

2008 No. []

MENTAL CAPACITY, ENGLAND

Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008

<i>Made</i>	- - - -	2008
<i>Laid</i>		2008
<i>Coming into force</i>	- -	2008

The Secretary of State for Health makes these Regulations in exercise of the powers conferred by section 65(1)(c) of, and paragraphs 138(1), 142 to 145, 148, 149, 151 and 152 of Schedule A1 to, the Mental Capacity Act 2005(a).

Citation, commencement and application

- 1.—(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008 and shall come into force on [] 2008.
- (2) These Regulations apply in relation to England only.

Interpretation

2. In these Regulations—
- “best interests assessor” means a person selected to carry out a best interests assessment under paragraph 38 of Schedule A1 to the Act;
- “donee” is a person who has a lasting power or attorney or a registered enduring power of attorney conferred on them by the relevant person;
- “the Act” means the Mental Capacity Act 2005.

PART 1

Appointment – general

Appointment procedure

- 3.—(1) A person is to be selected for appointment as a representative in accordance with Part 2.
- (2) A person is to be appointed as a representative in accordance with Part 3.

(a) 2005 (c.9). Schedule A1 was inserted by section 50(5) of and Schedule 7 to the Mental Health Act 2007 (c.12).

Commencement of appointment procedure

4. The procedure for appointing a representative must begin as soon as—
- (a) a best interests assessor is selected by the supervisory body(a) for the purposes of a request for a standard authorisation(b); or
 - (b) a relevant person’s representative’s appointment terminates, or is to be terminated, under regulation 14, and the relevant person remains subject to a standard authorisation.

Eligibility of a person to be a representative

- 5.—(1) A person is eligible to be appointed as a representative if they are—
- (a) 18 years of age or over;
 - (b) able to keep in contact with the relevant person(c);
 - (c) not prevented by ill-health from carrying out the role of the representative;
 - (d) willing to be the relevant person’s representative;
 - (e) not financially interested in the relevant person’s managing authority;
 - (f) not a close relative of a person who is financially interested in the managing authority;
 - (g) not employed by, or providing services to, the relevant person’s managing authority(d); where the relevant person’s managing authority is a care home(e);
 - (h) not employed to work in the relevant person’s managing authority in a role that is, or could be, related to the relevant person’s case, where the relevant person’s managing authority is a hospital(f); and
 - (i) not employed to work in the relevant person’s supervisory body in a role that is, or could be, related to the relevant person’s case.

(2) For the purposes of this regulation a “close relative” means:

- (a) a spouse, civil partner or partner;
- (b) a parent or child,
- (c) a brother or sister;
- (d) a grandparent or grandchild;
- (e) a child of a person falling with sub-paragraphs (a) or (c);
- (f) a stepfather or stepmother; or
- (g) a half-brother or half-sister;

(3) For the purposes of this regulation a person is another’s partner if the two of them (whether of different sexes or the same sex) live as partners in an enduring family relationship.

(a) The identity of the supervisory body is determined in accordance with paragraphs 180 and 182 of Schedule A1 to the Mental Capacity Act 2005 (“the Act”).

(b) “standard authorisation” is defined in paragraph 8 of Schedule A1 to the Act.

(c) “relevant person” is defined in paragraph 7 of Schedule A1 to the Act.

(d) The identity of the managing authority is determined in accordance with paragraphs 176, 177 and 179 of Schedule A1 to the Act.

(e) “care home” is defined in paragraph 178 of Schedule A1 to the Act.

(f) “hospital” is defined in paragraph 175 of Schedule A1 to the Act.

PART 2

Selection

Determination of capacity

6. The best interests assessor must determine whether the relevant person has capacity to select a representative.

Selection by the relevant person

7.—(1) Where the best interests assessor determines that the relevant person has capacity, the relevant person may select a family member, friend or carer.

(2) Where the relevant person does not wish to select a family member, friend or carer under paragraph (1), regulation 10 applies.

Selection by a donee or deputy

8.—(1) Where—

- (a) the best interests assessor determines that the relevant person lacks capacity to select a representative; and
- (b) the relevant person has a donee, or deputy^(a) and the donee's, or deputy's, scope of authority permits the selection of a family member, friend or carer of the relevant person ,

the donee or deputy may select such a person.

(2) Where a donee or deputy does not wish to select a family member, friend or carer of the relevant person under paragraph (1), regulation 10 applies.

Approval of family member, friend or carer

9.—(1) The best interests assessor must confirm that a person selected under regulations 7(1) or 8(1) is eligible to be a representative.

(2) When the best interests assessor confirms the selected person's eligibility under paragraph (1) he must recommend the appointment of that person as a representative to the supervisory body.

(3) Where the best interests assessor is unable to confirm the selected person's eligibility under paragraph (1), he must,—

- (a) advise the person who made the selection of that decision and give the reasons for it; and
- (b) invite them to make a further selection.

Selection by the best interests assessor

10.—(1) Where —

- (a) a family member, friend or carer, who is eligible to be a representative, is unable to be selected under regulations 7(1) or 8(1); or
- (b) regulations 7(1) or 8(1) do not apply,

the best interests assessor may select a family member, friend or carer of the relevant person who is eligible to be a representative and recommend that person for appointment as a representative to the supervisory body.

(2) But the best interests assessor must not select a person under regulation 10(1) where the relevant person, donee, or deputy objects to that selection.

(a) "deputy" is defined in section 64(1) of the Act.

(3) The best interests assessor must advise the supervisory body if they do not select a person who is eligible to be a representative.

Selection by the supervisory body

11.—(1) Where a supervisory body is given notice under regulation 10(3), it may select a person to be a representative, who—

- (a) would be performing the role in a professional capacity;
- (b) has satisfactory skills and experience to perform the role;
- (c) is not a family member, friend or carer of the relevant person;
- (d) is not employed to work in the relevant person’s managing authority, where the relevant person’s managing authority is a hospital; and
- (e) is not otherwise employed to work for the supervisory body.

(2) A supervisory body may make payments to a representative appointed following a selection under this regulation.

PART 3

Appointment of representatives

Appointment of representative

12. Unless regulation 11 applies, a supervisory body may not appoint a representative unless the person is recommended to it under regulations 9 or 10.

Formalities of appointing a representative

13.—(1) The appointment of a representative must be made in writing and state its date of expiry.

(2) The representative must inform the supervisory body in writing that they are willing to accept the appointment.

(3) The appointment must be made for the period of the standard authorisation issued.

(4) The supervisory body must send copies of the written appointment to—

- (a) the appointed person;
- (b) the relevant person;
- (c) the relevant person’s managing authority;
- (d) any donee or deputy of the relevant person;
- (e) any independent mental capacity advocate^(a) appointed under section 35(1) of the Act^(b) involved in the relevant person’s case; and
- (f) any person consulted by the best interests assessor.

Termination of representative’s appointment

14. A person ceases to be a representative if—

- (a) they die;
- (b) they inform the supervisory body that they no longer are willing to continue in the role;

(a) “independent mental capacity advocate” is defined in section 64(1) of the Act.

(b) Section 35(1) was amended by paragraph 3 of Schedule 9 to the Mental Health Act 2007.

- (c) the period of their appointment ends;
- (d) a relevant person who has selected a family member, friend or carer under regulation 7(1) who has been appointed as their representative informs the supervisory body that they object to the person continuing to be a representative;
- (e) a donee or deputy who has selected a family member, friend or carer of the relevant person under regulation 8(1) who has been appointed as a representative informs the supervisory body that they object to the person continuing to be a representative;
- (f) the supervisory body terminates the appointment because it is satisfied that the representative is not maintaining sufficient contact with the relevant person in order to support and represent them; or
- (g) the supervisory body terminates the appointment because it is satisfied that the person is no longer eligible to be a representative.

Formalities of termination of representative’s appointment

15.—(1) Where a representative’s appointment is to be terminated in accordance with regulations 14(c) to (g) the supervisory body must inform the representative of—

- (a) the pending termination of their appointment;
- (b) the reasons for the termination of their appointment; and
- (c) the date on which their appointment terminates.

(2) The supervisory body must send copies of the termination of the appointment to —

- (a) the relevant person;
- (b) the relevant person’s managing authority;
- (c) any donee or deputy of the relevant person;
- (d) any independent mental capacity advocate appointed under section 35(1) of the Act involved in the relevant person’s case; and
- (e) any person consulted by the best interests assessor.

Signed by authority of the Secretary of State

Date

Name
Parliamentary Under Secretary for Health
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Mental Capacity Act 2005 (“the Act”) provides for the deprivation of liberty of people who lack capacity to consent to arrangements proposed for their care in care homes and hospitals, but only where authorisation under Schedule A1 to the Act (“Schedule A1”) exists.

Paragraph 139 of Schedule A1 requires that the supervisory body appoint a representative to a person in respect of whom a standard authorisation has been issued. Supervisory bodies are only able to appoint representatives who have been selected for that purpose. The role of the representative is to maintain contact with the person and to support and represent them in matters relating to their deprivation of liberty.

These Regulations provide for the selection and appointment of representatives and the circumstances in which they may be paid, by—

- (a) requiring that the procedure for appointing a representative begins as soon as a best interests assessor is selected in relation to a request for a standard authorisation or as soon as an existing representative’s appointment terminates or is about to terminate (regulation 4);
- (b) detailing the eligibility requirements for appointment as a representative (regulation 5);
- (c) enabling the best interests assessor to determine whether the person deprived, or potentially deprived of, liberty (“the relevant person”) has capacity to select a person to be their representative (regulation 6)
- (d) enabling the relevant person to select a family member, friend or carer to be their representative, where they have capacity to make that decision (regulation 7);
- (e) enabling a donee or deputy, of a relevant person who lacks capacity to select a representative, to select a family member, friend or carer to be the representative, where their scope of authority permits that (regulation 8);
- (f) requiring that the best interests assessor confirms the eligibility for appointment of any selection made by a relevant person, donee or deputy. Where confirmation is given the best interests assessor must recommend the selected person for appointment. Where confirmation cannot be given, the selector must be advised why that is the case and invited to make another selection (regulation (9));
- (g) enabling the best interests assessor to select a relevant person’s family member, friend or carer as the representative when one is not, or cannot, be selected by the relevant person, a donee or a deputy (regulation 10);
- (h) enabling the supervisory body to select and pay a person in a professional capacity to be a representative where one cannot be selected from the relevant person’s family, friends or carers (regulation 11);
- (i) requiring that the supervisory body only appoints a person approved by the best interests assessor, unless such approval cannot be given (regulation 12); and
- (j) detailing the formalities of appointment and termination of appointment (regulations 13 to 15).