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STATUTORY INSTRUMENTS

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**2008 No. 1315**

**MENTAL CAPACITY, ENGLAND**

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

<i>Made</i>	- - - -	<i>14th May 2008</i>
<i>Laid</i>	- - - -	<i>20th May 2008</i>
<i>Coming into force</i>	- -	<i>3rd November 2008</i>

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

**Citation, commencement and application**

1.—(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008 and shall come into force on 3<sup>rd</sup> November 2008.

(2) These Regulations apply in relation to England only.

**Interpretation**

2. In these Regulations—

“best interests assessor” means a person selected to carry out a best interests assessment under paragraph 38 of Schedule A1 to the Act;

“donee” is a person who has a lasting power of attorney conferred on them by the relevant person, giving that donee the authority to make decisions about the relevant person’s personal welfare;

“the Act” means the Mental Capacity Act 2005; and

“the relevant person’s managing authority” means the managing authority(2) that has made the application for a standard authorisation(3) in respect of the relevant person(4).

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(1) 2005 (c.9). Schedule A1 was inserted by section 50(5) of and Schedule 7 to the Mental Health Act 2007 (c.12).  
(2) The identity of the managing authority is determined in accordance with paragraphs 176, 177 and 179 of Schedule A1 to the Act.  
(3) “standard authorisation” is defined in paragraph 8 of Schedule A1 to the Act.  
(4) “relevant person” is defined in paragraph 7 of Schedule A1 to the Act

## PART 1

### Selection of representatives

#### Selection of a person to be a representative - general

**3.—(1)** In addition to any requirements in regulations 6 to 9 and 11, a person can only be selected to be a representative if they are—

- (a) 18 years of age or over;
  - (b) able to keep in contact with the relevant person;
  - (c) willing to be the relevant person’s representative;
  - (d) not financially interested in the relevant person’s managing authority<sup>(5)</sup>;
  - (e) not a relative of a person who is financially interested in the managing authority;
  - (f) not employed by, or providing services to, the relevant person’s managing authority, where the relevant person’s managing authority is a care home<sup>(6)</sup>;
  - (g) not employed to work in the relevant person’s managing authority in a role that is, or could be, related to the relevant person’s case, where the relevant person’s managing authority is a hospital<sup>(7)</sup>; and
  - (h) not employed to work in the supervisory body<sup>(8)</sup> that is appointing the representative in a role that is, or could be, related to the relevant person’s case.
- (2) For the purposes of this regulation a “relative” means—
- (a) a spouse, ex-spouse, civil partner or ex-civil partner;
  - (b) a person living with the relevant person as if they were a spouse or a civil partner;
  - (c) a parent or child;
  - (d) a brother or sister;
  - (e) a child of a person falling within sub-paragraphs (a), (b) or (d);
  - (f) a grandparent or grandchild;
  - (g) a grandparent-in-law or grandchild-in-law;
  - (h) an uncle or aunt;
  - (i) a brother-in-law or sister-in-law;
  - (j) a son-in-law or daughter-in-law;
  - (k) a first cousin; or
  - (l) a half-brother or half-sister.
- (3) For the purposes of this regulation—
- (a) the relationships in paragraph (2)(c) to (k) include step relationships;
  - (b) references to step relationships and in-laws in paragraph (2) are to be read in accordance with section 246 of the Civil Partnership Act 2004<sup>(9)</sup>;
  - (c) a person has a financial interest in a managing authority where—

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

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

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

(8) The identity of the supervisory body is determined in accordance with paragraphs 128, 180 and 182 of Schedule A1 to the Act.

(9) 2004 (c.33).

- (i) that person is a partner, director, other office-holder or major shareholder of the managing authority that has made the application for a standard authorisation, and
  - (ii) the managing authority is a care home or independent hospital<sup>(10)</sup>; and
- (d) a major shareholder means—
- (i) any person holding one tenth or more of the issued shares in the managing authority, where the managing authority is a company limited by shares, and
  - (ii) in all other cases, any of the owners of the managing authority.

### **Determination of capacity**

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

### **Selection by the relevant person**

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

(2) Where the relevant person does not wish to make a selection under paragraph (1), regulation 8 applies.

### **Selection by a donee or deputy**

6.—(1) Where—

- (a) the best interests assessor determines that the relevant person lacks capacity to select a representative; and
- (b) the relevant person has a donee or deputy<sup>(11)</sup> and the donee's or deputy's scope of authority permits the selection of a family member, friend or carer of the relevant person,

the donee or deputy may select such a person.

(2) A donee or deputy may select himself or herself to be the relevant person's representative.

(3) Where a donee or deputy does not wish to make a selection under paragraph (1) or (2), regulation 8 applies.

### **Confirmation of eligibility of family member, friend or carer and recommendation to the supervisory body**

7.—(1) The best interests assessor must confirm that a person selected under regulation 5(1) or 6(1) or (2) is eligible to be a representative.

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

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

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

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<sup>(10)</sup> "independent hospital" is defined in paragraph 175(3) of Schedule A1 to the Act.

<sup>(11)</sup> "deputy" is defined in section 64(1) of the Act.

### **Selection by the best interests assessor**

8.—(1) The best interests assessor may select a family member, friend or carer as a representative where paragraph (2) applies.

(2) The best interests assessor may make a selection where—

- (a) the relevant person has the capacity to make a selection under regulation 5(1) but does not wish to do so;
- (b) the relevant person's donee or deputy does not wish to make a selection under regulation 6(1) or (2); or
- (c) the relevant person lacks the capacity to make a selection and—
  - (i) does not have a donee or deputy, or
  - (ii) has a donee or deputy but the donee's or deputy's scope of authority does not permit the selection of a representative.

(3) Where the best interests assessor selects a person in accordance with paragraph (2), the assessor must recommend that person for appointment as a representative to the supervisory body.

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

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

### **Selection by the supervisory body**

9.—(1) Where a supervisory body is given notice under regulation 8(5), it may select a person to be the representative, who—

- (a) would be performing the role in a professional capacity;
  - (b) has satisfactory skills and experience to perform the role;
  - (c) is not a family member, friend or carer of the relevant person;
  - (d) is not employed by, or providing services to, the relevant person's managing authority, where the relevant person's managing authority is a care home;
  - (e) is not employed to work in the relevant person's managing authority in a role that is, or could be, related to the relevant person's case, where the relevant person's managing authority is a hospital; and
  - (f) is not employed to work in the supervisory body that is appointing the representative in a role that is, or could be, related to the relevant person's case.
- (2) The supervisory body must be satisfied that there is in respect of the person—
- (a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997<sup>(12)</sup>(enhanced criminal record certificates);or
  - (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of that Act<sup>(13)</sup> (criminal record certificates).

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<sup>(12)</sup> 1997 (c.50). Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c.15).

<sup>(13)</sup> Section 113A was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005.

## PART 2

### Appointment of representatives

#### Commencement of appointment procedure

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

#### Appointment of representative

**11.** Except where regulation 9 applies, a supervisory body may not appoint a representative unless the person is recommended to it under regulations 7 or 8.

#### Formalities of appointing a representative

- 12.—**(1) The offer of an appointment to a representative must be made in writing and state—
- (a) the duties of a representative to —
    - (i) maintain contact with the relevant person,
    - (ii) represent the relevant person in matters relating to, or connected with, the deprivation of liberty, and
    - (iii) support the relevant person in matters relating to, or connected with, the deprivation of liberty; and
  - (b) the length of the period of the appointment.
- (2) The representative must inform the supervisory body in writing that they are willing to accept the appointment and that they have understood the duties set out in sub-paragraph (1)(a).
- (3) The appointment must be made for the period of the standard authorisation.
- (4) The supervisory body must send copies of the written appointment to—
- (a) the appointed person;
  - (b) the relevant person;
  - (c) the relevant person’s managing authority;
  - (d) any donee or deputy of the relevant person;
  - (e) any independent mental capacity advocate<sup>(14)</sup> appointed in accordance with sections 37 to 39D of the Act<sup>(15)</sup>, involved in the relevant person’s case; and
  - (f) every interested person named by the best interests assessor in their report as somebody the assessor has consulted in carrying out the assessment.

#### Termination of representative’s appointment

- 13.** A person ceases to be a representative if—
- (a) the person dies;

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<sup>(14)</sup> “independent mental capacity advocate” is defined in section 64(1) of the Act.

<sup>(15)</sup> Sections 39B to 39D were inserted by section 50 of and Schedule 9 to the Mental Health Act 2007.

- (b) the person informs the supervisory body that they are no longer willing to continue as representative;
- (c) the period of the appointment ends;
- (d) a relevant person who has selected a family member, friend or carer under regulation 5(1) who has been appointed as their representative informs the supervisory body that they object to the person continuing to be a representative;
- (e) a donee or deputy who has selected a family member, friend or carer of the relevant person under regulation 6(1) who has been appointed as a representative informs the supervisory body that they object to the person continuing to be a representative;
- (f) the supervisory body terminates the appointment because it is satisfied that the representative is not maintaining sufficient contact with the relevant person in order to support and represent them;
- (g) the supervisory body terminates the appointment because it is satisfied that the representative is not acting in the best interests of the relevant person; or
- (h) the supervisory body terminates the appointment because it is satisfied that the person is no longer eligible or was not eligible at the time of appointment, to be a representative.

#### **Formalities of termination of representative's appointment**

**14.**—(1) Where a representative's appointment is to be terminated for a reason specified in paragraphs (c) to (h) of regulation 13, the supervisory body must inform the representative of—

- (a) the pending termination of the appointment;
  - (b) the reasons for the termination of the appointment; and
  - (c) the date on which the appointment terminates.
- (2) The supervisory body must send copies of the termination of the appointment to—
- (a) the relevant person;
  - (b) the relevant person's managing authority;
  - (c) any donee or deputy of the relevant person;
  - (d) any independent mental capacity advocate appointed in accordance with sections 37 to 39D of the Act, involved in the relevant person's case; and
  - (e) every interested person named by the best interests assessor in their report as somebody the assessor has consulted in carrying out the assessment.

#### **Payment to a representative**

**15.** A supervisory body may make payments to a representative appointed following a selection under regulation 9.

Signed by authority of the Secretary of State for Health.

14th May 2008

*Ivan Lewis*  
Parliamentary Under-Secretary of State,  
Department of Health

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

The Mental Capacity Act 2005 (“the Act”) provides for the deprivation of liberty of people who lack capacity to consent to arrangements proposed for their care in care homes and hospitals where authorisation under section 4A of and Schedule A1 to the Act (“Schedule A1”) exists.

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

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

- (a) detailing the eligibility requirements for appointment as a representative (regulation 3);
- (b) enabling the best interests assessor to determine whether the person deprived, or potentially deprived of, liberty (“the relevant person”) has capacity to select a person to be their representative (regulation 4);
- (c) enabling the relevant person to select a family member, friend or carer to be their representative, where they have capacity to make that decision (regulation 5);
- (d) enabling a donee or deputy of a relevant person who lacks capacity to select a representative, to select a family member, friend, carer or him or herself to be the representative, where their scope of authority permits that (regulation 6);
- (e) requiring that the best interests assessor confirms the eligibility for appointment of any selection made by a relevant person, donee or deputy. Where confirmation is given, the best interests assessor must recommend the selected person for appointment. Where confirmation cannot be given, the selector must be advised why that is the case and invited to make another selection (regulation 7);
- (f) enabling the best interests assessor to select a relevant person’s family member, friend or carer as the representative when one is not, or cannot, be selected by the relevant person, a donee or a deputy (regulation 8);
- (g) enabling the supervisory body to select a person in a professional capacity to be a representative where one cannot be selected from the relevant person’s family, friends or carers (regulation 9);
- (h) requiring that the procedure for appointing a representative begin as soon as a best interests assessor is selected in relation to a request for a standard authorisation or as soon as an existing representative’s appointment terminates or is about to terminate (regulation 10);
- (i) requiring that the supervisory body only appoints a person approved by the best interests assessor, unless such approval cannot be given (regulation 11);
- (j) detailing the formalities of appointment and termination of appointment (regulations 12 to 14); and
- (k) enabling the supervisory body to pay a person who has been selected to be a representative in a professional capacity (regulation 15).

**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.