



Personal Injury and Medical Law Teams Practice and Procedure Note

SUMMARY OF DRAFT COURT OF PROTECTION RULES: MENTAL CAPACITY ACT 2005

The Mental Capacity Act 2005 [MCA 2005] received Royal Assent in April 2005 and is due to come into force on 1st April 2007.

This Practice and Procedure Note should be read in conjunction with the summary of the proposed changes under the MCA 2005, set out in the 13 KBW PI and Medical Law Teams September 2006 PIMLU

On 17th July 2006 a consultation paper was published by the DCA entitled **Draft Court Rules: Mental Capacity Act 2005 Court of Protection Rules**¹. This paper invited comment on the draft rules of court to govern applications to the new Court of Protection created by this Act.

Consultation ended on 6 October 2006 and on 6th February 2007 a Report was published setting out the background, a summary of the responses together with detailed response to specific questions raised and the proposed timetable following the consultation:
Response to Consultation carried out by the Department for Constitutional Affairs¹

Under 'Background' this Response states that the MCA 2005 "establishes a new specialist court, to be known as the Court of Protection, with a new jurisdiction to deal with decision-making for adults who lack capacity to take particular decisions for themselves. This court will have important structural differences from the current office of the Supreme Court (also known as the Court of Protection). The new court will be able to make decisions both, as the current court can about a person's 'property and affairs' (the term the Act uses to describe the financial decision-making jurisdiction) and also about 'personal welfare' matters. The court will also have the power to make a declaration as to whether or not a person has capacity to make a particular decision or in relation to a particular matter"

Responses were sought to 14 questions relating to the new rules:

¹ CP (R) 10/06 06/02/2007

1. The Overriding Objective

This will be the benchmark to enable the new Court of Protection to deal with cases and this is adopted in a largely unchanged form from the consultation paper.

2. Pre-Action Protocols

The committee accepted that most applications to the current Court of Protection are where a court order is needed to give another person decision-making authority over the property and affairs of a person who lacks capacity. These applications are commonly uncontested, cannot be decided by other means and therefore have to come to court in any event. Accordingly, requiring parties to undertake actions under a pre-action protocol would have little practical benefit in progressing the court application and could cause delay in urgent matters. The proposed way forward therefore is to consider whether pre-action protocols would be of particular benefit for some types of case coming before the new court and whether, if that is the case, they should be introduced when the new Court of Protection comes into being or, at a later stage, once the new court has established operating procedures.

3. Permission to apply

Exemption from the general requirement to seek permission to apply, will be given for applications made by the Official Solicitor, the Public Guardian or applications relating to a Lasting or Enduring Power of Attorney. Similar provision will be made to continue the limitation under the current Court of Protection rules restricting the class of persons that may make certain property and affairs applications.

It is also agreed that personal welfare matters should only be brought before the court when they cannot be resolved by any other means or where the matter is so serious that the court needs to decide on the matter. The provisions for the seeking of permission in the Act provide a 'check' to ensure that applications are necessary and well-founded and for this reason it has been decided not to extend the types of applications which can be made to the court without permission to include personal welfare applications in general or to applications in relation to personal welfare when made by other particular types of applicants (such as NHS Trusts or Local Authorities).

To address concerns about the progress of urgent applications, rules are being drafted to allow urgent matters to be considered quickly by the court such as decisions on the withdrawal/withholding of treatment.

4. The Core Process and Provisions for Service

The rules will be developed to provide for urgent cases where an interim or a final order needs to be made before all the rules can be complied with. The committee is also considering whether the rules can provide a simpler process for people who already have

the court's authority, to apply again to court in respect of limited changes to that authority.

Written guidance will be produced to assist those considering applying to the court (including carers who wish to be appointed 'Personal Welfare Deputies') and the Customer Service Unit in the Office of the Public Guardian will be able to provide advice about how to make an application.

There will be increased numbers and levels of judiciary, from High Court Judges to District Judges, sitting in the new court. Despite expressed concerns during the consultation that the informality (and thus efficiency) of the existing Court will be lost, the wider range of applications that will come to the new Court of Protection mean that "the new rules will require more formal processes whilst keeping the procedure as straightforward as possible".

5. Involvement of the person who lacks capacity in the proceedings

The consultation proposed that the court rules should provide a range of different ways for involving the person who lacks capacity who is the subject of the application in the court proceedings. These ranged from: personally informing that person that an application had been made; to the court ordering an impartial court report or asking a Court of Protection Visitor to visit them; to joining them as a party to the application represented by a litigation friend. Most respondents agreed with this proposal.

6. Admissions, Evidence and Depositions and Expert Evidence

The rules relating to evidence will ensure that there is a clear distinction between providing for evidence at start of proceedings to enable the court to establish whether the person who is the subject of the application lacks capacity to make the decision in question, and allowing the court to control filing of subsequent evidence and ensure the appropriate provision of expert evidence.

7. Should the new Court of Protection sit in public or in private?

There was a finely balanced response to this question highlighting a need to protect the person who lacks capacity and ensure that sensitive personal information about their finances, health or personal welfare is safeguarded, against the smaller number of cases, where the court is asked to decide on the legality of serious medical treatment which may have a significant effect on a person who lacks capacity's quality of life and where there may be a much greater public interest in knowing about such decisions and how they are taken by the court. The proposal is that the default position for hearings in the new Court of Protection will be that only the parties to an application and their representatives and the person who lacks capacity (whether they are a party or not) should have an automatic right to attend hearings but the rules will enable the court to admit the media or general public to all or part of a hearing or to report a judgment publicly, either of its own motion or upon application to it.

Many respondents proposed the reporting of court decisions with the identities of the person who lacks capacity and the parties anonymised. The committee supports this "as a way to promote greater openness and transparency in the new court" and anticipates a greater number of judgments to be reported in the new Court of Protection suitably anonymised. This recommendation is aligned with proposals for reform of reporting and attendance rights in the family courts following the consultation '*Confidence and Confidentiality: Improving transparency and privacy in family courts*' (DCA consultation paper CP 11/06) which also closed in October 2006.

8. Appeals

It had been suggested by some respondents that in cases concerning life-sustained treatment, permission to appeal should not be required. The recommendation however is for a general requirement to seek permission to prevent unfounded applications being made

9. Costs

The new and significantly wider jurisdiction of the new Court of Protection raises difficulties between applications made in respect of the person who lacks capacity's property and affairs (and which are usually unopposed), and where costs are normally met out of the incapacitated person's estate, and those cases that will arise under the new personal welfare jurisdiction: applications concerning withdrawal/withholding treatment and other serious medical treatment decisions in respect of the person who lacks capacity, will generally be contested with the need to determine costs. It was felt that for the incapacitated person to meet those costs from the estate could be unfair and also financially non-viable in some cases; further an order of costs against one party or the other acts as an incentive to resolve such cases²

The proposal is to provide different costs rules for personal welfare applications and property and affairs applications:

- in personal welfare applications the presumption would be that there will be no order as to costs (i.e. that each party would pay their own costs); and
- in property and affairs applications the presumption would be that costs should be paid out of the estate of the person who lacks capacity who is the subject of the application

with provision for an adverse costs order whereby one party pays the cost of the other should the court consider that the paying party has acted unreasonably³.

² Although this is arguably disingenuous in cases of withholding/withdrawing treatment which are generally not amenable to the universal panacea that everything is capable of settlement. There must be some concern that this will place undue pressure on relatives who are reliant upon public funding.

³ This is likely to give rise to satellite litigation particularly in cases concerning serious medical treatment decisions where the NHS and the LSC will be under pressure to recoup their costs albeit there are incurred as separate compartments of the same public purse. In this regard a limited consultation on bringing certain cases in the Court of Protection within the scope of legal aid funding was held between 30 November 2006 and 2 February 2007.

The plan is to finalise the rules to come into force on the implementation of the Mental Capacity Act 2005 (presently planned for 1st April 2007)

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Please note that this Practice and Procedure Note is intended to provide a summary and comment of the subject matter covered. It is not intended to be comprehensive or to provide legal or other professional advice.

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