THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

ENGLAND AND WALES

Daniel Bedford
Brian Sloan

Definitions

Adult: an adult is a person who has reached the age of 18 years.[1]

Adult protection measures: all measures and instruments, including *ex lege* representation (e.g. by partner or other family member); state-ordered representation (e.g. guardianship, public guardianship, institutional representation of persons in residential care); voluntary measures; and any other measures used for the purpose of adult protection, support or legal representation.

Advance directive: instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity.[2]

Attorney: representative/support person appointed by means of a continuing power of attorney by the adult.

Continuing power of attorney: a mandate given by an adult with the purpose that it shall either be effective immediately, or enter into force in the future, and shall remain in force in the event of the granter's incapacity.[3]

***Ex lege* representation:** an adult protection measure providing legal authority to other persons to act *ex lege* (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority *nor* a voluntary measure by the adult.

Granter: an adult giving the continuing power of attorney.[4]

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[1] In most cases this will also be the age of majority.
[2] Recommendation 2009.
[3] We refer to the situations addressed in Recommendation 2009.
[4] Recommendation 2009.

Legal capacity: the ability to hold rights and duties (passive legal capacity or legal standing) and to exercise those rights and duties (active capacity or legal agency).[5]

Mental capacity: the *de facto* decision-making and decision-communication skills of a person.[6]

Representative: a natural or legal person who acts on behalf of the adult.

State-ordered measures: adult protection measures, ordered by a competent state (judicial or administrative) authority, at the request of the adult or others.

Support person: a natural or legal person who assists the adult to legally act or who acts together with the adult.

Voluntary measures: any measure initiated by the adult without external compulsion *ex lege* or a decision by any competent state authority.

Vulnerable adult: adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.[7]

Remarks

Wherever the phrase 'partner/spouse' is used, this also refers to 'registered partners.'

The term 'guardian' has deliberately not been used in this questionnaire, even if this term may still be used in the official translations of certain jurisdictions. Often the term 'guardian' is linked to the combined measure of substitute decision making *and* deprivation or limitation of legal capacity (e.g. *curatele* in The Netherlands or *tutelle* in France), but in some jurisdictions, its meaning has been broadened to incorporate supported decision making without affecting legal capacity. If this term is used in your system, please explain clearly what it means and whether its meaning has changed over time.

The deprivation of liberty on the ground of "being of unsound mind" (art. 5, e) ECHR) and possible forced psychiatric treatment in such case, is outside the scope of this questionnaire, except insofar as it would be related to a measure as defined in this questionnaire.

[5] General Comment 1.
[6] GC 1.
[7] Art. 1 of the HCCH Convention on the International Protection of Adults.

Abbreviations used in this questionnaire

Adult: vulnerable adult
CRPD: UN Convention on the Rights of Persons with Disabilities
CSO's: Civil Society Organisations
GC: General Comment of the Committee on the Rights of Persons with Disabilities
Hague Convention: 2000 Hague Convention on the International Protection of Adults
Measures: adult protection measures
Recommendation 2009: Recommendation CM/Rec (2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity of the Council of Europe.

SECTION 1 - GENERAL

1. **Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and *ex lege* measures if applicable. Also address briefly any interaction between these measures.**

Two pieces of primary legislation are specifically 'concerned with the lives of people with mental disorders or disabilities' in England and Wales.[8] Broadly, 'the Mental Health Act 1983…caters for the psychiatric care and treatment of people suffering from mental disorder, while the Mental Capacity Act 2005 …caters for all kinds of decision making on behalf of people who, because of mental disorder or disability, are unable to take the decision for themselves'.[9] The same person could be subject to both Acts, albeit that this report will focus on the 2005 Act in light of the general exclusion of forced psychiatric treatment from the scope of the project.

There are also principles established under the common law. This includes the inherent jurisdiction of the high court for the protection of vulnerable adults, which enables interventions in relation to vulnerable adults whose autonomy has been compromised for a reason other than mental incapacity.[10]

[8] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 1-001.
[9] ibid.
[10] *DL v. A Local Authority* [2012] EWCA Civ 253.

2. **Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *опека - opeka*].**

Advance Decision - broadly equivalent to 'advance directive' for the purposes of the questionnaire.

Advance Statement - a written record of the values, beliefs, or wishes of an individual, which they desire to be taken into consideration in decisions about their future care.

Court of Protection - the competent state authority for adults who lack mental capacity within the meaning of the Mental Capacity 2005. It has the power to make declarations or decisions in relation to financial or welfare matters for adults who lack capacity.

Court of Protection Visitor - a person appointed by the Office of the Public Guardian to visit a court appointed deputy and produce a written report on such matters as the OPG may direct.

D - a person who is exercising powers over P, a person who (apparently) lacks capacity.

Deputy - a person appointed by the Court of Protection to make decisions in relation to certain matters where P is found to lack the capacity to make them for themselves.

Independent Mental Capacity Advocate - a person instructed to represent and support P in respect of certain significant decisions.

Inherent Jurisdiction - a jurisdiction of the High Court which, inter alia, enables interventions in relation to vulnerable adults whose autonomy has been compromised for a reason other than mental incapacity.

Lasting Power of Attorney - broadly equivalent to a 'continuing power of attorney' for the purposes of the questionnaire. These replaced enduring powers of attorney.

Litigation Friend - a person who conducts litigation on behalf of a person who lacks capacity to do so.

Office of the Public Guardian - an executive agency of the Ministry of Justice. The Public Guardian's functions include maintain a register of Lasting Powers of Attorney and deputies, supervising deputies and producing reports to the Court of Protection as required.

Official Solicitor - an officer of the court, but part of the Ministry of Justice, who acts as a litigation friend where P lacks capacity to conduct litigation and has no one else able and willing to act for them.

P - a person who does lack, or allegedly lacks, capacity.

Statutory Will - a will (effective on death) made by the Court of Protection on behalf of someone who lacks capacity to make one for themselves.

3. **Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.**

In the quarter from January to March 2022, there were 8,709 applications to the Court of Protection under the Mental Capacity Act, an increase of 10% on the equivalent quarter in 2021.[11] On the other hand, the 11,255 *orders* made by the Court in the first quarter of 2022 represented a 10% decrease on the equivalent 2021 figure.[12] 39% of the applications related to applications for appointment of a property and affairs deputy, while 40% of the orders made related to an existing deputy or registered attorney.[13]

There were 204,313 powers of attorney (the vast majority being Lasting Powers of Attorney) registered in the quarter from January to March 2022, an increase of 6% from the same quarter in 2021.[14] 53% of the donors of the power of attorney were over the age of 75.[15]

[11] MINISTRY OF JUSTICE, 'National statistics: Family Court Statistics Quarterly: January to March 2022', 2022 <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2022/family-court-statistics-quarterly-january-to-march-2022#mental-capacity-act---court-of-protection> accessed 29.08.2022.

[12] ibid.

[13] ibid.

[14] ibid.

[15] ibid.

The 2021 census shows that the population of England and Wales is ageing, with 'more people than ever before in the older age groups'.[16] 18.6% of the population (amounting to 11.1 million people) were aged 65 or over, compared to 16.4% (9.2 million) in 2011.[17] 0.9% of the population was shown to be aged 90 or over in 2021, compared to 0.8% in 2011.[18]

Statistics on disability in the United Kingdom are published as part of the Family Resources Survey, which is 'a continuous household survey which collects information on a representative sample of private households in the United Kingdom'.[19] In 2020-21, the equivalent of 14.6 million people reported a disability, defined as 'a physical or mental impairment that has "substantial" and "long term" negative effects on [a person's] ability to do normal daily activities'.[20] Around 22% of the population of the United Kingdom therefore consider themselves to have a disability. This is an increase of three percentage points on the figure from 2010-11.[21] Amongst working age adults, the joint most common types of disability related to mental health and mobility (each representing 42% of those who reported a disability).[22] Among those of state pension age (66 as of October 2020)[23] or older, however, 63% reported difficulty with mobility and 38% difficulty with stamina, while only 9% reported a mental health impairment.[24] It should be noted, however, that some of the other reportable categories, such as impairments relating to 'memory' and 'learning', could also be highly relevant to an assessment under the Mental Capacity Act.[25]

The charity Hourglass has asserted that '1 in 5 UK residents (22 percent) have personal experience of abuse as an older person or know someone who has been

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[16] Office for National Statistics, *Population and household estimates, England and Wales: Census 2021*, 2022, p. 4

[17] ibid.

[18] ibid.

[19] DEPARTMENT FOR WORK & PENSIONS, *National statistics*: *Family Resources Survey: financial year 2020 to 2021*, 2022 <https://www.gov.uk/government/statistics/family-resources-survey-financial-year-2020-to-2021/family-resources-survey-financial-year-2020-to-2021> accessed 29.08.2022.

[20] ibid.

[21] ibid.

[22] ibid.

[23] DEPARTMENT FOR WORK & PENSIONS, *National statistics*: *Family Resources Survey: background information and methodology*, 2022 < https://www.gov.uk/government/statistics/family-resources-survey-financial-year-2020-to-2021/family-resources-survey-background-information-and-methodology> accessed 29.08.2022.

[24] DEPARTMENT FOR WORK & PENSIONS, *National statistics*: *Family Resources Survey: financial year 2020 to 2021*, 2022 <https://www.gov.uk/government/statistics/family-resources-survey-financial-year-2020-to-2021/family-resources-survey-financial-year-2020-to-2021> accessed 29.08.2022.

[25] ibid.

abused - with almost 2.7 million victims thought to be affected across the country'.[26]

4. **List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.**

The UK signed the UN Convention on the Rights of Persons with Disabilities on 30 March 2007 and ratified it on 8 June 2009.[27]

The CRPD is not incorporated into domestic law and is not directly enforceable before national courts. However, it can be relied on as an 'interpretive tool'.[28] First, there is a presumption in favour of interpreting legislation in a way that is compatible with an international convention that is ratified by the UK. This requires that legislative provisions, which 'deal with the same subject matter' as the CRPD, should be 'construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the treaty obligation and not to be inconsistent with it'.[29] However, the CRPD can only be relied on as an 'aid to construction' where there is 'ambiguity or uncertainty' in the legislation that needs to be resolved.[30] It cannot be relied on to 'qualify the clear language of primary legislation'.[31] Second, the national courts may have regard to the CRPD in ascertaining the scope of the rights protected by the Human Rights Act 1998,[32] which effectively incorporates the European Convention on Human Rights.

The UN Committee on the Rights of Persons with Disabilities issued its Concluding Observations on the initial report of the UK in 2017.[33] In relation to Article 12 of the Convention, the Committee expressed concern inter alia about '[t]he leg-

[26] HOURGLASS, *Abuse of older people at 'unprecedented levels' as 2.7 million over-65s revealed to be affected, warns charity*, 2021, p. 1.

[27] UNITED NATIONS, 'Treaty Collection: Chapter IV: Human Rights: 15. Convention on the Rights of Persons with Disabilities' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> accessed 29.08.2022.

[28] *R (Davey) v. Oxfordshire County Council* [2017] EWHC 354, para. 48.

[29] ibid, para. 46. See also: *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2, para. 3.

[30] *R (Davey) v. Oxfordshire County Council* [2017] EWHC 354, para. 46.

[31] ibid, para. 47.

[32] *Burnip v. Birmingham City Council & Anor.* [2012] EWCA 629 paras. 19-22; *P v. Cheshire West & Chester Council; P & Q v Surrey County Council* [2014] UKSC 19, para. 36.

[33] UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, 'Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland', CRPD/C/GBR/CO/1, 2017.

islation in the State party that restricts the legal capacity of persons with disabilities on the basis of actual or perceived impairment','[t]he prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities'.[34]

The UK signed the Hague Convention on the International Protection of Adults on 1 April 2003, and ratified it on 5 November 2003 prior to its entry into force on 1 January 2009.[35] According to the Explanatory Notes of the Mental Capacity Act 2005, schedule 3 of that Act 'gives effect in England and Wales to the Convention'.[36]

5. Briefly address the historical milestones in the coming into existence of the current framework.

Lady Hale has written how before the Mental Capacity Act 2005, 'English law did not have a comprehensive scheme for empowering others to take decisions on behalf of adults who lacked the capacity to take the decision for themselves'.[37] In relation to health and welfare, as Richard Jones and Eve Piffaretti put it:

…the High Court had attempted to respond to this situation by using the doctrine of necessity and the declaratory jurisdiction to determine the legality of action proposed to be taken in respect of a mentally incapacitated person, but this approach, which is aimed at responding to individual problems, was ill-suited to developing a coherent legal framework.[38]

The 2005 Act, which has its origins in a Law Commission report,[39] also replaced the existing statutory jurisdiction in relation to a person's property and financial affairs under the Mental Health Act 1983, which had itself replaced that in the Mental Health Act 1959.[40] The 2005 Act introduced 'a common "best interests" principle guiding the decisions made by courts, deputies, attorneys, doctors, carers and anyone else taking a decision on behalf of a person who cannot take it for himself'.[41]

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[34] ibid, para. 30.
[35] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 'Conventions and other Instruments' <https://www.hcch.net/en/instruments/conventions/status-table/?cid=71> accessed 29.08.2022.
[36] *Explanatory Notes to the Mental Capacity Act 2005*, Crown, 2005, para. 169.
[37] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-001.
[38] R. JONES and E. PIFFARETTI, *Mental Capacity Act Manual*, 8th ed., London, Sweet & Maxwell, 2018, para. 1-003.
[39] LAW COMMISSION, *Mental Incapacity*, Law Com. 231, 1995.
[40] *Re P* [2009] EWHC 163 (Ch).
[41] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-001.

6. **Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.**

The initial analysis of the CtteeRPD on the UK's compliance with the CPRD was discussed in response to question 4 above. Evaluation of the current framework will be discussed in response to questions 67 and 68 below.

7. **Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.**

The Law Commission completed a project on Mental Capacity and Deprivation of Liberty as recently as 2017,[42] but the implemented recommendations essentially fall outside of the scope of the FL-EUR project.[43]

Following a consultation exercise, the Government set out its intended next steps to modernise Lasting Powers of Attorney in 2022.[44] The proposals relate inter alia to using digital forms of evidence of the LPA's execution, potentially removing the ability to delay registration, and reforming identity checks for attorneys and the manner in which an LPA might be objected to. One practitioner has commented that '[t]he move towards digital LPAs could be far from supportive or enabling of an elderly person who is not a confident computer user'.[45]

SECTION II – LIMITATIONS OF LEGAL CAPACITY

8. **If your system allows limitation of the legal capacity of an adult, please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.**

   a. on what grounds?

[42] LAW COMMISSION, *Mental Capacity and Deprivation of Liberty*, Law Com. 372, 2017.
[43] Mental Capacity (Amendment) Act 2019.
[44] Ministry of Justice, *Modernising Lasting Powers of Attorney: Government* Response, CP 677, 2022.
[45] H. MIEVILLE-HAWKINS, 'Modernising lasting powers of attorney: change is coming', *Legal Futures*, 17.09.2022 <https://www.legalfutures.co.uk/features/modernising-lasting-powers-of-attorney-change-is-coming> 29.08.2022.

As Peter Bartlett has stated, '[a]s a matter of English law, there is no way prospectively to remove an individual's legal capacity.'[46] He notes that mental incapacity is not a legal status that can be relied on to deny the rights of persons to make decisions in all circumstances. Rather, a functional approach to capacity is adopted that is time and decision specific (see below). This applies even with respect to the appointment of representatives, such as deputies or attorneys, who may only act on behalf of P where they reasonably believe he lacks capacity. However, whilst the MCA 2005 does not allow for prospective denials of legal capacity, it does recognise that the decisions of P may be limited in relation to specific matters where they lack the ability to make the decision.

The Mental Capacity Act 2005 establishes a test for mental capacity that is composed of 1) diagnostic 2) functional and 3) causal elements. Importantly, however, under section 1 of the Act, a person 'must be assumed to have capacity unless it is established that he lacks capacity',[47] the person 'is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success',[48] and the person 'is not to be treated as unable to make a decision merely because he makes an unwise decision'.[49]

With respect to the diagnostic element, under section 2(1) of the MCA 2005 it must be established that P (a person who allegedly lacks capacity) was unable to make a decision 'because of an impairment of, or a disturbance in the functioning of, the mind or brain'. This may be established where there is evidence of a recognised psychological disorder or learning disability. It is possible to recognise an impairment or disturbance in the mind that is due to the effects of physical illness or the medication used to treat it.[50] The MCA Code of Practice refers, in particular, to 'confusion, drowsiness or loss of consciousness', which may arise from 'physical or medical conditions'.[51] It is also the case that the symptoms of alcohol or drug use can be recognised as an impairment.[52]

With respect to the functional element, it must be established that P is unable to make the decision at the material time, and being unable to make a decision is defined under section 3(1) MCA 2005 as being unable:

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[46] P. BARTLETT, 'At the Interface Between Paradigms: English Mental Capacity Law and the CRPD' (2020) 11 *Frontiers in Psychiatry* 570735, p. 2.
[47] Mental Capacity Act 2005, s. 1(2).
[48] Mental Capacity Act 2005, s. 1(3).
[49] Mental Capacity Act 2005, s. 1(4).
[50] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 4.12.
[51] ibid.
[52] ibid.

a) to understand the information relevant to the decision,
b) to retain that information,
c) to use or weigh that information as part of the process of making the decision, or
d) to communicate his decision (whether by talking, using sign language or any other means).

For the causal nexus, it must be established that the inability to make a decision was '*because of*' the 'impairment of, or a disturbance in the functioning of, the mind or brain'.[53] The question that the court will ask is whether the 'impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play?'.[54] In addressing this question, the court will need to be 'alive to other factors that may be more significant' in their impact on capacity, than an impairment.[55] *PC v. City of York Council* held that the causal nexus would not be satisfied where the impairment was 'referable to' or 'significantly relates' to the inability to make a decision;[56] the MCA entails a more demanding test of causation.

The MCA 2005 sits alongside the inherent jurisdiction of the high court for the protection of vulnerable adults. This applies where a vulnerable person has been disabled from making a free choice and their autonomy is compromised by reason of something other than a mental impairment. Munby J in *Re SA* states that a vulnerable adult is:

…someone who, whether or not mentally incapacitated, and whether or not suffering from any mental illness, or mental disorder,

- is or may be unable to take care of him or herself,
- or unable to protect him or herself against significant harm or exploitation,
- or who is deaf, blind, or dumb,
- or who is substantially handicapped by illness, injury or congenital deformity.

This, I emphasise, is not and is not intended to be a definition. It is descriptive, not definitive; indicative rather than prescriptive.[57]

[53] Mental Capacity Act 2005, s. 2(1).
[54] *Norfolk CC v. PB* [2014] EWCOP 14, para. 86.
[55] *A Local Authority v. RS (Capacity*) [2020] EWCOP 29, para. 31.
[56] *PC & Anor. v. City of York Council* [2013] EWCA Civ 478, para. 58.
[57] *Re SA* [2005] EWHC 2942, para. 82.

Munby J has suggested that the 'significance of the concept of a vulnerable is pragmatic and evidential: it is simply that an adult who is vulnerable is more likely to fall into the category of the incapacitated in relation to whom the inherent jurisdiction is exercisable than an adult who is not vulnerable.'[58] As such, it will be easier to persuade the court that a vulnerable adult is more likely to be susceptible to having their autonomy compromised by oppressive relationships, in contrast to someone who does not appear to be vulnerable. As Jonathan Herring has observed 'those labelled "vulnerable adults" *can* be subject to the jurisdiction, [but] being vulnerable is neither a necessary nor a sufficient condition to fall within the jurisdiction.'[59]

It is necessary for the exercise of the inherent jurisdiction to establish that the autonomy of a vulnerable adult has been compromised.[60] This may arise where:

…a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either:

i. under constraint -
ii. subject to coercion or undue influence or
iii. for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.[61]

b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?

The focus of the 2005 Act is upon whether P has capacity 'in relation to a matter…at the material time',[62] and therefore the scope of the limitation of legal capacity is inherently limited.

c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?

Again, the relevant question is whether P has mental capacity 'in relation to a matter…at the material time',[63] such that the limitation of legal capacity in one area does not of itself automatically lead to a limitation of capacity in another.

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[58] ibid, para. 83.
[59] J. HERRING, *Vulnerable Adults and the Law*, Oxford, Oxford University Press, 2016, p. 81.
[60] *DL v. A Local Authority* [2012] EWCA Civ 253, paras. 53-54.
[61] *Re SA* [2005] EWHC 2942, para. 77.
[62] Mental Capacity Act 2005, s. 2(1).
[63] Mental Capacity Act 2005, s. 2(1).

d. can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?

Similarly, the specific nature of the capacity question asked under the 2005 Act means that if a person regains capacity to make a decision in relation to a particular matter, they should be permitted to do so.

e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?

It has been asserted that:

The important decisions that everyone makes are often made with support (such as advice from family, friends, carers, counsellors or professional advisers). People with mental disabilities may simply need additional support to make decisions themselves.[64]

The mere fact that a decision has been made in a 'supported' context, therefore, should not of itself mean that it must be concluded that the relevant person lacks capacity or should have it limited in relation to the area in question. On a related note, Rosie Harding notes that 'English law does not currently make provision for a formal, nominated supporter scheme',[65] so it would in any case be impractical for supported decision-making to lead to an automatic deprivation of capacity in any event.

f. are there any other legal instruments,[66] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

Section 5 of the 2005 Act, for example, allows a person to perform acts in connection with P's care or treatment, and to avoid civil or criminal liability for the acts in certain circumstances. This is considered in more detail below.

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[64] M. VAN DEN BROEK and S. SEMBI, *Brain Injury Claims*, 2nd ed., London, Sweet & Maxwell 2020, para. 2-045.

[65] R. HARDING, 'Supporting Everyday Legal Capacity: Navigating the Complexities of Putting Rights into Practice' in M. DONNELLY, R. HARDING and E. TAŞCIOĞLU (eds), *Supporting Legal Capacity in Socio-Legal Context*, Oxford, Hart Publishing, 2022, p. 295.

[66] Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

9. **Briefly describe the effects of a limitation of legal capacity on:**

a. property and financial matters

If it is found that P lacks capacity in relation to one or more matters concerning their 'property and affairs',[67] the Court of Protection is specifically empowered by section 16 to make decisions 'on P's behalf in relation to the…matters',[68] or to 'appoint a person (a "deputy") to make decisions on P's behalf in relation to the…matters'.[69] Decisions of the Court itself take precedence over those of a deputy,[70] and the Court must have regard to the principle that 'the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances'.[71] Decisions both of the Court[72] and any deputy[73] are subject to the Act's general principles, including the principle that '[a]n act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests'.[74] A deputy, moreover, does not have the power to make a decision on behalf of P in relation to a matter if the deputy 'knows or has reasonable grounds for believing that P has capacity in relation to the matter'.[75] The deputy, inter alia, 'may not be given powers with respect to' 'the settlement of any of P's property, whether for P's benefit or for the benefit of others',[76] or to act inconsistently with a decision validly made under a Lasting Power of Attorney,[77] which are also subject to the best interests principle.

The powers to make decisions about property and affairs extend 'in particular', inter alia, to 'the control and management of P's property', 'the sale, exchange, charging, gift or other disposition of P's property', 'the acquisition of property in P's name or on P's behalf', 'the carrying on, on P's behalf, of any profession, trade or business', 'the taking of a decision which will have the effect of dissolving a partnership of which P is a member', 'the carrying out of any contract entered into by P', 'the discharge of P's debts and of any of P's obligations, whether legally enforceable or not', 'the settlement of any of P's property, whether for P's benefit

[67] Mental Capacity Act 2005, s. 16(1)(b).
[68] Mental Capacity Act 2005, s. 16(2)(a).
[69] Mental Capacity Act 2005, s. 16(2)(b).
[70] Mental Capacity Act 2005, s. 16(4)(a).
[71] Mental Capacity Act 2005, s. 16(4)(b).
[72] Mental Capacity Act 2005, s. 16(3).
[73] Mental Capacity Act 2005, s. 20(6).
[74] Mental Capacity Act 2005, s. 1(5), expanded upon in s 4.
[75] Mental Capacity Act 2005, s. 20(1).
[76] Mental Capacity Act 2005, s. 20(3).
[77] Mental Capacity Act 2005, s. 20(4).

or for the benefit of others' and 'the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise'.[78]

The 'bests interests' principle, contained in section 4 of the Act, is applicable in a range of contexts under the Act, including a substantive decision taken by the Court of Protection or a deputy in relation to P's 'property and affairs'. Section 4 provides:

> (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider—
>
> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> …
>
> (6) He must consider, so far as is reasonably ascertainable—
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

[78] Mental Capacity Act 2005, s. 18.

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

…

(11) 'Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

In addition, by virtue section 1(6) of the Act:

Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

There are specific provisions relating to wills in the Act, considered under d. below.

b. family matters and personal rights (e.g. marriage, divorce, contraception)

If it is decided that a person lacks capacity to marry, the Mental Capacity Act provides that '[n]othing in this Act permits a decision…to be made on behalf of a person' on matters including 'consenting to marriage or a civil partnership'.[79] The inherent jurisdiction of the High Court could be used to prevent a person lacking relevant capacity from entering a marriage.[80]

The 2005 Act also specifically provides that it does not permit a decision to be made on behalf of a person lacking capacity on 'consenting to a decree of divorce [or dissolution of a civil partnership] being granted on the basis of two years' separation.[81] It should be noted, however, that the two years' separation fact (along with all others) has been removed as a basis of divorce and dissolution in England and Wales,[82] and that this provision does not appear to cover situations where P is the party who initiates divorce proceedings.

As Lady Hale has put it, 'no-one can consent on another's behalf to that person…forming an intimate relationship'.[83] This is explicit in the 2005 Act,[84] and someone who forms a relationship with a person lacking capacity to consent may commit a criminal offence. Consent to contraception could be provided on behalf of P, but it is less likely that a more extreme measure such as sterilisation would be considered to be in P's best interests.[85]

c. medical matters

[79] Mental Capacity Act 2005 s. 27(1)(a).
[80] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-011.
[81] Mental Capacity Act 2005, s. 27(1)(c)-(d).
[82] Divorce, Dissolution and Separation Act 2020.
[83] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-006.
[84] Mental Capacity Act 2005, s. 27(1)(b).
[85] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-014.

If a patient lacks capacity to consent to treatment, it is lawful to give that treatment which is necessary in her best interests. A person ('D') who is proposing to give that treatment is protected from liability, provided that they have taken reasonable steps to establish that P lacks capacity, and they reasonably believe that it will be in the best interests of P for the treatment to be carried out.[86] However, D is not authorised to carry out that treatment if it conflicts with an advance decision to refuse consent.[87] D will not be protected from liability if they carry out or continue treatment where they are satisfied that an advance decision exists which is valid and applicable to the treatment. [88]

It would also be unlawful for D to treat P where this conflicts with the decision of a donee of LPA[89] or a deputy appointed by the Court of Protection[90] with the power to give or withhold consent to the treatment. In relation to life-sustaining treatment, a donee of an LPA must be expressly granted the authority to give or refuse consent,[91] whilst a deputy can never refuse to give consent to life-sustaining treatment.[92] It is also stated that D is not prevented, where their decision conflicts with an attorney or deputy, from 'providing life-sustaining treatment' or 'doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition', 'while a decision as respects any relevant issue is sought from the court'.[93]

In relation to the withholding or withdrawing of life-sustaining treatment, it was held by the UK Supreme Court in *Aintree University Hospitals NHS Foundation Trust v. James* that the 'fundamental question is whether it is lawful to give the treatment, not whether it is lawful to withhold it.'[94] It follows that "[i]f the treatment is not in [P's] best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it.'[95] In determining what is in the best interests of P in this context, it is stated in section 4(5) of the MCA 2005 that a decision must not be 'motivated by a desire to bring about his death'.

d. donations and wills

[86] Mental Capacity Act 2005, s. 5(1)
[87] Mental Capacity Act 2005, s. 5(4)
[88] Mental Capacity Act 2005, s. 26(2).
[89] Mental Capacity Act 2005, s. 6(6)(a).
[90] Mental Capacity Act 2005, s. 6(6)(b).
[91] Mental Capacity Act 2005, s. 11(8). Such treatment is defined as 'treatment which in the view of a person providing health care for the person concerned is necessary to sustain life' (s. 4(10).
[92] Mental Capacity Act 2005, s. 25(5).
[93] Mental Capacity Act 2005, s 6(7).
[94] [2013] UKSC 67, para. 20.
[95] ibid, para. 22.

The rules on *inter vivos* gifts as regards people who are found to lack capacity under the 2005 Act are considered in detail in answer to question 28 below. It has been seen that they fall within P's 'property and affairs'.

If it is decided that a living person lacks specific capacity to make a will according to the general capacity test in the MCA 2005, the Court of Protection (but not a deputy per se)[96] is empowered to make a statutory will on that person's behalf.[97] The will may 'make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it'.[98] However, a statutory will cannot dispose of immovable property outside England and Wales.[99]

The Court of Protection empowers 'the authorised person' to execute the will. Under sch. 2, para. 3(2), the will:

(a) must state that it is signed by P acting by the authorised person,
(b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time,
(c) must be attested and subscribed by those witnesses in the presence of the authorised person, and
(d) must be sealed with the official seal of the court.

In *Re P (Statutory Will)*, Lewison J described the 2005 Act as marking a 'radical change in the treatment of persons lacking capacity', inter alia because 'best interests' is not a matter of substituted judgment but objective judgment.[100] In *Re M (Statutory Will)*, M had previously executed a will of which Z (her carer) was the sole beneficiary, but the Court of Protection held that it was not in M's best interests for Z to be a beneficiary under her statutory will in the light of changed circumstances, the fact that Z had already received large sums of money from M, and Z's conduct including a failure to comply with previous orders.[101]

e. civil proceedings and administrative matters (e.g. applying for a passport)

[96] Mental Capacity Act 2005, s. 20(3).
[97] Mental Capacity Act 2005, s 18.
[98] Mental Capacity Act 2005, sch. 2, para. 2.
[99] Mental Capacity Act 2005, sch. 2, para. 4.
[100] [2009] EWHC 163 (Ch), para. 36.
[101] [2009] EWHC 2525 (Fam).

The 'conduct of legal proceedings in P's name or on P's behalf' is specifically included within the powers relating to P's 'property and affairs'. Further discussion of legal proceedings and administrative matters can be found in response to question 14e. below.

10. Can limitation of legal capacity have retroactive effect? If so, explain?

There are various contexts in which capacity may need to be assessed retrospectively. This is the case, for example, with the creation of a will, an advance decision, and the making of a Lasting Power of Attorney.

For example, it is relatively common for a court to be involved in the retrospective assessment of whether a now-deceased testator had testamentary capacity at the time they made their will (see further the answer to question 14.b below). If the testator did not have such capacity, the will will be considered invalid and will not be admitted to probate. It is important to note, however, that the applicable test of capacity differs: the common law *Banks v. Goodfellow* test will be applied by the high court in a retrospective contentious probate matter,[102] whereas the Court of Protection will apply the test in the Mental Capacity Act 2005 in deciding whether a still-living person should have a statutory will made on their behalf.

11. Which authority is competent to decide on limitation or restoration of legal capacity?

The Court of Protection 'hears challenges to the formal authorisation of deprivation of liberty under Sch.A1 to the MCA', 'decides questions about the validity, registration, operation and revocation of enduring and lasting powers of attorney', and 'makes declarations and decisions about the personal care and welfare or property and financial affairs of people who are unable to take such decisions for themselves'.[103] *Inter alia*, however, the inherent jurisdiction of the high court to protect the welfare of vulnerable adults has survived the passage of the MCA.[104] In addition, as explained in the answer to question 10 above, other courts may be involved in the assessment of capacity depending upon the context.

The situation is further complicated, however, by the fact that a range of other people could, in particular circumstances, have to decide whether a person has the capacity to make a given decision. The Act uses the letter 'D' to refer to a person

[102] (1870) 5 QB 549.
[103] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-033.
[104] *Westminster City Council v. C* [2008] EWCA Civ 198.

who is exercising powers over P, a person who (apparently) lacks capacity.[105] Section 5 of the Act, for example, allows D to perform acts in connection with P's care or treatment, and to avoid civil or criminal liability for the acts on the basis that, inter alia, D reasonably believes that P lacks capacity in relation to the matter and it would be in P's best interests for the Act to be done. Such 'section 5 Acts' 'could be performed by a range of professional and lay people', including relatives or informal carers.[106] Significantly, Jones and Piffaretti assert that '[t]he point at which it would be unwise to rely on the protection provided by [section 5], and when an application should be made to the Court of Protection for an order or to have a deputy appointed is unclear'.[107]

In relation to 'restoration' of legal capacity, it should be emphasised that the focus of the 2005 Act is upon whether P has capacity 'in relation to a matter…at the material time',[108] and therefore that the scope of the Court of Protection's decision may in principle be limited.

12. **Who is entitled to request limitation or restoration of legal capacity?**

Subject to the point about the numerous possible identities of D made in response to question 11, the Mental Capacity Act contains rules about who may make an application to the Court of Protection for the exercise of any of its powers under the Act. No permission is required for an application by a person who lacks, or is alleged to lack, capacity, by the holder of parental responsibility for such a person under the age of 18, or, where the application is sufficiently relevant, by the donor or a donee of a lasting power of attorney, a deputy appointed by the court or a person named in an existing order of the court.[109] The Court of Protection Rules 2017 further expands the categories of persons who do not require permission to include the Official Solicitor[110] and the Public Guardian.[111] It is also not required where the application concerns particular issues, such as property and affairs,[112] an LPA,[113] or an EPA.[114]

[105] See, e.g., Mental Capacity Act, ss. 2(5), 5(1).
[106] R. JONES and E. PIFFARETTI, *Mental Capacity Act Manual*, 8th ed., London, Sweet & Maxwell, 2018, para. 1-095.
[107] ibid.
[108] Mental Capacity Act 2005, s. 2(1).
[109] Mental Capacity Act 2005, s. 50(1).
[110] Court of Protection Rules 2017, r. 8.2(a)(i).
[111] Court of Protection Rules 2017, r. 8.2(a)(ii).
[112] Court of Protection Rules 2017, r. 8.2(b)(i).
[113] Court of Protection Rules 2017, r. 8.2(b)(ii).
[114] Court of Protection Rules 2017, r. 8.2(b)(iii).

Permission is required in most other cases,[115] and may be granted following consideration of the applicant's connection to P, the reasons for the application, the benefit to P and whether that benefit could be achieved in any other way.[116]

13. **Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:**

a. a requirement of legal representation of the adult

The Court of Protection is bound[117] to consider whether P should be joined as a party to the proceedings,[118] or whether an alternative or additional mechanism should be used to secure P's participation. The other possible directions are that P's participation should be secured 'by the appointment of an accredited legal representative to represent P in the proceedings and to discharge such other functions as the court may direct',[119] or by 'the appointment of a representative whose function shall be to provide the court with information as to' P's past and present wishes, feelings, values etc,[120] or that 'P should have the opportunity to address (directly or indirectly) the judge determining the application and, if so directed, the circumstances in which that should occur'.[121]

Significantly, however, the Court may also decide that 'P's interests and position can properly be secured without any' of the directions yet mentioned 'or by the making of an alternative direction meeting the overriding objective'.[122] The 'overriding objective' is for the 'court to deal with a case justly and at proportionate cost, having regard to the principles contained' in the Mental Capacity Act.[123]

If P does not have capacity to conduct the proceedings, an order making P a party will not take effect until the appointment of a litigation friend or an accredited legal representative.[124] A person may act as a litigation friend if they 'can fairly and competently conduct proceedings on behalf' of P and 'has no interests adverse to those of' P.[125] If there is no other person who is able or willing to act as a litigation friend in welfare matters, and P has sufficient security to cover the

[115] Mental Capacity Act 2005, s. 50(2).
[116] Mental Capacity Act 2005, s. 50(3).
[117] Court of Protection Rules 2017, r. 1.2(1)
[118] Court of Protection Rules 2017, r 1.2(2)(a).
[119] Court of Protection Rules 2017, r. 1.2(2)(b).
[120] Court of Protection Rules 2017, r. 1.2(2)(c), referring to s. 4(6) of the Mental Capacity Act 2005.
[121] Court of Protection Rules 2017, r. 1.2(2)(d).
[122] Court of Protection Rules 2017, r. 1.2(2)(e).
[123] Court of Protection Rules 2017, r. 1.1(1).
[124] Court of Protection Rules 2017, r. 1(5).
[125] Court of Protection Rules 2017, r. 17.

costs of legal representation, then the Official Solicitor may be appointed as a 'litigation friend of last resort' (except for serious medical treatment cases).[126] The need for there to be no other suitable person to act for P is not expressly stated as a requirement for financial matters.[127]

In making a decision on which (if any) of the directions should be made, the court will have to regard to 'the nature and extent of the information before the court', 'the issues raised in the case', 'whether a matter is contentious' and 'whether P has been notified…and what, if anything, P has said or done in response to such notification'.[128] According to the relevant Practice Direction:

The great majority of cases in terms of numbers before the Court of Protection relate to non-contentious matters concerning property and affairs, where there is a need to preserve P's resources and experience has shown that they can be dealt with on paper and without joining P as a party or appointing anyone to represent P.[129]

On the other hand:

Other cases, involving a range of issues relating to both property and affairs and personal welfare do or may call for a higher level of participation by or on behalf of P at one or more stages of the case.[130]

Even where not actually made a party, P must be notified of various things relating to the proceedings unless the court directs otherwise.[131]

b. participation of family members and/or of vulnerable adults' organisations or other CSO's

A relevant applicant to the Court of Protection must notify certain persons other than P of the application (unless that person has already been named as a respondent).[132] According to the applicable Practice Direction, the applicant:

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[126]OFFICIAL SOLICITOR AND PUBLIC TRUSTEE and MINISTRY OF JUSTICE, 'Practice Note: Appointment of the Official Solicitor in welfare proceedings', 2021.
[127]OFFICIAL SOLICITOR AND PUBLIC TRUSTEE and MINISTRY OF JUSTICE, 'Practice Note: Appointment of the Official Solicitor in property and affairs proceedings', 2021.
[128]Court of Protection Rules 2017, r. 1.2(1).
[129]COURTS AND TRIBUNALS JUDICIARY, 'Practice Direction 1A: Participation of P', 2017, para. 3.
[130]ibid, para. 4.
[131]Court of Protection Rules 2017, Part 7.
[132]Court of Protection Rules 2017, r. 9.10.

…must seek to identify at least three persons who are likely to have an interest in being notified that an application form has been issued. The applicant should notify them—

(a) that an application form has been issued;

(b) whether it relates to the exercise of the court's jurisdiction in relation to P's property and affairs, or P's personal welfare, or both; and

(c) of the order or orders sought.[133]

The Practice Direction provides a list of people 'ordered according to the presumed closeness in terms of relationship to P', who 'should be notified in descending order (as appropriate to P's circumstances)'.[134] The list begins with P's spouse/civil partner, informal partner, parent/guardian and child, and then proceeds to consider other relatives. The Direction makes clear, however, that the presumption in favour of family members in recognised categories 'may be displaced where the applicant is aware of circumstances which reasonably indicate that P's family should not be notified, but that others should be notified instead', such as 'where the applicant knows that the relative in question has had little or no involvement in P's life and has shown no inclination to do so'.[135] Conversely, '[i]n some cases, P may be closer to persons who are not relatives and if so, it will be appropriate to notify them instead of family members'.[136]

Following notification, a family member or other person could apply to be joined as a party to the proceedings.[137]

c. requirement of a specific medical expertise / statement

Most applications to the Court of Protection require the submission of an 'an assessment of capacity form',[138] unless this is impractical or the court has ordered otherwise.[139] The standard form is COP3.[140] Part B of the form must be completed by a registered practitioner 'who has examined and assessed the capacity of the person to whom the application relates'.[141] That person may be a medical practitioner such as P's general practitioner, a psychiatrist, an 'approved mental health professional', a social worker, a psychologist, a nurse, or a registered therapist

[133] COURTS AND TRIBUNALS JUDICIARY, 'Practice Direction 9B: Notification of other Persons that an Application Form has been Issued', para. 4.
[134] ibid, para. 7.
[135] ibid, para. 6.
[136] ibid.
[137] See, e.g., *M, H v. P (through his Litigation Friend, the Official Solicitor)* [2019] EWCOP 42, para. 35.
[138] Court of Protection Rules 2017, r. 9.4(b).
[139] COURTS AND TRIBUNALS JUDICIARY, 'Practice Direction 9A: The Application Form', para. 12.
[140] ibid.
[141] HM COURTS & TRIBUNALS SERVICE, 'COP3: Court of Protection: Assessment of capacity', 2017.

such as an occupational or speech therapist.[142] The form asks the practitioner to state the 'impairment of, or disturbance in the functioning of, the mind or brain' that P has, and the specific matters in relation to which P is unable to make a decision for themselves as a result. The practitioner must then relate the inability to make a decision to an inability to make the necessary use of information and/or to communicate their decision 'by any means at all'. They are asked inter alia to supply the evidence of lack of capacity on which their evidence is based, whether P has expressed any relevant views, whether P might regain or acquire relevant capacity, whether they are aware of anyone who holds a different view as to P's capacity, and whether the practitioner or a connected person has a financial or other interest in a matter concerning P.

d. hearing of the adult by the competent authority

It has been seen that the Court is bound to consider if and in what circumstances P should have the opportunity directly or indirectly to address the Court of Protection judge.[143] It is also possible, however, for the Court to decide that P's interests and position can properly be secured without any such opportunity to address the Court.

e. the possibility for the adult to appeal the decision limiting legal capacity

An appeal from the Court of Protection lies to the Court of Appeal.[144] However, unless the decision in question is a committal to prison, permission is required to appeal.[145] This is the case whether the appellant is P or another person.

14. **Give a brief account of the general legal rules with regard to *mental capacity* in respect of:**

a. property and financial matters

The Mental Capacity Act 2005 contains a general principle that '[a] person must be assumed to have capacity unless it is established that he lacks capacity'.[146] If a person lacks capacity according to the provisions of that Act, the Court of Protection may make a decision as to property and financial affairs on the person's behalf, or appoint a deputy to do so, or a power of attorney may be used to do so.

[142] ibid.
[143] See the answer to question 13.a. above.
[144] Mental Capacity Act 2005, s. 53.
[145] Court of Protection Rules 2017, Part 20.
[146] Mental Capacity Act 2005 s. 1(2).

The general principles that apply to these decision are addressed in other parts of this report. While there remain common law rules that will determine, for example, whether a contract entered into by a person was invalid because that person lacked capacity, a leading textbook asserts that the 2005 Act:

…is broadly consistent with the test applied by the courts at common law which has been to ask whether a person had an understanding of what 'was going on and what was involved in the transaction involved'.[147]

As the Supreme Court summarised the situation in *Dunhill v. Burgin*:

In *Imperial Loan Co Ltd v Stone…*,[148] the Court of Appeal held that a contract made by a person who lacked the capacity to make it was not void, but could be avoided by that person provided that the other party to the contract knew (or, it is now generally accepted, ought to have known) of his incapacity.[149]

There, is an exception for 'necessaries', however, now contained in the MCA. Under section 7 of the Act, '[i]f necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them'.[150] 'Necessary' for this purpose means 'suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied'.[151]

b. family matters and personal rights (e.g. marriage, divorce, contraception)

The effect of a prospective finding that a person lacks capacity to marry etc was considered above. A marriage or civil partnership that has already taken place can be annulled on the grounds inter alia that at least one party did not validly consent to it because of 'unsoundness of mind',[152] or that 'at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage' or civil partnership.[153] Significantly, however, a marriage/civil partnership already entered into by a person whose situation falls within these provisions

[147] E. PEEL, *Treitel on The Law of Contract*, 15th ed., London, Sweet & Maxwell, 2020, para. 12-054.
[148] [1892] 1 QB 599.
[149] [2014] UKSC 18, para. 25.
[150] Mental Capacity Act 2005, s. 7(1).
[151] Mental Capacity Act 2005, s 7(2).
[152] Matrimonial Causes Act 1973, s. 12(c); Civil Partnership Act 2004, s. 50(1)(a).
[153] Matrimonial Causes Act 1973, s. 12(d); Civil Partnership Act 2004, s. 50(1)(b).

is *voidable* rather than void. It will be considered valid unless and until it is annulled, and the annulment can be sought only by or on behalf of a party while both remain alive.[154]

The level of capacity for a divorce has historically been treated as the same as that required for marriage.[155] That said, the modern procedure for divorce will realistically permit few inquiries into the parties' capacity (or indeed any other factual circumstance).[156]

c. medical matters

The basic principle of English medical law is that a patient must consent to medical treatment, and that civil and criminal liability may flow from a decision to treat a patient inter alia where such consent is not present. As Emily Jackson puts it:

For consent to be valid: first, the patient must have the capacity to consent; secondly, her consent must be given voluntarily; and thirdly, she must understand, in broad terms, the nature of the treatment to which she has consented.[157]

A patient's capacity to consent to medical treatment is now determined in accordance with the Mental Capacity Act 2005. As Jackson put it:

At the beginning of the twenty-first century, there were several reasons for introducing statutory reform of the law relating to the treatment of adults who lack capacity. The common law framework was believed to be unclear, leaving medical professionals and carers uncertain how to act.[158]

If a person lacks capacity under the Act, treatment may be authorised under the Act, in accordance with the principles already outlined. The inherent jurisdiction, also discussed above, may be relevant in cases of borderline capacity or vulnerability falling outside the terms of the Act.

d. donations and wills

[154] Matrimonial Causes Act 1973, s. 16.
[155] *Mason v. Mason* [1972] Fam 302.
[156] Divorce, Dissolution and Separation Act 2020.
[157] E. JACKSON, *Medical Law: Text, Cases, and Materials*, 5th ed., Oxford, Oxford University Press, 2019, p. 237.
[158] ibid, p. 244.

Lady Hale has asserted that '[g]iving away property while alive seems to cause fewer disputes than do wills, although these may often arise after the donor has died'.[159] The leading common law authority on *inter vivos* gifts is *Re Beaney*, where it was noted that the test of capacity is 'whether the person concerned is capable of understanding what he does by executing the deed in question when its general purport has been fully explained to him'.[160] Specifically, it was held that:

The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect…In the case of…a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.[161]

In *Re Smith*, it was held that 'the correct approach to a post-MCA inter vivos gift is to apply the common law principles in *Re Beaney* rather than those set out in s.2 and 3 MCA 2005'.[162]

The classic exposition of the degree of mental competence required to make a will in English law is contained in *Banks v. Goodfellow*:

> It is essential … that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[163]

It was thought by some that the Mental Capacity Act 2005 test for capacity was broadly similar to the *Banks v. Goodfellow* test and could safely be applied as

[159] B. HALE, *Mental Health Law*, 6th ed., London, Sweet & Maxwell, 2017, para. 10-017.
[160] [1978] 1 W.L.R. 770, 773.
[161] ibid, 774.
[162] [2014] EWHC 3926 (Ch), para. 63.
[163] (1870) LR 5 QB 549, 565.

an alternative. It was nevertheless held in *Re Walker* that there were important differences between the two tests and that the statutory one was not intended to apply when a potential testator's capacity was being retrospectively assessed during probate proceedings.[164] This meant that 'the correct and only test for testamentary capacity, where what is in issue is the validity of the will executed by the deceased, is the common law test set out in *Banks*'.[165] The Law Commission expressed the view that *Banks* remained good law but that the potential discrepancy between it and the 2005 Act was anomalous.[166] They provisionally proposed that the 2005 Act be applied to assess capacity, alongside a Code of Practice.

e. civil proceedings and administrative matters (e.g. applying for a passport)

A party, or an intended party, to civil[167] or family[168] proceedings who lacks the capacity to conduct those proceedings within the meaning of the MCA is known as a 'protected party'. It is expressly provided that '[a] protected party must have a litigation friend to conduct proceedings on his behalf'.[169] Litigation friends were addressed in relation to question 13 above.

P's dealings with public authorities will be subject to the general principles in the MCA and under the common law considered elsewhere, including any intervention of the Court of Protection. As regards passports, a declaration under section 15 of the MCA that P lacks capacity in relation to the matter at hand could justify the refusal or withdrawal of a passport.[170] Conversely, it is possible for another person to complete and sign a passport form on behalf of a person with a relevant disability.[171]

15. **What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?**

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[164] [2014] EWHC 71 (Ch).
[165] ibid, para. 50.
[166] Law Commission, *Making A Will*, CP 231, 2017, ch. 2.
[167] Civil Procedure Rules 1998, Part 21.
[168] Family Procedure Rules 2010, Part 15.
[169] Civil Procedure Rules 1998 r. 21.2; Family Procedure Rules 2010, Part 15, r. 15.2.
[170] See, e.g., HOME OFFICE, 'Written statement to Parliament: The issuing, withdrawal or refusal of passports', 25.04.2013 <https://www.gov.uk/government/speeches/the-issuing-withdrawal-or-refusal-of-passports> accessed 29.08.2022.
[171] HM PASSPORT OFFICE, 'Guidance for paper passport applications (accessible)', 2022 <https://www.gov.uk/government/publications/applying-for-a-passport/guidance-for-paper-passport-applications-accessible> accessed 29.08.2022.

An evaluation of the system is carried out in response to questions 67 and 68 below.

SECTION III – STATE-ORDERED MEASURES

Overview

16. **What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.[172] Pay attention to:**
    a. can different types of state-ordered measures be applied simultaneously to the same adult?
    b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;
    c. does your system provide for interim or ad-hoc state-ordered measures?

Measures under the MCA 2005

The Court of Protection is the competent state authority for adults who lack mental capacity within the meaning of the MCA 2005. It has the power to make declarations or decisions in relation to financial or welfare matters for adults who lack capacity.

- **Declarations:** section 15 MCA 2005 provides that **t**he COP can make a declaration as to whether a person has capacity to make a particular decision or in relation to certain matters. The COP can also make a declaration as to whether a specific act or omission that concerns a person who lacks capacity is lawful (either where the action or omission has already occurred or where the act or omission is proposed).

- **Decisions** (or orders): section 16 MCA 2005 empowers the COP to make decisions on behalf of P in relation to welfare or property matters.

- **Appointment of Deputies:** section 16 enables the COP to appoint a deputy to make decisions on behalf of P (see the response to question 9.a) in relation to certain welfare or property matters.

[172] Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

The MCA 2005 states that a decision of the Court of Protection is to be preferred to the appointment of a deputy.[173] Where the COP is able to make a single decision about a particular matter, a deputy is unlikely to be appointed. The appointment of a deputy is more likely if ongoing decisions are required, and it would be impractical to constantly return to the COP.[174]

However, the COP may decide that an appointment of a deputy is not necessary, as it would be in the best interests of P for decision-making to be made within the 'informal and collaborative' framework of section 5 of the MCA (see the answer to question 54).

Interim Orders and Directions

Section 48 of the MCA 2005 establishes that the Court of Protection is able, pending the determination of an application in relation to P, to 'make an order' or 'give directions' if -

(a) there is reason to believe that P lacks capacity in relation to the matter,
(b) the matter is one to which its powers under this Act extend, and
(c) it is in P's best interests to make the order, or give the directions, without delay.

Measures under the Inherent Jurisdiction

The high court has the residual power to make orders to protect vulnerable adults who are incapacitated from making a particular decision by reason of such things as constraint, coercion, undue influence or other vitiating factors (see the response to question 8). It has been made clear that the high court should only impose those orders that are 'necessary and proportionate' and it should 'at all times have proper regard to the personal autonomy of the individual.'[175]

Some debate has arisen with regard to whether an order under the inherent jurisdiction may only be directed at the abuser who is compromising the autonomy of the vulnerable adult, with the aim of enabling the vulnerable adult to regain the

[173] Mental Capacity Act 2005, s. 16(4)(a).
[174] *Watt v. ABC* [2016] EWCOP 2532, para. 73. See DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 14.16.
[175] *A Local Authority v. BF* [2018] EWCA Civ 2962, para. 23.

autonomy to make the decision.[176] This is often described as the 'facilitative approach'. This approach was described in *LBL v. RYJ and VJ*:

I do not doubt the availability of the inherent jurisdiction to supplement the protection afforded by the Mental Capacity Act 2005 for those who, whilst 'capacitous' for the purposes of the Act, are 'incapacitated' by external forces –whatever they may be- outside their control from reaching a decision....However, I reject [the]...contention...that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance...[T]he relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.[177]

There are other cases that have indicated that the purpose of the inherent jurisdiction is not limited to facilitating the process of unencumbered decision-making. It has been recognised that, in appropriate circumstances, it may be necessary to make an order that is directed towards the vulnerable adult, which entails imposing an outcome or decision on them to ensure their protection. This is described as the more 'dictatorial approach'. It was indicated in obiter comments in *NCC v. PB and TB* that the high court was able to impose a regime of care on a vulnerable adult if that was the only way to safeguard their interests.[178] A clear example of a more 'dictatorial approach' is *Southend-On-Sea Borough Council v. Meyers*,[179] where the high court made an order directed at the vulnerable adult, which prevented him living with his abusive son, either in his bungalow or any alternative accommodation. This decision has been criticised by Sir James Munby for the way it sought to control the choices of the vulnerable person rather than being focused on facilitating the exercise of autonomy.[180] In a recent decision of the high court, in *London Borough of Islington v. EF*, it was suggested that *Meyers* was either wrong in imposing a decision on the vulnerable adult, or that any such decision should be limited to 'exceptional cases'.[181]

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[176] See SIR JAMES MUNBY, 'Whither the Inherent Jurisdiction? How did we get here? Where are we now? Where are we going?', Court of Protection Bar Association, 10.12.2020. <https://www.cpba.org.uk/wp-content/uploads/2020/12/2020COPBA.pdf> accessed 29.08.2022.

[177] [2010] EWHC 2665, 62.

[178] [2014] EWCOP 14, para. 113.

[179] [2019] EWHC 399.

[180] SIR JAMES MUNBY, 'Whither the Inherent Jurisdiction? How did we get here? Where are we now? Where are we going?', Court of Protection Bar Association, 10.12.2020. <https://www.cpba.org.uk/wp-content/uploads/2020/12/2020COPBA.pdf> accessed 29.08.2022.

[181] [2022] EWHC 803, para. 98.

Start of the measure

Legal grounds and procedure

17. **What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.**

<u>Declarations and Decisions under the MCA 2005</u>

Age: A declaration or decision of the Court of Protection can be made in respect of people who are aged 16 and over.[182]

Mental Capacity: A person must lack mental capacity within the meaning of s2 of the MCA 2005.

The answer to question 8.a discusses what constitutes an impairment in the functioning of the mind.

<u>Interim Orders and Directions under the MCA 2005</u>

The evidence of incapacity that is required at the interim stage is less than what is required for an ultimate declaration. The issue is 'whether the evidence establishes reasonable grounds to believe that P may lack capacity'.[183] This will entail an 'evidential enquiry in which the entire canvas of the available evidence requires to be scrutinised', such as 'hearsay evidence'.[184] According to Heyden J, the presumption of capacity still applies at the interim stage, so there must be sufficient evidence to establish that there are reasonable grounds to believe that P may lack capacity, rather than have to provide evidence to establish that they do have capacity.[185]

For an ultimate declaration under section 15, what is required is an 'evaluation as to whether P, in fact, lacks capacity'.[186] The same is true of the power of the court to make a decision under section 16, which 'applies if a person (P) *lacks* capacity'.[187]

<u>Orders under the Inherent Jurisdiction</u>

[182] Mental Capacity Act 2005, s. 2(5).
[183] Mental Capacity Act 2005, s. 48(a).
[184] *DP v London Borough of Hillingdon* [2020] EWCOP 45, para. 59.
[185] ibid, para. 58.
[186] ibid, para. 62.
[187] Mental Capacity Act 2005, s. 16(1).

The answer to question 8.a notes that the inherent jurisdiction is more likely to be invoked in relation to vulnerable adults, as they are more susceptible to having their autonomy compromised by oppressive relationships. However, it is also a necessary condition for the exercise of the inherent jurisdiction that the adult has been disabled from making an autonomous decision, whether by constraint, coercion, undue influence, or for some other reason.

18. **Which authority is competent to order the measure?**

The Court of Protection is the competent authority in respect of declarations, decisions, or interim measures under the Mental Capacity Act 2005.

The high court is the competent authority in respect of orders for the protection of vulnerable adults under the inherent jurisdiction.

19. **Who is entitled to apply for the measure?**

See the response to question 12 above.

20. **Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?**

Measures under the MCA

The consent of the adult is not required. The power of the COP to make decisions on behalf of P is limited to situations where they lack capacity to consent, and so something may need to be done in their best interests without their consent.

Measures under the Inherent Jurisdiction

The inherent jurisdiction is *primarily* concerned with promoting the autonomy of a vulnerable adult, where they have been disabled from making a free choice or giving a genuine consent by external pressures. This will usually entail orders that are directed at the abuser, in a way that seeks to control their behaviour. In this respect, the vulnerable adult does not need to consent to the order against the abuser, but the aim of any such order is to restore their ability to make autonomous decisions. The response to question 16, however, noted that there may arise exceptional circumstances where an outcome will be imposed on the vulnerable adult to safeguard their interests. The objection of the vulnerable adult, even when the

outcome conflicts with their strongly held views, will not prevent the imposition of the order.[188]

21. **Provide a general description of the procedure for the measure to be ordered. Pay attention to:**
    a. a requirement of legal representation of the adult;
    b. availability of legal aid;
    c. participation of family members and/or of vulnerable adults' organisations or other CSO's;
    d. requirement of a specific medical expertise / statement;
    e. hearing of the adult by the competent authority;
    f. the possibility for the adult to appeal the order.

Procedure before the Court of the Protection

Most of the procedural matters were addressed in response to questions 12 and 13. The answer here provides additional information on legal aid.

Legal Aid

Deprivations of Liberty

Legal aid is available for cases that concern a Deprivation of Liberty Safeguards authorisation, without the need for an assessment of the financial situation of P (i.e., non-means-tested).

Other Welfare Matters

Means-tested legal aid is available for oral hearings before the COP[189] that concern the person's 'right to life', 'liberty or physical safety', 'right to family life', 'medical treatment', or 'capacity to marry, to enter into a civil partnership or to enter into sexual relations'.[190]

In order to obtain legal aid, P must have limited means (have limited income and capital to cover the costs of legal representation). P must also satisfy the 'prospects of success' test (the likelihood of a successful outcome must be rated as

[188] See *Southend-On-Sea Borough Council v. Meyers* [2019] EWHC 399.
[189] An oral hearing has to have been ordered, or needs to be likely to be ordered, by the COP and it must be necessary for P to receive full representation: Civil Legal Aid (Merits Criteria) Regulations 2013, r. 52(2).
[190] Civil Legal Aid (Merits Criteria) Regulations 2013, r. 52(3).

very good, good, or moderate)[191] or the case must be of 'significant wider public interest'[192] or of 'overwhelming importance to the individual'.[193] The other requirement is the 'reasonable private paying individual test' which is the 'cost-benefit criteria' that is most likely to apply in the context of proceedings before the COP;[194] it will need to be established that potential benefit of proceedings justifies the costs, such the reasonable person would be prepared to pay for legal representation.

Property and Financial Affairs

In matters concerning property or financial affairs, there is no legal aid funding available.

22. **Is it necessary to register, give publicity or any other kind of notice of the measure?**

The level of transparency (or lack thereof) in relation to the general activities of the Court of Protection has long been a matter of controversy.[195] The Public Guardian is, however, statutorily obliged to maintain a register of orders appointing deputies.[196]

Appointment of representatives/support persons

23. **Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:**

    a. **what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**

Deputies

A deputy or deputies may be appointed by the Court of Protection to make decisions on behalf of P in relation to either health and welfare matters or property and financial affairs.

[191] Civil Legal Aid (Merits Criteria) Regulations 2013, r. 43(a).
[192] Civil Legal Aid (Merits Criteria) Regulations 2013, r. 43(b)(i).
[193] Civil Legal Aid (Merits Criteria) Regulations 2013, r. 43(b)(ii).
[194] Civil Legal Aid (Merits Criteria) Regulations 2013, r. 42(3).
[195] See, e.g., L. SERIES et al, *Transparency in the Court of Protection Report on a Roundtable*, Cardiff, Cardiff University, 2015.
[196] Mental Capacity Act 2005, s. 58.

Deputies that are appointed by the Court of Protection must be 18 years or over. A deputy for health and welfare can be an individual. A deputy for property and financial affairs can either be an individual or a trust corporation.[197] or a trust corporation.

A deputy must also -

- consent to act as a deputy[198]
- have the capacity to act as a deputy.

A deputy can be -

- P's spouse or partner;
- Any other relative who takes a personal interest in P's affairs;
- A close friend
- A professional adviser (e.g., a solicitor)
- A holder of a specific office or position (e.g., Director of Adult Services of the relevant local authority)
- A panel deputy (e.g., a professional who are approved by the Office of the Public Guardian).[199]

In relation to property and financial affairs, a deputy can also be a 'trust corporation'.[200]

The decision about whether to appoint a deputy, and the terms on which they are appointed, is governed by the best interests principle.[201] There are a range of situations, noted below (in response to question 23.c), where it will be considered contrary to best interests to appoint a person as a deputy.

Independent Mental Capacity Advocates

The MCA 2005 provides that an Independent Mental Capacity Advocate (IMCA) should be instructed to 'represent and support' P in respect of certain significant decisions. An IMCA will be appointed where there is no person, other than someone who is acting in a professional capacity or for remuneration, whom it would be appropriate to consult (such as family or friends).[202]

[197] Mental Capacity Act 2005, s. 19(1).
[198] Mental Capacity Act 2005, s. 19(3).
[199] *EB v. RC* [2011] EWCOP 3805, para. 35.
[200] Mental Capacity Act 2005, s. 19(1)(b).
[201] Mental Capacity Act 2005, s. 16(4).
[202] Mental Capacity Act 2005, ss. 37(1)(b) 38(1)(b), 39(1)(b) 39A(1)(b).

Regulations specify the requirements that an individual must satisfy to be appointed as an IMCA. An individual can be appointed an IMCA only if -

- He is approved by a local authority as satisfying the appointment requirements, or;
- He belongs to a class of persons that are approved by a local authority as satisfying the appointment requirements.[203]

The 'appointment requirements' of an IMCA are that the individual must:

- Have the appropriate experience.
- Have completed the standard IMCA training.
- Be a person of integrity and good character; and
- Be able to act independently.[204]

Before a person can be appointed as an IMCA, an enhanced criminal record certificate must be obtained from the Disclosure and Barring Service.[205] This must include suitable information relating to vulnerable adults, where the person to be appointed as an IMCA will be working with persons over the age of 18.

IMCAs must be independent and cannot act as an IMCA if they are involved in the care or treatment of the person or if they have links to the responsible body instructing them or to anyone else involved in the person's care or treatment, other than as their advocate.

b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?

Deputies

Preferences of P

[203] Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, r. 5.

[204] Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, r. 5; DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 10.18.

[205] Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, r. 5(3) as amended by The Mental Health and Mental Capacity (Advocacy) Amendment (England) Regulations 2009.

As the appointment of the proposed deputy must be in P's best interests, it is necessary for the Court of Protection to consider, so far is reasonably ascertainable, P's past and present wishes about who to appoint as a deputy.[206]

In some cases, the Court of Protection has attached considerable weight to the wishes of P as to who should be appointed. For example, in *Re M, N v. O & P,* M's colleague applied to be appointed as his deputy for property and financial affairs.[207] This was objected to by M's wife, proposing instead that she should be appointed as his deputy. The Court of Protection considered that one of the factors that were of 'magnetic importance' were 'M's past and present wishes' that his colleague be appointed.[208] It concluded that '[i]t would be wrong to frustrate his choice of [his colleague]...as his substitute decision-maker simply because his wife opposes it.'[209]

In *Essex County Council v. CVF* the Court of Protection had to consider whether the Local Authority should be substituted as financial deputy for CVF.[210] CVF had made her wishes clear that she no longer wanted her mother to continue as her deputy, on the basis that she felt her mother (JF) was using her finances to control her actions. She wished this role to be undertaken by the local authority. Lieven J held that it was in the best interests to make this order as it would improve the chances of them having a better relationship and it accorded with CVF's wishes. JF had further sought to be appointed as the welfare deputy of CVF. This was also rejected by Lieven J. CVF strongly opposed the appointment and her wishes and feelings on the matter were held to be 'the critical factor' in finding it was not in her best interests.[211]

There are likely to arise situations where considerably less weight will be attached to the wishes of the individual as to who should be appointed. As noted below in response to question 23.c, there are situations where the court is unlikely to countenance the appointment a person as a deputy, such as where they have been abusive. If P wishes for that person to be appointed, it is unlikely that the wishes of P will outweigh any concerns.

When considering the wishes of P, it is necessary for the Court of Protection to have particular regard to any relevant written statement made by P when they

[206] *Re Lawson, Mottram and Hopton (appointment of personal welfare deputies)* [2019] EWCOP 22.
[207] [2013] WTLR 681.
[208] ibid, para. 78.
[209] ibid.
[210] [2020] EWCOP 65.
[211] ibid, para. 31.

possessed capacity. It has been held, in relation specifically to a property and financial affairs deputyship, that a highly relevant written statement is the will of P. If, for example, P has appointed certain person to be executors, this would indicate that that are trusted by P and were considered competent in dealing with financial affairs.[212]

Preferences of Others

There is a formal process for notifying interested parties about a potential appointment that are specified in the Court of Protection Rules 2017 to enable them to be consulted about what is best for the protected person.

An application to become a deputy must be submitted to the Court of Protection. The Court of Protection will then 'issue' the application, if after an initial review it is prepared to consider it fully. It is then necessary for the applicant to notify person as soon as practicable or in any event within 14 days of the date on which the application form was issued.[213] Practice Direction 9B details the persons who need to be notified, and was outlined in response to question 13.b above.

An interested party who is notified of an application who wishes to take part in proceedings is given 14 days within which to acknowledge the notification using the COP5 form. It is open to the interested party to consent to the application,[214] oppose the application, or seek a different order. If the interested party opposes the order, then the proceedings become contested. They will need to explain why it would not be the best interests of the protected person to appoint the proposed applicant, and they should provide evidence to support this using COP24. If a different order is sought, then the interested party will have to explain how the different order would benefit P to whom the application relates, to enable the Court of Protection to determine what would be in their best interests of P.

When examining an application, the Court of Protection must determine what would be in P's best interests. This includes taking into account, as far is it is practicable and appropriate to consult them, anyone engaged in caring for P or interested in his welfare, as to what appointment would be in his best interests.[215] It may, for example, have to consult others on such matters as what P's wishes or feelings are, or are likely to be, about the appointment. The purpose of consulting others is primarily to identify what would be in the best interests of P, rather than simply being about establishing what the interested party wants.

[212] *Re PAW (appointment of a deputy)* [2015] EWCOP 57.
[213] Court of Protection Rules 2017, r. 9.10.
[214] Court of Protection Rules 2017, r. 9.12(4)(a).
[215] Mental Capacity Act 2005, s. 4(7).

In *NKR v. Thomson Snell and Passmore Trust Corp Ltd.* a mother preferred the appointment of a barrister to the position of deputy, over that of a panel deputy.[216] It was accepted that both would make suitable appointments. However, in deciding between them, it concluded that the preference of the mother (whilst taken into account) was outweighed by the fact that the panel deputy was, due to their experience, better placed to deal with a challenging case.

In relation to contested applications, it is inevitable that the Court of Protection will have to consider opposing viewpoints. In *Re PAW (appointment of a deputy)*, the Court of Protection was concerned with an application of a brother (BQ) and sister (SJ) who were the cousins of PAW, and the opposition of her son (IW) who wished to be appointed.[217] Senior Judge Lush reiterated that he was required under section 4(7)(b) of the MCA to take account of the views of those interested in PAW's welfare as to who to appoint. In relation to the potential appointment of IW, he observed that the views of 'rest of [the] family' were that he was 'totally unsuitable...because he lacks competence and integrity and because he has a poor track record of managing his company's financial affairs'.[218] The views of IW, expressed in his witness statement, however, were dismissed as being 'rambling, hysterical and vindictive'.[219] In contrast, the views of P's other son (PW), that it would be in the best interests of PAW to have SJ and BQ appointed, was given more weight.

KS v. JR is another example of a contested application. In that case the daughter of P had applied to be her deputy. The sister of P believed that the daughter was not a suitable appointment, on the grounds that she had been deceitful and effectively estranged from P. In contrast, it was the shared view of P's husband, son, and social worker, that the daughter should be the best person to be appointed. Senior Judge Lush concluded that the sister's views were unsupported by the evidence and that the views of all the other family members were to be preferred.

Independent Mental Capacity Advocates

An IMCA is someone who supports a P in situations where they have no family or friends that it would be appropriate to consult about particular decisions.

[216] [2019] EWCOP 15.
[217] [2015] EWCOP 57.
[218] ibid, para. 29.
[219] ibid, para. 30.

c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?

Deputies

The main consideration in determining whether to appoint a person as a deputy is P's best interests.[220]

There is 'no automatic right to be appointed' as a deputy under the MCA 2005 and the Court of Protection 'has a discretion as to whom it appoints'.[221] However, in some cases it has been indicated by the Court of Protection that there is an 'order of preference', in line with the pre-MCA authority on the appointment of a receiver under the Mental Health act 1983.[222] The order of preference is:

a. P's spouse or partner;
b. any other relative who takes a personal interest in P's affairs
c. a close friend;
d. a professional adviser, such as the family's solicitor or accountant;
e. a local authority's Social Services Department; and finally
f. a panel deputy, as deputy of last resort.

The reasons for preferring certain persons over others is 1) 'respect for their relationship' 2) 'practical reasons' and 'reasons of economy' (such as the fact that family or friends may not charge for their services) 3) and the fact that a person may be better placed to perform duties under the MCA 2005 (as they are more familiar with the wishes and feelings of P and are in a better position to encourage them to participate in the decision).[223]

It is important to emphasise that the 'order of preference' is not a fixed list that requires strict adherence or indicates that certain persons are automatically entitled to be appointed.[224] As an 'order of preference', it is no more than a general guide as to the order of selection that is likely to be followed when determining the appointment which would be in the best interests of P. There are situations where it will be considered inappropriate to adhere to this order, as there are factors that

[220] Mental Capacity Act 2005, s. 16(4).
[221] *Re EU (Appointment of a Deputy)* [2014] EWCOP 21.
[222] *Re M, N v. O & P* (unreported, 28.01.2013); *Re AS* (unreported, 07.12.2011).
[223] *Re BM* [2014] EWCOP B20 47.
[224] *Kent CC v. C* [2014] 2 WLUK 685.

are relevant to the assessment of best interests that will suggest a different preference.[225]

Senior Judge Lush has also detailed some situations where the COP will not or is unlikely to contemplate appointing a family member or a friend as a deputy on the basis that it will not be in the best interests of P to do so. These include where:

(a) the proposed deputy has physically, psychologically, financially or emotionally abused P;
(b) there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;
(c) there is a real conflict of interests;
(d) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and
(e) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs.[226]

The MCA Code of Practice recognises that it may be appropriate to appoint an independent deputy where P's affairs or care needs are particularly complicated or where there is ongoing friction.[227] An independent deputy can include, for example, the local authority (such as the Director of Adult Services) or a professional deputy (such as a solicitor, who will manage the finances of P).

The Code suggests that a deputy should not be a paid care worker apart from in exceptional circumstances, such as where the 'care worker is the only close relative of the person who lacks capacity'.[228] This is because of a potential for a conflict of interests.

Independent Mental Capacity Advocates

An IMCA is someone who supports a P in situations where they have no family or friends that it would be appropriate to consult about particular decisions.

d. what are the safeguards as to conflicts of interests at the time of appointment?

[225] *Re M: N v. O and P* [2013] WTLR 681
[226] *Re RP* [2016] EWCOP 1, para. 34.
[227] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para 8.33.
[228] ibid, para. 8.41.

In an application for the role of deputy, an applicant must complete a declaration form (COP4) in which they specify whether they are aware of any of their own interests may conflict with P's interests. An applicant must also give an undertaking to ensure that their personal interests do not conflict with their deputies as a deputy, and they will not use their position for personal benefit.

An important consideration of the Court of Protection in determining whether is in the best interests of P to appoint someone as a deputy is whether there is a potential conflict of interests. It is important, however, to note that a potential for a conflict of interests is not an absolute bar to a person from being appointed to the role of deputy. In *Re JW*,[229] Senior Judge Lush provided some guidance (later summarised in *Re ACC*) on the way that potential conflicts of interest should be approached:

1. Conflicts of interest are ubiquitous in any mental capacity jurisdiction and it would be unrealistic, if not impossible, to eradicate them entirely.
2. Whilst the MCA Code suggests that a deputy cannot obtain any personal benefit from their position, in practice all professional deputies profit from their position because they act for reward. The history of Court of Protection practice over the last hundred years has been a gradual relaxation of what was once an absolute prohibition on the appointment of solicitors as deputies on account of the conflict of interests.
3. There has also been a gradual relaxation of the prohibition of the appointment of local authorities as deputies. However, the Court of Protection is still wary of potential conflicts of interest when appointing a local authority as a deputy. This is in line with the guidance in the MCA Code, which specifies that the "court will need to be satisfied that the authority has arrangements to avoid possible conflicts of interests. For example where the person for whom a financial deputy is required receives community care services from the local authority, the court will wish to be satisfied that the decisions about the person's finances will be made in the best interests of that person, regardless of any implications for the services provided'.
4. Conflicts of interests frequently arise in family situations, but that doesn't mean that a family member is automatically disqualified from being appointed as a deputy.
5. One of the principal functions of the Court of Protection is to manage conflicts of interest to ensure that any act done or any decision made on behalf of a person who lacks capacity is done or made in their best interests.[230]

[229] [2015] EWCOP 82.
[230] [2020] EWCOP 9, para. 40.

A number of effective safeguards have been recognised that enable the court to manage the risk.[231] The COP may, for example, appoint joint deputies as an effective safeguard against the temptation of one or other of the deputies from succumbing to his personal interest at the expense of P.[232]

There are also safeguards against conflicts of interest that are contained in section 19 of the MCA 2005:[233]

(a) Although a deputy is entitled to be reimbursed out of P's property for his reasonable expenses in discharging his functions: section 19(7)(a), a deputy is only entitled to remuneration out of P's property for discharging his functions, 'if the court so directs when appointing him': section 19(7)(b);

(b) the court may confer on the deputy powers to take possession of all or only a specified part of P's property: section 19(8)(a);

(c) the court may confer on a deputy powers to exercise all or any specified powers in respect of P's property, including such powers of investment as the court may determine: section 19(8)(b);

(d) the court may require a deputy 'to give to the Public Guardian such security as it thinks fit for the due discharge of his functions': section 19(9)(a); and

(e) the court may require a deputy 'to submit to the Public Guardian such reports at such times or at such intervals as the court may direct': section 19(9)(b).

The Office of the Public Guardian may also respond to concerns about conflicts of interests as part of their supervisory role.

An example of where the Court of Protection has sought to manage the risk of a conflict of interests is *Re JW*.[234] In that case, a local authority opposed an application of a son as deputy on the basis of a conflict of interests. The son had proposed that a property owned by P (but not lived in by her) should be renovated before sale and he would carry out the works as he was a semi-retired builder. The local authority was concerned that the renovations would not benefit P, but only her estate, and that the son stood to make a financial gain. Whilst it was recognised that there was a risk of a conflict of interests, this could be controlled by, inter alia, setting a daily rate for his functions as a builder and that he should keep within an approved budget for the works.

[231] *Re JW* [2015] EWCOP 82, paras. 47-49.
[232] *Re JW* [2015] EWCOP 82, para. 47.
[233] Discussed in *Re JW* [2015] EWCOP 82, para. 49.
[234] [2015] EWCOP 82.

However, there will be situations where the potential for a conflict is considered serious, and the use of safeguards is likely to be ineffective, so the appointment is not in the best interests of P. For example, in *Re PAW (appointment of a deputy)*,[235] it was determined that it would be inappropriate to appoint a son to the role of deputy, as he was his parents' principal debtor – owing them £170,000 – and they would be likely to need those funds to provide for their care. It was held that the 'actual conflict between his interests and theirs is too great to enable him to secure their interests and position in a satisfactory manner'.[236]

More specific guidance has been given on how to manage a conflict of interests that might arise where a solicitor is appointed as a deputy, and they wish to instruct their own firm to carry out legal tasks. This arose in *ACC and Others.* It was recognised by the Court of Protection that, under the MCA, the '"general"' authority to manage 'property and affairs encompasses such ordinary non-contentious legal tasks, including obtaining legal advice, as are ancillary to giving effect to that authority.'[237] It is also the case that '[w]here a deputy has authority to make a decision / do an act in respect of P's property and affairs, such authority encompasses steps in contemplation of contentious litigation in the realm of that authority'.[238] However, to be able to conduct litigation on behalf of P, there is a need for 'specific authority'.[239]

In situations where a deputy is planning to instruct their own firm to carry out legal tasks, there are various 'special measures [that] are required to address the conflict of interest':[240]

a. the deputy may seek prior authority [paragraph 56.7(a) – I];

b. the deputy is required to se–k - in a manner which is proportionate to the magnitude of the costs involved and the importance of the issue to–P - three quotations from appropriate providers (including one from his own firm), and determine where to give instructions in the best interests of P [paragraph 56.7(f)(i)];

c. the deputy must seek prior authority from the Court if the anticipated costs exceed £2 000 + VAT;

d. the deputy must clearly set out any legal fees incurred in the account to the Public Guardian and append the notes of the decision-making process to the return. [paragraph56.7(f)(iv)]

[235] [2015] EWCOP 57.
[236] ibid, para. [28].
[237] [2020] EWCOP 9, para. 53.6.
[238] ibid, para. 5.
[239] ibid, para. 6.
[240] ibid, para. 9.

The Office of the Public Guardian has since issued guidance based on the *ACC* decision. This guidance 'extend[s] to any situations where a deputy is considering the procurement of services for a client which may include provision from the deputy's own firm and hence constitute a potential conflict of interest.'[241] It stipulates, for example, that a deputy will need to apply to court for authorisation when considering the procurement of services from within their own business where the costs are expected to exceed £2,000 + VAT.

Independent Mental Capacity Advocates

An IMCA must be 'independent of any person who will be responsible for the act or decision' for P.[242]

The MCA Code of Practice establishes that a person will lack the necessary quality of independence if they -

- care for or treat (in a paid or professional capacity) the person they will be representing (this does not apply if they are an existing advocate acting for that person), or
- have links to the person instructing them, to the decision-maker or to other individuals involved in the person's care or treatment that may affect their independence.[243]

e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?

Deputies

The Court of Protection may appoint more than one deputy and can stipulate whether they should act 'jointly', 'jointly and severally' or 'jointly in respect of some matters and jointly and severally in respect of others'.[244] The MCA Code of Practice explains that acting 'jointly' means that the deputies 'must all agree decisions or actions, and all sign any relevant documents', whereas acting 'jointly and

[241] OFFICE OF THE PUBLIC GUARDIAN, 'Decision ACC and Others: Guidance for property and financial affairs deputies (web version)', 2021 <https://www.gov.uk/government/publications/new-guidance-for-deputies-in-response-to-acc-judgement/acc-and-others-guidance-for-property-and-financial-affairs-deputies-web-version> accessed 30.08.2022, para. 5.7.

[242] Mental Capacity Act 2005, s. 35(4).

[243] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 10.19.

[244] Mental Capacity Act 2005, s. 19(4)(c).

severally' means that the deputies 'can act together, but they may also act independently if they wish'.[245] The last category means that deputies may be required to agree decisions in relation to specific matters, such as selling property, whilst being able to act independently in relation to other matters.

It is also possible for the Court of Protection to appoint a successor deputy or deputies to take over the duties of a deputy or deputies when they are no longer able to carry them out (e.g., to take over the duties of an older deputy who may die or lose capacity).

Independent Mental Capacity Advocates

A single IMCA will be appointed to support P.

f. is a person obliged to accept appointment as representative/support person?

Deputies

There is no duty on a person to be appointed as a deputy.[246] Section 19(3) makes it clear that consent is a prerequisite to appointment.

However, whilst a person must initially consent to the appointment, it does not follow that the deputy must continue to consent to remain in his role. Thus, if a deputy wishes to withdraw their consent, this will not automatically lead to termination of the appointment. This was confirmed in *Cumbria County Council v. A* where it was held that a decision to discharge was within the 'exercise of the court's discretion', which must be 'exercised reasonably',[247] and with regard to the 'P's best interests'.[248] The considerations relevant to determining best interests in a decision to discharge a deputy will include; the complexity of P's estate; conflicts of interests; P's own wishes and feelings; the value of the estate etc. One situation in which it may be contrary to the best interests of P to terminate an appointment is where, for example, an established public authority appears to be driven by arbitrary or discriminatory criteria that has been solely devised to save costs.

Independent Mental Capacity Advocates

[245] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 8.42.
[246] *Re EU (Appointment of a Deputy)* [2014] EWCOP 21, para. 35.
[247] [2020] EWCOP 38, para. 22.
[248] ibid, para. 34.

An IMCA is someone who will be instructed to represent P by decision-makers in the NHS or local authorities.

During the measure

Legal effects of the measure

24. **How does the measure affect the legal capacity of the adult?**

Deputies

Section 20(1) of the MCA 2005 stipulates that '[a] deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter'. Thus, a deputy only has the authority on behalf of P in relation to those matters where P lacks capacity, rather than treating P as always unable to make the decision themselves. This is in line with the functional approach to capacity under the MCA, which focuses on the specific time when a decision has to be made (time-specific), and on the particular matter to which the decision relates (decision-specific), rather than on any ability to make decision generally. The explanatory notes to the MCA give as an example of the time-specific nature of the functional approach, a person whose mental impairment causes their capacity to fluctuate.[249]

The deputy is also required to act in accordance with the principles contained in section 1 of the MCA when considering whether P has the capacity to make the decision in relation to the matter. That means they are required to assume that P has the capacity in relation to the matter unless it is established that he lacks capacity, that P is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success, and that a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

The MCA Code of Practice suggests that the principles in section 1 of the MCA require the deputy to consider, in relation to a particular decision, whether P has the capacity to make it.[250] They must also, before making the decision on the behalf of P, take steps to support them to make the decision for themselves.

Independent Mental Capacity Advocates

[249] *Explanatory Notes to the Mental Capacity Act 2005*, Crown, 2005, para. 75.
[250] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 8.51.

An IMCA will be instructed to represent and support P in relation to specific decisions where they are assessed as lacking capacity by the decision-maker. The IMCA does not determine whether a person lacks capacity to make the relevant decision, but they are able to challenge the capacity assessment of the decision-maker.[251]

Powers and duties of the representatives/support person

25. **Describe the powers and duties of the representative/support person:**
    a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:
        - **property and financial matters;**
        - **personal and family matters;**
        - **care and medical matters;**

According to the MCA Code of Practice, a court-appointed deputy is required to carry the following duties when performing their role:

- To only make those decisions which they have been authorised to make by the Court of Protection
- To follow the statutory principles established by the MCA
- To make decisions in the best interests of P where they lack capacity
- To have regard to guidance in the Code of Practice
- To fulfil their duties towards the person concerned (in particular the duty of care and their fiduciary duties).[252]

The MCA 2005 recognises a deputy as an agent of the person, which entails certain legal duties under the law of agency.[253] The MCA Code of Practice refers to the some of the duties that are imposed by the law of agency and refers to a wider category of 'other obligations':

- To act with due care and skill (duty of care)
- To not take advantage of their situation (fiduciary duty)
- To indemnify the person against liability to third parties caused by the deputy's negligence
- To not delegate duties unless authorised to do so
- To act in good faith
- To respect the person's confidentiality

[251] ibid, para. 10.33.
[252] ibid, paras. 8.50ff.
[253] Mental Capacity Act 2005, s. 19(6).

- To comply with the directions of the Court of Protection.[254]

For property and financial affairs deputyships:

- To keep accounts
- To keep the person's money and property separate from own finances.[255]

A deputy's ability to act in place of the adult etc depends on whether the person lacks capacity in relation to the particular matter at the particular time the decision need to be made. As noted in the response to question 24, under the MCA '[a] deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter'.[256] A deputy is also required to respect the principles under section 1 of the MCA, which means that they should provide practical assistance to enable P to make the decision for themselves, before they conclude that they lack capacity to do so. Only if they have taken such steps will the deputy be able to have reasonable grounds for believing P lacks capacity in relation to the particular matter.

If the deputy has reasonable grounds for believing that P lacks capacity, they can make a best interest decision on *behalf* of P. This will require the deputy to:

- Consider whether it is likely that P will regain or develop the capacity to make the decision in relation to the specific matter. There will arise situations where a decision can be deferred until such a time that P will be able to make the decision for themselves.
- Even if P does lack capacity in relation to the specific matter, the deputy should be involved in the best interests determination. The deputy must 'so far as is reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him'.[257] It is also necessary for the deputy to consider the wishes and feelings of P in determining what is in their best interests, to the extent that these are 'reasonably ascertainable'.[258]

IMCA

[254] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 8.56.
[255] ibid.
[256] Mental Capacity Act 2005, s. 20(1).
[257] Mental Capacity Act 2005, s. 4(4).
[258] Mental Capacity Act 2005, s. 4(6).

The overall function of the IMCA is to 'represent and support' P in relation to certain decisions. Section 36(2) of the MCA 2005 further identifies that an IMCA will -

- Provide support to P so the at they participate as fully as possible in the decision-making process
- Obtain and evaluate relevant information
- Ascertain P's wishes and feelings, beliefs and values
- Ascertain alternative courts of action
- Obtain further medical opinion where necessary

Regulations and the MCA Code of Practice provides more details about the above functions.

b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?

Deputies

A deputy is required to act or make a decision on behalf of P that is in their best interests. The details of the applicable test were set out in response to question 9.a above.

IMCA

An IMCA is not a decision-maker and is unable to consent on behalf of P. The role of the IMCA is to provide the ultimate decision-maker with information, such as the wishes of P, which must be considered as part of the best interests decision.

c. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?

Deputies

'P'

In determining what is in the best interests of P, a deputy 'must consider, so far as is reasonably practicable - (a) the person's past and present wishes and feelings'.[259]

Family and Others

The MCA requires a deputy to consult other people who are close to a person who lacks capacity, where it is practical and appropriate, as to what might be in the best interests of P. The persons that a deputy may be required to consult include-

Anyone the person has previously named as someone they want to be consulted
Anyone involved in caring for the person
Anyone interested in their welfare. [260]

Supervisory Authority (Office of the Public Guardian)

A deputy that has been appointed by the Court of Protection is required to produce an annual report for the Office of the Public Guardian.[261] The deputy must detail the decisions they have taken on behalf of P, their reasons for the decisions and why there were in the best interests of P, and who they consulted as to what was in the best interests of P.

IMCA

P

It is a core function of the IMCA that they ascertain what the wishes and feelings are of the persons that they represent. This includes interviewing the person where possible.[262]

Family and Others

The IMCA is intended to act as a safeguard for persons who lack capacity where there is no one appropriate to consult about the person's best interests (apart from those who are providing care in a professional capacity or for remuneration).

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[259] Mental Capacity Act 2005, s. 4(6).
[260] Mental Capacity Act 2005, s. 4(7).
[261] GOV.UK, 'Deputies: make decisions for someone who lacks capacity' <https://www.gov.uk/become-deputy/print> accessed 30.08.2022.
[262] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 10.28.

The MCA precludes the instruction of an IMCA where there is already someone in a position to speak with the provider of treatment or accommodation, including-

(a) a person nominated by P (in whatever manner) as a person to be consulted on matters to which that duty relates, and they are able and willing to help
(b) a donee of a lasting power of attorney created by P who is authorised to make decisions in relation to those matters, or
(c) a deputy appointed by the court for P with power to make decisions in relation to those matters.[263]

Before an IMCA is instructed to represent P, a decision-maker must also be satisfied that there is no-one else to consult who is engaged in caring for the person or interested in his welfare (other than paid professionals). That will usually mean require the decision-maker to be satisfied that there are no family or friends that are appropriate to consult about P's best interests.

The MCA fails to specify when it will not be appropriate to consult a family member or a friend, but the MCA Code of Practice gives as examples -

- Family members living overseas or who only rarely visit P
- Friends or neighbours who are unwilling or unable to be included in the formal decision-making processes.[264]

Whilst an IMCA is instructed to represent P only where there is no one whom it is appropriate to consult, they are, if instructed, under a duty to consult with certain persons about the best interests of P. First, they are required to consult 'persons engaged in providing care or treatment for P in a professional capacity or for remuneration', 'to the extent that it is practicable and appropriate'.[265] Thus, whilst a IMCA must be appointed as an independent representative where the only persons who might be consulted are paid professionals, an IMCA should consult those persons as part of their information gathering role.

Second, an IMCA must also consult 'to the extent that it is practicable and appropriate to do so', 'other persons who may be in a position to comment on P's wishes, feelings, beliefs or values'.[266] It is possible for 'other persons' to include a family member or friend in situations where they are unwilling or unable to be

[263] Mental Capacity Act 2005, s. 40.
[264] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 10.77.
[265] Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, r. 6.
[266] Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, r. 6.

consulted as part of the ongoing formal decision-making process. In these situations, a decision-maker may have determined that it would not be appropriate to consult in a formal manner. However, as the MCA Code indicates, an IMCA may still be required to 'enable them to be involved more informally'.

d. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?

Deputies are not required to live with the adult or be their carer. To act in the best interests of P, they will need to consider their wishes and feelings, and they must enable them to participate as fully as possible in the decision-making process.

e. is there any right to receive remuneration (how and by whom is it provided)?

Deputies

Section 19(7)(a) of the MCA entitles a deputy to reimbursement from the property of P for his reasonable expenses in discharging his functions.

S19(7)(b) of the MCA 2005 provides that a deputy can receive remuneration from the property of P, if that is what the court directs when appointing him. As such, there is no automatic right to reasonable remuneration for performing the functions of a deputy.

The options open to the Court of Protection in providing for the remuneration of a deputy are specified in Rule 19.13(1) of the Court of Protection Rules 2017. This stipulates that -

(1) Where the court orders that a deputy, donee or attorney is entitled to remuneration out of P's estate for discharging functions as such, the court may make such order as it thinks fit including an order that—

(a) the deputy, donee or attorney be paid a fixed amount;

(b) the deputy, donee or attorney be paid at a specified rate; or

(c) the amount of the remuneration shall be determined in accordance with the schedule of fees set out in the relevant practice direction.

(2) Any amount permitted by the court under paragraph (1) shall constitute a debt due from P's estate.

(3) The court may order a detailed assessment of the remuneration by a costs officer in accordance with rule 19.10(b).

The decision about whether a deputy should receive remuneration for discharging their functions is based on the 'best interests' of P and 'is therefore made by reference to the individual facts of a particular case'.[267] In *Re AR*, an issue arose with regard to the previous practice of the Court of Protection in producing bulk orders for the remuneration of a solicitor deputy in relation to 31 persons.[268] Charles J was highly critical of the practice, stating that orders in such a generic and wide form were incompatible with a 'fundamental principle' of the MCA, as it meant the court had failed to properly assess the best interests of each P individually.[269]

Re AR also required Charles J to consider the effect of Practice Direction 19B that supplements rule 19.13 of the Court of Protection Rules. PD19B set down the fixed amounts of remuneration that may be claimed by solicitors and office holder in public authorities appointed to act a deputy for P. Charles J rejected an approach that would presume that a deputy should be appointed on the basis that his charges were governed by PD19B. Instead, the rates fixed by PD19B were to be treated as one of the options available to the Court of Protection that is identified by r19.13, but is not the only option open to it. Charles J also held that it was contrary to the principles of the MCA to start with a presumption that a deputy's charges should be governed by the PD19B, as it failed to respect the individualised focus of the best interests principle.

IMCAs

An IMCA is paid by the IMCA service that employs them. The local authority is responsible for commissioning and funding the IMCA service in their area.[270]

26. **Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**
    a. **if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
    b. **if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

[267] *Re AR* [2018] EWCOP 8, para. 24.
[268] ibid.
[269] ibid, para. 25.
[270] Mental Capacity Act 2005, s. 35(6A); DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 10.7.

See the answers to question 23.e on the appointment of multiple deputies and question 36 on *ex lege* representation.

Safeguards and supervision

27. **Describe the organisation of supervision of state-ordered measures. Pay attention to:**
    a. what competent authority is responsible for the supervision?
    b. what are the duties of the supervisory authority in this respect?
    c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;
    d. describe the financial liability of the representative/support person for damages caused to the adult;
    e. **describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

Deputies

A deputy is accountable to the Court of Protection, and the Office of the Public Guardian has the responsibility for supervising the actions of the deputy on behalf of the court.[271] The OPG is required to maintain a register of court orders that appoint deputies for this purpose.

The OPG provides 'general' and 'minimal' levels of supervision.[272] In their first year of appointment, all new deputies are subject to the 'general' level of supervision. After this, a property and affairs deputy may have their level of supervision reduced to the 'minimal level' if the assets they are managing are below £21,000, and a general level of supervision is no longer required. If a property and affairs deputy is managing assets above this amount, they will remain subject to a 'general' level of supervision, as will all health and welfare deputies.

Reporting

Deputies that are subject to a general level of supervision are required to produce a detailed annual report for the OPG.[273]

[271] ibid, para. 14.18.
[272] GOV.UK, 'Deputies: make decisions for someone who lacks capacity' <https://www.gov.uk/become-deputy/print> accessed 30.08.2022.
[273] ibid.

Deputies that are subject to a minimal level of supervision are also required to produce an annual report, but this is less detailed.

The OPG will review the reports to check that decisions are being taken in the best interests of P.

The OPG can also order deputies to provide reports (for example, financial accounts or reports on the welfare of the person who lacks capacity) to the Public Guardian at any time or at such intervals as the court directs.

Visits

The OPG may instruct a Court of Protection Visitor to visit a court appointed deputy and produce a written report on such matters as they may direct.[274] A visit may be requested by the OPG in a range of circumstances, such as where:

- It wants to check whether the deputy has understood their duties and has the right level of support
- It wants to be assured that the deputy is carrying out their duties in line with the court order and is acting in accordance with the principles of the MCA
- It is conducting a formal investigation into allegations of abuse.

To fulfil their duties, a Court of Protection Visitor is entitled to take copies of and examine the health records, care records, and social services records of P who lacks capacity.[275] They are also entitled to interview P in private.[276]

Safeguarding Investigations

The OPG has a statutory duty to deal with safeguarding concerns raised about the actions or omissions of deputies appointed by the Court of Protection. Guidance published by the OPG states that in most cases an investigation will entail:

- Asking a deputy for an explanation and evidence about the concerns
- Asking social services for any information they have about the person's mental capacity, finances and care, and whether anyone has reported a safeguarding concern

[274] Mental Capacity Act 2005, s. 61.
[275] Mental Capacity Act 2005, s. 61(5).
[276] Mental Capacity Act 2005, s. 61(6)

- Asking for paperwork, such as bank statements, receipts and legal and medical papers.[277]

The OPG will also work with other authorities that may need to be involved in a safeguarding investigation (e.g., the police in cases where it is suspected that a crime has been committed).

Once an investigation is completed, the OPG will either -

- **Take further action.** This can involve directing the deputy to take certain actions and monitoring the case until they have been carried out to the satisfaction of the OPG.
- **Take no further action.** If the OPG is satisfied the deputy is acting in the best interests of donor, then they will take no further action.
- **Apply to the Court of Protection.** If there are serious concerns about the welfare of P, the OPG can apply to the COP.[278]

Applications to the Court of Protection

If the OPG has significant concerns about the conduct of the deputy, then it can refer the matter to the Court of Protection.

The court can also vary the powers conferred on the deputy or revoke the appointment if it is satisfied that the deputy has previously behaved,[279] is continuing to behave,[280] or proposes to behave,[281] in a way that contravenes -

- The authority that is conferred on him *or*
- The best interests of P.

The grounds on which an order can be varies or revoked are 'mutually exclusive', meaning that 'a deputy could have acted in P's best interests at all times but, if he has contravened the authority conferred on him by the court, his appointment as deputy can be revoked.'[282] It has also been established that acting within the authority conferred on him entails not only acting within the limits of the powers set down by the order, but also failing to comply with the reporting requirements

[277] OFFICE OF THE PUBLIC GUARDIAN, 'Guidance: How we deal with safeguarding concerns', 2021 <https://www.gov.uk/guidance/how-we-deal-with-safeguarding-concerns> accessed 30.08.2022.
[278] ibid.
[279] Mental Capacity Act 2005, s. 16(8)(a).
[280] Mental Capacity Act 2005, s. 16(8)(a).
[281] Mental Capacity Act 2005, s. 16(8)(b).
[282] *Re CJ* [2015] EWCOP 21, para. 35.

that accompany those powers. In *Re CJ* the Court of Protection had to consider an application by the Office of the Public Guardian to revoke the appointment of a financial deputy, even though there was no suggestion of financial wrongdoing.[283] The grounds for the application were that the deputy had failed to comply with requirements related to his supervision by the OPG, including non-submission of annual reports, refusal to pay supervision fees, and denying a court visitor access to P. Senior Judge Lush held that it was not possible to turn a blind eye to wilful refusal to comply with reporting requirements, as this would undermine the safeguarding work of the OPG. It was also considered incompatible with the obligation under Art 12.4 of the UNCRPD to have in place effective safeguards to prevent abuse. It was therefore concluded that the deputy should be removed on the basis that, by failing to comply with his duties of accountability, he had contravened the authority conferred on him by the court.

Financial Liability

Section 19(9)(a) entitles the COP to require a deputy to put in place a security bond with an authorised provider, to protect P from any financial loss. The security bond is paid from P's assets, and it can be 'called in' by the COP in event that the deputy mishandles the affairs of P.[284]

The insurers can make a claim in the civil courts for recovery of the amount that has been paid out, plus their expenses, from the deputy.[285]

28. **Describe any safeguards related to:**
    - **a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**
    - **b. unauthorised acts of the adult and of the representative/support person;**
    - **c. ill-conceived acts of the adult and of the representative/support person;**
    - **d. conflicts of interests;**
    - **e. Please consider the position of the adult, contractual parties and third parties.**

Deputies

[283] ibid.

[284] *Public Guardian v. Riddle* [2020] EWCOP 41, para. 145.

[285] OFFICE OF THE PUBLIC GUARDIAN, 'Guidance: Public Guardian practice note (SD15): OPG's approach to surety bonds (web version)', 2019 <https://www.gov.uk/government/publications/public-guardian-practice-note-surety-bonds/opgs-approach-to-surety-bonds#enforcement> accessed 30.08.2022.

Statutory Restrictions

The MCA imposes limitations on deputies by providing that some of the powers to make decisions on behalf of P, in respect of welfare or property, cannot be given to a deputy. These are matters that must be dealt with by the Court of Protection, rather than a deputy.

In relation to personal welfare, a deputy cannot be given the power to -

- **Prohibit a named person from having contact with P**.[286] However, whilst a deputy cannot be given the power to 'prohibit contact' under section 17(1)(c), they can be given the power under section 17(1)(b) to decide 'what contact, if any, P is to have with any specified persons'. This raises the obvious issue of where the line is to be drawn between a decision to 'prohibit contact' which a deputy is unable to make, and restrictions on contact that it can make. In *PB v. RB*, this issue arose in respect of an order that authorised the deputy to suspend contact between P and her children for up to seven days.[287] Judge Altman concluded that in order to avoid being a prohibition, the period without contact had to be a part of the process of an ongoing management of contact in a flexible way for a proportionate period. It would, for example, have to be used as 'a management tool to avoid conflict and support the care plan on a day to day basis'.[288] This is in contrast to a 'prohibition' which involves a 'strategic or more long term decision' as to no contact.[289] The power of the local authority to impose restrictions on contact for up to seven days was not a prohibition.
- **Direct a person who is responsible for P's health care to allow a different person to take over that responsibility.**[290]
- **Refuse consent to carry out or continue any life-sustaining treatment in relation to P.**[291]

In respect of property, a deputy cannot be given power in respect of -

- The settlement of any of P's property;[292]
- The execution for P of a will;[293]

[286] Mental Capacity Act 2005, s. 20(2)(a).
[287] [2014] COPLR 481.
[288] ibid, para. 48.
[289] ibid.
[290] Mental Capacity Act 2005, s. 20(2)(b).
[291] Mental Capacity Act 2005, s. 20(5).
[292] Mental Capacity Act 2005, s. 20(3)(a).
[293] Mental Capacity Act 2005, s. 20(3)(b).

- The exercise of any power vested in P whether beneficially or as trustee or otherwise.[294]

Restraint

The MCA imposes limitations on deputies in relation to restraint, which are essentially the same as those imposed on a donee of an LPA (section 11) or a person that is involved in the care of treatment of P (section 6).

A welfare deputy is precluded from doing an act that is intended to restrain P, unless the following four conditions are satisfied:[295]

- That in doing the act the deputy is acting within the scope of the authority expressly conferred on him by the court;[296]
- That P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter;[297]
- That the deputy reasonably believes that it is necessary to restrain P to prevent harm to P;[298]
- That the act is a proportionate response to the likelihood of P suffering harm and the seriousness of that harm.[299]

Restraint is defined as the use or threat of force to help do an act which P resists, or the restriction of the person's liberty of movement, whether or not they resist.[300] It is therefore possible for a deputy to impose 'restrictions on liberty', but this has to be distinguished from a 'deprivation of liberty'. Where the circumstances constitute a deprivation of liberty, they will require authorisation in accordance with the Deprivation of Liberty Safeguards (to be replaced with the Liberty Protection Safeguards).[301]

Gifts

[294] Mental Capacity Act 2005, s. 20(3)(c).
[295] Mental Capacity Act 2005, s. 20(7).
[296] Mental Capacity Act 2005, s. 20(8).
[297] Mental Capacity Act 2005, s. 20(9).
[298] Mental Capacity Act 2005, s. 20(10).
[299] Mental Capacity Act 2005, s. 20(11).
[300] Mental Capacity Act 2005, s. 20(12).
[301] See, generally, LAW COMMISSION, *Mental Capacity and Deprivation of Liberty*, Law Com. 372, 2017.

The Court of Protection is able to confer on a deputy for property and affairs the authority to give gifts on behalf of P.[302]

In contrast to the position for Lasting Powers of Attorney, there are no specific provisions of the MCA that govern the scope of the powers of a deputy to give gifts on behalf of P. However, in nearly all cases, an order that confers authority on a deputy to give a gift will incorporate wording that is virtually identical to the conditions imposed by section 12 of the MCA 2005 on the authority of LPAs to give a gift. The intention of the court in adopting this practice, according to Senior Judge Lush, is to ensure that deputies have the same responsibilities with respect to decisions about gifting as attorneys do.[303] These responsibilities entail limits on:

- the **recipient** of the gift: a gift can be made only to a person who is related to or connected to P or a charity the persons supported or might have supported;
- the **timing** of the gift: whilst a gift to a charity can be made at any time, for a person who is related or connected to P a gift will be limited to 'customary occasions';
- the **value** of the gift: the amount of the gift must not be unreasonable, having regard to all of the circumstances and, in particular, the size of P's estate.

Should a deputy wish to make a gift that is beyond the scope of the authority conferred on them (e.g., making a gift on an occasion that is not customary), they must apply to the Court of Protection. However, this is subject to the same 'de minimis' exception that applies in respect of LPAs. This allows for a deputy to make a gift which infringes the above requirements in 'so minor' a way that it would be disproportionate to *expect* the deputy to have to make a formal application to the court.[304]

End of the measure

29. **Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.**

Deputies

[302] Section 16(5) permits the court to confer such powers as it considers necessary or expedient to give effect the appointment of a deputy for matters concerning property and affairs. Section 18 of the Mental Capacity Act 2005 further stipulates that the 'powers under section 16 as respect property and affairs extend in particular to', the 'gift...of P's property'.

[303] *MJ and JM v. Public Guardian* [2013] EWHC 2966 (COP), para. 53.

[304] *Re Buckley* [2013] EWHC 2965 (COP), para. 43.

Time Limited Orders

It is possible for a deputy order to be time limited. The deputyship will cease at the end of any time period set down in the order, unless an application is made to the COP for an extension of the term.

Death of P

The death of the protected party (P) will mean that the deputyship comes to an end. The deputy must notify the OPG and provide proof of death.[305] They may also be requested by the OPG to produce a final report.

Death of the Deputy

Should a deputy die before the protected party, their executor or personal representative must notify the OPG and the Court of Protection.[306] They may be required to produce an account of the decision-making of the deputy.

The death of a deputy will bring about the end of the deputyship unless -

- The deputy was appointed to act jointly and severally with another person (i.e., they may make independent decisions). If this is the case, the surviving deputy will continue in their role. Whereas the death of a deputy who was appointed to act jointly with another person (i.e., they must agree all decisions jointly) will bring about the end of the deputyship, unless a successor deputy was named.
- At the time of appointing the deceased, a successor deputy was appointed to take on the role in the event of death. In which case, the successor deputy will assume responsibility for the protected party.
- It is considered necessary to appoint a replacement deputy to take on responsibility for P. Guidance issued by the OPG indicates that it will advise the next of kin that an application is needed or, if it looks unlikely that an application will be made, they will advise the person's local authority adult case services so that they can take any necessary action.[307]

Retirement of the Deputy

[305] OFFICE OF THE PUBLIC GUARDIAN, *Public Guardian Practice Note: Notification of death*, No. 02/2011, para. 7.1.
[306] ibid, para. 6.1.
[307] ibid, para. [9.3].

A deputy may wish to be discharged from his role due to ill health or retirement. As noted in response to question 23.f above, if a deputy wishes to be discharged from his role, an application must be made to the Court of Protection. The withdrawal of consent will not lead to the automatic termination of the deputyship.[308]

Recovery of Capacity

P may recover from an incapacitating illness or injury to such an extent that they regain the capacity to make their own decisions in relation to matters covered by the deputyship. If it is believed that a person has regained capacity, so that deputyship is no longer required, an application will need to be made to the Court of Protection to discharge the deputy. This will need to be supported with a capacity assessment (using 'COP3 form') that has been conducted by a suitable practitioner, such as a GP, psychiatrist, mental health professional, psychologist or nurse.

Revocation

As stated in response to question 17, a deputy order can be revoked by the COP if the deputy has contravened the authority conferred on them or acted contrary to the best interests of P.

IMCA

Guidance produced by the OPG states that:

The IMCA will stop being involved in a case once the decision has been finalised and they are aware that the proposed action has been carried out. They will not be able to provide on-going advocacy support to the person.[309]

Reflection

30. **Provide statistical data if available.**

Statistical information was provided in answer to question 3 above.

[308] *Cumbria County Council v. A* [2020] EWCOP 38.

[309] OFFICE OF THE PUBLIC GUARDIAN, *Making decisions: The Independent Mental Capacity Advocate (IMCA) service*, OPG606, p. 27.

31. **What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?**

See the evaluation carried out in response to questions 67 and 68 below.

SECTION IV – VOLUNTARY MEASURES

Overview

32. **What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.[310]**

Ordinary Power of Attorney (OPA)

An OPA is a legal document in which someone (the donor) gives the authority to another person or persons (the attorney(s)) to manage their property or financial affairs.[311] These are primarily used in situations where a person is in hospital or they are abroad for an extended period. An ordinary power of attorney can be used by a donor to confer power on the attorney to deal with all of their property or financial affairs, or it can be limited to specific matters.[312]

An OPA ceases to be valid if the donor loses capacity.[313]

Lasting Power of Attorney (LPA)

An LPA is a legal document which allows a person (known as the 'donor') to confer the authority to one or more people (the attorney(s)) to make a decision on their behalf in relation to health and welfare and/or property and financial affairs.[314] The attorney(s) must make a decision in the best interests of the donor.

An LPA for health and welfare only takes effect if the donor has lost capacity at the material time and in relation to the specific decision. In contrast, an LPA for property and financial affairs can take effect as soon as it is registered, unless the donor specifies that they wish it only to apply when they lose capacity.

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[310] Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

[311] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 1-06.

[312] ibid, para. 2-02-2-03.

[313] ibid, para. 1-02.

[314] ibid.

Enduring Powers of Attorney (EPA)

EPAs were replaced by LPAs on 1 October 2007. However, an EPA that was created before the 1 October 2007 can still be relied on, if it was made correctly.[315]

An EPA is a legal document which allows a person (known as the 'donor') to confer the authority to one or more people (the attorney(s)) to make decision on their behalf in relation to property and financial affairs. It is not capable of being used for health and welfare matters.

Advance Decisions

An adult over the age of 18 can create an advance decision to refuse medical treatment in the event that they lose mental capacity.[316] To be effective, an advance decision must be valid and applicable.

Advance statements

An advance statement is a written record of the values, beliefs, or wishes of an individual, which they desire to be taken into consideration in decisions about their future care.[317]

33. **Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:**
    a. the existence of specific provisions regulating voluntary measures;
    b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.

Ordinary Powers of Attorney

The common law and the Powers of Attorney Act 1971 governs the power of a person with capacity to establish an OPA. It had been said that the position of the holder of an ordinary power of attorney is 'in some ways fiduciary',[318] and therefore the attorney's position is in some ways similar to that of a trustee. It is

[315] ibid.
[316] Mental Capacity Act 2005, ss. 24-26.
[317] R. JONES and E. PIFFARETTI, *Mental Capacity Act Manual*, 8th ed., London, Sweet & Maxwell, 2018, para. 1-271.
[318] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 2-13.

not itself a contract, and the granting is a unilateral act on the part of the donor.[319] Nevertheless, '[c]ontractual duties may arise in connection with a power of attorney'.[320] For example, the donor of a power of attorney 'normally agrees to ratify the attorney's act under the power, and that is a matter of contract'.[321]

Lasting Powers of Attorney

Sections 9-14 of the Mental Capacity Act regulate the appointment, restrictions, and revocation of LPA. Schedule 1 of the MCA sets out the formalities for creating an LPA.

Part 2 and Schedule 1 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 supplements the provisions on the LPA in the MCA. It prescribes the forms that must be used to create an LPA and the process for registering it.

Enduring Powers of Attorney

Section 66 of the MCA 2005 repeals the Enduring Powers of Attorney Act 1985. It is not possible to create a new EPA, since the commencement of the MCA 2005. However, under Schedule 4 of the MCA, an EPA that was made pre-commencement can still be registered and used.

Advance Decisions

Sections 24-26 of the Mental Capacity Act 2005 establish the requirements for the effective creation of an advance decision to refuse medical treatment. The Act also provides details of the effect of any valid and applicable of an advance decision on the liability of medical professionals for carrying out or continuing to carry out treatment in relation to P.

Advance Statements

The MCA does not contain specific provisions that govern the use of advance statements. However, it does suggest that an advance statement will be relevant in the assessment of best interests. Section 4(6)(a) of the MCA 2005 provides that a decision-maker should consider the past wishes of P, and in particular any written statement of P when they possessed the capacity, in determining their best interests.

[319] ibid, para. 1-11.
[320] ibid.
[321] ibid.

34. **If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.**

If an advance decision is created before an LPA, it will cease to be valid if the LPA confers authority on the attorney(s) to give or refuse consent to the relevant treatment.[322] The attorney(s) will then be required to make the decision in the best interests of the individual.

If an advance decision is created after an LPA, and refuses consent to the relevant treatment, it will not be possible for the attorney(s) to consent to it.

An advance statement is not legally binding, but it may need to be considered when an attorney is determining what is in the 'best interests' of the donor. In ascertaining what is in the 'best interests' of a donor, an attorney is obliged to 'consider, so far is a reasonably ascertainable…the person's past and present wishes and feelings (and, in particular, any r*elevant written statement made by him when he had capacity*)'.

35. **Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?**

Ordinary Power of Attorney (OPA)

An ordinary power of attorney is only applicable to property and financial affairs. It is not possible to confer authority in relation to health and welfare matters.[323]

Lasting Power of Attorney (LPA)

An LPA can be created in relation to health and welfare and/or property and finance.

The MCA Code of Practice states that health and welfare matters can encompass decisions that relate to:

[322] Mental Capacity Act 2005, s. 25(2)(b).

[323] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 1-06.

- medical examinations and treatment
- where the donor should live and who they should live with
- the donor's day-to-day care, including diet and dress
- who the donor may have contact with
- assessments for and provision of community care services
- whether the donor should take part in social activities, leisure activities, education or training
- the donor's personal correspondence and papers
- rights of access to personal information about the donor
- complaints about the donor's care or treatment.[324]

The MCA Code of Practice states that property and financial affairs can encompass decisions that relate to:

- buying or selling property
- opening, closing or operating any bank, building society or other account
- giving access to the donor's financial information
- claiming, receiving and using (on the donor's behalf) all benefits, pensions, allowances and rebates...
- receiving any income, inheritance or other entitlement on behalf of the donor
- dealing with the donor's tax affairs
- paying the donor's mortgage, rent and household expenses
- insuring, maintaining and repairing the donor's property
- investing the donor's savings
- making limited gifts on the donor's behalf...
- paying for private medical care and residential care or nursing home fees
- applying for any entitlement to funding for NHS care, social care or adaptations
- using the donor's money to buy a vehicle or any equipment or other help they need
- repaying interest and capital on any loan taken out by the donor.[325]

Enduring Power of Attorney (EPA)

An EPA was limited to decisions that concern the property and financial affairs of the donor. It could not be used for personal welfare decisions, in contrast to the LPA that replace them.

[324] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 7.21
[325] ibid, para. 7.36.

Advance Decision

An advance decision can only cover a refusal of *medical treatment*. It is not possible to create an advance decision to refuse 'basic or essential care'.[326] The MCA Code of Practice defines such care as anything that is necessary to keep an individual comfortable, which includes providing them with warmth, shelter, maintaining cleanliness, or offering them food or drink by mouth. However, this does not apply to Artificial Nutrition and Hydration which is recognised as a form of 'medical treatment'. The rationale for this is that ANH is something that 'by-passes the natural mechanisms that control hunger and thirst and requires clinical monitoring'.[327]

Start of the measure

Legal grounds and procedure

36. **Who has the capacity to grant the voluntary measure?**

OPA

A donor can create an OPA if, at the time of making it, they:

- Are over the age of 18 (the status of powers granted by minors being in some doubt);[328] and
- Have the mental capacity to make an OPA.

An OPA will only remain effective as long as the donor retains the capacity to make decisions for themselves. It will cease to have effect as soon as the donor loses capacity.

EPA

A donor was required to have capacity at the time they made an EPA, for it to be valid. In *Re K; Re F* it was held that, for a person to have the requisite capacity, they needed to understand the nature and effect of the power, which included understanding that -

[326] ibid, para. 9.28.
[327] ibid, para. 9.26.
[328] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 3-07.

- the attorney will be able to assume complete authority over the donor's affairs (if such be the terms of the power);
- the attorney will in general be able to do anything with the donor's property which the donor could have done (if such be the terms of the power)
- the authority will continue if the donor should become mentally incapable
- if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.[329]

It was further confirmed in *Re K; Re F* that a donor could have the capacity to make an EPA, whilst being incapable of managing his affairs by reason of a mental disorder.

LPA

A donor is able to create an LPA if, at the time of creating it, they:

- Are over the age of 18 and
- Have the mental capacity to make an LPA and
- Are not bankrupt (for property and financial affairs LPAs)[330]

The test of capacity for an LPA is established under the Mental Capacity Act 2005. As identified in response to question 8, this requires the person to able to understand, retain, use or weigh the information that is relevant to executing an LPA. In this context, the relevant information has been identified by the Court of Protection as including:

- The effect of the LPA.
- Who the attorneys are.
- The scope of the attorneys' powers and that the MCA 2005 restricts the exercise of their powers.
- When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective.
- The scope of the assets the attorneys can deal with under the LPA.
- The power of the donor to revoke the LPA when he has capacity to do so.
- The pros and cons of executing the particular LPA and of not doing so.[331]

Advance Decisions

[329] [1988] Ch 310.
[330] Section 13(3) establishes a financial LPA will cease to be effective if the donor becomes bankrupt, whether before or after registration.
[331] *The Public Guardian v. RI & Ors.* [2022] EWCOP 22, para. 16.

A person is able to create an advance decision if, at the time of making it, they are:

- Over the age of 18; and
- Have the mental capacity to make an advanced decision about treatment.[332]

The test of capacity for an advance decision is governed by the Mental Capacity Act 2005. This requires the person to able to understand, retain, use or weigh the information that is relevant to creating an advance decision.

Advance Statements

S4(6)(a) of the MCA 2005 stipulates that decision-maker should consider, as far is reasonably practicable, the past and present wishes of P. This can include the wishes of P who lacks capacity. However, as noted in response to questions 33 and 34, a particular emphasis is placed on written statements that are made by the person whilst they had capacity. The explanatory notes to the MCA 2005 suggest that where such statements are 'well-thought out and considered, they are likely to carry particular weight for the purposes of best interests determinations'.[333] In this respect, it may be that evidence of mental capacity at the time of making the statement will mean it treated with more weight in the assessment of best interests.

37. **Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.**

Ordinary Power of Attorney

An OPA under the Powers of Attorney Act must be 'executed as a deed' (s1(1)). To be executed as a deed, the following formalities must be satisfied under the Law of Property (Miscellaneous Provisions) Act 1989:

- It must be in writing;
- It must be signed;[334]

[332] Mental Capacity Act 2005, s. 24(1)(a).
[333] *Explanatory Notes to the Mental Capacity Act 2005*, Crown, 2005, para. 32.
[334] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(3)(a).

- It must be signed by the donor in the presence of a witness who attest the signature,[335] or in the presence of two witnesses where it is signed under the direction of the donor;[336]
- It must be clear on the face of the document that it is intended to be a deed;[337]
- It must be 'delivered as a deed'.[338] This does not require the transfer of possession of the deed, but requires that the donor evidences an intention to be bound by the deed.[339]

Enduring Power of Attorney

It is no longer possible to create an EPA, but if it was executed prior to 1 October 2007, it can still be used if it complies with the relevant requirements. An instrument which purports to create an EPA must be in a prescribed form,[340] be executed in the prescribed manner,[341] and incorporate the prescribed explanatory information.[342]

Lasting Power of Attorney

An LPA must comply with the formalities set out in the Mental Capacity Act and associated regulations.[343]

An LPA must be created via a prescribed form. There are separate forms for health and welfare (LP1H) and property and financial affairs (LP1F). An application must include:

A) A signed statement by the donor that they understand the prescribed information that concerns the nature and effect of an LPA.
B) A signed statement by the attorney that they have read the prescribed information and understand the nature of their duties
C) The names of up to five people (not any of the attorneys) who should be notified about an application to register the LPA, or that there is no-one that the donor wishes to be told

[335] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(3)(a)(i).
[336] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(3)(a)(ii).
[337] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(2)(a).
[338] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(3)(b).
[339] *Bibby Financial Services Ltd. v. Magson* [2011] EWHC 2495 (QB).
[340] Mental Capacity Act 2005, sch. 4, para. 2(1)(a); Enduring Powers of Attorney (Prescribed Form) Regulations 1990.
[341] Mental Capacity Act 2005, sch. 4, para. 2(1)(b).
[342] Mental Capacity Act 2005, sch. 4, para. 2(1)(c).
[343] Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.

D) A certificate completed by an independent third party (either someone who has known the donor personally for two years or a person with the relevant skills to make the assessment) that in their opinion:
    a. The donor understands the purpose and scope of the LPA
    b. That nobody used force or undue pressure to trick or force the donor to make the LPA
    c. There is nothing to prevent the LPA from being created.

Advance Decisions

An advance decision, except for refusals of life-sustaining treatment, does not have to conform to a prescribed format, and it can be made verbally.[344]

An advance decision will not apply to life-sustaining treatment unless it is verified by a statement confirming that the decision is to apply to that treatment even if life is at risk.[345] That statement must further comply with the following formalities -

- It must be in writing; [346]
- It must be signed by P or another person in the presence and under the direction of P;[347]
- It must be witnessed,[348] and the witness must sign, or acknowledge his signature, in P's presence (d)).[349]

38. **Describe when and how the voluntary measure enters into force. Please consider:**
    a. the circumstances under which voluntary measure enters into force;
    b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?
    c. who is entitled to initiate the measure entering into force?
    d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?

OPA

[344] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 9.10.
[345] Mental Capacity Act 2005, s. 25(5)(b).
[346] Mental Capacity Act 2005, s. 25(6)(a).
[347] Mental Capacity Act 2005, s. 25(5)(b).
[348] Mental Capacity Act 2005, s. 25(5)(c).
[349] Mental Capacity Act 2005, s. 25(5)(d).

An OPA will take effect immediately or from the date specified in the deed. It will continue to be effective for the period that the donor stipulates and retains capacity.

Lasting Power of Attorney

An LPA must be registered with the Office of the Public Guardian.[350] An LPA will not enter into force until it has been registered. It can be registered by a donor whilst they still possess capacity, or by the attorney(s) at any point.

An LPA for health and welfare will take effect only if the donor has lost capacity at the material time and in relation to the matters covered by the LPA. An LPA for property and financial affairs can take effect as soon as it is registered, unless the donor specifies in the instrument that they wish it only to apply when they lost capacity.

Prior to registering the LPA, a form must be sent to all person who were listed in the LPA as persons to notify.[351] Those notified are given a period of three weeks in which to raise any objections.[352]

The MCA Code of Practice recommends the registration of an LPA soon after the donor makes it, rather than wait until P begins to lose capacity. This is in order to avoid a period in which P is incompetent and the attorney(s) are unable to act under it.[353]

Enduring Power of Attorney

Unlike an LPA, an EPA could 'take full effect before registration if the donor retains mental capacity'.[354] But '[w]hen the donor loses mental capacity, the attorney's authority is suspended pending registration, with minor exceptions'.[355]

Advance Decisions

[350] Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.
[351] Mental Capacity Act 2005, sch. 1, para. 6(1)-(2).
[352] Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, r. 14(2).
[353] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 7.15.
[354] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 16-01.
[355] ibid, para. 16-03.

An advance decision entitles a person to refuse medical treatment in advance of losing capacity. There is no formal process for registering an advance decision and no requirement for a court or administrative body to pronounce on its validity. However, it is possible for the Court of Protection to make a declaration as to the existence, validity, or applicability of an advance decision where there is significant doubt about these matters.[356]

An advance decision has the same effect as if P had capacity to refuse to consent to the treatment, and they had withheld that consent.[357] This has implications for the legal liability of healthcare professionals who are proposing to carry out or are continuing to carry out medical treatment. A healthcare professional will incur liability if, despite being satisfied that there exists a valid and applicable advance decision, they proceed to treat P. However, they will be protected from liability if they are not satisfied that an advance decision exists, is valid, and is applicable to the circumstances.[358]

A healthcare professional can also avoid liability for failing to provide treatment if they reasonably believe that a valid and applicable advance decision to refuse treatment exists.[359] A person must have capacity to refuse treatment at the time of making the statement if it is to be valid and applicable.[360]

There must be proof of an advance statement refusing treatment by the patient. An advance decision is not valid if the patient -

- has withdrawn the decision at the time he had capacity to do so;[361]
- has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee[s] to give or refuse consent to the treatment to which the advance decision relates;[362] or
- has done anything else clearly inconsistent with the advance decision remaining his fixed decision.[363]

An advance decision is not applicable to the treatment if –

- the patient has capacity at the material time;[364]

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[356] Mental Capacity Act 2005, s. 26(4).
[357] Mental Capacity Act 2005, s. 26(1).
[358] Mental Capacity Act 2005, s. 26(2).
[359] Mental Capacity Act 2005, s. 26(3).
[360] Mental Capacity Act 2005, s. 24(1).
[361] Mental Capacity Act 2005, s. 25(2)(a).
[362] Mental Capacity Act 2005, s. 25(2)(b).
[363] Mental Capacity Act 2005, s. 25(2)(c).
[364] Mental Capacity Act 2005, s. 25(3).

- the treatment is not the treatment specified in the advance decision;[365]
- any circumstances specified in the advance decision are absent;[366] or
- there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would affected his decision had he anticipated them.[367]

Appointment of representatives/support persons

39. **Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:**
    a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?
    b. what are the safeguards as to conflicts of interests?
    c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?

OPA

The donor of an ordinary power of attorney generally has 'complete freedom of choice in deciding who shall act as his attorney' and 'the law does not take any special steps to restrict the capacity to act as an attorney to those who might be considered suitable'.[368] More than one person can be appointed as an attorney, whether jointly or jointly and severally.[369] An ordinary power of attorney is a form of agency, and agents generally owe fiduciary duties to their principals.[370] The basic position is that:

A fiduciary must act in good faith; he must not make a profit out of his [position]; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.[371]

LPA

[365] Mental Capacity Act 2005, s. 25(4)(a).
[366] Mental Capacity Act 2005, s. 25(4)(b).
[367] Mental Capacity Act 2005, s. 25(4)(c).
[368] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 4-01.
[369] ibid, para. 4-03.
[370] J. MCGHEE et al, *Snell's Equity*, 34th ed., London, Sweet & Maxwell, 7-004.
[371] *Bristol & West Building Society v. Mothew* [1998] Ch 1, 18.

Under section 10 of the MCA 2005, an attorney must be 18 years or over. An attorney for health and welfare can be an individual. An attorney for property and financial affairs can either be an individual *or* a trust corporation. Similar rules are applicable to existing EPAs.[372] As regards LPAs, a distinction is drawn in guidance between a professional and a lay attorney.[373] A professional attorney is someone who is paid for their services or holds relevant professional qualifications. In contrast, a non-professional attorney is usually a family member or friend who is unpaid.

An appointment of an attorney under an LPA will cease to be effective, whether before or after registration, in the event that -

1. the attorney loses capacity;
2. they become bankrupt or a trust corporation is dissolved;[374]
3. a marriage or civil partnership is annulled or dissolved between the donor and the attorney (unless the donor has specified that the power of the attorney should not be terminated in these circumstances).

It is possible for two or more people to be appointed to act as an attorney.[375] A donor can also name a person to replace the attorney where an event occurs that results in the end of the appointment.[376] If a donor creates an LPA for health and welfare and an LPA property and finance, they may name the same person to be an attorney for both.

Advance Decisions

Not applicable – as this does not concern the appointment of a representative/support person.

Advance Statements

Not applicable – as this does not concern the appointment of a representative/support person.

During the measure

[372] Mental Capacity Act 2005, sch. 4, para. 2.
[373] OFFICE OF THE PUBLIC GUARDIAN, *Practice Note: Agreeing to Act as a Professional Attorney*, PN1, 2017.
[374] Mental Capacity Act 2005, s. 10(2).
[375] Mental Capacity Act 2005, s. 10(3).
[376] Mental Capacity Act, s.10(8)(b).

Legal effects of the measure

40. **To what extent is the voluntary measure, and the wishes expressed within it, legally binding?**

OPA

We have seen that the scope of a power of attorney is determined by construction of the power, and that the act of an attorney is invalid if it exceeds that power.

LPA

Wishes in an LPA

The MCA provides for a donor to impose 'restrictions or conditions' on the authority of the attorney.[377] An example of a restriction would be limiting the range of decisions that an attorney could make (e.g., specifying that an attorney for property and finance does not have the authority to make gifts). A condition might include stipulating a particular procedure that must be followed in the exercise of the power by the attorney (e.g., requiring the attorney to keep and submit annual accounts to an accountant).

In the original version of the LPA form, there was a section for the donor to stipulate any 'conditions or restrictions' which an attorney would be required to follow. However, the current version replaced this with a section for including 'instructions'. This departure from the statutory language has been criticised by the COP as misleading, as an 'instruction' has a wider meaning than a 'restriction or condition'.[378] There have been calls for the drafters to revise the wording to avoid any confusion as to what sorts of provisions are capable of being effective as part of an LPA.

In addition to a section for including 'instructions', there is a space in the LPA form for a donor to express their 'preferences'. Whilst an 'instruction' is a binding condition that is expressed in mandatory terms, a preference is a statement of his wishes that are precatory in nature. In relation to 'preferences', the LPA will be treated as 'a written statement of wishes' that an attorney would be required to consider pursuant to s4(7) of the MCA when making a decision that is in the best interests of the donor.

[377] Mental Capacity Act 2005, s. 9(4)(b).
[378] *Re DA and VP* [2018] EWCOP 26, para. 9.

It is important to note that whilst the donor is given an opportunity to include provisions, either mandatory or precatory in nature, these are reviewed by the OPG prior to registration. Schedule 1 of the MCA establishes that the Public Guardian must apply to the COP if it appears to him that the instrument contains a provision which would be ineffective as part of an LPA or would prevent the instrument from operating as a valid LPA.[379] It is unable to register the LPA until the COP has made a determination on the matter. It is open to the COP to decide whether a specific provision should be severed or that the LPA should not be registered.

The COP has recognised a number of provisions that will need to be severed, as they would by ineffective as part of an LPA. In most cases, these provisions will be expressed in mandatory terms (i.e. as 'instructions'), and they will seek to extend the attorney's authority to act beyond the limitations that are contained in the MCA 2005 or are contrary to the general law. Examples include -

1. A provision that purports to authorise an attorney to make gifts that go beyond the limits in section 12 of the MCA;
2. A provision that purports to authorise an attorney to consent to marriage or sexual relations on their behalf in contravention of section 27 of the MCA;
3. A provision that purports to authorise the attorney to make or change a will, which is a power reserved for the COP;[380]
4. A provision that purports to authorise an attorney for health and welfare to be able to make decisions when they lack physical capacity but do possess the mental capacity. This would contravene section 11 of the MCA, which provides that decisions may not be made in circumstances other than those where the donor lacks, or is reasonably believed to lack, mental capacity.
5. A provision that purports to authorise the attorney to act in a manner that is inconsistent with the general law (e.g., an instruction to end the donor's life or assist in that process).[381]

It is also the case that the authority conferred on an attorney by the donor is subject to the 'best interests' principle.[382] This can preclude the donor from including a mandatory provision (an 'instruction') if this would inhibit the attorney from properly making a best interests decisions. This was the case in *Re Various Lasting Powers of Attorney*, which related to provisions in various LPAs that sought to oblige the attorney to use the funds of the donor to benefit someone other than the

[379] Mental Capacity Act 2005, sch. 1, para. 11(3)(a).
[380] *Re Cranston* (unreported, 18.02.2011).
[381] *Public Guardian v. DA & Ors.* [2018] EWCOP 26, para. 27.
[382] Mental Capacity Act 2005, s. 9(4)(a).

donor.[383] The case concerned various provisions that sought to benefit others, which did not constitute gifts within the meaning of section 12 of the MCA. It concerned provisions that sought to oblige the attorney to provide support to another, which were based on a sense of obligation on the part of the donor. For example, in one LPA form it was stipulated that the attorney was required to ensure that the needs of the donor's daughter were taken care of. Senior Judge Hilder held that a provision such as this, which was phrased in mandatory terms, would be incompatible with the best interests principle. This is because the wish to benefit another is only something that must be *considered* and must be *weighed* in any best interests decision. However, those wishes will not always prevail. There may arise circumstances where it will not be in the best interests of the donor to give effect to their wish to benefit another. This may be the case where, for example, the funds of the donor are diminished to the extent that it is no longer possible to protect the individual interests of the donor and also confer a benefit on another in line with the wishes expressed in the LPA. It must be possible, in these circumstances, for an attorney to disregard the desire to benefit someone else, if they are to act in the best interests of the donor.

The decision in *Re Various Lasting Powers of Attorney* makes it clear that a desire to benefit someone else will be ineffective as part of an LPA if it is expressed in mandatory terms. However, it can be included in an LPA if it is expressed in precatory terms, such that it is only a wish that the attorney will be expected to consider (but not to necessarily follow) in determining best interests.

As the preceding discussion suggests, there may be less need to sever certain provisions, if they are framed in precatory terms i.e., they are framed as a wish that should be *considered* in the determination of best interests. However, there are situations where the COP will conclude that even a provision that is precatory in form should be severed. This is the case where, for example, a donor expresses a desire for the attorney to do something unlawful e.g., stipulating that they would *like* to be euthanised or to be assisted to die.[384] Even where a desire is expressed as being conditional on a change in the law, it will be ineffective (e.g., stipulating that they would like to be euthanised or to be assisted to die if the law should change to allow this).[385] Due to the impossibility of predicting what the future changes in the law might entail, it is considered likely to cause uncertainty and confusion to treat them as valid.

Advance Decisions

[383] [2019] EWCOP 40.
[384] *Re DA* [2018] EWCOP 26, para. [27]
[385] ibid, para. [29]

An advance decision to refuse treatment that is valid and applicable to a treatment must be respected. A person will incur liability if they carry out or continue to carry out treatment where they are satisfied that an advance decision exits that is valid and applicable to the treatment.

An advance decision can be withdrawn,[386] or displaced by an LPA.[387] It can also be invalidated if P has 'done anything else' (other than withdrawal or granting an LPA) which is 'clearly inconsistent' with the advance decision remaining his 'fixed decision'.[388] Thus, any wish expressed in an advance decision that P does not want to receive treatment will not need to be respected in the event that they have done something which renders the advance decision invalid, by virtue of section 25(2)(c). The most detailed consideration of section 25(2)(c) was provided by Poole J in *Re PW (Jehovah's Witness: Validity of Advance Decision)*,[389] where he indicated that:

- An advance decision can be rendered invalid by things done either before or after P loses capacity to make a decision about the relevant treatment. As such, a person who lacks capacity, but is still able to express their wishes and feelings, can do a thing that renders the advance decision no longer valid.
- Something that is 'done' by P to render an advance decision no longer valid includes actions, but also words whether written or spoken.
- To be 'clearly inconsistent', it is not enough that something was done that was 'arguably' inconsistent, or only 'might' be inconsistent. It is not for the court (or the decision-maker) to 'strain' to find something done which is inconsistent with the advance decision.
- It is not enough that P has done something clearly inconsistent with the advance decisions, as something done must be inconsistent with it remaining P's fixed decision. Where actions or words indicates a fluctuating adherence to an advance decision, this may well indicate that it is no longer their 'fixed' decision.

Re PW (Jehovah's Witness: Validity of Advance Decision) was concerned with the validity of an advance decision of a Jehovah's Witness to refuse a blood transfusion. She was in a perilous condition in hospital and, without a blood transfusion, there was a risk of death at any time.

[386] Mental Capacity Act 2005, s. 25(2)(a).
[387] Mental Capacity Act 2005, s. 25(2)(b).
[388] Mental Capacity Act 2005, s. 25(2)(c).
[389] [2021] EWCOP 52.

Poole J had to consider whether P had done something inconsistent with her advance decision remaining her fixed decision. He was satisfied, on the balance of probabilities, that she had done things that were clearly inconsistent:

- She had created an LPA authorising her children to make decisions about her health and welfare, save for refusal or consent to life-sustaining treatment, on her behalf. It had not been argued that this had the effect of displacing the advance decision under section 25(2)(b), as it did not apply to life-sustaining treatment. However, it was recognised as something done that was clearly inconsistent with the advance decision. This is because she had given authority to her children, who she knew to be hostile to Jehovah's Witnesses, the authority to give or refuse consent to blood transfusions in relation to non life-sustaining treatment.
- She had requested the removal of a 'Do Not Resuscitate' notice, without qualification and without telling her children or, to their knowledge, her clinicians, about the advance decision or that she would refuse a blood transfusion.
- She had expressed wishes that were inconsistent with the advance decision whilst she lacked capacity. These carried more weight than other occasions where she stated that she did not want treatment, given that they were expressed with more clarity of thought and were not formulaic responses. Even if the contradictory assertions were to carry equal weight, this would indicate that the advance decision was no longer her 'fixed' decision.

Advance Statements

As discussed in relation to question 34, an advance statement is an expression of the wishes, feelings, beliefs and/or values of P whilst they possess capacity. These are not legally binding on the decision-maker, but they must be 'considered', as far as they are 'reasonably ascertainable', in any determination of the best interests of P.

41. **How does the entry into force of the voluntary measure affect the legal capacity of the grantor?**

OPA

An OPA remains valid only for so long as the donor retains capacity. Thus, although the attorney has the authority to act in the grantor's name within the scope

of the power, the legal capacity of the donor must be formally intact for the power to remain valid.

LPA

Personal Welfare

A personal welfare LPA will have effect only if the person loses mental capacity. Section 11(7)(a) of the MCA 2005 further stipulates that that the authority conferred on an attorney 'does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity'. This is similar to the restrictions on the powers of a court-appointed deputy under section 20(1) of the MCA 2005 (see the answer to section 24 above). P may retain to capacity to make decisions on some welfare matters, even if they are unable to do so in relation to others. They may also, due to fluctuating capacity, be able to make decisions at certain points in time, but require the attorney to make decisions on other occasions.

The attorney is also required to act in accordance with the principles contained in section 1 of the MCA when considering whether P has the capacity to make the decision in relation to the matter.[390] That means they are required to they are required to assume that P has the capacity in relation to the matter unless it is established that he lacks capacity, that P is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success, and that a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Property and Financial Affairs

Once an LPA is registered, the attorney has the authority to make decisions on behalf of the donor in relation to property and financial affairs even if the donor still has capacity. This is unless the donor stipulates in the LPA document that they do not want the LPA to take effect until they lose capacity. This does not preclude the donor from making financial decisions for themselves while they have capacity.

We have seen that an EPA could enter into force before the donor lost capacity, but in such circumstances the donor would not inherently lose legal capacity.

Advance Decisions

[390]Mental Capacity Act 2005, s. 4.

An advance decision is an instrument that enables a P with capacity to refuse consent to treatment in the future, in the event that they lose the capacity to make the decision. If an advance decision is valid and applicable to the circumstances, it has the same effect as if the person had made it, and had the capacity to make it, at the time when the decision about treatment arises.

It is important to emphasise a number of ways in which P is not prevented from exercising their autonomy after the making of an advance decision, which were discussed in relation to question 38 above.

Powers and duties of the representative/support person

42. **Describe the powers and duties of the representative/support person:**
    - **a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**
        - **property and financial matters;**
        - **personal and family matters;**
        - **care and medical matters?**
    - **b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
    - **c. is there a duty of the representative/support person to inform and consult the adult?**
    - **d. is there a right to receive remuneration (how and by whom is it provided)?**

OPA

It has been seen that the scope of an ordinary power of attorney is effectively limited to property and financial matters. Beyond that, '[t]he acts that a power of attorney authorises the attorney to do is a question of construction of the document' conferring the power, and an attorney's act is *prima facie* invalid if it exceeds the scope of the power.[391] It has been said that while '[a]n unpaid attorney need not do anything' in a positive sense, '[a]n attorney for reward has an obligation to carry out any duties which he undertakes to perform, and is liable for non-feasance'.[392] The attorney has the full right to act within the scope of his power on behalf of the donor. While '[a] power of attorney often contains an undertaking by the donor to ratify what the attorney does or purports to do under the power',[393]

[391] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 2-01.
[392] ibid, para. 10-02.
[393] ibid, para. 5-10.

this should not be necessary where the act was done within the scope of the power. According to a leading practitioner work:

…it is accepted practice, e.g. for professional attorneys to pay their own fees from the donor's estate, without express authority in the power—yet it is assumed that he cannot make voluntary payments in his own favour.[394]

LPA

According to the MCA Code of Practice, an attorney is required to carry out the following duties when performing their role:

- follow the Act's statutory principles...
- make decisions in the donor's best interests
- have regard to the guidance in the Code of Practice
- only make those decisions the LPA gives them authority to make.[395]

The MCA Code of Practice further stipulates that an attorney is an agent of the donor, which entails certain legal duties under the law of agency.[396] The MCA Code of Practice refers to the some of the other duties imposed on an attorney:

- To apply certain standards of with due care and skill (duty of care)[397]
- To carry out the donor's instructions
- To not take advantage of their situation and benefit themselves (fiduciary duty)
- To not delegate duties unless authorised to do so
- To act in good faith
- To respect the person's confidentiality
- To comply with the directions of the Court of Protection.
- To not give up the role without telling the donor and the court

For property and financial affairs LPAs:

- To keep accounts

[394] ibid, para. 2-13.

[395] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 7.52.

[396] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 7.58.

[397] A professional attorney is someone who will be held to a higher standard of care: ibid, para. 7.59; OFFICE OF THE PUBLIC GUARDIAN, *Practice Note: Agreeing to Act as a Professional Attorney*, PN1, 2017.

- To keep the person's money and property separate from own finances.[398]

Someone who is appointed under an LPA is entitled to make decisions within the scope of their authority on *behalf* of the donor. However, in relation to health and welfare LPAs, an attorney is only able to make the decision if P lacks, or the attorney reasonably believes that P lacks, capacity.[399] As is the case with deputies (see the responses to questions 24 and 25), an attorney should take practical steps to support the donor to make the decision for themselves, only proceeding to make a best interests decision if they conclude that the donor lacks capacity. As part of a best interests decision, it is necessary for the attorney to support the donor to participate ('so far as reasonably practicable') and to consider the wishes of the donor ('so far as reasonably ascertainable').

The attorney is required to act in the best interests of the donor.[400]

Remuneration

Guidance produced by the Office of the Public Guardian indicates that an attorney is entitled to charge for services only when the donor includes an instruction specifying payments in the LPA.[401]

It has been suggested by John Thurston that if a donor appoints a professional as an attorney, this entails an implied power of the attorney to be paid.[402] However, a practice note (PN1) provided by the OPG suggests this is not the case, and that a professional attorney will not be entitled to charge for services if the LPA is silent on the matter.

An example of a standard charging clause for a professional attorney is:

I wish my professional attorneys to be paid the standard solicitor rate as set by [state the name of a relevant professional organisation here].[403]

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[398] *ibid*, para. 7.58.

[399] Mental Capacity Act 2005, s. 11(7)(a).

[400] Mental Capacity Act, s. 9(4)(a).

[401] OFFICE OF THE PUBLIC GUARDIAN, *Practice Note: Agreeing to Act as a Professional Attorney*, PN1, 2017.

[402] J. THURSTON, *A Practitioner's Guide to Powers of Attorney*, 9th ed., London, Bloomsbury, 2016, p. 72.

[403] OFFICE OF THE PUBLIC GUARDIAN, 'Form LP12 Make and register your lasting power of attorney: a guide (web version)', 2022, <https://www.gov.uk/government/publications/make-a-lasting-power-of-attorney/lp12-make-and-register-your-lasting-power-of-attorney-a-guide-web-version> accessed 31.08.2022.

It will be less common for a lay attorney, such as a family member or friend, to be paid any remuneration. However, a donor is able to include a charging clause, which the guidance suggests will usually be in the form of a yearly payment.

An example of a standard charging clause for a lay attorney is:

Each attorney must be paid a single fee of £1,000 each year, the payment to be made on 20 December each year. The fees will stop when my estate drops to £[fill in amount].[404]

If the LPA does not itself give the attorney the authority to charge for his services, they can apply to the Court of Protection for directions under section 23(3)(c) of the MCA, whereby the court can authorise an attorney's remuneration.

43. **Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**
    a. **if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
    b. **if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

OPA

It has been seen that an OPA has effect only while a donor retains capacity, while an LPA concerning property and financial affairs can in principle come into effect whether or not the donor retains capacity. It has been said that '[a] donor does not necessarily revoke an earlier power of attorney by granting another one'.[405]

It has been seen that more than one person can hold an OPA jointly, whether or not severally. In circumstances where an attorney is obliged to act jointly but fails to do so, it is significant that '[a] third party is…deemed to know of a limit on the attorney's power of which he was given the opportunity to learn, even though he did not avail himself of that chance'.[406]

[404] ibid.
[405] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, [7-19].
[406] ibid, para. 12-13.

LPA

A donor is able to appoint two or more attorneys in the same instrument and they can specify whether they should act 'jointly', 'jointly and severally', or 'jointly in respect of some matters and jointly and severally in respect of others'.[407] The MCA Code of Practice states that -

- Joint attorneys must always act together. All attorneys must agree decisions and sign any relevant documents.
- Joint and several attorneys can act together but may also act independently if they wish. Any action taken by any attorney alone is as valid as if they were the only attorney.

The donor may want to appoint attorneys to act jointly in some matters but jointly and severally in others. For example, a donor could choose to appoint two or more financial attorneys jointly and severally. But they might say then when selling the donor's house, the attorneys must act jointly.[408]

A donor of an LPA can choose a replacement attorney to take over in certain circumstances.[409]

44. **Describe the interaction with other measures. Please consider:**
    a. **if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**
    b. **if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

See the responses to questions 36 and 56.

Safeguards and supervision

45. **Describe the safeguards against:**
    a. **unauthorised acts of the adult and of the representative/support person;**

[407] Mental Capacity Act 2005, s. 10(4).
[408] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, paras. 7.11-12.
[409] Mental Capacity Act 2005, s. 10(8).

b. ill-conceived acts of the adult and of the representative/support person;

c. conflicts of interests

Please consider the position of the adult, contractual parties and third parties.

OPAs

See the answers to questions 42 and 46.

LPAs

Statutory Limitations:

Life Sustaining Treatment

The MCA requires a donor of an LPA for health and welfare to expressly confer authority on the attorney to give or refuse consent to life-sustaining treatment. [410] If they do not, then the attorney will be limited to making decisions only in regards to treatment that is not life-sustaining.

Restraint

The MCA imposes limitations on health and welfare attorneys in relation to restraint (in section 11), which are essentially the same as those imposed on a deputy (section 20) or a person that is involved in the care of treatment of P (section 6).

A welfare attorney is precluded from doing an act that is intended to restrain P, unless the following three conditions are satisfied:

- That P lacks, or the attorney must reasonably believe that P lacks, capacity in relation to the matter
- That the attorney reasonably believes that it is necessary to restrain P to prevent harm to P
- That the act is a proportionate response to the likelihood of P suffering harm and the seriousness of that harm.[411]

See the response to question 28 on the meaning of restraint.

Conflicts of Interest

[410] Mental Capacity Act 2005, s. 11(8).
[411] Mental Capacity Act 2005, s. 11(1)-(4).

Guidance on the management of conflicts of interest in relation to attorneys was addressed by the Court of Protection in *Re Various Lasting Powers of Attorney*.[412] In that case, it was recognised that it was undesirable to impose an absolute prohibition against conflicts of interest. This is because such a prohibition would render impermissible the arrangement for managing their affairs that many people would like once they lose capacity. It is common for a donor to choose their attorney from the persons closest to them, and they are often the people the donor may be likely to want to benefit. If there was an absolute prohibition on a conflict of interest, that arrangement would not be possible. In this regard, the potential for abuse had to be balanced against the objective of facilitating autonomous decision-making.

A number of safeguards against conflicts of interest were recognised in this case:

- Certificate provider: before registration of an LPA, an independent person is required to certify that the donor understands the purpose of the LPA, the scope of the authority conferred under it and that no fraud or pressure is being used to induce the donor to create the LPA.
- If the COP has sufficient concerns about the actions, or proposed actions, of the attorney, it has the power to direct them to render accounts or produce records, information or documents for review, although this could not be the norm due to the resource implications.
- Where the use of funds give rise to a conflict of interests, and there was no evidence of the donor demonstrating a wish they should be used in a such a way prior to loss of capacity, then the attorney would be required to apply for authority under section 23(2) of the MCA 2005.

46. **Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:**
    a. is supervision conducted:
        - **by competent authorities;**
        - **by person(s) appointed by the voluntary measure.**
    b. in each case, what is the nature of the supervision and how is it carried out?
    c. the existence of measures that fall outside the scope of official supervision.

OPA

[412] [2019] EWCOP 40.

The extent of any 'supervision' of an OPA is determined by the general law, such as the law of agency, the law of contract, the law applicable to fiduciaries and criminal law.

LPA

An LPA must be registered with the Office of the Public Guardian before it can be used. As previously noted, the OPG will review an application. It must apply to the COP if it appears to him that the instrument contains a provision which would be ineffective as part of an LPA or would prevent the instrument from operating as a valid LPA.

Once an LPA has been registered, there is not the same level of regular ongoing supervision as is applied to court-appointed deputies. Thus, there is no requirement for an attorney to provide annual reports to the OPG. There is also less protection of P in the event of misconduct (e.g. an attorney does not need to provide a surety bond).

Supervision by the Court of Protection and Office of the Public Guardian

A person who is concerned that an attorney is abusing their position, or is not acting in the best interests of the donor, can refer the matter to the OPG (using OPG130 form). This may lead the OPG to conduct an investigation. The OPG has the same powers for investigating the conduct of an attorney as it does for a deputy (see *'Safeguarding Investigations'* in the response to question 27).[413] For example, the OPG can require that an attorney provide specific information or documents when it is investigating concerns.[414]

The OPG may apply to the COP for the LPA to be revoked. The COP can revoke an LPA if the donee has behaved, is behaving, or proposes to behave, in way that contravenes his authority or is not in the best interests of P.[415]

Supervision by Person(s) Identified in the LPA

As noted in response to question 40, a donor is able to stipulate 'conditions' on the exercise of an attorney's powers.[416] An example of a condition would be a

[413] OFFICE OF THE PUBLIC GUARDIAN, 'Policy paper: SD8: Office of the Public Guardian safeguarding policy (web version)', 2022 <https://www.gov.uk/government/publications/safeguarding-policy-protecting-vulnerable-adults/sd8-opgs-safeguarding-policy> accessed 31.08.2022.

[414] Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, r. 36.

[415] Mental Capacity Act 2005, s. 22(b).

[416] Mental Capacity Act 2005, s. 9(4)(b).

procedure that ensures a degree of supervision of the attorney by another person, such as requiring the attorney to submit annual accounts to relatives.[417] If the accountant was concerned about the way in which the attorney is exercising their powers, they may refer the matter to the OPG or make an application to the COP.

End of the measure

47. **Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.**

OPA

In summary, an ordinary power of attorney 'may come to an end by effluxion of time', where for example its length was limited to a particular time or purpose, 'by operation of law', such as where the donor loses capacity, 'by the donor revoking it, or by the attorney releasing or disclaiming it'.[418]

LPA

A registered LPA can be revoked by the donor if they continue to possess the capacity to make that decision.[419] The donor will need to submit a deed of revocation, along with the original LPA, to the OPG.

The COP can also revoke a registered LPA if the donee has behaved, is behaving, or proposes to behave, in a way that contravenes his authority or would not be P's best interests.[420]

The occurrence of certain events will also result in the revocation of the LPA.[421] This is unless a replacement donee has been named in the instrument or the event does not impact on the appointment of another donee (where the appointment was on a joint and several basis). The relevant events are -

a. Disclaimer of the appointment by the donee.
b. Bankruptcy of the donee.
c. Loss of capacity of the donee.

[417] Included as an example of an instruction in guidance: OFFICE OF THE PUBLIC GUARDIAN, *Make and register your lasting power of attorney a guide*, LP12, 2022.
[418] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, para. 7-01.
[419] Mental Capacity Act 2005, s. 13(2).
[420] Mental Capacity Act 2005, s. 22(4).
[421] Mental Capacity Act 2005, s. 13.

d. Dissolution or annulment of a marriage or civil partnership between the donor and donee (unless the instrument specifies provides that this event does not terminate the appointment).
e. Death of the donee. The OPG require proof of the donee's death and the LPA should be returned to the OPG for cancellation.
f. Death of the donor. The donee is required to notify the OPG and provide proof of death. The original LPA should also be returned to the OPG for cancellation.

In relation to the above events, it will usually be necessary for the OPG to be notified and provided with proof of the event. Copies of the LPA will also need to be returned to the OPG for cancellation. For some events, there are official documents that need to be completed (e.g. Form LPA005 for a disclaimed LPA).

EPA

In summary, an EPA will come to an end if the donee becomes bankrupt, the Court of Protection appoints a deputy and orders revocation, the Court objects to revocation, the EPA is disclaimed or is revoked by a donor with capacity (and the Court approves if the EPA has already been registered).[422]

Advance Decision

See the answer to question 41 on the circumstances in which an advance decision can be revoked, displaced or otherwise rendered invalid by the actions of P.

Advance Statement

There is no formal process for the termination of an advance statement, given the absence of any formalities for their creation. The P may seek to pronounce that previous expression of their wishes are no longer to be considered, and that they would like in future decision for their current views to be considered.

Reflection

48. **Provide statistical data if available.**

Statistical information was provided in answer to question 3 above.

[422] G. SHINDLER and P. WASS, *Aldridge: Powers of Attorney*, 12th ed., London, Sweet & Maxwell, 2022, ch. 16.

49. **What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measures been evaluated, if so what are the outcomes?**

Possible reforms to LPAs were considered in response to question 7 above.

SECTION V – EX LEGE REPRESENTATION

Overview

50. **Does your system have specific provisions for ex lege representation of vulnerable adults? If so, please answer questions 51 – 64. and, if not, proceed with question 65.**

Section 5 of the MCA 2005 allows carers, healthcare, and social care staff to carry out acts in connection with the care or treatment of a person (P) who lacks the capacity to consent. It provides protection from civil liability or criminal prosecution for acts that would otherwise be unlawful without P's consent.

Start of the ex-lege representation

Legal grounds and procedure

51. **What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?**

Section 5(1) of the MCA 2005 applies in relation to 'acts done in connection with care or treatment'.

The person carrying out the action must take reasonable steps to establish whether P lacks capacity in relation to the relevant matter. The MCA Code of Practice makes it clear, with reference to the principles in section 1 of the MCA, that reasonable steps must include -

- Taking all practicable steps to help P to make a decision about an action for themselves.

- Applying the two-stage test of capacity. That entails considering whether there is a impairment or disturbance in the mind or brain (diagnostic criteria) and whether this causes P to be unable to make the decision about the relevant act (functional criteria).[423]

The person must also have a reasonable belief when carrying out the act that P lacks capacity and that the act is in their best interests.

52. **Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?**

No. Actions taken under section 5 of the MCA do not always require an assessment of capacity by a medical expert. The MCA Code of Practice recognises that a person who is involved in carrying out an act in connection with care or treatment of P, will need to assess the capacity of P to make a decision before carrying out the act. The examples given are of everyday care (e.g. a care worker might need to assess if P can agree to being bathed or clothed) and routine treatment (e.g., a nurse who might need to assess if P can consent to have a dressing changed).[424]

More complex and serious decisions may require a more formal process of capacity assessment to ensure that 'reasonable steps' have been taken to establish whether P lacks capacity.[425] The MCA Code outlines situations where a formal assessment may be required:

- the decision that needs to be made is complicated or has serious consequences
- an assessor concludes a person lacks capacity, and the person challenges the finding
- family members, carers and/or professionals disagree about a person's capacity
- there is a conflict of interest between the assessor and the person being assessed
- the person being assessed is expressing different views to different people – they may be trying to please everyone or telling people what they think they want to hear

[423] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, ch. 6.

[424] ibid., para. 4.38.
[425] ibid, paras. 4.42, 4.53.

- somebody might challenge the person's capacity to make the decision – either at the time of the decision or later (for example, a family member might challenge a will after a person has died on the basis that the person lacked capacity when they made the will)
- somebody has been accused of abusing a vulnerable adult who may lack capacity to make decisions that protect them
- a person repeatedly makes decisions that put them at risk or could result in suffering or damage.[426]

A professional opinion on P's capacity may be obtained from any number of people with the experience necessary to conduct an assessment. A suitable professional can include 'a psychiatrist, psychologist, a speech and language therapist, occupational therapist or social worker'.[427] In some cases, where the skills and expertise of different professionals is required, a multi-disciplinary assessment may be conducted.

It is important to emphasise that whilst a medical practitioner or psychiatrist may conduct an assessment, there are other professionals who may be equally or better placed to do so. Consideration should be given to such factors as the extent to which the professional knows P, for how long they have known P, and whether P is at ease with the professional. In this regard, a social worker may be 'eminently suited' to conduct an assessment.[428]

53. Is it necessary to register, give publicity or give any other kind of notice of the *ex-lege* representation?

No. A person who does an act in connection with the care or treatment of P does not need to register, give publicity or any other kind of notice.

Section 5 provides a defence for acts done in connection with the care or treatment of P. If a person has taken reasonable steps to establish the incapacity of P, and they reasonably believe that it is in the best interests of P to carry out an act, then they will have acted lawfully in proceeding to carry it out.[429]

They do not need prior authorisation from a relevant authority, such as the Court of Protection, for the act to be rendered lawful.

Representatives/support persons

[426] ibid, para. 4.53.
[427] ibid, para. 4.42.
[428] *A Local Authority v. SY* [2013] EWHC 3485 (COP), para. 22.
[429] In relation to withdrawal of medical treatment, see *An NHS Trust v. Y* [2018] UKSC 46.

54. **Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.**

Section 5 of the MCA has been recognised as prescribing an 'informal and collaborative' framework for decision-making[430] that involves 'individuals or groups of people consulting and working together'.[431] Baker J in *G v. E* stated that it was 'emphatically not part of the scheme underpinning the [MCA]...that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons'.[432] Thus, there is no priority given to a partner/spouse or other family member to make a decision (in the absence of an LPA).

It will be the person most directly involved, and proposing to do the act in connection with P, who will need to consider what is in the best interests of P. This is exemplified in the reasoning of Baker J in *G v. E*, who rejected the appointment of a deputy in favour of the informal model of decision-making under the MCA. He suggested the following would be involved in making decisions in relation to P -

- The routine decisions concerning E's day-to-day care, including decisions about holidays and respite care can be taken by F as his carer.
- Decisions about his education should be taken collaboratively by F, G (E's sister), his teacher, and other relevant professionals.
- Decisions about possible medical treatment should be taken by his treating clinicians, who will doubtless consult both F and G and others as appropriate.

The above reflects the fact that it is person who is carrying out an act in connection with care and treatment that must be satisfied that it is in the best interests of P to avoid liability. It is also in line with the guidance of the MCA Code, which indicates that the decision-maker will be the person who is directly involved in caring for or treating P.[433]

During the ex-lege representation

Powers and duties of the representatives/support person

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[430] *G v. E* [2010] EWHC 2512 (Fam), para. 51; *Re Lawson* [2019] EWCOP 22.
[431] *G v. E* [2010] EWHC 2512 (Fam), para. 57.
[432] ibid.
[433] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 5.8.

55. **What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.**

Section 5(1) of the MCA 2005 applies in relation to 'acts done in connection with care or treatment'.

56. **What are the legal effects of the representative's acts?**

As noted above, a person ('D') is entitled to carry out acts in connection with care or treatment that would otherwise be unlawful in the absence of the consent of P, provided D reasonably believes that P lacks relevant capacity (having taken reasonable steps to establish whether that is the case) and that the act will be in P's best interests.

Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?

The ability of P to opt out of the use of section 5 is inherently limited. That said, they may already have made an advance decision in relation to certain medical treatment,[434] which cannot be overridden through section 5,[435] and there may be orders preventing any contact between P and certain individuals. Section 6(6) of the 2005 Act expressly provides that section 5 does not authorise a person to do an act that conflicts with a decision legitimately made by the donee of an LPA granted by P or a decision of a deputy appointed by the Court of Protection. Even this, however, does not stop a person from 'providing life-sustaining treatment' or 'doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition', 'while a decision as respects any relevant issue is sought from the court'.[436]

57. **Describe how this *ex lege* representation interacts with other measures? Think of subsidiarity.**

As noted above, '[t]he point at which it would be unwise to rely on the protection provided by [section 5], and when an application should be made to the Court

[434] Mental Capacity Act 2005, s. 24.
[435] Mental Capacity Act 2005, s. 5(4).
[436] Mental Capacity Act 2005, s. 6(7).

of Protection for an order or to have a deputy appointed is unclear'.[437] The interaction with LPAs and deputyships was considered in answer to question 56. In addition, section 5 decisions cannot conflict with a decision made by a guardian where P is subject to guardianship under the Mental Health Act 1983.[438] According to the Code of Practice, the following decisions must be referred to the Court of Protection rather than being taken under section 5:

1. the proposed withholding or withdrawal of artificial nutrition and hydration (ANH) from a patient in a permanent vegetative state (PVS)
2. cases where it is proposed that a person who lacks capacity to consent should donate an organ or bone marrow to another person
3. the proposed non-therapeutic sterilisation of a person who lacks capacity to consent (for example, for contraceptive purposes)
4. cases where there is a dispute about whether a particular treatment will be in a person's best interests.[439]

In *An NHS Trust v. Y*, however, the Supreme Court held that the Code of Practice was inconsistent on the matters that must be referred to court, and did not in fact create an obligation to refer cases on artificial nutrition and hydration to court where there the Act and relevant guidance were followed and there was agreement as to the patient's best interests.[440]

Safeguards and supervision

58. **Are there any safeguards or supervision regarding *ex lege* representation?**

It has been said that section 5 is 'not subject to any routine monitoring'.[441] That said, there are some safeguards. In addition to those covered in response to questions 56 and 57, where D does an act that is intended to restrain P, the protection provided by subsection 5 will not be available unless, firstly, 'D reasonably believes that it is necessary to do the act in order to prevent harm to P',[442] and, secondly, the act is a 'proportionate response' to the likelihood and seriousness of the

[437] R. JONES and E. PIFFARETTI, *Mental Capacity Act Manual*, 8th ed., London, Sweet & Maxwell, 2018, para. 1-095.
[438] Mental Health Act 1983, s. 8.
[439] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 6.18.
[440] [2018] UKSC 46.
[441] HOUSE OF LORDS SELECT COMMITTEE ON THE MENTAL CAPACITY ACT 2005, *Mental Capacity Act 2005: post-legislative scrutiny*, HL Paper 139, 2014, para. 98.
[442] Mental Capacity Act 2005, s. 6(2).

harm.[443] The section does not negate the need (where applicable) for involvement for an 'independent mental capacity advocate', nor does it permit decisions to be made on matters (such as consenting to a marriage or civil partnership) for which decisions can *never* be made for P under the Act.[444] Importantly, nothing in section 5 'excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act'.[445]

End of the ex-lege representation

59. **Provide a general description of the end of each instance of *ex-lege* representation.**

It has been seen that section 5 does not confer a 'status' on any given individual, such that each Act done by D in relation to P must satisfy the requirements of section 5 (and section 6). Therefore, for example, if an act of restraint were to become a disproportionate response to the likelihood and seriousness of any harm, the protection afforded by section 5 would expire. Realistically, where the Court of Protection makes an order relating to an aspect of P's welfare, section 5 cannot justify a breach of that order.

Reflection

60. **Provide statistical data if available.**

By definition, the informal nature of the circumstances in which section 5 can be used mean that statistical information regarding its use is not realistically available.

61. **What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?**

The criticism of lack of oversight of section 5 has already been mentioned, as has the Supreme Court's decision in *An NHS Trust v. Y*. Commenting on the case,

[443] Mental Capacity Act 2005, s. 6(3).
[444] R. JONES and E. PIFFARETTI, *Mental Capacity Act Manual*, 8th ed., London, Sweet & Maxwell, 2018, para. 1-095.
[445] Mental Capacity Act 2005, s. 5(3).

Wicks considered it 'regrettable…that the Supreme Court in Y has removed a valuable safeguard for both the right to life and the autonomy of incapacitated patients'.[446]

Specific cases of ex lege representation

ex lege representation resulting from marital law and/or matrimonial property law

62. **Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then also legally bind the other spouse?**

The basic principle of matrimonial property law in England and Wales is that of separation of property. Marriage per se has few impacts on the property affairs of their spouses, and each generally retains their separate property and contractual capacity.[447] In general, therefore, one spouse (irrespective of capacity) cannot enter into transactions that will bind the other spouse, subject to the rules on power of attorney, deputyship etc already considered. In certain circumstances, one spouse may act as a trustee in relation to property to which the other is beneficially entitled, and may deal with it in a way that affects the entitled spouse.[448] Again, however, this could occur regardless of capacity.

63. **Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.**

As detailed above, there is no system of community of property relating to spouses in England and Wales.

ex lege representation resulting from negotiorum gestio and other private law provisions

[446] E. WICKS, '*An NHS Trust and others v Y and another* [2018] UKSC 46: Reducing the Role of the Courts in Treatment Withdrawal' (2019) 27 *Medical Law Review* 330, 338.

[447] See, generally, N.V. LOWE, G. DOUGLAS, E. HITCHINGS and R. TAYLOR, *Bromley's Family Law*, 12th ed., Oxford, Oxford University Press, 2021, ch. 3

[448] See, generally, e.g., G. VIRGO, *The Principles of Equity and Trusts*, 4th ed., Oxford, Oxford University Press, 2020.

64. **Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If so, does this instrument have any practical significance in cases involving vulnerable adults?**

There is no doctrine of *negotiorum gestio* per se in English Private Law, even if there are specific circumstances in which an intervener will be provided with a defence to some torts and allowed a claim to expenses.[449]

SECTION VI – OTHER PRIVATE LAW PROVISIONS

65. **Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?**

The recognition of the relationship between informal carers and the people for who they provide care is patchy and is not contained within a coherent framework.[450]

66. **Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?**

For example, an advance decision to refuse medical treatment can be made only by P themselves, where P has reached the age of 18 and has the capacity to make the decision.[451]

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. **Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
    a. **the transition from substituted to supported decision-making;**
    b. **subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
    c. **proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**

[449] See, e.g., D. SHEEHAN, 'Negotiorum Gestio: A Civilian Concept in the Common Law?' (2006) 55 *International and Comparative Law Quarterly* 253.
[450] See, e.g., B. SLOAN, *Informal Carers and Private Law*, Oxford, Hart Publishing, 2013.
[451] Mental Capacity Act 2005, s. 24.

The MCA 2005 establishes that a person must be given all practicable help to exercise their decision-making abilities, before it can be concluded that they lack capacity. A decision on the basis of substitute decision-making should, therefore, only be resorted to if steps have been taken to support the person but this has proven unsuccessful in enabling them to understand or weigh the relevant information. If a decision is to be taken on behalf of P in their best interests, it is still necessary for the decision-maker to consider the wishes of P, and to support P to participate in the decision.

It is clear that the MCA has brought about some advancements in the provision of support for decision-making, but it has been criticised for not doing enough to realise UNCRPD compliance.[452]

Qualitative empirical research conducted by Rosie Harding and Ezgi Taşcıoğlu has found that in relation to everyday decisions, such as food and clothing choices, the MCA has 'facilitated a culture of supported decision-making'.[453] However, in relation to more complex matters, they found that often 'supported decision-making...collapses into best interests substituted decision making, as provided for by s4 MCA, and the associated chapters of the Code of Practice'.[454] For these more complex matters, those involved in the care of P lacked the required expertise to support with decision-making, and there were challenges with accessing advocacy services.[455]

The support model under the MCA has also been criticised due to the decision-specific nature of the test of mental capacity. This encourages an approach to support that focuses on one-off interventions in respect of an individual decision, at a point in time when capacity is being doubted.[456] As Series et al put it, the MCA focuses on 'support for isolated decisions rather than taking a coordinated, holistic and longitudinal approach'.[457] In this way, there is a failure to recognise that sup-

[452] E. JACKSON, *Medical Law: Text, Cases, and Materials* 5th ed., Oxford, Oxford University Press, 2019, pp. 275-75.

[453] R. HARDING and E. TAŞCIOĞLU, 'Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity' (2018) 8 *Societies* 25, p. 14.

[454] ibid.

[455] ibid, p. 10.

[456] B.A. CLOUGH, 'New Legal Landscapes: (Re)constructing the Boundaries of Mental Capacity Law' (2018) 26 *Medical Law Review* 246.

[457] L. SERIES, A. ARSTEIN-KERSLAKE and E. KAMUNDIA, 'Legal capacity: a global analysis of reform trends' in P. Blanck, E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights*, London, Routledge, 2016, p. 147.

porting autonomy is a continuous process that depends on wider structures of support and on relational skills that take time to develop.[458] As Beverley Clough has noted, rather than 'facilitating ongoing agency', the idea of support is 'reduced to simply providing information' in relation to a particular decision.[459] The MCA Code of Practice, for example, contains some guidance on the meaning of 'practicable steps' under s1(3), but this focuses almost exclusively on 'communication as *the* means towards supported decision-making'.[460]

A particularly important criticism of the MCA concerns the lack of any formal supported decision-making scheme.[461] There is provision for Independent Mental Capacity Advocates, but this is limited in number of respects. In particular, an IMCA is instructed only if P has already been found to lack capacity, and so it is proposed that a best interests decision should be made on their behalf.[462] An IMCA is not part of the practical help that may be given to enable the person to make the decision for themselves, as required by s1(3) MCA 2005. Recognising the limitations of the current framework, the Law Commission did consider the need to implement a formal legal process as part of its consultation on reform of the MCA. However, they were unable to 'propose a detailed legal process', due to a lack of a 'sufficient evidence base'.[463] The proposal to empower the Secretary of State for Health and Social Care to create such a process was also ultimately excluded from the Mental Capacity (Amendment) Act 2019.

d. effect of the measures on the legal capacity of vulnerable adults;

e. the possibility to provide tailor-made solutions;

The UK Supreme Court has emphasised that the purpose of the best interests test, which is the basis for making decisions on the behalf of P, 'is to consider matters from the patient's point of view.'[464] It requires the decision-maker to take account of the subjective wishes and feelings of P as 'a component in making the choice which is right for human as an individual human being'.[465] Therefore, the

[458] R. HARDING and E. TAŞCIOĞLU, 'Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity' (2018) 8 *Societies* 25.

[459] B.A. CLOUGH, 'New Legal Landscapes: (Re)constructing the Boundaries of Mental Capacity Law' (2018) 26 *Medical Law Review* 246, 262.

[460] R. HARDING and E. TAŞCIOĞLU, 'Supported Decision-Making from Theory to Practice: Implementing the Right to Enjoy Legal Capacity' (2018) 8 *Societies* 25, p. 14.

[461] LAW COMMISSION, *Mental Capacity and Deprivation of Liberty*, Law Com. 372, 2017.

[462] For a discussion of the limits of the Mental Capacity Act 2005 scheme as a model of supported decision-making, see: P. BIELBY, 'Towards Supported Decision-Making in Biomedical Research with Cognitively Vulnerable Adults' in O. CORRIGAN et al (eds), *The Limits of Consent: A socio-ethical approach to human subject research in medicine*, Oxford, Oxford University Press, 2009.

[463] LAW COMMISSION, *Mental Capacity and Deprivation of Liberty*, Law Com. 372, para. 14.54

[464] *Aintree University Hospitals NHS Foundation Trust v. James* [2013] UKSC 67, para. 45.

[465] ibid.

best interests test is not a purely objective standard that requires a one size fits all solution.

f. transition from the best interest principle to the will and preferences principle.

There is an ongoing debate as to whether the best interests principle is illegitimate and needs to be entirely abandoned to ensure 'respect' for the 'will and preferences' under Art 12(4) of the CRPD. It has been noted that the Committee on the Rights of Persons with Disabilities expressed concern about '[t]he legislation in the State party that restricts the legal capacity of persons with disabilities on the basis of actual or perceived impairment', '[t]he prevalence of substituted decision-making in legislation and in practice, and the lack of full recognition of the right to individualized supported decision-making that fully respects the autonomy, will and preferences of persons with disabilities'.[466]

Presently, the MCA 2005 only identifies a number of factors that must be 'considered' as part of the process of determining best interests, including the 'wishes and feelings of P'. There is no indication given in the MCA 2005, or the accompanying Code of Practice, as to the relative weight that should be attached to those 'wishes and feelings' as part of that determination. Emily Jackson has argued that the statutory wording, which gives 'no particular priority to P's 'will and preferences',...treat[ing] them as simply one relevant factor among many, is not compliant with Article 12(4) of the UNCRPD'.[467]

Due to concerns about lack of compliance with the UNCRPD, it has been contended that there is a need to give clearer direction to decision-makers about the significance of the wishes of P in determining best interests.[468] In its consultation on reform of the MCA 2005, the Law Commission reported that a majority of consultees supported an amendment to Section 4 of the MCA to place greater emphasis on the wishes of P.[469] The proposal recommended by the Law Commission was that a decision-maker should have to 'give particular weight to any wishes or feelings ascertained', which it claimed would be consistent with the aspirations of the UNCRPD.[470] However, this proposal was omitted from the Mental Capacity

[466] UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES, 'Committee on the Rights of Persons with Disabilities Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland', CRPD/C/GBR/CO/1, 2017, para. 30.

[467] E. JACKSON, 'From "Doctor Knows Best" to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment' (2018) 81 *Modern Law Review* 247, 266.

[468] ibid.

[469] LAW COMMISSION, *Mental Capacity and Deprivation of Liberty*, Law Com. 372, para. 14.7.

[470] ibid, para. 14.21

(Amendment) Act 2019, which implement some of the reforms put forward by the Law Commission.

Whilst it has been contended the wording of Section 4 of the MCA 2005 should be amended, there are suggestions that developments in the judicial interpretation of best interests have gone a considerable way to achieving UNCRPD compliance. Alex Ruck Keene and Cressida Auckland, for example, have argued that a 'trend is readily discernible: greater emphasis is undoubtedly being given to identifying the wishes and feelings of the individuals concerned...; these wishes are taking on a much higher priority in the assessment of best interests; and clear and convincing justification is required before they are departed from.'[471] Indeed, they suggest that the courts have effectively established, without always using the exact wording, a 'rebuttable presumption...in favour of giving effect to a person's wishes and feelings'.[472] Drawing on the work of the *Essex Autonomy Project*, they argue that 'respect' for 'will and preferences' under Art 12(1) UNCRPD does not necessarily require the abolition of the best interest decision-making framework, but it does require a rebuttable presumption that it is in the best interests of P to bring about a course of action they would prefer.[473] On this basis, by developing a rebuttable presumption, they argue that the courts have established an approach to best interests that is necessary to ensure UNCRPD compliance.[474]

It is important to highlight that, whilst some decisions do indicate the adoption of a rebuttable presumption in favour of giving effect to the preferences of P, the cases are not entirely consistent. Emily Jackson has stated that the 'current best practice' of the COP does endorse such a presumption, though it is not a universal practice.[475] She refers to instances where the COP has stated that the weight to be attached to the wishes of P is fact specific.[476] Furthermore, even if it is the 'best practice' of the COP, it does not necessarily follow that this is the practice of those involved in the informal process of decision-making under section 5, which is

[471] A. RUCK KEENE AND C. AUCKLAND, 'More presumptions please? Wishes, feelings and best interests decision-making' (2015) 5 *Elder Law Journal* 293, 299.

[472] ibid, 295

[473] ibid, 300. See W. MARTIN et al, *Achieving CRPD Compliance: Is the Mental Capacity Act of England and Wales Compatible with the UN Convention on the Rights of Persons with Disabilities? If Not, What Next?*, Essex, University of Essex, 2014.

[474] A. RUCK KEENE AND C. AUCKLAND, 'More presumptions please? Wishes, feelings and best interests decision-making' (2015) 5 *Elder Law Journal* 293.

[475] E. JACKSON, 'From "Doctor Knows Best" to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment' (2018) 81 *Modern Law Review* 247, 274.

[476] Examples include *M v. N* [2015] EWCOP 76, para. [28]; *Wye Valley NHS Trust v. B* [2015] EWCOP 60, para. [10].

where the vast majority of decisions about capacity are made.[477] It is the conclusion of Emily Jackson, to ensure greater respect for autonomy, that it is necessary to amend the MCA 2005 to instruct decision-makers to give effect to a rebuttable presumption.[478]

That said, Bartlett and Sandford argue that:

The marginalisation of the subjective elements of the best interests test reflects the fact that, at least insofar as the reported cases are a guide, the MCA 2005 is used primarily for adult safeguarding.[479]

Fundamentally, as Camilla Parker notes, 'the MCA falls within a category of legislation that the CRPD Committee considers to be incompatible with CRPD Article 12' because the Act permits substituted decision-making.[480] Despite this, on her analysis the 'framework for determining what is in a person's best interests under the MCA can and should ensure that the views of that person are at the forefront of any decisions that are being made on their behalf'.[481]

68. **Provide an assessment of your system in terms of *protection* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**

a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;

On Parker's analysis, the MCA 'encapsulates the "autonomy versus protection" dynamic'.[482] An application can be made to the Court of Protection for a declaration as to whether a person has capacity to make a decision or an act done, or yet to be done, would be lawful. However, it is important to re-emphasise that this is not technically a process of seeking to authorise a deprivation, limitation or restoration of legal capacity. Rather, it is a process that should be resorted to for resolving doubts or disputes as to whether P lacks capacity or a proposed act is

[477] E. JACKSON, 'From "Doctor Knows Best" to Dignity: Placing Adults Who Lack Capacity at the Centre of Decisions About Their Medical Treatment' (2018) 81 *Modern Law Review* 247, 256.
[478] ibid. See also M. DONNELLY, 'Best Interests in the Mental Capacity Act: Time to say Goodbye?' (2016) 24 *Medical Law Review* 318, 330.
[479] P. BARTLETT and R. SANDLAND, *Mental Health Law: Policy and Practice*, 4th ed., Oxford, Oxford University Press, 2013, p. 199.
[480] C. PARKER, 'Balancing the rights of respect for autonomy and protection from harm: Lessons fromthe Mental Capacity Act 2005 (England and Wales)' in J. ŠIŠKA and J. BEADLE-BROWN (eds), *The Development, Conceptualisation and Implementation of Quality in Disability Support Services*, Prague, Karolinum Press, 2021, p. 241.
[481] ibid, p. 246.
[482] ibid, p. 241.

lawful. It is possible that P will be assessed to lack the capacity to make specific decisions , without any formal application to the COP. As noted in response to question 52, for more complex decisions an assessment of capacity may be required by someone with relevant expertise, whereas this may not be necessary for day-to-day decisions. If, however, there is an ongoing dispute as to whether P has capacity, then an application to the COP may be necessary to settle the matter.[483]

Concerns have been raised about the failure of practitioners to properly consider whether a person has the capacity to make risky decisions. Despite criticism that the Mental Capacity Act can produce an *overly* protectionist responses, because of the extent to which it relies upon substituted decision-making, the House of Lords Select Committee on the Mental Capacity Act 2005 has also expressed concern that, in practice, the MCA was 'sometimes used to support non-intervention or poor care, leaving vulnerable adults exposed to risk of harm'.[484] The reasons given by the Select Committee were, first, widespread misunderstanding of the presumption of capacity and, second, attempts by professionals to misapply the presumption to avoid taking responsibility in cases where an individual's choices were considered challenging.[485]

Similar concerns have been raised in a more recent national analysis of Safeguarding Adult Reviews (SARs).[486] The analysis found that a 'failure to attend to mental capacity was one of the most frequently noted deficiencies in direct practice'. In a number of instances, this was due to 'reliance on the assumption of capacity', which had 'served to close down awareness of the need to monitor decision making ability in the face of escalating risk and frailty'.[487] Other issues identified by the analysis include the rigid application of the 'diagnostic test', such as where the lack of a previously diagnosed mental disorder was the reason for not carrying out a capacity assessment.[488] There were also problems in the way that 'unwise decisions' were treated as a 'lifestyle choice' by practitioners, without considering the possibility of compromised executive capacity.[489]

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[483] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 8.16.

[484] HOUSE OF LORDS SELECT COMMITTEE ON THE MENTAL CAPACITY ACT 2005, *Mental Capacity Act 2005: post-legislative scrutiny*, HL Paper 139, 2014, para. 105.

[485] ibid.

[486] M. PRESTON-SHOOT et al, *Analysis of Safeguarding Adult Reviews April 2017–March 2019: Findings for Sector-Led Improvement*, London, Local Government Association and the Association of Directors of Adult Social Services, 2020.

[487] ibid, p. 118.

[488] ibid, p 119.

[489] ibid.

Another theme that is addressed in the national analysis is 'capacity outside of the MCA'. SARs that fell into this theme would involve an 'assessment [that] resulted in a finding that the individual had mental capacity within the meaning of the Mental Capacity Act, [whilst] there was sometimes insufficient recognition of the possibility that decision making was being impaired by third party influence, coercion or control'.[490] In these cases, there was sometimes insufficient attention paid to other ways of protecting P, such as an application to the high court for the exercise of the inherent jurisdiction.[491]

If an application to the COP is made, as noted in response to question 17, the court may make an interim order in the best interests of P, even if cannot be established on the evidence that the person lacks the relevant capacity. This enables the court to protect P in urgent situations, where there is a reason to believe that they may lack the capacity to make the decision. It is notable, however, that the courts have struggled with striking the right balance between respect for autonomy and protection of the vulnerable when determining the threshold test for an interim order. Whilst it is clear that interim orders may be needed to protect vulnerable adults pending the final determination, these orders can entail 'significant infringements on the civil liberty of an adult', which can last for 'months or at least weeks' whilst the issue of capacity is resolved.[492] In *London Borough of Wandsworth v. M and others*[493] it was indicated that a reasonable belief that P lacked capacity, which is required for an interim order, 'must be predicated on solid and well reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves.'[494] In this case, it was proposed that an interim order under the MCA 2005 to protect a child who was about to turn 18 by preventing him from returning to live with his mother where he would be at risk. The deficiencies in the capacity assessment led the court to conclude that an interim order could not be imposed, pending a proper assessment, under the MCA 2005. Heyden J stressed that such an order 'would be entirely disrespectful...to curtain any aspect of his autonomy on the basis of such unsatisfactory evidence'.[495] However, despite the importance attached to autonomy, the judge nonetheless felt able to rely on the inherent jurisdiction to effectively achieve the same result on the basis that he was a vulnerable adult.

[490] ibid, p. 121
[491] ibid, p. 133
[492] *DP v. London Borough of Hillingdon* [2020] EWCOP 45 para. [57].
[493] [2017] EWHC 2435.
[494] ibid, para. [69].
[495] ibid, para. [71].

The decision in *Wandsworth* can be criticised for raising the threshold for interim orders to too high a level, which interferes with the possibility of addressing emergency situations where there are substantial barriers to conducting a proper assessment of capacity. However, as discussed in response to question 17, the issue of the threshold was later addressed in *DP v. London Borough of Hillingdon.*[496] Heyden J revisited his earlier comments in *Wandsworth* and clarified that an interim order could be made, even where the assessment of capacity was deficient in some way. Again, the challenge of balancing the duty to promote autonomy and protect the vulnerable was recognised. However, rather than adopting too stringent a test for the imposition of an interim order, Heyden J noted that the permissive nature of section 48 provided a crucial safeguard for autonomy.[497] Thus, an interim order 'may' be made the COP where there is reason to believe P lacks capacity, but it will need to consider the proportionality of the proposed measure and whether it would amount to an 'unjustifiable interference with P's autonomy'.[498]

b. protection during a procedure resulting in the application, alteration or termination of adult support measures;

As with the previous response, it is not always necessary to resort to the formal process of applying to the COP for a decision to be taken to protect P. As an example, the MCA 2005 permits a carer to use proportionate restraint to protect P from harm, where they are reasonably believed to lack capacity (see the response to question 28). The MCA Code of Practice gives as an example a carer who holds the arm of a person who does not understand the risks of crossing the road.[499] The carer will not incur liability for using restraint in these circumstances, assuming they have complied with the relevant requirements.

Again, an application may need to be made to the COP if there is an ongoing dispute as to what is in the best interests of P. It will also be necessary to apply in relation to decisions that can only be taken by the COP, such as a prohibition on contact (see the response to question 28).

c. protection during the operation of adult support measures:

- **protection of the vulnerable adult against his/her own acts;**

[496] [2020] EWCOP 45.
[497] ibid, para. [59].
[498] ibid.
[499] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 6.47.

In line with the guidance at the beginning of the report, the below analysis will not deal with the forced psychiatric treatment of P for a mental disorder where this is needed to protect their health or safety.[500]

The COP has regularly emphasised the importance of adopting a sensible approach to protection that is concerned exclusively with reducing the risk of physical harm, without considering the implications this may have for their well-being in a wider sense. In an often-quoted passage by Sir James Munby, it has been stated that:

> The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?[501]

The above passage was relied on in *Westminster City Council v. Sykes*[502] in guarding against the protective imperative. This concerned an 89-year-old woman who was unaware of the problems that had led her to be placed into a care home. These included a lack of acceptance of personal care and maintenance of the home, alleged altercations with neighbours, some weight loss and a lack of awareness of her personal safety in terms of falling. However, her continued placement in the care home meant she was 'unhappy and distressed' and there was a concern that her 'mental health may deteriorate'.[503] District Judge Eldergill appreciated the risks of her returning to live in her home, but these had to be balanced against the risks to emotional well-being of her continued placement in the care home. He concluded that it would be in her best interests to attempt a one-month trial of home-based care, with a system of careful monitoring. As the trial would be monitored, he was satisfied that the risks of home living were acceptable, and that there

[500] This is regulated by the Mental Health Act 1983.
[501] Re MM (an adult) [2007] EWHC 2003, para. 120.
[502] [2014] EWCOP B9.
[503] ibid, para. 10.

was ‘no question of an unsatisfactory situation at home developing and being allowed to drift’.[504]

It is important, however, to recognise that there are situations where the risks associated with P’s own conduct are considered unmanageable, and that they will need to be protected in their best interests. *Dorset County Council v. EH*,[505] for instance, it was held that it was in the best interests of a person with dementia to move to a care home, in light of the risks of hypothermia, injury, malnutrition, food poisoning, fires, increasing distress, and continued deterioration of her condition. She had also proven resistant to support whilst living in her own home. The risks associated with living at home outweighed any loss of her limited independence and the risk of depression.

If the person does not lack capacity under the MCA 2005, it is not clear that the inherent jurisdiction of the high court can be relied on to protect a vulnerable adult against his/her own risky acts. As noted in response to question 8.a, it is a necessary condition for the exercise of the inherent jurisdiction that the will of the person is overborne by factors other than those covered by the MCA 2005. It is clear that this applies where a person is unable to make their own decision because of the coercion or undue influence of another. The primary aim, in responding to these situations, is to restore the autonomy of the person to make that decision. It is less clear that the inherent jurisdiction can be invoked to protect a person from their own risky conduct, which are not the result of the influence of another person. Some obiter remarks made in *London Borough of Croydon v. CD*[506] could indicate the relevance of the inherent jurisdiction in this context. In that case, an adult with significant disabilities was living in conditions of severe self-neglect and was refusing access to his home to receive support. An order was made under the MCA 2005, but Cobb J also stated that the inherent jurisdiction was available to local authority in relation to the facts of the particular case. It is notable, however, that Cobb J only briefly dealt with conditions for invoking the jurisdiction, stating that P was vulnerable within the definition laid down in previous cases.[507] His decision refers only to the indicative definition of the vulnerable adult, which was introduced by Munby J in *Re SA*, without also addressing the issue of whether the individual had been, or was reasonably believed to be, under constraint or subject to coercion or undue influence or for some other reason disabled from making the decision.

[504] ibid.
[505] [2009] EWHC 784.
[506] [2019] EWHC 2943.
[507] ibid, para. 21.

- **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**

As the response to question 46 noted, there are differences in the supervision of someone who has been given authority to act on behalf of P, which depend on the manner of their appointment. A court-appointed deputy will need to produce annual reports for the OPG, and these will need to be compared with an inventory of assets that is prepared at the commencement of the deputyship. The OPG also has the role of 'educating, supporting and visiting' a deputy, so that they can effectively perform their role.[508] In addition to measures designed to reduce the risk of abuse, a deputy must provide a surety bond as insurance in the case of mismanagement of P's financial affairs. In contrast, an attorney, who is appointed by P, is not subject to the same level of supervision. Whilst they are expected to keep records as part of their fiduciary duty to P, these are only scrutinised if a concern has been raised with the OPG or the donor has included a supervisory mechanism as an instruction in the instrument (see the response to question 16). This has led to concerns that there are insufficient mechanisms for detecting abuse, or the risk of it, at an early stage. It is also more difficult to rectify any resulting financial loss, given the lack of security.

There are also limits to safeguards at the stage of registering an LPA. There is no requirement for a donor to identify people that must be notified before the registration of the LPA. If they choose not to, then those concerned with the welfare of the donor may not have the opportunity to raise concerns prior to registration of the instrument. Again, this can be contrasted with the process for appointing a deputy. A person is required to notify at least three people before the COP will appoint them as a deputy.

Denzil Lush, former Senior Judge of the Court of Protection, and author of a leading guide on LPAs, has raised serious concerns about the risks associated with LPAs.[509] He has further argued that the 'lack of transparency and accountability causes suspicions and concerns, which tend to rise in a crescendo and eventually explode'.[510]

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[508] See D. LUSH, 'Adult Guardianship and Powers of Attorney in England and Wales' in L. HO and R. LEE (eds), *Special Needs Financial Planning: A Comparative Perspective*, Cambridge, Cambridge University Press, 2019, p. 143.

[509] D. LUSH, Foreword to *Cretney & Lush on Lasting and Enduring Powers of Attorney*, 9th ed., London, LexisNexis, 2022.

[510] D. LUSH, 'Adult Guardianship and Powers of Attorney in England and Wales' in L. HO and R. LEE (eds), *Special Needs Financial Planning: A Comparative Perspective*, Cambridge, Cambridge University Press, 2019, p. 144.

- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions;**

The response to this question focuses on the possible appointment of a person connected with a residential institution as a deputy or attorney for P. It is important to remember that a vulnerable adult may be subject to 'adult support measures' without a decision of the COP or anyone having been appointed to represent P. There will be situations where an IMCA will need to be instructed to support P in relation to decisions about changes in accommodation, where the only person who can be consulted about the best interests of P is a paid care worker. An IMCA *may* also be instructed to support P in the context of adult safeguarding measures, if the local authority is 'satisfied' this 'would be of particular benefit of P'.[511]

The MCA Code of Practice indicated it would be very unlikely for a person to be appointed as a deputy where they are a part of a residential institution that is responsible for the care of P, precisely because of the risk of a conflict of interests. The MCA Code of Practice stipulates that–

Paid care workers (for example, care home managers) should not agree to act as a deputy because of the possible conflict of interest – unless there are exceptional circumstances (for example, if the care worker is the only close relative of the person who lacks capacity.[512]

Whilst the guidance refers to the agreement of the deputy, the decision about who should be appointed is ultimately for the COP to be made on the basis of the best interests of P (see the response to question 23). The potential for a conflict of interests will be an important consideration of the COP.

The MCA Code of Practice does recognise the possibility of appointing an office holder in a local authority to the role of deputy, such as the Director of Adult Services.[513] This could lead to concerns about a potential conflict of interests where P is receiving care services that are arranged by the same local authority. Again, the risk is recognised in the Code and states that the COP, before making an appointment, 'will need to be satisfied that the authority has arrangements to

[511] Mental Capacity Act 2005 (Independent Mental Capacity Advocates (Expansion of Role) Regulations 2006, r. 5(1).
[512] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 8.41.
[513] ibid.

avoid possible conflicts of interest'.[514] In *Re JW*, it was stated that the COP 'is still wary of potential conflicts of interest when appointing a local authority as deputy'.[515] It is also open to the COP to discharge a local authority deputy if significant concerns about conflicts of interests arise post-appointment.[516] In *Cumbria County Council v.* A, it was stated that it is likely to be appropriate to discharge a local authority deputy where there arises an '[u]nmanageable conflict of interest, e.g. where P has a potential claim against the authority, and where that claim cannot properly be investigated by the local authority deputy'.[517]

It is also recognised in the MCA Code that a person might seek to appoint a paid car worker (such as a care home manager) as their attorney.[518] Again, the guidance stipulates that they should 'not agree to act as an attorney, apart from in unusual circumstances'.[519] Whilst the decision about who to appoint is for P, rather than the COP, there are important safeguards. This includes the need for someone to certify the absence of undue pressure and the raising of objections to an appointment.

- **protection of the privacy of the vulnerable adult.**

The issue of how to balance transparency against the privacy of persons who lack capacity in COP proceedings has given rise to much debate.[520] Prior to reforms implemented in early 2016, there were criticisms that the balance had been weighted too much in favour of privacy. Indeed, the COP had gained a reputation in the media for being a 'secret court', as proceedings were not held in public.[521]

Since the implementation of reforms, the general rule that proceedings will be held in private has been reversed. The usual approach is that proceedings will be held in public, with the privacy of the vulnerable adult protected by a transparency order.[522] This will entail restrictions on the publication of the identity of P who is

[514] ibid.
[515] [2015] EWCOP 82, para. 39.
[516] Mental Capacity Act 2005 (Independent Mental Capacity Advocates (Expansion of Role) Regulations 2006, r. 5(1).
[517] [2020] EWCOP 38, para. 24.
[518] DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *Mental Capacity Act 2005: Code of Practice*, London, The Stationery Office, 2007, para. 7.10
[519] ibid.
[520] See L. SERIES et al, *Transparency in the Court of Protection Report on a Roundtable*, Cardiff University, 2015.
[521] ibid.
[522] COURTS AND TRIBUNALS JUDICIARY, 'Practice Direction 4C – Transparency', 2017, para 2.1.

the subject of the proceedings or any information that might lead to their identification. It is also the case that the report of the decision of the COP, which will detail the protection measures, will nearly always conceal the identity of P.