, care, etc. However, the individual must be suffering from mental disorder before the Court's procedures can be considered or used.

From all this it can be seen that the doctor completing a medical certificate needs to have a good knowledge of psychiatry, be aware of what the Court of Protection is about and be able to assess an individual's capacity, or otherwise, to handle his or her affairs.

Assessment of capacity can be, at times, very difficult whilst at others relatively easy.

Problems with assessment

In the case of individuals who are severely brain damaged, either as a result of infection, trauma, or chronic disease, there are few real difficulties since the incapacity can be easily assessed and there tends to be little variation in this incapacity from hour to hour or day to day. Obviously there is some variation but in the case of severe damage this is not significant. The real problems arise when the patient is a victim of functional psychiatric disorder or has an organic disorder that may fluctuate for one reason or another. An example of the latter would be an individual with some disturbance of brain oxygenisation or metabolism that varied depending upon the illness itself and the treatment provided. Someone with an underactive thyroid could be incapable of managing his or her affairs whilst untreated but be quite capable if he or she is treated and continues such treatment.

However, a patient may omit to take their medication and revert to a state of incapacity. When considering the functional mental illnesses the problem becomes even greater.

The Psychoses

Individuals who suffer from manic depressive psychosis can at times be incapable of managing their own affairs while at other times, often the majority of the individual's life, are as capable as any of us. Obviously the victim of one attack of depression, or one attack of hypomania, is unlikely to even be considered as a candidate to be dealt with by the Court of Protection. However, many patients have recurrences of either depression, mania or both. Thus, at times they are incapable of managing

their affairs and may, while ill, involve themselves in all kinds of financial and legal problems, spending large amounts of money, disposing of all their property, or becoming entangled in complicated contracts. They may also become easily influenced by others who, in turn, may be looking to trick them out of their money.

In the case of the schizophrenias the same may apply with an individual suffering recurrent attacks of the disorder while being reasonably well and certainly capable between attacks.

The Neuroses

It may be generally considered that victims of neurosis are unlikely to need consideration for having their affairs taken over by the Court of Protection. This is not necessarily so since those with chronic severe neurotic reations may be incapacitated and/or unwilling to look after their own affairs. They may also be easy victims to influence by the dishonest members of our society in all their guises. Once again these individuals can vary not only from month to month but day to day and even hour to hour in their mental capacity. They, like the victims of psychosis and organic disease may also vary in their function at different levels being quite capable of dealing with their overall financial affairs, but incapacitated in dealing with more mundane every day activities such as paying bills or financing necessary and important repairs to their property. Victims of personality disorders present all these problems but, by the very nature of their illness, the problems are multiplied by the greater variation in their abilities.

The Examination

From what has been said it should be clear that a formal examination of the patient cannot be enough in itself. The patient's capacity can vary from time to time and their various capacities may also vary. It is obviously necessary to consider, in detail, the pattern of the individual's illness and always to consider what effect treatment in its broadest sense may have upon that individual and the individual's likelihood of continuing to accept or reject such treatment.

Whenever possible the assessment should be a multidisciplinary one involving the appropriate nurse, social worker, psychologist, occupational therapist and others who may be involved, such as a speech therapist.

Usually the individual being assessed will be known to the doctor and the other professionals involved and will have been observed and assessed on a number of occasions as part of normal therapeutic practice. However, this may not always be the case. If the assessment is being carried out on someone who has not previously been known or treated by the doctor and/or the team, it would appear reasonable to suggest that the examination should be carried out on more than one occasion.

One interview can be, and frequently is, very misleading. I once saw a patient who wished to resume control of his own affairs. I interviewed him for one and a half hours and could find little amiss. He appeared to have almost fully recovered from his schizophrenic illness. However, as he was leaving my consulting room, he said 'You do know who I am?' He then went on to point out that he was Christ who had come again and that he wished to resume control of his affairs so that he could distribute his wealth to the poor. This is not a made up story. Some may say that there is nothing wrong in giving away your wealth since all property is theft. This may be one view but cannot detract from the need of the Court of Protection's continuing involvement in the patient's affairs.

Good Practice

Any doctor who is asked to provide a medical certificate for the Court of Protection should carefully consider whether or not he or she has adequate knowledge of psychiatry and an understanding of the assessment of capacity. If the doctor is unsure of these abilities it would be sensible to suggest that the individual be referred to a psychiatrist for assessment and the provision of a medical report for the Court.

Whenever possible the assessment should be a multidisciplinary one with, of course, the doctor taking full responsibility for the medical certification.

Taking away the individual's right to manage their own affairs is obviously a very serious thing. It is almost as serious as taking away the individual's liberty. It would appear that certification should be very carefully considered and every effort made to obtain a clear picture of the individual and their illness over a period of time. This must involve obtaining as much information as possible and reviewing both this information and the individual's mental state on at least one occasion before completing the certificate. Bearing in mind the possible fluctuation in capacity it does not seem unreasonable to suggest that in the case of those individuals with a fluctuating disorder there should be a regular medical review and a mechanism that would ensure that the individual could seek a regular review along the lines laid down in the Mental Health Act in relationship to compulsory detention. This may sound to be a cumbersome and perhaps expensive process but again it must be strongly emphasised that taking away an individual's right to deal with their own affairs is a serious matter. However the law does not, currently, require this. (It is possible, however, to require regular medical reviews where enduring powers of attorney are concerned. See the section by David Carson above). It should also be remembered that the great majority of individuals who are dealt with by the Court of Protection are victims of permanent brain damage with a functional ability that varies but little.

It is the sufferers from functional disorders that present the problems. However, they cannot be selected out since I suspect this would be viewed as improper and even an individual labelled as having permanent brain damage may not be either so damaged as at first thought or, of course, may function at a low level because of a combination of factors other than the actual damage to the brain. In young individuals everyone has seen examples of patients who at first appeared to be extremely damaged, improving over a period and some recovering function to a level equal to that before the damage occurred.

A medical certification is a serious thing and considerable effort must be given to fully assessing an individual. This involves both examining the past history, exploring the present mental state and coming to some kind of a conclusion about prognosis. In cases where the individual is not under treatment and hence regular assessment, the assessment should take place on two separate occasions. It also appears important that a mechanism of review needs to be built into the procedure. Such a review should be at regular intervals with or without a request coming from the patient, their relatives or friends.

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THE LOCAL AUTHORITY, THE COURT OF PROTECTION AND CHARGES FOR SOCIAL SERVICES

John Ripley

Charges for Social Services

Section 21 of Part III of the National Assistance Act 1948 empowers each Local Authority to provide residential accommodation for people who are elderly, infirm or otherwise in need of care and attention. Section 22 provides for the cost of the accommodation to be met by the resident at a standard rate fixed by the local authority which varies from authority to authority. But residents who demonstrate that they have insufficient means to pay the standard rate can be assessed to only pay according to their means, although they must pay the minimum charge which is fixed annually by a government minister. The assessment is calculated on the resident's income and capital.

A statutory weekly personal allowance is fixed annually. It is currently £7.90. This is disregarded for assessment purposes. In addition a further £1.00 per week is disregarded made up of any occupational pension. Income from a trust fund, provided that the trust is non-discretionary, is disregarded up to £4.00 per week. A more generous disregard of £4.00 per week is given on certain other types of income, for example a war widow's or widower's pension, war disablement pension, workman's compensation, Civil List pensions, police and fireman's disablement pension, police and fire service special widow's pension, payments made from benevolent funds (provided they are not paid by an employer) and income from an annuity or similar investment purchased out of a lump sum pension entitlement if this was not arranged by an employer. But the total additional disregard may not exceed £4.00. Mobility allowance is disregarded entirely for assessment purposes as is constant attendance allowance payable under war and service pensions arrangements. However payment of the latter is only made for the first four weeks of residence in Part III accommodation. Payments made to holders of the Victoria or George Cross are disregarded as are death grants under Section 32 of the Social Security Act 1975 and maternity grants payable under Section 21 of the Social Security Act 1975.

In addition local authorities have a discretion under paragraph 27 of Schedule 1 to the Supplementary Benefits Act 1976 to disregard other forms of income. These include charitable or voluntary payments for a specific purpose not met by the residence, Christmas gifts from former employers, war pensioners' clothing allowances and gallantry and meritorious service awards.

Attendance allowance is not payable to residents in Part III accommodation except for the first four weeks if they were in receipt of it before admission. This is disregarded for assessment purposes.

Section 19 of the 1976 Act provides that the first £1,200 of capital is disregarded. Above that figure every entire £50.00 of capital is treated as producing a weekly income of 25p. The value of a house owned by a resident or with an interest in it, or business property, is regarded as capital and assessed accordingly. A valuation of the property should take into account its condition, the nature of ownership and title.

Where a Part III resident's affairs are under the Court of Protection and include an unoccupied house, the Court's directions will be necessary for its sale or letting. Until the sale is completed the local authority should work on a provisional assessment based on its market value. Once sold the local authority will work on the actual sale figures.

Where a Part III resident cannot, or does not wish to, sell their house the local authority can recover its charges and arrears from the resident's estate after their death. This is done by a deed of charge on the property subject to the consent of the resident. The charges would then be met on the property's sale or upon the death of the individual and the administration of their estate. Where they are mentally incapable the Court of Protection can authorise the creation of a deed of charge in favour of the local authority. Section 22 of the Health and Social Services and Social Security Adjudications Act 1983 (hereafter described as the Adjudications Act 1983) allows a local authority to create a charge on the resident's property to secure it's charges. This charge is created by a declaration in writing by the local authority. However, the appropriate section of the Act has not yet come into force.

If a resident's property is let rather than sold after their admission to Part III accommodation, the local authority is likely to take the value of the property as being its capital value with vacant possession.

Shareholdings, whether equities or gilt edged securities, and unit trust holdings are assessed according to their actual market value and not their nominal value.

In deciding whether a resident has an interest in a trust fund that can be taken into account, the local authority will, just like the DHSS when calculating entitlement to supplementary benefit, discover the trust allows the trustees any discretion to advance capital to the resident. If it does, then the capital value of the trust can be taken into account by the local authority when calculating charges for Part III accommodation.

The Supplementary Benefits Act 1976 states that anyone deliberately abandoning assets, usually by giving or transferring them to someone else, in order to obtain any or more supplementary benefit may have those assets treated as still part of their capital resources. In this way they could fail to get benefit. Abandoning assets in order to get a lower assessment of charges for Part III accommodation is treated in the same way by the local authorities. Section 21 of the Adjudications Act 1983 goes further and makes the recipients of any gift or transfer of assets, where the price given for them is less than their real value, liable to pay the difference where it causes a change in the assessment of charges. However this section has not yet been brought into force.

Section 42 of the National Assistance Act 1948 provides that husbands and wives are equally legally responsible to maintain each other and their children. So the income and capital of a husband or wife can be taken into consideration by the local authority when calculating a resident's accommodation charges.

Similarly, if the husband or wife is in Part III accommmodation a disregard may be made on their assessment for charges, provided these exceed the minimum charge, for contributions necessary towards the maintenance of dependents.

Other social service charges, such as for accommodation in hostels for people with mental or physical handicaps and training centres, are subject to local variations. For example, in Hampshire a 40 per cent disregard is given against assessable income to the residents of a hostel, subject to a maximum charge of £46.00 per week. Part III rules apply however, when assessing capital resources. Section 17 of the Adjudications Act 1983 allows local authorities to fix such charges for these services as it considers reasonable. However, if a person is unable to meet a set charge then 'the Authority shall not require him to pay more for it than it appears to them that it is reasonably practicable for him to pay'.

Local Authorities have a duty, under section 48 of the National Assistance Act 1948, to take reasonable steps to protect or minimise loss to the property of people admitted to hospital or Part III accommodation where no other suitable arrangements have been made. The authority is, however, entitled to recover, from the person whose property is being protected, 'any reasonable expenses' incurred. Section 49 allows local authorities to be remunerated for their expenses in making receivership application to the Court of Protection and for on-going expenses where an officer of a local authority acts as a receiver. These are usually written into a standard clause in the Court of Protection's order which appoints the receiver.

The Local Authority and Court of Protection

Financial restraints on local authorities and the Court of Protection limit the extent of their interaction. Nonetheless, because of the increased average life expectancy, the growth in relative wealth, the incidence of mental illnesses such as senile dementia and the move from institutional to community care, the two bodies are now probably working together in a way which they have never done before.

Hampshire works with the Court of Protection as a necessary fact of daily life. It is easier to accept and work with the Court than to ignore it in the hope that the problems it deals with will resolve themselves without recourse to the Court. However imperfect a vehicle, the Court of Protection is unquestionably the only one which can confer any legal authority upon the actions of those seeking to intervene in the managment of a mentally incapable person's financial affairs. From that standpoint a

local authority's involvement with the Court in the management of a client's affairs is hopefully in the client's interest and the authority's. But where a conflict of interests exists between them the Court should come into its own.

Whether or not a local authority puts one of its officers forward to the Court of Protection to be a receiver will depend on a number of factors such as whether there is anyone else suitable or willing to apply, the availability of staff to perform the administrative functions and the level of involvement with the client. The nature of the client's financial circumstances and problems will also be very important factors. It may be that these are such that a full receivership order can be avoided and a summary or short procedure order issued instead. This could allow a client's debts to be settled out of money obtained from their bank, using the balance to meet future debts as they arise and provide them with what the Court rather quaintly refers to as 'extra comforts'. Even the short procedure order might be unnecessary if the client's finances consist of income rather than capital and they are in Part III accommodation since their DHSS benefit can be received by an appointee. Similarly, the Paymaster General's Office is prepared to pay public service pensions to an appointee such as an officer-in-charge of a Home for the elderly upon the completion of one of its 'mental incapacity' forms by the resident's doctor.

Local authorities are, no doubt, more likely to make an application to the Court for its appointment as receiver in cases where the client is a resident in its own accommodation - a Home for elderly people or a hostel for people with a mental handicap, for instance. From a purely financial viewpoint, the local authority invoking the Court of Protection can effectively secure debts due to it from residents. The Court will check and, when satisfied with the authority's rate of assessment of accommodation charges, sanction the payment of those charges out of the client's funds and fix the remuneration of the local authority receiver.

Equally, to maintain a client in the community the local authority may feel obliged to apply for a receivership order that is necessary to make the community care work. However, the Court of Protection has no control over the behaviour or choices of clients. (See the section by Lydia Sinclair below)

Clients in board and lodging accommodation might not be entitled to supplementary benefit and access to capital may be necessary to pay for their lodgings. Obviously the administrative burden on a local authority is much more onerous in receivership cases where clients live in their own homes rather than Part III accommodation. However, where the clients financial affairs are in chaos referral to the Court of Protection is necessary for the benefit of the client. They may even be without essential services to the property because of non-payment of bills.

It is, perhaps, surprising that more local authorities do not use the Court more actively, even in their own interests. Even if the local authority is unwilling to make an application to the Court of Protection to be appointed receiver, it can use the Court in the client's interests.

(i) If a client is being harassed the authority can write to creditors informing them that the jurisdiction of the Court of Protection has been established by medical evidence and that bills can be settled upon the appointment of a receiver. However it may well be some months before the receiver is appointed.

(ii) To end a client's immediate hardship the authority can apply to the Court of Protection, when sending the required medical evidence, to release sufficient funds from a client's account to enable clothing to be purchased, essential outgoings to be met, or private residential home fees to be paid.

(iii) The local authority can apply for someone other than one of its officers to be appointed receiver. However it is not always easy to justify the extent of work involved in making an application for someone else to operate the receivership.

(iv) In sending the medical certificate to the Court of Protection the local authority can suggest that the Court invites a named individual to apply for his or her appointment as receiver. It can also ask to be kept informed by the Court of the position.

(v) It can inform a client's bank or building society of the position. This puts the bank 'on alert' and thereby protects the client from unauthorised movement of their account and hopefully ensures that in this event the bank accepts full responsibility.

The Court then, is immensely useful to local authorities. It might be argued that it is as good as the user wants it to be. Those who do not wish to use it tend to speak of it as being cumbersome, long-winded and so seek to justify avoiding contact with it. However, a little time spent studying the Court's 'once and for all' procedures will show they have changed noticeably in the last few years, becoming much more streamlined and can now be used effectively and efficiently in the management of a client's affairs.

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APPOINTEESHIP - SOCIAL SECURITY BENEFITS

Mr David Gent

Appointees or agents?

If someone who is entitled to a social security benefit or allowance is unable to manage their affairs, by reason of mental incapacity, the Secretary of State (in practice usually a benefit supervisor in a local DHSS office) may, on receiving a written application, appoint someone else to exercise that person's right to make claims for and receive the benefit.

Exceptionally, an appointment may be made in cases of serious physical incapacity. However, a person who is physically incapable of completing a claim form, but in possession of their mental faculties, will usually be capable of making a claim on a form filled in on their behalf by some other person, by making their mark and having it duly witnessed. In such a case, or where someone is only physically unable to attend the post office, creating an appointee is not appropriate. Rather, the person entitled to benefit may authorise any person of their choice to act as agent to collect the benefit. This arrangement does not allow the agent to spend or keep the money. Further, the person entitled to the benefit remains responsible for all matters relating to their claim, in particular notifying the DHSS of any relevant change of circumstances. The claimant's consent to this agency procedure must be obtained.

If a receiver has been appointed by the Court of Protection, that person will act on behalf of the claimant and neither the Secretary of State nor DHSS can make an appointment. (See Mrs Macfarlane's section, above.)

In-patients and Out-patients

If a person is in a psychiatric hospital and there is no record that someone has already been appointed, the Department would write to the hospital asking:

(i) whether the claimant can manage their own affairs; and, if not,

(ii) whether a Receiver has been appointed to look after their affairs.

If the hospital manager states that a definite answer cannot be given to question (i), or that patients in that hospital are not allowed to receive money, the DHSS treats the answer as 'no'.

If any person calls at a DHSS local office to report that a claimant is unable to manage their own affairs because of mental incapacity, that no one else has already been appointed, and that they are either:

(i) the claimant's dependent spouse or adult relative;

or

(ii) a person who has the care of a child for whom the claimant obtains an increase in benefit;

then an application form for an appointee is completed there and then. They are advised, however, that enquiries will have to be made to confirm that the claimant is incapable of acting for themselves.

If the person is not in a psychiatric hospital, they are visited to find out whether they are in fact, unable to act. If this is not possible then medical evidence is invited about their inability to manage their affairs.

If the claimant is unable to name a person to act, or a person giving information about the incapacity is unwilling to act, the DHSS benefit supervisor will consider, in consultation with the person who gave the information and next-of-kin who might be suitable and willing to act as an appointee.

If the benefit supervisor decides that a person may be suitable to act on behalf of a person who is in hospital, the hospital manager is asked whether the person suggested as the prospective appointee takes an interest in the patient's welfare, for example by visiting or by writing to

them. If the reply shows that the suggested appointee does not take an active interest in the patient's welfare, then the suggested appointee is visited to confirm that they are a suitable person before inviting them to complete an application for appointment. It is explained to them that, if their application is accepted, all social security benefit received by them must be wholly applied to the use and advantage of the claimant for whom they are acting. This is detailed in the conditions printed on the reverse of the certificate of appointment.

References will not usually be necessary, but the benefit supervisor may request the names and addresses of two referees if they are not sure about the suitabilty of the applicant.

If no application to act has been received for a person in hospital, or no person is considered suitable to act, and yet the indications are that an appointee is necessary, the manager of the health authority is invited to apply.

Terms and conditions

An appointment made by the Secretary of State may be revoked at any time. A person who has been made an appointee may resign their appointment by giving one month's notice. An appointment ends automatically as soon as the claimant is able to act for themselves, a receiver is appointed by the Court of Protection, or the claimant dies.

An appointment may be revoked if the appointee does not comply with the duty to apply the money in the claimant's interests. Revocation is not effective however, until the appointee has been seen, the position has been explained and their attention drawn to the notes on the reverse of the certificate of appointment. If they are then willing to administer the benefit in a satisfactory manner, on behalf of the claimant, the appointment is continued for a trial period. In practice an appointment is only withdrawn from a claimant's wife or husband in the most exceptional circumstances. Where power of attorney has been granted to a person, that person is, as necessary, made the appointee. They are, however, under the same obligations as any other appointee, and their certificate of appointment can also be revoked in the circumstances indicated above.

The Department encourages anyone from any of the caring agencies to approach the DHSS local office where they feel that an appointee is needed, or where an existing appointee is falling down on their obligations to the claimant. They should ask to speak to the benefit supervisor responsible for action on the particular claim. Once an appointment has been made the DHSS relies in the main on evidence from third parties, for example health authorities, to advise it where an appointee is apparently acting contrary to the terms of their appointment. The Department does not have the resources to have the claimant and appointee visited on anything like a regular basis (unless, of course, it is suspected that something is wrong).

* * * * * * * * *

GUARDIANSHIP OF THE PERSON

Lydia Sinclair

Section 7(2)(b) of Mental Health Act 1983 provides for the guardianship of people suffering from mental illness, severe mental impairment, mental impairment and psychopathic disorder when 'it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received'. The terms 'mental impairment' and 'severe mental impairment' only cover a small minority of people with mental handicaps. (See the definitions quoted in the section by Mrs MacFarlane). The only people covered are those whose behaviour is 'abnormally aggressive' or 'seriously irresponsible'. Guardianship, which involves limited powers, may not be thought to be appropriate for people who behave in this way.

The person is described as a 'patient' and must be over sixteen. Care orders are to be used when appropriate, with people under sixteen. The applicant must either be an approved social worker or the nearest relative and the guardianship order runs for up to six months in the first instance but can be renewed for a further six months and then for periods of one year thereafter. A relative or social worker can be the guardian, but the order must be approved by the local authority social services department. This means ongoing involvement and monitoring by the social services department with each case.

The guardian only has the following powers. They are specified in section 8 of the Act:

1. The power to require the patient to reside at a place specified by the local authority or person named as guardian.

2. The power to require the patient to attend at places and times specified for the purpose of medical treatment, occupation, education or training.

3. The power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved social worker or other person so specified.

However, a guardian is not given power in these provisions to compulsorily detain or convey a patient to a hospital, institution or hostel, to compel the patient to accept medical treatment without their consent or to force entry to the patient's house when this is refused. The guardian therefore has very limited powers over the patient and cannot make decisions on behalf of the patient about matters such as accommodation, dress, work, social activities, medical treatment, friends, sexual relationships. Also the guardian may have difficulty in enforcing the powers because there is no penalty for ignoring or disobeying a guardian. Whereas the guardian might be able to apply for the person's admission to hospital, this ought rarely to be successful. Admission to hospital needs to be in the interests of a patient's health or safety or for the protection of other people. However, it does not follow that this will be true just because the patient disobeys the guardian.

Guardianship under the Mental Health Act 1983 is therefore limited to patients who are eligible under the criteria set out in section 7 and in its scope.

MIND's concern in considering 'guardianship of the person' is with adults who in law can make decisions about their personal life, but who for reasons of age or disability may be unable to fully understand the issues to make any decision or to make a reasonable decision.

The Court of Protection clearly has jurisdiction to manage the property and financial affairs of such persons whether they are elderly mentally confused, mentally handicapped or mentally ill. But this jurisdiction does not extend to personal decision-making and for many persons living in the community and in hospitals or other instititutions these decisions are made by a range of carers - doctors, nurses, social workers, therapists, relatives, friends, neighbours etc. However, they have no legal authority to make these decisions, however good or well intentioned they may be, and the legal uncertainties leave both carers and individuals at risk.

MIND and MENCAP are aware of many cases where wrong decisions are made, where exploitation occurs, where medical treatment is withheld or given without monitoring or challenge and where other abuses or neglect occur. Legal provisions such as Mental Health Act guardianship, powers of attorney, wardship, detention under section 47 of the National Assistance Act 1948 do not resolve this problem.

We have been looking at adult guardianship provisions in other countries, for example France, New Zealand, Australia and Canada. The draft statute in Appendix 1 is an attempt by Michael Whelton, Legal Officer of MENCAP, and myself to provide a basis for debate about this problem. The draft is based on a Canadian Statute which was implemented in Alberta in 1978 - The Dependent Adults Act. This provides for substitute decision-making when adults, because of 'incapacity', require substitute decision-makers on personal matters.

We are concerned about the serious civil liberties problems this proposal entails but we are equally concerned about the gap in the law and the uncertainty and real hardship this can cause in practice. The draft statute as drafted is only a basis for discussion and requires much modification. However, it is crucial that any guardianship provision is based on the assumption that individuals should be free to make their own decisions and that power is only taken away when the evidence overwhelmingly establishes that a substitute decision-maker is necessary and only in these areas of decision-making absolutely necessary. Guardianshship must be thought of as 'partial guardianship' with an appreciation that competence is a flexible concept. Levels of understanding necessary for different decisions vary and the legal proposals must take account of this.

See Appendix 1 for the draft statute.

* * * * * * * * *

APPENDIX 1: DRAFT STATUTE

Michael Whelton, MENCAP and Lydia Sinclair, MIND

PART 1

GUARDIANSHIP FOR ADULTS

APPLICATION FOR GUARDIANSHIP ORDER

1. (1) Subject to this Section and Section 3, any interested person may apply to the Court for an Order appointing a guardian in respect of an adult person

(2) No application shall be made to the Court under sub-section (1) unless founded on the written recommendation in the prescribed form of a registered medical practitioner or a psychologist in the prescribed form.

(3) The interested person making an application under sub-section (1) shall, at the same time the application is made, file with the Court the written consent of the person proposed as guardian to the effect that he is willing to act as a guardian of the person in respect of whom the application is made.

2. (1) A registered medical practitioner or a psychologist who makes a report under Section 2 shall not acquire any liability for making the report in civil or criminal matters.

(2) No person shall disclose any information provided in a report referred to in Section 2 except -

(a) when the disclosure is made to an interested person to assist him in deciding whether or not an application should be made under this Act;

(b) at a proceeding under this Act; or

(c) under an Order of the High Court (for discovery of documents).

3. (1) An application for an Order appointing a guardian shall be made:

(a) in the County Court of the district in which the person in respect of whom the application is made is ordinarily resident; or

(b) if the Court considers it appropriate in the circumstances of the case in the County Court of the district in respect of which the applicant is ordinarily resident.

(2) The interested person making the application shall, at least 10 days before the date the application is to be heard, serve a copy of the application and the report referred to in Section 2 on -

(a) The person in respect of whom the application is made;

(b) the person who is known to be -

(i) the nearest relative of the person in respect of whom the application is made, unless it is not reasonably practicable or would cause unreasonable delay to do so; or

(ii) if the nearest relative referred to in sub-clause (i) is the applicant, the next nearest relative practicably available of the person in respect of whom the application is made

(c) the person proposed as the guardian of the person in respect of whom the application is made if he is not the applicant or the nearest relative served pursuant to clause (b);

(d) if the person in respect of whom the application is made is an in-patient or resident of a hospital or institution, the person in charge of the institution;

(e) any receiver appointed by the Court of Protection;

(f) any other person that the Court may direct.

(3) The Court may, if it considers it appropriate to do so, in exceptional circumstances -

(a) shorten the time for service on all or any of the persons referred to in sub-section (2); and

(b) dispense with the requirement for service on all or any of the persons referred to in sub-section (2) and the person in respect of whom the application is made, if the Court is satisfied that it is in the best interests of that person to do so.

4. (1) On hearing an application for an Order appointing a guardian, the Court shall inquire as to whether -

(a) the person in respect of whom the application is made is in need of a guardian; and

(b) it is in the best interests of the person in respect of whom the application is made for a guardian to be appointed for him.

(2) When

(a) the Court has any doubt as to whether a guardian should be appointed; or

(b) a Guardianship Order is being reviewed by the Court

the Court may receive such reports as it shall deem necessary on the person named in the application with respect to any or all of his physical, mental, social, vocational, residential, educational or other needs both present and future and generally his ability to care for himself and to make reasonable judgements with respect to matters relating to his person.

5. At a hearing of an application for an Order appointing a guardian or on a review of a Guardianship Order -

(a) any person served pursuant to Section 3(2); and

(b) any other person who wishes to make representations and whom the Court agrees to hear

may appear and make representations.

PART 2

GUARDIANSHIP ORDER AND ITS EFFECT

6. (1) When the Court is satisfied that a person named in an application for an Order appointing a guardian is -

(a) an adult who is not a ward of court; and

(b) unable repeatedly or continuously unable -

(i) to care for himself; and

(ii) to make reasonable judgements in respect of one or more of the matters relating to his person;

and

(c) in need of a guardian

the Court may make an Order appointing a guardian.

(2) The Court shall not make an Order under sub-section (1) unless:

(a) it is satisfied that the Order would be in the best interests of the person in respect of whom an application is made; and

(b) result in substantial benefit to the person in respect of whom the application is made.

(3) If the Court makes an Order under this Section, the applicant shall serve a copy of the Order on the persons who are required to be served with an application under sub-section 3(2).

(4) The Court shall limit the Order to the areas of decision-making and will only empower the guardian to exercise powers in those areas where the adult is on review of evidence unable to make a reasonable decision.

7. (1) The Court may appoint as a guardian of a dependent adult, any adult person who consents to act as guardian and in respect of whom the Court is satisfied that -

(a) he will act in the best interests of the dependent adult;

(b) he will not be in a position where his interests will conflict with the dependent adult's interests;

(c) he is a suitable person and is able to act as the guardian of the dependent adult.

(1.1) Notwithstanding sub-section (1)(b), a person shall not be considered to be in a position where his interests will conflict with the dependent adult's interests by reason only of the fact that the person is a potential beneficiary or a relative of the dependent adult.

(2) The Court will require the person proposed as guardian to attend and answer questions to determine whether he meets the requirements of sub-section (1).

(3) The guardian who is proposed will be regarded as a person exempted from the provisions of The Rehabilitation of Offenders Act.

8. On making or receiving a Guardianship Order, the Court shall specify -

(a) the areas of decision-making in Section 9 under which the guardian is empowered to act subject to the provisions of Section 6(2)(c).

(b) the time in which the Order must be reviewed by the Court which shall not be later than 3 years after the date of the Order or the date of the review of the Order as the case may be;

(c) the right of any interested person to apply to the Court for a review of the Guardianship Order, this includes the person in respect of whom the Order is made;

(d) any requirement to be complied with by the guardian or any other person with respect to a review of the circumstances of the dependent adult;

(e) the guardian's duty to report to the Court annually.

9. (1) Subject to sub-section (2), when the Court makes an Order appointing a guardian, the Guardianship Order confers on the person named as the guardian the power and authority in one or more of the following:-

(a) to decide where the dependent adult is to live, whether permanently or temporarily;

(b) to decide with whom the dependent adult is to live and with whom the dependent adult is to consort;

(c) to decide whether the dependent adult should or should not be permitted to engage in social activities and, if so, the nature and extent thereof and matters related thereto;

(d) to decide whether the dependent adult should or should not be permitted to work and, if so, the nature or type of work, for whom he is to work and matters related thereto;

(e) to decide whether the dependent adult should or should not be permitted to take or participate in any educational, vocational or other training and, if so, the nature and extent thereof and matters related thereto;

(f) to decide whether the dependent adult should apply or should be permitted to apply for any licence, permit, approval or other consent or authorization required by law;

(g) to commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceeding taken against the dependent adult that does not relate to his Estate;

(h) to consent to any health care that is in the best interests of the dependent adult;

(j) to make normal day-to-day decisions on behalf of the dependent adult including the diet and dress of the dependent adult;

(k) to make any other decisions that would be made by a father in respect of an immature child that are not specified or referred to in this sub-section.

(2) In making an Order appointing a guardian, the Court may make its Order subject to any conditions or restrictions it considers necessary.

(3) Any decision made, action taken, consent given or thing done by a guardian shall be deemed for all purposes to have been decided, taken, given or done by the dependent adult as though he were an adult capable of giving consent.

10. A guardian shall exercise his power and authority -

(a) in the best interests of the dependent adult;

(b) in such a way as to encourage the dependent adult to become capable of caring for himself and of making reasonable judgements in respect of matters relating to his person; and

(c) in a manner least restrictive of the rights of the person being appointed to make decisions only in one or more matters defined in Section 9 in which the dependent adult is found by the Court to be unable to make reasonable judgements, the dependent adult retaining authority to make his own decisions to the maximum extent possible.

PART 3

OTHER GUARDIANSHIP PROVISIONS

11. (1) Nothing in this Act or an Order of the Court made under this Act prevents a dependent adult or any interested person on his behalf from applying to the Court for a review of a Guardianship Order at any time.

(2) When an application is made to the Court for a review of a Guardianship Order, the person making the application shall, at least 10 days before the application is to be heard, serve a copy of the application on -

(a) the dependent adult;

(b) the person who is known to be -

(i) the nearest relative of the dependent adult, unless it is not reasonably practicable or would cause unreasonable delay to do so; or

(ii) if the nearest relative referred to in sub-clause (i) is the applicant, the next nearest relative of the dependent adult, unless it is not reasonably practicable or would cause unreasonable delay to do so.

(c) the guardian of the dependent adult if he is not the applicant or the nearest relative served pursuant to clause (b);

(d) if the dependent adult is a resident of a hospital or institution, the person in charge thereof;

(e) any receiver appointed by the Court of Protection;

(f) any other person the Court may direct.

(3) The Court may, when it considers it appropriate to do so, in exceptional circumstances -

(a) shorten the time for service on all or any of the persons referred to in sub-section (2);

(b) dispense with the requirement for service on all or any of the persons referred to in sub-section (2); or

12. (1) On hearing an application for review of a Guardianship Order, the Court -

(a) shall consider whether the conditions referred to in Section 6(1) and (2) are still applicable and whether the guardian has exercised his power and authority in accordance with the Guardianship Order and Section 10; and

(b) may amend, terminate, renew, continue, vary or replace the Order subject to any conditions or requirements it considers necessary.

(2) If the Court amends, varies or replaces an Order under sub-section (1), the applicant shall serve a copy of the Order as amended or varied or of the replacement Order, as the case may be, on the persons who are required to be served with an application under Section 11(2).

(3) If the Court terminates, renews or continues an Order under sub-section (1), the applicant shall serve on the persons referred to in sub-section (2) a notice indicating that the termination, renewal or continuation has taken place.

13. (1) On making a Guardianship Order or on a review of a Guardianship Order, the Court may appoint an alternate guardian if -

(a) the person proposed as alternate guardian has given his written consent to act as guardian of the dependent person in the event of the death of the original guardian; and

(b) it is satisfied that the persons on whom the application for an Order of guardianship or review thereof is served pursuant to Section 11(2) have had sufficient notice of the willingness of the person proposed as alternate guardian to act as such.

(2) Section 7 applies to the person proposed as the alternate guardian.

(3) If the Court appoints an alternate guardian under sub-section (1), the applicant shall serve a copy of the Order appointing the alternate guardian on the persons who are required to be served with an application under Section 3(2).

14. (1) If an alternate guardian is appointed, the alternate guardian shall take over the office of guardian, without further proceedings -

(a) in the event of the death of the guardian; or

(b) if authorized in writing by the guardian, during the temporary absence of the guardian.

(2) An authorization under sub-section (1)(b) shall indicate the period during which the alternate guardian may act as guardian and terminates -

(a) at the end of the period indicated on the authorization; or

(b) when revoked in writing by the previous guardian, whichever is the earliest.

15. (1) The guardian or any interested person may apply to the Court for an Order discharging the guardian from his office.

(2) An application pursuant to sub-section (1) shall be made in the County Court district in which the dependent adult is ordinarily resident.

(3) The person making an application under sub-section (1) shall, at least 10 days before the date the application is to be heard, serve a copy of the application on the persons referred to in Section 11(2) and the provisions of Section 11(3) apply.

(4) When the Court considers that a dependent adult is no longer in need of a guardian or if the Court is satisfied that a guardian -

(a) is unable or unwilling to continue to act as guardian;

(b) refuses to act or to continue to act as guardian;

(c) fails to act as guardian or fails to act in accordance with a Guardianship Order;

(d) acts in an improper manner or in a manner that has endangered or that may endanger the well-being of the dependent adult; or

(e) is no longer a suitable person to act as guardian

the Court may make an Order discharging the guardian from his office or make any other Order it considers appropriate in the circumstances.

(5) Before making an Order under sub-section (4) the Court shall satisfy itself that, if necessary -

(a) suitable arrangements have been or will be made in respect of the dependent adult; or

(b) if the Court makes an Order under sub-section (4) the applicant shall serve a copy of the order on the persons who are required to be served with a copy of an application under Section 15.

APPENDIX 2

C.P. 3

MEDICAL CERTIFICATE
COURT OF PROTECTION

(a) Patient's full name

IN THE MATTER OF [a] .....

(b) Full name and address of Practitioner

I [b] .....

of .....

(c) Medical qualifications

[c] .....

hereby certify as follows:

1. I am the medical attendant of the above-named Patient, who resides at

(d) Patient's address

[d] .....

and have so acted since .....

2. I last examined the Patient on the .....

..... 19 and in my opinion the Patient is incapable by reason of mental disorder as defined in the Mental Health Act 1983 [e] of managing and administering h.. property and affairs.

3. I base my opinion on the following grounds: [f]

(e) "Mental Disorder" is defined in the Act (Section 1(2)) as meaning "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind", and "psychopathic disorder" is defined as disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned".

(f) State the nature of the mental disorder and reasons for the opinion expressed. Attention is drawn to the notes which accompany this Certificate.

Page 2

The following particulars and answers are accurate to the best of my knowledge and belief:

4. How long has the present mental disorder lasted?

   For .....months/years (or) since .....

5. Is the Patient dangerous to h . . self or others in any way?.....

   If so, give details .....

   .....

6. Is the Patient capable of appreciating h . . surroundings? .....

7. Does the Patient need anything to provide additional comfort? .....

   If so, what recommendations do you make? .....

8. (Where the Patient is living in a hospital/nursing home)

   Is there a reasonable prospect of the Patient being discharged to a nursing home/own home?

   .....

   If so, in approximately how many months/years? .....

9. Is the Patient visited by relatives or friends? .....

   How frequently? .....

   By whom? .....

10. What is the Patient's age? .....

11. What are the Patient's prospects of life? .....

12. Brief summary of Patient's physical condition .....

    .....

    .....

    .....

13. What are the Patient's prospects of mental recovery? .....

14. Additional comments (if any) .....

.....

.....

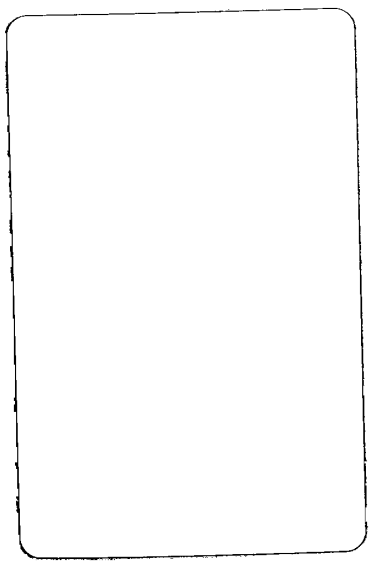
.....

.....

.....

SIGNED .....

Dated the day of 19



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