

3C-272 28. Mental Capacity Act 2005**28.1 General**

1. The Mental Capacity Act 2005 creates a new legal framework to improve and clarify the decision making process for people who may lack mental capacity to make decisions for themselves. The Act establishes a new Court of Protection with its own procedures. The new court is able to make decisions about the property and financial affairs of a person who lacks capacity to take those decisions and also in relation to decisions in respect of their personal welfare. Where someone needs to be granted the power to take decisions in respect of the assets or finances of a person who lacks capacity, the authority granted by an order of the Court of Protection (or by a Lasting or Enduring Power of Attorney) will be needed. In many other day-to-day decisions, issues about a person's health or personal welfare arising under the new Act will be capable of being resolved without contested proceedings before a court. Where legal services are required for eligible clients in relation to issues under the 2005 Act, Legal Help will be the normal vehicle for funding such advice and assistance as the client requires. Under the new fee schemes which apply to Controlled Work in the Mental Health category from 1 January 2008, Legal Help in relation to the 2005 Act is funded as Level 1 Non MHRT work under the rules contained in the Unified Contract Civil Specification.
2. For cases where an application to Court may be necessary, the relative accessibility of the Court in reaching a decision in many cases will make a grant of Legal Representation unnecessary as support will be available when needed through Legal Help. Similarly Legal Help may be used to settle potential disputes through negotiation, mediation or other settlement.
3. However there will be some cases before the Court of Protection that raise fundamental issues for the client which will require Legal Representation at a formal hearing. For example, important cases concerning decisions over the giving or withholding of medical treatment in respect of people who lack capacity to consent to that treatment, which prior to the 2005 Act would have been heard under the inherent jurisdiction of the High Court, and which will now be heard by the Court of Protection.
4. The Court of Protection is a superior court of record but is not part of the High Court. Therefore advocacy bought before the Court of Protection is not within the scope of Schedule 2 to the Access to Justice Act 1999. However, the Lord Chancellor has issued an authorisation under section 6(8) of that Act bringing certain cases before the Court of Protection within the scope of CLS funding. This authorisation captures many of the cases that, prior to the 2005 Act, would have been heard in the High Court for which CLS funding has always been available. The text of the authorisation is at 28.2 below and the guidance on its application is at 28.3. Guidance on costs and procedures in relation to applications for Legal Representation before the Court of Protection is at 28.4.
5. Note that the main purpose of the Authorisation at 28.2 is to provide for Legal Representation and Help at Court in the Court of Protection as it is primarily advocacy services which are excluded by Schedule 2. The Authorisation refers to Legal Help to ensure that such help is also available in any cases that might otherwise be excluded from funding under paragraph 1 of Schedule 2, for example, because they concern trust law. In the great majority of cases however, there are no specific restrictions on the availability of Legal Help. Legal Help is generally

available in relation to issues before the Court of Protection and is not limited to cases meeting the tests set out in the Authorisation.

6. If Legal Representation is required for an individual case before the Court of Protection that falls outside the authorisation below, an application can be made for exceptional funding in accordance with section 27 of this guidance.

28.2 Text of the Lord Chancellor's authorisation

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1. This is an authorisation by the Lord Chancellor under section 6(8) of the Access to Justice Act 1999 ("the Act"). It authorizes the Legal Services Commission ("the Commission") to fund, in the circumstances specified below, services generally excluded from the scope of the Community Legal Service Fund by Schedule 2 to the Act.
2. References in this authorisation to which services the Commission may fund are to the levels of service defined in those terms in the Commission's Funding Code ("the Code").
3. All applications under this authorisation remain subject to the relevant regulations under the Act and all relevant criteria in the Code.
4. The Lord Chancellor authorizes the Commission to fund Legal Help, Help at Court and Legal Representation in relation to proceedings or potential proceedings before the Court of Protection in the circumstances specified below.
5. The circumstances are where:
 - (i) the proceedings fall within paragraph 6 below AND
 - (ii) the Court has ordered or is likely to order an oral hearing at which it will be necessary for the applicant for funding to be legally represented.
6. The proceedings specified in paragraph 5 above are those which, in relation to the person whose personal welfare is the subject of the proceedings, concern that person's:
 - Life;
 - Liberty;
 - Physical safety;
 - Medical treatment (including psychological treatment);
 - Capacity to marry or enter into a civil partnership;
 - Capacity to enter into sexual relations; OR
 - Right to family life.
7. The Lord Chancellor authorises the Commission to fund Legal Help in relation to the making of Lasting Powers of Attorney and advance decisions where the client is:
 - (a) aged 70 or over; or
 - (b) a disabled person within the meaning of section 1 of the Disability Discrimination Act 1995.

28.3 Funding Criteria

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1. Paragraph 5 of the authorisation above sets out two substantive tests for bringing a case before the Court of Protection within the scope of CLS funding. The first test is whether the case concerns one or more of the issues listed in paragraph 6 of the authorisation in relation to the person (referred to in the guidance below as "P") whose personal welfare is the subject of the proceedings. This will be the person who lacks or is alleged to lack capacity to make important decisions on their own behalf. The second test is whether it is necessary for the applicant for funding to be represented at an oral hearing. The wording of the authorisation makes it clear that funding can extend not just to "P" himself or herself but sometimes for other parties, such as "P's" immediate family, provided all other relevant criteria are satisfied.

2. Since the authorisation is intended to capture the serious health and welfare cases that would previously have been considered by the High Court under its inherent jurisdiction, the Commission will take into account case law on that jurisdiction in deciding whether a case comes within the authorisation.
3. Examples of medical treatment cases that would fall within the authorisation include:
 - (a) Where it is proposed to withdraw artificial nutrition and hydration from a patient in a permanent vegetative state - see, for example, *Re Airedale NHS Trust –v- Bland* [1993] AC 789.
 - (b) Where the issue is withdrawal or withholding of life sustaining treatment, where the legality of so doing is in doubt - see *R (Burke) –v- GMC & Others* [2005] EWCA 1003.
 - (c) Where the issue is whether to sterilise a person for contraceptive purposes when they cannot give consent - see *Re S (Sterilisation)* [2000] 2 FLR 389.
 - (d) Certain termination of pregnancy cases - see *D –v- An NHS Trust* [2003] EWHC 2793 (Fam).
4. The guidance of the Official Solicitor in Official Solicitor Practice Note of 28 July 2006 on *Declaratory Proceedings: Medical & Welfare Decisions for Adults Who Lack Capacity* [2006] 2 FLR 373, says that, in general, any serious treatment decision where there is a disagreement between those involved and those close to P, where the treatment proposed may involve the use of force to restrain P or otherwise may be resisted by P or where there are doubts and difficulties over the assessment of either the person’s capacity or best interests should be referred to the court. Many, but not all, cases within that guidance will also come within the terms of the authorisation.
5. The authorisation is not limited to cases concerning medical treatment. One of the provisions of the Mental Health Bill 2006 amends the Mental Capacity Act 2005 to provide legal safeguards for those vulnerable people (who do not fall within the provisions of the Mental Health Act) who are deprived of their liberty, to prevent arbitrary decisions to deprive a person of their liberty and to give rights of review - see the Bournemouth case (HL v UK ECtHR, 5th October 2004). In the meantime, applications to the Court of Protection which involve decisions which would have the effect of depriving a person who lacked capacity to consent of their liberty would come within the scope of this authorisation.
6. Many welfare cases concern accommodation issues which will not as such fall within the scope of the authorisation. However accommodation cases will be within scope where they concern P’s family life. This is likely to be the case where either the issue is whether or not P should remain with his or her family or where a change of accommodation would have a serious impact on contact between P and his or her family. Cost Benefit criteria may also be an important consideration in such applications.
7. The second limb of the authorisation requires that the applicant would need to be represented at an oral hearing. Under the Court of Protection Rules 2007, the Court has the discretion as to whether to hold an oral hearing to decide the application before it and will give directions on whether an oral hearing is required during proceedings. In the most urgent and important cases Legal Representation may be granted before the Court has made any determination on whether to direct an oral hearing, whilst in other cases it may be appropriate to await what directions the Court makes before a decision on the need for representation is made. However in practice many cases within paragraph 6 of the authorisation will be those for which an oral hearing is likely to be directed by the Court. If Legal Representation were granted but the Court subsequently directed that an oral hearing was not required consideration would be given to discharge of the certificate.

8. In considering whether it is necessary for the applicant to be represented at an oral hearing it will often be necessary for P to be legally represented as well as represented by a litigation friend where the Court has directed that “P” should be a party but this is less likely to be true of any other parties. Typically applicants will include close family members of “P” or others with a lasting or enduring power of attorney or who have been appointed as deputies under the 2005 Act. In deciding whether it is necessary for parties to be represented we will take into account all the circumstances, in particular:
 - (a) The applicant’s connection with “P” and hence their interest in the proceedings
 - (b) The submissions that the applicant proposes to make, and whether oral advocacy as opposed to written submissions is the best means of putting that case to the Court
 - (c) All other parties that are likely to be before the Court and the submissions they are expected to make
 - (d) Any directions or indications given by the Court
 - (e) Whether or not the proceedings are being brought by a Local Authority or NHS body and whether or not they are being heard by a High Court Judge.
9. In general the Commission will only grant Legal Representation if the applicant wishes to put forward a new and significant argument which would not otherwise be advanced. As a rule there should not be more parties separately represented before the Court than there are either cases to put or desired outcomes.
10. Cases which come within the authorisation must still satisfy all relevant merits criteria in the Funding Code. Cases before the Court of Protection are likely to be considered under the general Funding Code. The most important criteria will often be prospects of success. Many (but not all) of the cases which come within paragraph 6 of the authorisation also fall within the test of ‘Overwhelming Importance to the Client’ as defined in section 2.4 of the Funding Code. For cases of overwhelming importance to the client the requirement is to have at least borderline prospects of achieving the outcome desired by the applicant. For this purpose in relation to applications on behalf of the family of “P” the issues will be treated as of overwhelming importance to the applicant if they are of overwhelming importance to “P”.
11. Cost benefit will be an important consideration in many cases before the Court of Protection. All costs will be subject to the Private Client Test at Code Criterion 5.7.4 – see guidance on the test at section 4.8 of this guidance. Cost benefit is unlikely to be an issue in medical treatment cases, especially for P. It is recognised that parties other than P may well have no direct and tangible interest or benefit other than the desire to secure the best outcome for P. This interest will be taken into account under the private client test but in all cases the likely costs must be proportionate to the importance of the issues to the applicant.

28.4 Costs and Procedures

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1. All applications for Legal Representation before the Court of Protection should be made to the Commission’s Mental Health Unit, which is based in our Nottingham and Liverpool offices. This includes both cases coming within the authorisation and cases appealing from that Court to the Court of Appeal or House of Lords which would, in any event, be within the scope of CLS funding. Exceptional funding applications for cases in the Court of Protection outside the authorisation should be made to the Special Cases Unit in London in the normal way.
2. Cases before the Court of Protection are subject to the usual financial eligibility rules for CLS funding. Neither the Lord Chancellor nor the Commission have any powers to waive eligibility levels or contributions in such cases.

3. When Legal Representation is granted for proceedings in the Court of Protection the remuneration rules applied will be those applicable to proceedings in the High Court.
4. All proceedings in the Court of Protection will be treated as falling within the Mental Health category, although many cases will on their facts fall within other categories such as Clinical Negligence, Community Care or Family. If a case falls into any other category it may be undertaken by a firm with an SQM either in that category or in the Mental Health category. When a case falls only in the Mental Health category it may only be undertaken by a firm with a Mental Health SQM.
5. In urgent Court of Protection cases firms with devolved powers to grant emergencies certificates within their SQM category may do so, for example where there is an urgent need to protect P from harm, but if in doubt should seek advice from the Commission's Mental Health Unit (referred to above).
6. Certificates granted in Court of Protection cases will contain appropriate stage and cost limitations but in particular should carefully be reviewed when the Court has given directions for the disposal of the case.
7. Under section 49 of the Mental Capacity Act 2005 the Court of Protection has a general power to call for reports to assist in any question relating to P. Such a report, which may be made by the Public Guardian, a Court of Protection Visitor, a local authority or NHS body, may help the Court in determining whether an oral hearing is needed. Reports under section 49 are not an allowable disbursement under Legal Help. Where Legal Representation is in force a proportionate share of the cost of the report may be an allowable disbursement if such costs could be charged to the client in the absence of legal aid.
8. The following wordings are available for proceedings before the Court of Protection:
 - (i) MH021 Court of Protection Medical - To be represented in proceedings before the Court of Protection in relation to medical treatment issues;
 - (ii) MH022 Court of Protection Non-Medical - To be represented in proceedings before the Court of Protection in relation to issues other than medical treatment.

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28.5 Lasting Power of Attorney/Advance Decisions

1. Sections 9 to 14 of the 2005 Act and Schedule 1 create a new statutory form of power of attorney, the "lasting power of attorney" (or LPA) which is capable of being made in respect of both property and financial affairs and personal welfare matters. This replaces the "enduring power of attorney" (or EPA) provided for by the Enduring Powers of Attorney Act 1985. Only EPAs made before April 2007 will be capable of being registered by the Public Guardian after April 2007.
2. Sections 24 to 26 of the 2005 Act address advance decisions to refuse medical treatment (Advance Decisions), codifying and clarifying the common rules that have developed in relation to such decisions.
3. Amendments made by the 2005 Act (at Schedule 6, paragraph 44) to Schedule 2 to the Access to Justice Act 1999 provide that Legal Help may not be given in relation to the creation of a lasting power of attorney or the making of an Advance Decision.
4. However, Legal Help may be appropriate in some circumstances in relation to an application or proposed application to the Court of Protection under sections 22 or 23 of the 2005 Act concerning questions about the validity or operation of lasting powers of attorney. Similarly, it may in some cases be appropriate to provide Legal Help concerning questions under section 25 of the 2005 Act about the validity and applicability of Advance Decisions.
5. Further, under paragraph 7 of the Lord Chancellor's Authorisation, Legal Help in relation to the making of an LPA or an Advance Decision is brought into scope of funding where the client is aged 70 or is a disabled person within the meaning of section 1 of the Disability Discrimination Act 1995. Legal Help should only be provided, however, where there is sufficient benefit to the client in terms of their

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financial circumstances or potential decisions concerning medical treatment or other welfare matters.