

Number 7

Draft Mental Incapacity Bill

The Government has recently published a Draft Mental Incapacity Bill, which aims to clarify and codify the common law procedures currently in place for the management of the affairs of individuals who lack mental capacity to manage for themselves.

Capacity

The Draft Bill defines lack of capacity as being unable to make a decision in relation to a specific matter, due to an impairment or disturbance in the functioning of the brain. This definition means that an individual will be assessed on their capacity in relation to each decision that needs to be taken. Thus where an individual is found to be incapable this provision ensures that they are not labelled as incapable, but rather that they lacked capacity in relation to that specific matter at that point in time. The Bill sets out when a person is to be deemed to be unable to make a decision for themselves. There is a presumption that an individual does have capacity unless it is shown otherwise.

Best Interests

All decisions made or actions taken on behalf of an individual who has been found to lack mental capacity, must be done or made in the best interests of that individual. To identify a person's best interest the Bill sets out a checklist of matters that the decision maker must have regard to before reaching any decision:

- The likelihood that the individual will regain capacity in the future.
- Any past or present wishes or feelings of the individual.
- The opinion of any person so directed by either that individual or the court, or any person caring or concerned for the welfare of the individual as to any past or present wishes or feelings of that individual.

General Authority

The Bill provides a general authority for those persons who care for individuals lacking mental capacity to do acts on their behalf. This can relate to the finances of the individual, for example a carer will under the general authority be able to purchase food on behalf of individual using the individual's money. The general authority will extend to medical practitioners and carer treatment decisions that need to be taken on behalf of the individual. In all cases the decision maker may only act where it is reasonable for him to do so, which includes a reasonable belief that the individual lacks the required mental capacity and they have worked through the 'best interest' checklist.

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Lasting Powers of Attorney (“LPA”)

The Bill proposes to extend the current Enduring Power of Attorney system to include not only management of the individual’s financial affairs, but also the management of the individual’s general welfare. The Draft Bill refers to a Lasting Power of Attorney, which allows an individual who currently has mental capacity to appoint an attorney to act on their behalf if they lack the capacity in the future. The appointed attorney will have the ultimate say in what should be done for the individual where they lack the required mental capacity, including making medical decisions as well as financial and general welfare ones. The LPA is subject to the attorney going through the ‘best interest’ checklist before reaching any such decision, but it represents a significant change to current law which does not recognise a “healthcare proxy” (ie the ability for another individual to make healthcare decisions).

The Court of Protection

Under the Draft Bill the powers of the Court of Protection will also be widened. The court will be able to appoint a deputy if an individual has been unable to execute a LPA. The deputy will have the same powers and duties as an attorney under an LPA. There will also be opportunities for applications to be made to the Court of Protection seeking a decision in relation to one off situations such as closure of a bank account.

Advance Decisions to Refuse Treatment

Perhaps the most controversial aspect of the Draft Bill has been its codification of the validity of Advance Decisions (also known as advance directives or living wills). The draft states that where an individual has reached the age of 18 and has mental capacity they can make an Advance Decision about the sort of medical treatment they do not wish to receive if they are lacking mental capacity at the time of specific future treatment. For such an Advance Decision to be valid, the decision must not have been withdrawn at any time when the individual had capacity, or withdrawn via the appointment of an LPA who has the power to grant or refuse consent to the treatment. Further, if the individual clearly acts in a way inconsistent with the Advance Decision then the Advance Decision will have to be scrutinised closely to see if it is still valid. Indeed if new treatment or information has arisen since the Advance Decision was made, (for example new drugs), then the decision will again be closely scrutinised to judge whether it is still applicable. An Advance Decision can be made about life sustaining treatment, if that is specified in the decision.

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FUTURE TOPICS FOR OUR CARE HOMES BRIEFINGS

If there are specific topics you would like us to address in our future Care Homes Briefings, please let us know by sending an email to andrew.parsons@rlb-law.com

For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7388.

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