



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER
ON
LAW AND THE ELDERLY

(LRC CP 23 - 2003)

IRELAND

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THE LAW REFORM COMMISSION

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The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published seventy Reports containing proposals for reform of the law; eleven Working Papers; twenty two Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty three Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix A to this Consultation Paper.

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INTRODUCTION

1. Increased longevity and the increase in the numbers of people living to advanced age should be regarded as a triumph and a cause for celebration. However, as with most human achievements, it may give rise to problems. Elderly people require support from income maintenance, health, housing and personal social services. The Law Reform Commission is conscious that the elderly constitute a significant and growing group who may also need specific support and protection from the legal system.¹ While the majority of elderly people do not need any special legal support or protection, there is a significant minority who, because of illness or disability, impaired mental capacity or social and economic dependency do need protection. They may require protection from physical or mental abuse. They may need protection from misuse of their money or property. At some stage they may need help with making decisions and ultimately may need a substitute decision maker. This is a matter of interest to everyone and not just to the current generation of elderly people – any one of us could become a vulnerable adult in need of protection. This Consultation Paper is concerned with legal mechanisms for the protection of such vulnerable elderly people.

2. We should emphasise at an early stage of the Paper that old age is only one of the reasons why a person may be vulnerable. To take other obvious examples, one may be vulnerable because of youth coupled with the effective absence of parents or guardian; or because of a lack of mental or physical capacity, whether this condition is congenital or due to some accident or illness. To a considerable degree the legal responses to these difficulties draw on a common stock of rules and concepts, most obviously the wards of court system, which may apply to an orphan or anyone who is incapacitated

¹ They may be susceptible to financial advantage being taken of them by the unscrupulous or even by the well-meaning acting in ignorance of their genuine welfare needs and entitlements.

as a result of a serious accident. The law in relation to capacity to make a will could apply to any of these people; though in fact most of the case law concerns elderly testators. Nevertheless, in this paper the focus is on the law in relation to the elderly. This is a wide-ranging and important topic, and to digress in respect of the young and incapable would have involved such particular areas as education or parental duties. But while we have concentrated on the elderly, it goes almost without saying that, as will become clear, the law in this area has created a common shelter under which many citizens may take refuge. In addition, while the improvements which we recommend are made with elderly people in mind, they are also relevant to other adults with decision making disabilities or who are otherwise in need of protection. The Commission has not analysed the issues involved for other adults but considers that the proposed new system could be adapted to their needs without much modification.

3. The substantial growth in the numbers of elderly people both in absolute and relative terms over the past ten years and the projected growth over the next thirty years are well documented.² There were approximately 430,000 people aged 65 and over living in Ireland in 2001.³ This is just over 11% of the total population. The majority of those aged 65 and over are women – 56.7%. The numbers have been projected to grow by nearly 108,000 in the period 1996-2011. It is expected that there will be approximately 840,000 people aged 65 and over in 2031, that is more than twice as many as in 1996. By 2011, it has been estimated that those aged 65 and over will constitute just over 14% of the total population and that proportion could be between 18% and 21% by 2031. However, these projections were based on the assumption that the overall population would not grow. Preliminary results from the 2002 Census show that this is not the case – in fact, the overall population grew by 8% between 1996 and 2002. This does not invalidate the projections for the absolute numbers but it suggests that older people will not

² Central Statistics Office, 1996 Census; Census 2002 Preliminary Report www.cso.ie; Fahey *Health Service Implications of Population Ageing in Ireland, 1991-2011* (National Council for the Elderly 1995).

³ The figures in this paragraph were taken from the National Council on Ageing and Older People's *Demography – Ageing in Ireland Fact File 1*. Available at <http://www.ncaop.ie/FF1demography.pdf>.

constitute such a high proportion of the total population. Just over 21% of older people are aged 80 years or over. It is expected that this will have increased to almost 25% by 2011.

4. Research carried out by the National Council on Ageing and Older People provides us with a reasonably comprehensive view of the life and lifestyle of elderly people in Ireland.⁴ This research shows that the vast majority of people over 65 live independently in their own homes and want to continue to do so.⁵ They consider their quality of life to be good or very good.⁶ Some need help with the tasks of everyday living and a relatively small proportion of them had major difficulties or were severely impaired in carrying out those tasks.⁷ This help and support comes mainly from family and neighbours and the social services provided by the health boards. Clearly elderly people who are dependent on others for help in daily living or for financial support are vulnerable – particularly where they may have no means of communicating that vulnerability – and may need specific legal supports.

5. Only about 5% of elderly people are in long stay care.⁸ It is clear that elderly people often want to remain at home but it is also clear, and officially accepted, that there are not enough long stay care places for people who need them⁹. Admission to long stay public care requires an element of dependency.¹⁰ Private nursing homes

⁴ See www.ncaop.ie/researchpub/index.htm for a list of published material.

⁵ See Garavan *et al* *The Health and Social Services for Older People* (HeSSop Report) (The National Council on Ageing and Older People 2001). The majority of people surveyed (87%) wished to continue to live in their own homes.

⁶ *Ibid* at 16.

⁷ *Ibid*.

⁸ National Council on Ageing and Older People's *Demography – Ageing in Ireland Fact File 1* available at <http://www.ncaop.ie/FF1demography.pdf>.

⁹ See Department of Health and Children *Quality and Fairness – A Health System for You – The 2001 Health Strategy* (Department of Health and Children 2001). www.doh.ie/publications/strategy.html.

¹⁰ The rules in relation to admission to long stay public care are not clear. The legislation does not deal with the issue but health board guidelines do. See Mangan *Older People in Long Stay Care* (Human Rights Commission 2003) at 25.

may admit any person but, in order to qualify for a financial subvention from the health board, a resident must be a dependent.¹¹ As the population ages and people live longer it is likely that the proportion of people in long stay care will increase and their levels of dependency are likely to be greater. The inspection system for all long stay care is inadequate¹² and the needs of the elderly residents for protection or substitute decision making on their behalf and in their interest may never be addressed.

6. Vulnerable older people are covered by the law in relation to crime, tort, domestic violence, breach of trust and other relevant areas in exactly the same way as other people, but the exercise of their rights under the law may not always be practicable. In some jurisdictions, there are separate laws dealing with protection from abuse on the one hand and substitute decision making procedures on the other. This paper deals with both these aspects of protection and the Commission is of the view that both should be dealt with in an integrated way.

7. Concern about elder abuse has been increasing in recent years. Preliminary research was published in Ireland in 1998.¹³ The Working Group on Elder Abuse was established to advise the Minister for Health and Children on what is required to address effectively and sensitively the issue of elder abuse. The Working Group reported in September 2002.¹⁴ Among the issues addressed by the Working Group was the question of changes which may be necessary in legislation and legal procedures to protect the elderly. The Working Group recommended that “the response to elder abuse

¹¹ Dependent person is defined in section 1 of the *Health (Nursing Homes) Act 1990* as “a person who requires assistance with the activities of daily living such as dressing, eating, walking, washing and bathing by reason of - (a) physical infirmity or a physical injury, defect or disease, or (b) mental infirmity”.

¹² Mangan fn 10 *op cit* at 27.

¹³ O’Loughlin and Duggan *Abuse, Neglect and Mistreatment of Older People: An exploratory study*, National Council on Aging and Older People (1998) at

http://www.ncaop.ie/researchpub/intros/Intro_52_Abuse.pdf.

¹⁴ Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002). Available at <http://www.doh.ie/pdfdocs/pof.pdf>.

be placed in the wider context of health and social care services for older people.”¹⁵ The Commission agrees with this recommendation. While this Consultation Paper is primarily concerned with the legal mechanisms and responses which are required to protect the elderly, these must be seen in the context of health and social care services because the protection of vulnerable elderly people cannot be guaranteed by legal mechanisms alone, and the need for protection would be considerably reduced if adequate health and social care services were available.

8. There is evidence from a small number of court cases and considerable anecdotal evidence from legal and social service personnel that elderly people are vulnerable to financial abuse. The increasing depersonalisation of financial services delivery – the closure of local post offices and local bank branches and the promotion of automated and internet banking – means that there is little protection for vulnerable elderly people who need assistance with their banking arrangements. Concerns have also been raised about financial institutions promoting arrangements which involve older people using their homes as the security on which to raise funds for younger family members.¹⁶ Such arrangements may be entirely appropriate and may be socially desirable but there is always a danger that they may involve exploitation of vulnerable older people. There does not seem to be much evidence that financial institutions have addressed the problems which could arise for their elderly customers. Widespread concerns about the pressures which may be put on the susceptible elderly by such arrangements have been expressed to the Commission.

9. Many of the elderly people with whom this paper is concerned could also be categorised as people with disabilities. The increased concern with the rights of people with disabilities, the need for societal adjustments to enable their social inclusion and the debate on the proposed *Disability Bill 2001* have all contributed to the discussion in this paper. The Disability Legislation Consultation Group adverted to the need for separate legislation (separate from the

¹⁵ Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002) at paragraph 2.1.

¹⁶ “Old People should be wary of reversions scheme, warns Age Action”, see www.ageaction.ie.

proposed Disability Bill) “to identify the competence of vulnerable adults and particularly adults unable to make decisions on their own behalf, to provide protection for those who lack competence”.¹⁷

10. The issues which are addressed in this paper have been examined in detail in a number of other jurisdictions – notably the England and Wales, Scotland, New Zealand, Hong Kong and the provinces, states and territories of Canada and Australia. Most have modernised their substitute decision making laws and some have introduced intervention mechanisms to deal with abused adults. This paper draws on their experiences of law reform.

11. Chapter 1 addresses the issue of general legal capacity. Some of the existing legal mechanisms are relevant only to people who do not have legal capacity. There are considerable difficulties in assessing legal capacity especially in cases where there is a gradual impairment of that capacity. The question of assessing legal capacity usually arises in a specific context, for example, the capacity to make a will or the capacity to marry and the assessment is specific to the issue. The assessment of general legal capacity arises less frequently and is more difficult. Who should assess capacity is also a major issue. In some jurisdictions, this is always done by a Court but in others, notably the various Australian jurisdictions, a tribunal is the preferred forum.

12. Chapter 2 examines the legal capacity required to make a will and makes recommendations for the better protection of elderly people from inappropriate and improper influence. Chapter 3 gives a brief description of the Enduring Powers of Attorney (EPA) legislation and discusses a number of issues which have arisen in relation to it. The EPA system is a relatively recent legal initiative which provides for substitute decision making. The EPA procedure only applies in cases where people have the foresight to put the procedure in place. So far, the system has not been very widely used.

¹⁷ Disability Legislation Consultation Group *Equal Citizens – Proposals for Core Elements of Disability Legislation* (Disability Legislation Consultation Group 2003) at Part IV.

Available at:

www.nda.ie/CntMgmt.nsf/Category/ED016DCF05B653CB80256C790068FD6E?OpenDocument at 32.

There is no supervision system in place to ensure that attorneys appointed under the legislation carry out their functions in the appropriate manner.

13. Chapter 4 describes the Wards of Court system which is an old mechanism for substitute decision making. It uses language and concepts that are now inappropriate. The Wards of Court procedure is generally considered by practitioners and people concerned with the care of elderly people to be too cumbersome, expensive and outdated. It is also an all-or-nothing approach and does not take account of the variations in decision making ability. Much of the system evolved before modern developments in understanding of mental illness and intellectual disability and it has no formal connection with the health and social and personal care services. While it does allow for substitute personal and health decisions, there is a perception that it is concerned largely with property.¹⁸

14. Chapter 5 describes the general legal mechanisms which are available to protect elderly people who are vulnerable to, or are subjected to, financial or physical abuse. The current systems in place for the protection of people who need help with financial transactions are inadequate. The role of the financial institutions in protecting their customers from improper access to their accounts and from undue pressure to support the younger generation is examined. Elderly people or their successors may apply for equitable remedies in order to set aside property transactions which have been entered into under undue influence or which are improvident. In practice, these remedies are not often used by elderly people – people who have been subjected to undue influence are unlikely to be in a position to try to seek redress. Establishing undue influence is onerous and each case has to be examined in detail and, of course, the anxiety and the costs involved are considerable. The general domestic violence legislation is also available to older people living with certain relatives but, again, there are practical problems. There is provision for health boards to initiate applications for barring, safety and protection orders on behalf of people who are unable, for

¹⁸ The website of the Courts Service says that the principal purpose of wardship is “to protect the property of the ward and to manage it for his benefit and that of his dependants.”

www.courts.ie/Home.nsf/LookupPageLink/Courts+Opening

various reasons, to initiate proceedings themselves. This legislation is generally used by or on behalf of spouses and children and does not seem to have been widely used by or on behalf of vulnerable older people.

15. Elder abuse is not confined to people who lack legal capacity yet the Wards of Court system is only available to protect abused elderly people who do not have legal capacity. There is no provision for intervention to protect an elderly person who is legally competent but is considered to be at risk and who is unable personally to initiate proceedings. Similarly, the involuntary detention provisions of the Mental Health legislation apply only to people who suffer from a mental disorder as defined and who would benefit from psychiatric treatment.¹⁹

16. Chapter 6 sets out the Commission's proposals for a new system of protection for vulnerable adults. The proposed system takes account of the need to ensure the dignity of elderly people and the vindication of their human and constitutional rights. The proposals involve co-ordination between the new system and the health and social services and are designed to provide usable mechanisms which will be accessible by all. Against this background, the proposed system involves a substitute decision making mechanism to be called Guardianship and a personal protection mechanism involving intervention orders, services orders and adult care orders. There is a proposed new Office of the Public Guardian which would have a wide supervisory role as with an Ombudsman and also with an advocacy role on behalf of vulnerable elderly people. A new Tribunal is also proposed to supervise the Office of the Public Guardian, and to determine issues of capacity. The proposed new system itself will require funding but the more significant resource implications will arise from the requirement to provide the social and personal care services which may be required by the elderly people concerned.

17. The Commission invariably publishes in two stages: first, the Consultation Paper and then the Report. The Paper is intended to

¹⁹ *Mental Health Act 2001*. In fact, the relevant sections of this Act are not yet in force and involuntary detention is still governed by the *Mental Treatment Act 1945*.

form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation, including a colloquium attended we hope by a number of interested and expert people (details of the venue and date of which will be announced later). Submissions on the provisional recommendations included in this Consultation Paper are also welcome. Secondly, the Report also gives us an opportunity which is especially welcome with the present subject not only for further thoughts on areas covered in the Paper, but also to treat topics, not yet covered. In order that the Commission's final Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing to the Commission by **30 September 2003**.

CHAPTER 1 LEGAL CAPACITY

A Introduction

1.01 A finding that a person lacks legal capacity results in the restriction or removal of fundamental human rights. For this reason, the definition of legal capacity, how it is assessed and who carries out the assessment are all very important issues. There are undoubted problems in defining what constitutes legal capacity and further problems in assessing whether or not a particular person has such capacity. The existing legislation¹ dealing with general mental capacity to do things does not define what exactly is required. There is some legislation on what constitutes mental disorder² but this deals with specific situations. Many of the cases dealing with the issue do so in a specific context – for example, capacity to make a valid will,³ capacity to marry,⁴ capacity to engage in litigation,⁵ capacity to give consent to medical procedures.⁶ Capacity to make a will or to marry is often assessed retrospectively while capacity to consent to medical procedures or to engage in litigation may have to be assessed either in the present or retrospectively. The Ward of Court system⁷ and the Enduring Power of Attorney (EPA) scheme⁸ require that legal competence be assessed in general, in the present and for the future. In this chapter, the law on legal capacity in general and in some

¹ The Wards of Court and Enduring Powers of Attorney legislation which are described in Chapters 3 and 4.

² The *Mental Health Act 2001* defines mental disorder for the purposes of that legislation – see paragraph 1.29.

³ *Bankes v Goodfellow* [1870] LR 5 QB 549.

⁴ *Durham v Durham* (1885) 10 PD 80.

⁵ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889.

⁶ *In Re C* [1994] 1 WLR 290.

⁷ See Chapter 4 for a discussion of this jurisdiction.

⁸ See Chapter 3 for a discussion of this legislation.

specific contexts is examined. Options for the method of assessment of legal capacity and the forum for that assessment in the context of the proposed new protection system for vulnerable adults⁹ are set out.

1.02 The Commission would like to emphasise that our focus is on incapacity, whether it derives from physical or mental effects. In the nature of things the source is normally mental since if it is physical an ordinary power of attorney under section 16 of the *Powers of Attorney Act 1996* would suffice. However, we do wish to emphasise that we are not confining the scope by reference to the source of the incapacity, not least because this might throw up unnecessary and undesirable questions of characterisation.

1.03 A number of different words and phrases are used to describe people who do not have legal capacity. People are variously described in Irish or other legislation as being *incompetent, mentally incapable, mentally disordered, dependent, and of unsound mind*. Recent Irish Mental Health legislation¹⁰ recognises various categories of “mental disorder” including intellectual disability, but this is concerned with people who may benefit from psychiatric care and not with legal capacity. Nevertheless, mental disorder as defined under the mental health legislation may be an indicator of lack of legal capacity. The EPA legislation uses the term “mental incapacity”. The *Criminal Law Insanity Bill 2002*¹¹ deals with unfitness to plead which may be regarded as a form of lack of legal capacity. Mental incapacity or mental disorder do not, in themselves, mean that a person is legally incapacitated but they may provide convincing evidence of legal incapacity.¹²

1.04 Minors lack legal capacity by operation of law but the concern here is with adults whose legal capacity is in question. Generally, elderly people whose legal capacity is in question did once have such capacity but it has been restricted, impaired or lost because they are suffering from a degenerative illness (for example, Alzheimer’s disease) or neurological damage. They may suffer a

⁹ Which is detailed in Chapter 6.

¹⁰ *Mental Health Act 2001*.

¹¹ This Bill is currently going through the Oireachtas.

¹² Here, the terms “legal capacity” and “legal incapacity” are used in the strict sense of being considered legally capable or incapable of a particular function or of general functions.

gradual decline in capacity or there may be a sudden onset due to injury. The line between legal capacity and incapacity is not easy to define. It is possible to identify the extreme stage of lack of legal capacity (person in a coma) but there are varying degrees of impaired, restricted or diminished capacity. As was pointed out many years ago by Cranworth LJ: “[Th]ere is no possibility of mistaking midnight for noon, but at what moment twilight becomes darkness is hard to determine”.¹³

B Issue Specific Capacity

1.05 In a recent decision of the English Court of Appeal, *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies*,¹⁴ Kennedy LJ reviewed the development of the law on legal capacity. The central issue in the case was whether or not the claimant was a “patient” within the meaning of the *Mental Health Act 1983* – that is, “a person who by reason of mental disorder within the meaning of the Act, is incapable of managing and administering his property and affairs”.¹⁵ In summary, from this case and others on specific capacity quoted below, the law can be stated as follows:

- Adults are presumed to have legal capacity unless the contrary is proved.¹⁶
- The onus of proving that an adult does not have legal capacity rests on the person asserting this.¹⁷
- It had generally been considered that there was also a presumption of continuance of incapacity.¹⁸ Kennedy LJ did not accept this to be the case.¹⁹ He was of the opinion that if incapacity is established at a particular point, there is no presumption that it has continued. He stated, “If there is clear

¹³ *Boyse v Rossborough* 6 HLC 1 45. This metaphor was originally coined to distinguish good and doubtful title to land.

¹⁴ *Masterman Lister v Brutton & Co* [2002] EWCA Civ 1889.

¹⁵ Section 94(2) *Mental Health Act 1983*.

¹⁶ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 17.

¹⁷ *Ibid.*

¹⁸ Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley’s 2003) at D1.3; see quote from Casey and Craven at paragraph 2.15 in relation to testamentary capacity.

¹⁹ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 17.

evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity.”²⁰ However, the onus of proving that an otherwise incapacitated person has had a “lucid interval” rests with the person asserting this.²¹

The capacity required by the law is capacity in relation to the transaction which is to be effected, that is, it is issue specific. What is required is the capacity to understand the nature of the transaction when it is explained.²²

1.06 Issue specific capacity means that there are different tests for capacity in relation to making a will, consenting to medical treatment and other decisions. These are mainly derived from common law. A decision on legal capacity in relation to one issue does not necessarily mean that the same decision will be given in relation to a different issue. For example, a litigant in personal injuries proceedings may have the capacity to deal with the issues up to and including a decision on whether or not to settle but may not have the capacity to manage the proceeds of the resulting settlement. This should not prevent a person from pursuing and deciding on the legal proceedings, but that person may subsequently have to be taken into wardship.²³ The issue specific assessment of capacity has been categorised by the Law Commission of England and Wales as the “functional approach”.²⁴

C Capacity to Make a Gift

1.07 The leading case on capacity in respect of gifts is *In Re Beaney, deceased*.²⁵ This involved a gift of a house to a daughter by a woman suffering from advanced dementia. In this case, it was held:

²⁰ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 17.

²¹ See paragraphs 2.14 – 2.18 below.

²² *In Re C* [1994] 1 WLR 290, 295, approved by Chadwick LJ in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 60.

²³ Or guardianship in accordance with the proposals outlined in Chapter 6.

²⁴ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.3.

²⁵ [1978] 1 WLR 770.

“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 will the degree required is always high. In the case of a contract, a deed made for consideration or 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 of the potential donees and the extent of the property to be disposed of.”²⁶

D Capacity to Consent to Medical Treatment

1.08 There does not seem to be any reported case where the capacity to consent to medical treatment was considered in Ireland. In the English case of *In Re MB*²⁷ Butler Sloss LJ outlined the general principles for assessing capacity to consent to medical treatment:

“A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or refuse treatment. That inability to make a decision will occur when:

(a) the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having, or not having, the treatment in question;

(b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision”²⁸

²⁶ *Ibid* at 774.

²⁷ [1997] 2 FLR 426.

²⁸ [1997] 2 FLR at 437.

It was also held that the capacity required for medical consent must be commensurate with the gravity of the decision.²⁹

1.09 It seems to be accepted in Ireland that a person who is made a ward of court lacks the capacity to give consent to medical treatment by virtue of the status of ward.³⁰ However, if the ward were to challenge this, the outcome might be different in that the issue may be decided on an issue specific basis. In the English case of *In re C (Adult: Refusal of treatment)*,³¹ the court held that the person who was a patient³² under the *Mental Health Act 1983* nevertheless had the required capacity to refuse to have a gangrenous leg amputated:

“Although his general capacity is impaired by schizophrenia, it has not been established that he does not sufficiently understand the nature, purpose and effects of the treatment he refuses. Indeed, I am satisfied that he has understood and retained the relevant treatment information, that in his own way he believes it, and that in the same fashion he has arrived at a clear choice.”³³

1.10 In Ireland (and in many other jurisdictions), the involuntary admission of patients for psychiatric treatment results in the removal of the need for consent to those treatments.³⁴ This does not necessarily mean that the people concerned do not have legal capacity to make decisions on treatment which is not related to their psychiatric care.

²⁹ *Ibid.*

³⁰ See Chapter 4, paragraph 4.49-4.51.

³¹ [1994] 1 ALL ER 819.

³² This is broadly similar to a ward of court under Irish legislation.

³³ *Op cit* footnote 31 at 824.

³⁴ Under the *Mental Treatment Act 1945* it appears that consent is not required for the treatment of involuntary patients. On this point see Casey and Craven *Psychiatry and the Law* (Oak Tree Press 1999) at 501-504. The 1945 Act will be updated by the *Mental Health Act 2001*. Under the 2001 Act the consultant psychiatrist cannot treat a patient without consent except where the patient is incapable of consenting, and they consider the treatment necessary for the best interests of the patient. However, psycho-surgery and electro-convulsive therapy cannot be administered without the sanction of the Mental Health Commission/Tribunals. The 2001 Act is not yet fully operative.

E Capacity to Execute an Enduring Power of Attorney

1.11 The capacity required to execute an Enduring Power of Attorney (EPA) was considered in *In re K*.³⁵ The Master of the Court of Protection had refused to register an EPA on the ground that the donor, although capable of understanding the nature of the power at the time of execution, was herself incapable by reason of mental disorder of managing her property and affairs at the time that. On appeal from this decision, it was held:

“...there is no logical reason why, though unable to exercise her powers, [the donor] could not confer them upon someone else by an appropriate juristic act. The validity of that act depends on whether she understood its nature and effect and not on whether she would hypothetically have been able to perform all the acts which it authorised.”³⁶

1.12 In effect, the donor may have the capacity to execute the power even though the donor lacked the capacity to do what the attorney was being asked to do under the order. The Court set out what the donor needed to understand when executing an EPA:

“First (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor’s affairs. Secondly (if such be the terms of the power) that the attorney will in general be able to do anything with the donor’s property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.”³⁷

1.13 The Commission is not aware of any cases where the issue of capacity arose at the registration³⁸ of the EPA. The considerations

³⁵ *In Re K (Enduring Powers of Attorney), In re F* [1988] Ch 310.

³⁶ *Ibid* at 315.

³⁷ *Ibid* at 316. It should be noted that, in England, unlike in Ireland, a medical certificate of the donor’s capacity is not required when an EPA is being executed.

³⁸ See paragraph 3.19 for the circumstances in which the registration of an EPA arises.

would be different – the issue would be did the donor have the capacity to make personal and health care decisions and deal generally with their affairs.

F General Legal Capacity

1.14 The registration of an EPA and the Wards of Court systems require that an assessment be made about a person’s general capacity to manage their person and property. The Commission is not aware of any Irish Court decisions where the assessment of capacity in these contexts has been analysed – as is pointed out in paragraph 4.24, there are very few objections to wardship proceedings so the necessity to consider capacity rarely arises. There are cases from other jurisdictions which involve a similar assessment but they are remarkably short on analysis of the criteria for making the assessment. A leading English authority has stated:

“Until the recent decision in ... *Masterman-Lister v Brutton & Co* there was a remarkable shortage of information about the criteria for assessing whether someone is mentally capable of managing and administering his or her property and affairs. This is particularly surprising since it is the cornerstone of the Court of Protection’s jurisdiction under both the *Mental Health Act 1983* ... and the *Enduring Powers of Attorney Act 1985*.”³⁹

1.15 In *Masterman-Lister v Brutton & Co*,⁴⁰ having examined some of the tests in relation to specific decisions, Kennedy LJ approved the following formulation submitted by counsel for the *amicus curie* to determine the question of general capacity to manage:

“...a person’s ability to manage his or her property and affairs requires an ability to make and communicate, and where appropriate give effect to, all decisions required in relation to them. So the mental abilities required include the ability to recognise a problem, obtain and receive,

³⁹ Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley’s 2003) at D1.35; the cornerstones of the Irish Wards of Court and EPA systems are slightly different to those mentioned, but the assessment required is broadly similar.

⁴⁰ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889.

understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision.”⁴¹

1.16 It is recognised that very few people have the ability to manage all of their affairs without some assistance. In a case involving the capacity to litigate, Boreham J made this point and went on to say that the question was:

“...is she capable of doing so? To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice....Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately....Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive.”⁴²

1.17 The extent of the person’s property may be a factor. Kennedy LJ stated in *Masterman-Lister* that in an application to the Court of Protection under the *Mental Health Act 1983*:

“...the judge must consider the totality of the property and affairs of the alleged patient, and no doubt if it is shown that he lacks the capacity to manage a significant part of his affairs the court will be prepared to act, exercising control in such a way that the patient continues to have control in relation to matters which he can handle.”⁴³

G How General Legal Capacity is to be Assessed

1.18 The new system of protection for vulnerable adults which is proposed in Chapter 6 requires an assessment of general legal

⁴¹ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 17 at paragraph 26.

⁴² *White v Fell* 12 November 1987 at page 9-10 of the transcript; quoted in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 18.

⁴³ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, paragraph 19.

capacity – that is, the capacity to make personal and health care decisions and/or to deal with property and affairs generally. The problems in assessing capacity have been addressed in publications in other countries which have examined the issues relating to vulnerable elderly people. The discussion in this chapter draws on some of these publications.

(1) *Different Approaches to Incapacity*

1.19 In the 1997 Consultation Paper “*Who decides? Making decisions on behalf of mentally incapacitated adults*”,⁴⁴ the Lord Chancellor’s Department in England and Wales addressed the “three key principles which underpin the Law Commission’s proposals on mental incapacity.”⁴⁵ These were the concepts of capacity, best interests and the general authority to act reasonably.⁴⁶ In this section, only capacity is examined; the other concepts are addressed in Chapter 6. In 1995, the Law Commission of England and Wales recommended that there should be a statutory presumption against lack of capacity and that any question whether a person lacks capacity should be decided on the balance of probabilities.⁴⁷ It identified three possible approaches to incapacity – the status approach, the outcomes approach and the functional approach.

1.20 The status approach to legal capacity applies in the Irish Ward of Court and EPA systems. The status of a person as the donor of a registered power of attorney or a ward triggers a number of legal consequences.⁴⁸ While some of the people concerned may have the legal capacity to make specific decisions, their general decision making capacity has been removed by their status. While the ‘status’ approach has the advantage of certainty, it was criticised by the Law Commission of England and Wales as being “quite out of tune with the policy aim of enabling and encouraging people to take for

⁴⁴ Lord Chancellor’s Department *Who Decides? Making decisions on behalf of mentally incapacitated adults* (CM 3808) (The Stationery Office 1997).

⁴⁵ *Ibid* at Chapter 3.

⁴⁶ *Ibid*.

⁴⁷ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.2.

⁴⁸ These are outlined in Chapters 3 and 4 respectively.

themselves any decision which they have capacity to take.”⁴⁹ The ‘outcome’ approach focuses on the result of an individual’s decision, so that a decision which did not conform with normal societal values (or those of the assessor) might be deemed to be evidence of incapacity. The Law Commission’s view was that this type of approach “penalises individuality and demands conformity at the expense of personal autonomy”.⁵⁰ The functional approach was favoured by the Law Commission and has also now been accepted by the Lord Chancellor.⁵¹ This approach was explained by the Law Commission as follows:

“the assessor asks whether an individual is able, at the time when a particular decision has to be made, to understand its nature and effects. Importantly, both partial and fluctuating capacity can be recognised. Most people, unless in a coma, are able to make at least some decisions for themselves, and many have levels of capacity which vary from week to week or even from hour to hour.”⁵²

1.21 This approach, which received a “ringing endorsement”⁵³ by respondents to the Law Commission’s Consultation Paper, was also approved by the Lord Chancellor whose 1999 Report⁵⁴ stated:

“This is a very specific approach which will avoid unnecessary intrusion into the individual’s managing of his own affairs. It will allow for cases where the individual is able to make some decisions, but is unable to understand the implications of others. In cases of fluctuating capacity the functional approach together with the best interest factors...will ensure that, wherever possible, decisions are

⁴⁹ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.3.

⁵⁰ *Ibid* at paragraph 3.4.

⁵¹ Lord Chancellor’s Department *Who Decides? Making decisions on behalf of mentally incapacitated adults* (CM 3808) (The Stationery Office 1997) at paragraph 3.6.

⁵² Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.5.

⁵³ *Ibid* at paragraph 3.6.

⁵⁴ Lord Chancellor’s Department, *Making Decisions* CM 4465 (The Stationery Office 1999).

made when the individual is able to exercise the maximum decision-making powers possible.’⁵⁵

1.22 The functional approach is the one that is currently applied when a specific issue as to capacity arises in a case. There is no reason why this should not continue to apply. However, this approach may not be appropriate in assessments of general capacity. If, having made the general assessment and appointed a Personal Guardian,⁵⁶ a new functional assessment had to be made every time a decision arose, then the whole point of having a guardian with substitute decision making powers would be questionable. There would be doubt over the validity of decisions taken by the Guardian. This would not be in the interests of the protected person. In Chapter 6, the role of the Guardian in facilitating the protected person to make as many decisions as possible is outlined but this can be done while maintaining the status of the protected person as lacking legal capacity.

1.23 The question arises as to whether the law on general capacity should also address the specific capacity which is required for making wills, gifts and other decisions. The decision on capacity in these cases falls to be decided by a court in specific circumstances. The legislation could include the statutory presumption of capacity and provisions about the onus of proof. While the general definition of capacity which is proposed for inclusion in the new guardianship system could clearly inform any assessment of capacity in specific situations, the Commission considers that the specific assessment should continue to be made in the present manner. It is not clear that a statutory definition of capacity for every particular purpose would make the task of assessing the facts of each situation any easier. It should be noted that the law on consent to medical treatment may need to be addressed because of the widespread false belief that family members and carers may make valid decisions on behalf of people who do not have legal capacity. However, that is a separate issue and is not dealt with here.

⁵⁵ Lord Chancellor’s Department, *Making Decisions* CM 4465 (The Stationery Office 1999) at paragraph 1.4.

⁵⁶ As proposed in Chapter 6.

(2) *Defining General Legal Capacity*

1.24 There is a range of definitions of general legal capacity in other jurisdictions. In attempting to come to a decision on a definition for the proposed new system for Ireland, the words used are those which are also used in the description of the proposed system in Chapter 6.

1.25 The Australian State of Victoria⁵⁷ provides that a person lacks legal capacity if suffering from a disability – this is defined as intellectual impairment, mental illness, brain damage, physical disability or senility.⁵⁸ In New Zealand⁵⁹ it is not necessary to show a defined incapacity – the court has jurisdiction over a person who either:

- Lacks, wholly or partly, the capacity to understand the nature, and to foresee the consequences, of decisions in respect of matters relating to their personal care and welfare; or
- Has these capacities, but wholly lacks the capacity to communicate decisions about their personal care and welfare.⁶⁰

The Australian Law Reform Commission⁶¹ recommended that the defined incapacity should refer to a physical, mental, psychological or intellectual condition, but a person should not be considered to have such a condition merely because he or she:

- is eccentric;
- does or does not express a particular political or religious opinion;
- is of a particular sexual orientation or expresses a particular sexual preference;
- engages or has engaged in illegal or immoral conduct; or

⁵⁷ Under the *Guardianship and Administration Board Act 1986*.

⁵⁸ The definition of “disability” is defined in section 3 of the Act.

⁵⁹ *Protection of Personal and Property Rights Act 1988*.

⁶⁰ Section 6 of the 1988 Act.

⁶¹ Australian Law Reform Commission *Guardianship and Management of Property* (No 52 1989). Available at:

<http://www.austlii.edu.au/au/other/alrc/publications/reports/52/index.html>.

- takes or has taken drugs, including alcohol (but the effects of a drug may be taken into account).⁶²

1.26 On the basis of its preference for the functional approach, the Law Commission of England and Wales proposed a statutory definition of mental incapacity, which has also been approved by government but not yet implemented.⁶³ This provides:

“A person is without capacity if, at the time that a decision needs to be taken, he or she is:

(1) unable by reason of mental disability to make a decision on the matter in question, or

(2) unable to communicate a decision on that matter because he or she is unconscious or for any other reason.”⁶⁴

1.27 In Scotland, the *Adults with Incapacity (Scotland) Act 2000* applies to adults who are incapable because of mental disorder or inability to communicate. The definition of mental disorder⁶⁵ includes mental illness or mental handicap however caused or manifested.⁶⁶ Personality disorder is also included in the definition of mental illness. A person may not be regarded as mentally disordered by reason solely of immoral conduct, sexual deviancy or dependency on alcohol or drugs nor does the definition cover people who simply act imprudently. People who are temporarily under the influence of alcohol or drugs are not to be regarded as mentally disordered, although those whose mental faculties are impaired due to past alcohol or drug abuse do come within the definition.

1.28 The New Zealand formulation has attractions in that it excludes the need for a defined incapacity and concentrates on the ability of the person to make decisions. However, there are advantages to including a defined incapacity in the legislation. The requirement of a defined incapacity means that intervention will only

⁶² Australian Law Reform Commission *Guardianship and Management of Property* (No 52 1989) at paragraph 4.10

⁶³ Lord Chancellor’s Department *Making Decisions* (CM 4465) (Lord Chancellor’s Department 1999) at paragraph 1.6.

⁶⁴ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.14.

⁶⁵ Which is the same as that in the *Mental Health (Scotland) Act 1984*.

⁶⁶ Section 87 of the 1984 Act.

take place in specified circumstances. This would safeguard against a system which may equate eccentric or anti-social behaviour with legal incapacity. However, it is not clear that defining incapacity in legislation makes the actual assessment any easier. As already stated, the existence of a defined mental incapacity does not necessarily mean that legal capacity is impaired or lost.

1.29 The terms which may be used to help define incapacity include mental disability, mental disorder, mental incapacity or mental impairment. These may be vague and immeasurable conditions unless they are further defined. There are various definitions contained in Irish and other legislation. Section 3(1) of the *Mental Health Act 2001* defines “mental disorder” as mental illness, severe dementia or significant intellectual disability where certain other circumstances are present which necessitate psychiatric treatment. These other circumstances are not relevant here but the detailed definitions of the elements of mental disorder may be helpful in trying to reach a satisfactory definition for the purposes of guardianship legislation. Section 3(2) of the Act goes on to provide:

“ ‘mental illness’ means a state of mind of a person which affects the person’s thinking, perceiving, emotion or judgment and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons;

‘severe dementia’ means a deterioration of the brain of a person which significantly impairs the intellectual function of the person thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression;

‘significant intellectual disability’ means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.”

1.30 Under the *Powers of Attorney Act 1996*, “mental incapacity”, in relation to an individual, means incapacity by reason of a mental condition to manage and administer his or her own

property and affairs.⁶⁷ This does not provide any detailed definition. The *Disability Bill 2001*⁶⁸ states that disability in relation to a person means “a substantial restriction in the capacity of the person to participate in economic, social or cultural life on account of an enduring physical, sensory, learning, mental health or emotional impairment”.⁶⁹ This is a deliberately broad definition for the purposes of the provision of services. It is too broad for the purposes of this paper as it includes people with physical disabilities who have no mental impairment.

1.31 The Law Commission of England and Wales recommended that the expression “mental disability” should mean “any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning.”⁷⁰ A person would be regarded as unable to make a decision by reason of mental disability if the disability was such that, at the time when the decision needed to be made, he or she was:

- unable to understand or retain the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make a decision; or
- unable to make a decision based on the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision.⁷¹

1.32 The Law Commission also specified that a person should not be regarded as unable to understand the information relevant to a decision if he or she was “able to understand an explanation of that information in broad terms and simple language”,⁷² or merely because he or she made a decision “which would not be made by a person of

⁶⁷ Section 4 of the *Mental Health (Scotland) Act 1984*.

⁶⁸ This Bill has been withdrawn and a new Bill is expected to be published in Autumn 2003.

⁶⁹ Section 2 of the Bill.

⁷⁰ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.12.

⁷¹ *Ibid* at paragraphs 3.16-3.17.

⁷² *Ibid* at paragraph 3.18.

ordinary prudence”.⁷³ Before regarding individuals as unable to communicate their decisions, all practicable steps to enable them to do so should have been taken without success. The Law Commission had decided, after consultation with representative groups, to prefer the term ‘mental disability’ to ‘mental disorder’, because of the implications of the latter term for such issues as compulsory detention under the *Mental Health Act 1983*. It was intended that new legislation in the area of mental incapacity should have a wider ambit, to include, for example, people with learning disabilities, brain damage, autism, sensory deficit, temporary toxic confusional states and neurological disorders, as well as those suffering from the types of psychiatric disorders which would more frequently trigger the application of the provisions of the 1983 Act.

1.33 One possible definition is that legal incapacity exists where an adult is suffering from a mental disorder or is under a mental disability and, because of that disorder or disability, is unable to make personal and health care decisions and/or to manage property and affairs generally. Mental disorder would be defined as mental illness, severe dementia or significant intellectual disability (using a similar definition to that in the *Mental Health Act 2001*). A person will not be considered to suffer from a mental disorder merely by virtue of evidence of eccentric or anti-social behaviour or unconventional opinions. Mental disability means a mental impairment which results in the person’s inability to communicate decisions.

(3) *How Capacity is to be Assessed*

1.34 There is no one single criterion to determine whether or not a person has legal capacity. It is recognised internationally that there are problems in devising tests of capacity that are not simply intelligence tests. Geriatricians and clinical psychologists use a range of medical and psychometric tests to try to establish mental capacity. Some tests may be more akin to intelligence tests or tests of articulation and may not take different standards of literacy into account. There is a danger of regarding as lack of legal capacity what is in effect the result of educational or social neglect; the impairment may be with the family or the carer or the social services personnel who are too impatient or unwilling or preoccupied to listen and interpret correctly. It is important to recognise that bad or

⁷³ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.19.

improvident decisions are not necessarily evidence of legal incapacity and that eccentric or anti-social behaviour, self neglect or evidence of imprudent decisions do not, in themselves, constitute grounds for a determination that a person lacks legal capacity. Clearly, a medical diagnosis is a major factor in any assessment of capacity but there may be other, equally important, factors such as economic and social conditions. Elderly people may be dependent on others because they do not have legal capacity, because they are suffering from a physical or mental disability or because of social and economic circumstances and this dependence may make it impossible for them to exercise genuine choice in decision making. Other professionals such as clinical psychologists, social workers, occupational therapists and public health nurses may be able to contribute to the assessment of a person's capacity. Family members, carers and representatives of voluntary caring organisations may also have a role.

1.35 The Ontario legislation⁷⁴ requires that an assessment of capacity must be made by a qualified assessor;⁷⁵ this means a medical professional, including doctors, psychologists, social workers, nurses and occupational therapists who have successfully completed an approved course.⁷⁶

1.36 When exactly a person's capacity is assessed could be very important. For example, a person who has just discovered that he or she is physically disabled as a result of a stroke may appear more confused and disorientated than is actually the case. Capacity should not be assessed when the person is in such a condition unless an urgent decision has to be made.

1.37 It is accepted that the outcome of a decision is not the test of capacity but it may constitute evidence of capacity or incapacity. Chadwick LJ in *Masterman-Lister v. Brutton & Co.*⁷⁷ stated that whether or not a person had capacity to take the decisions in issue:

⁷⁴ *Substitute Decisions Act 1992.*

⁷⁵ Sections 9(3), 16(1) and 20(1) of the Act provide for the assessment of individuals by assessors.

⁷⁶ As set out in Article 1 of the *Substitute Decisions Act 1992 (Capacity Assessment) Regulation 1996* Ontario Regulation No 293 of 1996.

⁷⁷ *Masterman Lister v Brutton & Co* [2002] EWCA Civ 1889.

“[W]as not to be answered solely by reference to outcomes...For the same reason that - as the Law Commission pointed out - a person is not to be regarded as unable to make a rational decision merely because the decision which he does make is one which would not be made by a person of ordinary prudence, so he is not to be regarded as having capacity merely because the decision appears rational. But, to my mind, outcomes are likely to be important (although not conclusive) indicators of the existence, or lack, of understanding.”⁷⁸

1.38 Legal capacity can be seen in the narrow sense of understanding the nature and consequences of the decision to be made. Even in that sense, an assessment of capacity is difficult. There is also the broader issue of capacity to avail of legal remedies. Can it be said that an adult, who does not suffer from any mental disorder but who is unable to exercise the various options available to abused people within the general criminal, civil and domestic violence law because of fear, intimidation, lack of independent advice or advocacy services, lack of finance, or even lack of information, has genuine legal capacity? In effect, the adult may be legally capable and autonomous but may not be capable of exercising autonomy. Such adults may be in need of protection but may not be eligible for it because they do not meet the usual tests of legal incapacity.

1.39 Legal capacity may be absent, restricted, impaired or diminished in many different circumstances. People with intellectual or developmental disabilities may have diminished legal capacity but appropriate skills training may facilitate their capacity to make decisions. People who are unable to communicate by speech may be able to communicate in other ways and with the help of family, carers or an advocacy service may be able to make their decisions known. Advocacy services should be available to people when a general assessment is being made. In this context advocacy does not necessarily include legal advice but would be in accordance with the proposed provisions in the *Disability Bill 2001*. This provides that, where a person with a disability applies to the health board for a health service, the board must carry out an assessment of need. This assessment must be carried out with maximum possible involvement by the person concerned and:

⁷⁸ *Masterman Lister v Brutton & Co* [2002] EWCA Civ 1889 at paragraph 82.

“[W]here, by reason of age or disability, the person is unable to become involved, or fully involved, in the assessment, a representative of the person is involved in it....”⁷⁹

1.40 Assessments for the purposes of capacity should, if possible, be conducted in co-ordination with any assessment of need for health and social services because it may be that the provision of those services would meet the needs of the person concerned without the imposition of guardianship.⁸⁰

1.41 The Law Commission of England and Wales recommended that a code of practice should be prepared for the guidance of those involved in the assessment of mental capacity.⁸¹ It was mentioned that various respondents to the Law Commission had criticised such methods as psychometric testing and the concept of “mental age”, and emphasised that “cultural, ethnic and religious values” should be respected by an assessor of mental capacity.⁸² The Commission took the view that these matters, although very important, were “not apt subjects for primary legislation”, but suggested that a code of practice should address them.⁸³

1.42 In its *Guide to Professional Conduct of Solicitors in Ireland*⁸⁴ the Law Society notes that “if a client is of unsound mind, he does not have the legal capacity to enter into a contractual relationship with the solicitor.”⁸⁵ This guideline is supplemented by a Practice Note⁸⁶ from 1998 which is worth quoting at length:

⁷⁹ Section 23(3) of the 2001 Bill.

⁸⁰ This is examined further in Chapter 6.

⁸¹ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 3.22.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Law Society of Ireland *A Guide to Professional Conduct of Solicitors in Ireland* (2nd ed 2002).

⁸⁵ *Ibid* at 12.

⁸⁶ Law Society Gazette Practice Note “Clients of unsound mind” December 1998 at 33.

“In marginal cases, the solicitor may consider discussing his or her concerns with the client and advising the client that, in order to avoid possible queries from family or third parties in relation to the validity or instructions at a later date, the client should obtain a medical certificate confirming mental health.

If an issue arises with regard to a client’s mental health, the solicitor should ensure that detailed and accurate attendances of all meetings or conversations with the client are made.

The solicitor should take reasonable steps to ensure that the client’s interests are protected. This may involve contact with relatives, medical practitioners or with the Wards of Court Office. In these circumstances, the professional duty of absolute confidentiality is lessened in the client’s own interest, to the extent necessary. Having contacted the appropriate parties, the solicitor’s professional obligations are at an end.”

The obligation to protect the confidentiality of the client must be breached in these circumstances. *Kenward v Adams*⁸⁷ is authority for the proposition that when a lawyer is writing to a doctor to ask whether a client is capable of making a will, and, out of necessity needs to divulge certain facts relating to the proposed transaction, the solicitor can make such a disclosure.

H Who Makes the Decision on General Legal Capacity: Tribunal or Court?

1.43 At present, decisions on general legal capacity in Ireland are made by the Courts – mainly the High Court in the context of the Wards of Court system (while decisions on issue specific capacity are made by the Court in which the issue arises.) Decisions on general capacity are made by the Courts in the UK⁸⁸ and New Zealand while

⁸⁷ The Times 29 November 1975 as quoted in Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley’s 2003) at D1.10.

⁸⁸ For example, in England and Wales, the Court of Protection is a branch of the High Court.

they are made by Tribunals in the various Australian jurisdictions. Tribunals are usually composed of lawyers, members of the medical and other caring professionals and lay people who are involved in relevant voluntary organisations or who have experience with people who have disabilities. For example, the New South Wales *Guardianship Act 1987* provides that the Guardianship Tribunal introduced by the Act⁸⁹ should have at least 10 members of whom:

- at least three should be legal practitioners of at least seven years standing;
- at least three should be persons (such as medical practitioners, psychologists and social workers) who have experience of assessing or treating mentally incapacitated persons; and
- at least four should be persons, other than those referred to above who, in the opinion of the Minister, have had experience with mentally incapacitated persons.⁹⁰

1.44 When exercising its functions, the Tribunal sits as a panel of between three and five members, with at least one member of the panel drawn from each of the above groups.⁹¹ At the date of publication of its *2000-2001 Annual Report*, 68 members had been appointed to the New South Wales Guardianship Tribunal, including many part-time members.⁹² The Queensland Law Reform Commission⁹³ recommended that the Tribunal which it proposed should consist of a small number of full-time members and a larger pool of part-time members. It expressed the view that the inclusion of part-time members “would give the tribunal the flexibility to provide expertise in particular areas of disability, and would also help to

⁸⁹ Under Part 6 of the 1987 Act.

⁹⁰ Section 49 of the 1987 Act.

⁹¹ Section 51 of the 1987 Act.

⁹² See the Tribunal’s Website at <http://www.gt.nsw.gov.au>. “The Guardianship Tribunal consists of two separate groups. The first group – the Tribunal staff - are full-time employees who manage the day-to-day administration of the tribunal. As at 30 June 2002, the Tribunal employed 66 staff. The second group – the Tribunal members – are appointed by the Governor. They conduct the hearings, make the decisions and orders and write the reasons for decisions. During 2001/2002, there were 68 Tribunal members, most of whom were available on a part-time basis to attend hearings.”

⁹³ Queensland Law Reform Commission *Assisted and Substituted Decisions – Decision-making by and for people with a decision-making disability* (No 49 1996).

overcome some of the problems of distance experienced by regional and remote communities, by allowing appointment of members from those communities”.⁹⁴ The structure of tribunals in other Australian jurisdictions, and in States which have followed the Australian example, is similar to that in New South Wales. In Hong Kong, for example, the Guardianship Board⁹⁵ consists of a full-time Chairperson and 60 part-time members.⁹⁶ Again, hearings usually take place before three members of the Board – one lawyer, one health professional and one lay member. In the view of its Chairperson, the Board “has advantages over a single judge, as its multidisciplinary perspective results in a holistic approach to the resolution of applications”.⁹⁷

1.45 In the near future, tribunals will be involved in assessing mental disorder in other contexts in Ireland. The *Mental Health Act 2001*⁹⁸ provides for the establishment of a Mental Health Commission⁹⁹ which has overall responsibility for the provision of mental health services.¹⁰⁰ The Commission will appoint Mental Health Tribunals to review all cases of involuntary detention.¹⁰¹ A tribunal must consist of a lawyer of not less than seven years standing as chairperson, a consultant psychiatrist and a person who is not a

⁹⁴ Queensland Law Reform Commission *Assisted and Substituted Decisions – Decision-making by and for people with a decision-making disability* (No 49 1996) at 222.

⁹⁵ The Hong Kong Board is an independent statutory corporation.

⁹⁶ See <http://www.adultguardianship.org.hk/english/whatis.html>. It is a multi-disciplinary Board consisting of the Chairperson and 60 part-time persons, including members who have personal experience of mentally incapacitated persons, lawyers, doctors, social workers and psychologists.

⁹⁷ Scully “Guardianship – Is it a Solution to Elder Abuse?” Paper delivered to Hong Kong University seminar on Elder Abuse, 22 February 2000, paragraph 24.

⁹⁸ This is not yet fully implemented.

⁹⁹ This Commission has been established and is currently putting systems in place for the implementation of the provisions of the *Mental Health Act 2001*.

¹⁰⁰ The Commission was established by Part III of the Act and was brought into being by *Mental Health Act 2001 (Sections 1 to 5, 7, 31 to 55) (Commencement) Order, 2002* Statutory Instrument No 90 of 2002.

¹⁰¹ Section 49 of the 2001 Act.

lawyer or doctor.¹⁰² The *Criminal Law (Insanity) Bill 2002* provides for the establishment of a Mental Health Review Board to review the detention of people found not guilty by reason of insanity or unfit to be tried, who have been detained in a designated centre by order of a court.¹⁰³ This Board will be made up of a chairperson who must have not less than ten years experience as a practising barrister or solicitor or be a judge or former judge of the Circuit or Superior Courts and a number of other people, one of whom must be a consultant psychiatrist.¹⁰⁴

1.46 The Commission considers that specific assessments of capacity should continue to be made by the court in which the issue is raised. The question then arises as to whether the court or tribunal is the more appropriate body for the assessment of general legal capacity, under the proposed system outlined in Chapter 6. There are a number of arguments in favour of having a determination of legal capacity made by a court. Such a determination has major consequences for the person affected and so should be made in the formal context of a court. The courts have expertise in weighing evidence and balancing the rights of parties who are in dispute, and are generally perceived as independent, fair and impartial. However, the same can be said of an appropriately composed tribunal.

1.47 Tribunals carry a number of advantages over courts. In the first place a tribunal does not have to be composed exclusively of a judge or judges; but may include, for instance, doctors and social workers. In particular, its composition may be varied depending upon the needs of the particular case, a point which is illustrated by the Australian tribunals outlined in paragraph 1.43-1.44. Secondly, a tribunal is usually allowed greater flexibility to meet diverse circumstances, for example it may sit in any part of the country and in any location, such as a health board office or nursing home. Again, although a tribunal may not adopt procedures which are unfair or which imperil a just result it is nonetheless, within these limitations, master of its own procedures and enjoys a considerable discretion as to, for instance, whether to depart from the strict rules of evidence. A tribunal usually involves less formality, which could be intimidating, and less delay. Before a tribunal the parties may not need to be

¹⁰² Section 48 of the 2001 Act.

¹⁰³ Sections 10 and 11 of the 2002 Bill.

¹⁰⁴ Section 10 schedule 1 of the 2002 Bill.

legally represented and the costs are thereby reduced. Again, it is difficult to see how the court system could accommodate a personal advocacy service in the *Disability Bill 2001* sense.¹⁰⁵

1.48 A decision on general legal capacity or the lack of it is made for the purposes of putting in place a system of protection for the person in question. Therefore, the decision on capacity may be the first of a number of decisions to be made and it cannot be made in isolation. The forum which makes the decision on capacity should also be the forum which decides if the proposed arrangements for guardianship and protection should be applied and to what extent they should be applied. A decision on capacity may not be required at all if any of the other less intrusive mechanisms can be used to meet the needs of the person. So, the approach does not necessarily start with a decision on capacity. It should start with an assessment of the needs of the person concerned. If one of the needs identified is the need for substitute decision making, then a decision on capacity must be made. However, if the assessed needs can be met by other less intrusive mechanisms, then these should be put into operation and no decision made on capacity. A Tribunal would seem to be the more appropriate forum for the range of assessments and decisions that may need to be made.

1.49 There is also the question of whether the issue should be dealt with on an adversarial or inquisitorial basis. At present, the wards of court legislation provides for an inquiry into the proposed ward's capacity. In practice, there is rarely any objection so the proceedings are not conducted in an adversarial manner. This is plainly desirable: in the adversarial system each side calls expert evidence which may result in totally different assessments of capacity and is not an ideal structure for the resolution of issues of general capacity. While the adversarial system is quite suited to issues of specific capacity because there is one party who wants a finding of incapacity and one who does not, it is usually unnecessary in general capacity situations because there should not be anyone with an interest in proving incapacity and the issue should be conducted entirely in the interests of the allegedly incapacitated person. The Commission would prefer the inquisitorial system because it is more likely to take all of the relevant matters into consideration and to make a judgement in the best interests of the person concerned. An

¹⁰⁵ Advocacy services are proposed by Part 5 of the 2001 Bill – see paragraphs 1.39 and 6.15.

inquisitorial system may, of course, be operated either in a court (as at present for wards of court) or tribunal setting. In so far as it cuts either way, it would come more naturally to a tribunal.

The Constitutionality of a Tribunal

1.50 The question arises as to whether the vesting of decisions on legal capacity in a tribunal rather than a court would be constitutional. The relevant provision is Article 34.1 of the Constitution of Ireland, which states that: “[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution....” However Article 37.1 creates an exception in the case of: “the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters...” A decision on legal capacity has far reaching effects and it seems very unlikely that it could be as “a limited function”, in the words of Article 37.1. Thus the exception to Article 34.1 established by Article 37.1 would not seem to apply.

1.51 The question then arises as to whether the making of such a decision might be regarded as an ‘administration of justice’ in the language of Article 34.1. The making of a declaration of incapacity would seem not to possess any of the characteristics of an ‘administration of justice’. The orthodox test for deciding whether a function amounts to an administration of justice consists of assessing the function in question against the check-list of characteristics regarded as typical of the judicial function¹⁰⁶ and requiring a positive result in respect of all¹⁰⁷ of them. One of these characteristics consists of the conventional trappings and procedures of a court, including the configuration of parties (the *lis inter partes*).¹⁰⁸ Yet the procedure being suggested here would be inquisitorial rather than adversarial. This is not characteristic of a common law court. An alternative basis on which to find that the declaration is not an

¹⁰⁶ For an account, see Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997) at Chapter 4.

¹⁰⁷ *Keady v Commissioner of An Garda Siochana* [1992] 2 IR 197, 204.

¹⁰⁸ It has recently been remarked, not in the context of Article 34.1, but in the context of whether the hearsay rules of evidence apply “that the President of the High Court ... is not necessarily, when exercising the wardship jurisdiction, deciding a *lis inter partes* and that, accordingly, his or her duties are on occasions properly regarded as administrative rather than judicial.” *Eastern Health Board MK* [1999] 2 IR 99, 122.

administration of justice is to focus on the purpose of the decision and to see it as an aspect of “the Executive’s role in caring for society and the protection of the common good”.¹⁰⁹ In short, it would be regarded as an executive, rather than a judicial function¹¹⁰.

1.52 The *Mental Health Act 2001* provides for the making of an ‘admission order’ authorising the involuntary detention of a person suffering from a mental disorder. By section 18 of this Act, the affirmation of such an order is vested in a tribunal. If the making of a decision on legal capacity under our proposal were to be regarded as an administration of justice, then so, surely, must the affirmation of an admission order under the 2001 Act. Yet the legislature, one must assume, considers that the arrangement which is established in the 2001 Act is saved from potential unconstitutionality, by section 19 of the 2001 Act. Section 19 provides for an appeal to the Circuit Court against a decision of a tribunal and this appeal must be made within 14 days. In making this arrangement the Oireachtas seems to be drawing on the idea that where a court is involved in confirming an order made by a non-court, then this suffices to remove any danger of unconstitutionality.¹¹¹ In providing for a comprehensive appeal to a court, we should, we believe meet any possible difficulty flowing from Article 34.1.¹¹²

¹⁰⁹ *Keady v Commissioner of An Garda Siochana* [1992] 2 IR 197, 204.

¹¹⁰ *D.P.P v Gallagher* [1991] ILRM 339, 344. This case centred on which authority – executive or judicial – should decide on the release or continued detention of a person against whom a special verdict of “guilty but insane” had been reached. The formulation quoted in the text would certainly cover the making of a declaration of incapacity.

¹¹¹ However, if there were any possible doubt (perhaps because of fresh constitutional jurisprudence in this area) then the device used in, for instance the *Solicitors (Amendment) Act 1960* of providing that the tribunal’s decision was not effective until either the time for appeal had elapsed, or the decision had been confirmed by the High Court could be followed. This is the legislative technique which has been adopted, following the seminal case of *Re Solicitors Act* [1960] IR 220. See Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997) at 74-78. But, as at the present state of the law, we do not consider this necessary.

¹¹² This device would also meet any possibility of violating Article 6.1 of the ECHR; but there is unlikely to be any danger in the first place because Article 6.1 states: “[I]n the determination of is civil rights and obligations...everyone is entitled to a...hearing...by an independent and impartial tribunal established by the law.” We believe that the tribunal we

1.53 Even leaving aside the possible issue of guarding against unconstitutionality, it would seem to us right for policy reasons to provide a wide appeal to a court because of the importance of the issue. The appeal, we believe, should be modelled on that provided in section 19 of the 2001 Act. It should be a full appeal (on law or fact). It should be held in private. The exigencies which dictate such a short period under the 2001 Act does not exist to the same degree in the situation under consideration here. The Commission would prefer a period of 28 days. In contrast to section 19, however, we would recommend that, because other peoples' interests might be affected by the decision as to capacity, the right of appeal should not be confined to the person who is the subject of the capacity decision. It should be available to any 'interested party' because there could be third parties, probably family members, who could have a legitimate interest in the outcome and such persons should be entitled to appeal.

1.54 The Commission provisionally recommends that:

- *If the issue of capacity arises in a specific context, the question should be decided by the courts in accordance with the law as it exists at present.*
- *There should be a statutory presumption of capacity.*
- *The decision on general legal capacity should be made by a tribunal composed of a Judge as chairman with appropriate medical and lay personnel, and with an appeal to the Circuit Court, and further appeal to the High Court. They should conduct an inquiry into the person's capacity on a non adversarial basis.*
 - *There should be guidelines available to people who are assessing capacity to ensure that the assessment is a genuine objective assessment of capacity and is not affected by issues such as literacy, conventional views of values or other irrelevant matters.*
 - *There should be a detailed definition of general legal incapacity which includes mental disorder broadly as defined in the Mental Health Act 2001 and mental disability.*

recommend would satisfy the requirement for an "independent and impartial tribunal".

CHAPTER 2 CAPACITY TO MAKE A WILL

A **Introduction**

2.01 In Ireland, the vast majority of wills are made and put into effect without any doubt regarding the capacity of the testator to make the will. There are no official statistics but anecdotal evidence suggests that there are less than ten cases in Ireland each year which come to the attention of the Probate Office, with a small additional number in which the issue is raised in the context of disputes in the Circuit Court.¹ Testamentary capacity is examined in some detail because the vast majority of people make a will, the issue of capacity is covered by legislation, there are a number of cases from which lessons may be drawn and these issues may provide lessons for the assessment of general capacity.

B **Capacity to Make a Will**

2.02 The requirements for the making of a valid will are set out in the *Succession Act 1965*.² Among other things, this provides that the person making the will (the testator) must have reached a minimum age and must have had testamentary capacity (the legal capacity to make a will) when the will was made. If it is subsequently established that these requirements were not met, then the will is invalid and ineffective.

¹ It may be that the rarity with which the power to lodge a caveat is used might constitute further evidence suggesting that allegations in relation to lack of testamentary capacity are not very common. Where capacity is disputed, one might expect a caveat to be lodged, which would prevent a Grant of Probate being issued without notification being received by the objector – in fact this option is rarely exercised.

² Section 77(1) *Succession Act 1965*.

(1) Age

2.03 The age requirement is very clear – the testator must be 18 or over or be or have been married.³ There is no maximum age. This fact was remarked upon recently in the Supreme Court decision in *Blackall v Blackall*,⁴ where O’Flaherty J commented:

“I think there was evidence that the testatrix had the mental capacity to make a will. She was old, nearly one hundred years; she had her good days and bad days ... There is a lower but no upper age limit for the making of a will. George Bernard Shaw was ninety-four when he executed his will and it was said of it that ‘it is rather youthful exuberance than the circumspection of old age that mars its symmetry’.”⁵

The Commission considers that the imposition of a maximum age would be discriminatory and inappropriate.

(2) Sound Disposing Mind

2.04 Section 77(1)(b) of the *Succession Act 1965* provides that the will must be “made by a person who...is of sound disposing mind”. The term “sound disposing mind” is not defined by the statute but has been examined in case law over the years. In *Re Glynn (deceased)*,⁶ McCarthy J described the term as “a judicial term of art requiring that the testator should know and approve the contents of the will and, at the time of execution of the will, be of sound mind, memory and understanding.”⁷ The problems which doctors and others experience with the concept of “unsound mind” in wardship cases are described in paragraph 4.25 and they apply equally here.

³ Section 77(1)(a) *Succession Act 1965*.

⁴ *In the Estate of Helena Agnes Blackall, deceased: Blackall v Blackall* Supreme Court 1 April 1998.

⁵ Supreme Court 1 April 1998, per O’Flaherty J, citing *Re Shaw Deceased* [1957] 1 WLR 729, 731.

⁶ [1990] 2 IR 326.

⁷ *Ibid* at 337.

2.05 The question of whether or not the person was of sound disposing mind generally comes before the court after the testator has died so it has to be decided retrospectively. This makes proof of legal capacity or the lack of it difficult. It requires a detailed examination of all the relevant circumstances including the circumstances in which the will was made and the mental state of the testator. It may be difficult to get relevant evidence. The person alleging lack of capacity is usually a disappointed successor who has an interest in having the will declared invalid. In some cases, it may be that the only relevant evidence available is the terms and effect of the will. The terms and effect may cast light on capacity but it is capacity itself and not outcomes which must be assessed. Later in this chapter the issue of whether or not there should be procedures in place for contemporaneous assessment and certification of the mental capacity of testators, particularly vulnerable elderly testators, is examined.⁸

2.06 What exactly constitutes a “sound disposing mind” has been addressed in a number of cases. Cockburn CJ stated in the leading case of *Banks v Goodfellow*:⁹

“By the terms ‘a sound and disposing mind and memory’ it has not been understood that a testator must possess these qualities of the mind in the highest degree...neither has it been understood that he must possess them in as great a degree as he may have formerly done...the mind may have been in some degree debilitated, the memory may have become in some degree debilitated, and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament.”¹⁰

In attempting to define this essential residual capacity further, he held:

“[I]t is essential to the exercise of such a power [of testation] that a testator shall understand the nature of the act and its effects; shall understand the extent of the

⁸ At paragraph 2.25-2.35.

⁹ [1870] LR 5 QB 549.

¹⁰ *Ibid* at 565.

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.”¹¹

2.07 In various decisions, the courts have tried to provide practical guidelines as to when the required degree of capacity may be said to be present. In *Sefton v Hopwood*,¹² it was stated:

“[i]t is not sufficient, in order to make a will, that a man shall be able to maintain an ordinary conversation, and answer familiar and easy questions; he must have more mind than suffices for that. He must have what lawyers call a disposing mind; he must be able to dispose of his property with understanding and reason. That does not mean that he should make what other people think a sensible will, or a reasonable will, or a kind will ... But he must be able to understand his position; he must be able to appreciate his property, to form a judgment with respect to the parties whom he chooses to benefit by it after his death, and if he has capacity for that, it suffices.”¹³

2.08 In the *Estate of Andrew O’Donnell, Deceased*,¹⁴ Kelly J recalled several of the leading precedents governing this area of law, including the threefold test laid down in *Banks v Goodfellow*.¹⁵ Kelly J then recounted, at length, the evidence of the witnesses whom he divided into three categories: first, individuals who were not family

¹¹ [1870] LR 5 QB 549. This was applied in *Richards v Allan* [2001] WTLR 1031.

¹² (1855) 1 Fos & F 578.

¹³ *Ibid.*.

¹⁴ *In the Estate of Andrew O’Donnell: O’Donnell v O’Donnell* High Court (Kelly J) 24 March 1999.

¹⁵ [1870] LR 5 QB 549, 565.

members and were not medically qualified; secondly, members of the family; and thirdly, medical and psychological evidence. He did not discuss the relative weight to be accorded to the evidence of witnesses from each category. He concluded that although the testator had been a paranoid schizophrenic, his condition was well-controlled on medication, and the disposition contained in the will was “rational, clear, insightful and sensible.”¹⁶ In the circumstances, he held that the will should be admitted to probate.

(3) *The Outcome of the Will*

2.09 The outcome of the will may cast some light on the capacity of the testator. Testators are entitled to deal with their property and money in whatever way they choose, subject only to the legal right share of the spouse and to any responsibilities to children.¹⁷ An examination of those few cases where capacity has been raised suggests that the question is usually raised by a disappointed successor – a person who has an interest in having the will declared invalid. The wills which are questioned usually involve either death bed dispositions or a decision to dispose of assets in what would be considered an unconventional or eccentric manner. The property or money may have been left to people outside the family, to a charity or one or more family members may have been favoured over others. Such choices are not in themselves evidence of incapacity. The requirement that the testator “should be able to comprehend and appreciate the claims to which he ought to give effect”¹⁸ does not mean that those claims must be favoured. A distribution of assets which, to one person, appears irrational, unjust or even immoral in its neglect of a worthy person who might have expected to benefit, may to another simply be an acceptable exercise of choice or an eccentric exercise of choice. Wigram VC stated in *Bird v Luckie*:¹⁹

¹⁶ *In the Estate of Andrew O'Donnell: O'Donnell v O'Donnell* High Court (Kelly J) 24 March 1999, at 50.

¹⁷ Section 111 of the *Succession Act 1965* provides for the spouse's legal right share. Section 117 enables the children of a testator to make application to court where it is alleged that the testator ‘failed in his moral duty to make proper provision for the child in accordance with his means’.

¹⁸ Which is part of the test laid down in *Banks v Goodfellow* [1870] LR 5 QB 549, 565.

¹⁹ (1850) 8 Hare 301.

“No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his disposition.”²⁰

2.10 The borderline between the eccentric exercise of choice and the absence of genuine choice because of legal incapacity is difficult to determine. In *Re Glynn (deceased)*,²¹ McCarthy J held:

“[a] duly attested will carries a presumption of due execution and testamentary capacity...it is a fundamental matter of public policy that a testator’s wishes should be carried out however, at times, bizarre, eccentric or whimsical they may appear to be. One man’s whimsy is another man’s logic.”²²

(4) Difficulties of Communication

2.11 A testator may have legal capacity in the sense of understanding the issues involved but be unable to communicate what is intended. A case which involved communication difficulties, though it was unusual in that it involved a testator whose state of mind deteriorated sharply between the time when he formulated the contents of a will and the date of its execution, is *Re Glynn (deceased)*.²³ The will in this case was formally executed in a hospital, fifteen days after the testator had suffered a massive stroke. Before he suffered his stroke, at a time when there was no question of his lacking a ‘sound disposing mind’, the testator had given instructions regarding the contents of a will to two independent people. After the stroke, these two people visited the testator in hospital and read the will to him; he nodded and made an ‘X’ at the foot of the will, at which stage the two visitors duly attested the will

²⁰ (1850) 8 Hare 301 at 306. The absolute freedom of a testator is now limited by the rights of spouses and possible responsibilities towards children – see footnote 17 above.

²¹ *In the Goods of William Glynn, deceased: Glynn v Glynn* [1990] 2 IR 326.

²² *Ibid* at 340.

²³ [1990] 2 IR 326.

as witnesses. The two later declared themselves satisfied that the testator had understood and approved what was happening, although the medical evidence had been:

“that the deceased was not fit to make a will because he would not have been able to communicate his ideas or intentions with regard thereto, that ideas would have to be suggested to him and that a code of communication would have to be worked out...it is extremely difficult to assess the intellectual function of a person who is unable to speak”.²⁴

2.12 During the High Court hearing of the case, Hamilton P (as he then was) had been impressed, however, by the fact that neither of the two witnesses:

“had any interest in the manner in which the testator disposed of his property; that their sole concern was to give effect to his wishes as stated to them on a number of occasions; that the contents of the document represented what had been agreed and approved previously by the testator; that...[on the relevant date]...they satisfied themselves that the testator knew what he was doing; that he approved the contents of the will; that he signified his approval by nodding as the will was being read out and by his apparent eagerness and determination to place his mark on the will and by his nodding with a smile when asked...if he was satisfied”.²⁵

2.13 In the Supreme Court, the majority affirmed the High Court decision to admit the will to probate

(5) *Fluctuating Capacity and Lucid Intervals*

2.14 A will may be valid if made during a “lucid interval” by a testator who suffers from a mental disorder. This is because:

²⁴ [1990] 2 IR 326 at 331.

²⁵ *Ibid* at 332.

“[t]he crucial time in relation to the determination of the testator’s capacity is the date of execution of the will, and it follows that a testator who suffers from a mental disorder may make a valid will during a lucid interval.”²⁶

2.15 The onus of proving that the will was executed during a lucid interval rests on the person asserting this. Casey and Craven²⁷ state that the law:

“presumes that a state of things shown to exist continues to exist unless and until the contrary is established. Thus, a putative testator in respect of whom there is no evidence that he lacked testamentary capacity, before the execution of his will is presumed to continue to have the requisite testamentary capacity unless and until the contrary is shown. However, as an exception to the general rule of competence, the corollary is also held to be true. Thus, once proved, unsoundness of mind is presumed to exist even if it is not always apparent; and if proved to have existed prior to, and subsequent to a certain time, it is presumed to have existed at that time also, unless there is adequate evidence of a ‘lucid interval’...The burden of proof that a will was made in a ‘lucid interval’ is upon the person so alleging.”²⁸

2.16 One of the leading Irish cases in this area is that of *In bonis Corboy; Leahy v Corboy*,²⁹ where the question in issue was whether or not the testator had executed a codicil during a lucid interval. This

²⁶ Brady *Succession Law in Ireland* (2nd ed Butterworths 1995) at 74, citing *Cartwright v Cartwright* (1793) 1 Phillim 90; *Chambers and Yatman v Queen’s Proctor* (1840) 2 Curt 415; *In the Estate of Walker* (1912) 28 TLR 466. However, it should be noted that the English courts have held that if a testator is competent when he gives instructions to another person to draw up his will, and the will is drawn up in accordance with his instructions, then the will may be considered valid, even if at the time of formal execution the testator is no longer competent, see *Parker v Felgate* (1883) 8 PD 171.

²⁷ Casey and Craven *Psychiatry and the Law* (Oak Tree Press 1999).

²⁸ *Ibid* at 318.

²⁹ [1969] IR 148.

case again illustrates the need to examine the particular facts very carefully. Budd J, giving judgment for the Supreme Court, concluded that:

“...the testator was a chronically sick man. He was subject to recurrent attacks of convulsions which varied in duration and intensity. While their effects lasted, he was clearly incompetent to make a will. In between attacks there were difficulties of communication. He said little and frequently had difficulty in making himself understood. His condition was transient and varied. It would be a formidable task to discover whether he had testamentary capacity at any given time.”³⁰

2.17 In the circumstances, which were that a codicil had been drawn a unanimous Supreme Court decided that the case “was clearly one to excite the suspicion of the Court and to call for the exercise of a vigilant and jealous mind.”³¹ The person asserting the testator’s capacity in this case had drafted the codicil which was under dispute, and the codicil provided for an increase in the amount of the legacy to her. The Court was quite clear that:

“she is the person benefiting under this codicil which was procured by her and it is on her that the onus lies of removing the suspicions surrounding its execution.”³²

Clearly, the Court considered that the fact that she had a personal interest in its validity had a significant bearing on the evidence in the case. Other factors were also significant – the testator’s medical history and the “lack of positive testimony” which could be relied upon “to prove that the testator had knowledge and approved of the contents of the codicil”.³³ In effect, the person asserting its validity

³⁰ [1969] IR 148 at 162.

³¹ *Ibid* at 165.

³² *Ibid* at 168.

³³ *Ibid* at 167.

had failed to prove that the testator had made the codicil during a lucid interval.³⁴

2.18 In *Richards v Allan*,³⁵ the testatrix had fluctuating capacity over the course of a short period of time. It was held that “where the deceased has, while having full capacity, given instructions for the drawing of a will, it is sufficient if, at the time of execution, she has sufficient understanding to understand that she was executing a will for which she had previously given instructions, even if she was not, at that moment, capable of understanding the provisions of the will if read clause by clause.”³⁶

C Proving Testamentary Capacity

2.19 There is a presumption that a formally executed will is valid. As was stated by Hamilton P (as he then was) in *Re Glynn*:³⁷

“Normally the legal presumption is in favour of the will of a deceased and in favour of the capacity of a testator to dispose of his property and to rebut this presumption, the clearest and most satisfactory evidence is necessary.”³⁸

In *Blackall v Blackall*,³⁹ Barron J referred to the presumption of testamentary capacity and stated:

“There are two separate and distinct presumptions. This first is that it is presumed from the due execution of the will that the testator was of sound disposing mind. Secondly, if a testator of sound disposing mind has a will read over to

³⁴ In this case, the Court might well have considered the possibility of undue influence having been exercised by the prospective beneficiary. The result would most likely have been the same.

³⁵ [2001] WTLR 1031.

³⁶ *Ibid* at paragraph 23.

³⁷ [1990] 2 IR 326.

³⁸ *Ibid* at 330.

³⁹ Supreme Court 1 April 1998.

them then there is a further presumption that they knew and approved of the contents of the will.”⁴⁰

2.20 Generally speaking, the onus is on the person condemning the will to rebut the presumption and to prove that the testator did not have testamentary capacity. However, in certain circumstances, the onus is on the person propounding the will to prove that the testator had capacity at the time of execution. This occurs where the will is prepared under circumstances that “excite the suspicion of the Court.”⁴¹ Examples of this are where the person who stands to benefit from the will prepares it, such as occurred in *In b Corboy*.⁴² In that case, Budd J approved of the following statement of Lord Cairns where he stated that there are two rules in these circumstances:⁴³

“the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion on the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”⁴⁴

⁴⁰ Barron J, Supreme Court 1 April 1998 at 35. While Barron J gave a dissenting judgment on the facts, his interpretation of *In Re Glynn* and his statement regarding the presumptions of capacity were approved by O’Flaherty J. The majority judgment of Lynch J did not discuss the idea of testamentary capacity in detail.

⁴¹ *Ibid* at 36.

⁴² *In the Goods of Corboy, Deceased: Leahy v Corboy* [1969] IR 148.

⁴³ Giving judgment in *Fulton v Andrew* (1875) LR 7 HL 448, 461 approving the statement of Mr Baron Parke in *Barry v Butlin* (1838) 2 Moo PCC 480, 482.

⁴⁴ [1969] IR 148, 156.

2.21 Another example is where the testator suffers from a mental illness, in which case the propounder of the will must establish that the will was executed during a lucid interval.⁴⁵ Old age does not necessarily in itself “excite the suspicion of the court.” As stated by Brady:⁴⁶

“Old age, like infirmity is not, without more, proof of testamentary incapacity but, like infirmity, it may be invoked in support of a plea that the testator did not know and approve of the contents of his will, or that the will was procured as the result of undue influence.”⁴⁷

With regard to the issue of old age and the presumption of capacity, Barron J in *Blackall v Blackall*,⁴⁸ stated:

“Since want of intelligence may be brought about by supervening physical infirmity or the decay of advancing age, it is essential to determine whether there is sufficient intelligence to understand and appreciate the testamentary act in its different bearings. In the instant case the age of the testatrix alone imposed the onus of his establishing that the power to make a will remained. The fact that she also suffered a stroke added to that onus.”⁴⁹

2.22 Thus, it can be summarised that where a will is formally executed, testamentary capacity is presumed and the onus is on the person challenging the will to prove that the testator lacked the required capacity. However, if the circumstances surrounding the execution of the will are such as to excite the suspicion of the court, the onus is on the person propounding the will to prove that the individual had the requisite testamentary capacity.

2.23 The assessment required is of the legal capacity of the testator but medical witnesses have a crucial role in the determination

⁴⁵ See paragraphs 2.14-2.18

⁴⁶ Brady *Succession Law in Ireland* (2nd ed Butterworths 1995).

⁴⁷ *Ibid* at 78.

⁴⁸ Supreme Court 1 April 1998.

⁴⁹ *Ibid* at at 41.

of whether or not the testator had legal capacity. The role of the medical witness is summarised by Casey and Craven⁵⁰ as follows:

“A medical witness who attended a testator may give evidence as a witness of fact, but, in accordance with general principles, unless expert, cannot give evidence as to the existence of facts which he has not personally observed. However, also in accordance with general principles, an expert witness who did not see or examine the testator may express an opinion on facts otherwise proved in evidence. Notwithstanding the evidence of expert medical witnesses, the evidence of other eyewitnesses who observed and knew the putative testator has been preferred.”⁵¹

Finally, the probative value of such medical evidence has been addressed. In *Richmond v Richmond*,⁵² the court stated:

“It is for the court to decide, although the court must have the evidence of experts in the medical profession who can indicate the meaning of symptoms and give some general ideas of mental deterioration which takes place in cases of this kind.”⁵³

(1) *The Practice in the Probate Office*

2.24 The vast majority of wills are admitted to probate and put into effect without any contentious issues arising which require the involvement of the courts. The Probate Office of the High Court is concerned with what is termed the ‘non-contentious’ probate jurisdiction of the High Court. In 2002, the Probate Office in Dublin issued 6,029 Grants of Probate and the 14 District Probate registries issued 4,902 grants.⁵⁴ There were 1,987 Grants of Administration

⁵⁰ Casey and Craven *Psychiatry and the Law* (Oak Tree Press 1999).

⁵¹ *Ibid* at 321.

⁵² (1914) LT 273.

⁵³ As quoted in Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley’s 2003) at D1.8.

⁵⁴ These include grants of Administration with Will Annexed – these are cases where a will has been made but Executors have not been appointed

Intestate (where there is no will) issued by the Probate Office and 2,066 issued by the District Probate Registries. Ninety-nine percent of the work of the Office is carried out without the necessity for a court application. The main functions of the office are:

1. the admission of wills to proof,
2. the issuing of Grants of Probate and Administration,
3. the preservation of probate records for inspection and the provision of certified copies of probate documents,
4. the processing of Court applications to the probate Judge.⁵⁵

2.25 The Probate Office staff work on the basic assumption that a testator had capacity to make a valid will. They do not require proof of the testator's legal capacity unless doubts are raised about it. Age alone does not give rise to doubts. There are various circumstances in which doubts may be raised, for example, if the Death Certificate states the cause of death as "senile dementia" or "Alzheimer's disease", if it is asserted that the will was executed during a "lucid interval" or if the testator was a patient in a psychiatric hospital or resident in a residential care unit for people with mental disabilities. If the Death Certificate states the cause of death as dementia or Alzheimer's disease, then in the view of the Probate Office doubt is cast on the testator's capacity even if the will was made many years before the death. This seems to be unnecessary and the doubt should only arise if the will was made within a few years of the death.

(2) Dementia

2.26 If the testator died from dementia or a related illness, the Probate Office may require evidence as to the date of onset, and

or have been appointed but in may have predeceased the testator are unable or unwilling to act. Information supplied by the Probate Office.

⁵⁵ See the website of the Probate Office at:

<http://www.courts.ie/Home.nsf/Content/Court+Offices+Opening>

severity, of the condition. Such evidence may be requested even if the will was quite an old one and was likely to have pre-dated the onset of the testator's condition. Where evidence of the testator's capacity at the date of the will is required, in practice, a doctor's certificate is considered to be the 'best evidence'. If a medical affidavit certifying capacity is provided and is not contested by anyone, this generally satisfies the Probate Office. If it is contested, the issue is referred to the High Court. If it is not possible to get a medical affidavit (for example, where no doctor attended the deceased around the time of execution of the will), then the Probate Office seeks affidavits from the solicitor who drew up the will (if any), and/or from the attesting witnesses. Similar affidavits are also required where, for example, it is claimed that the will was made during a 'lucid interval', occurring during the course of a pre-existing condition causing intermittent incapacity.

(3) *Residents in Psychiatric Hospitals*

2.27 If the testator was a patient in a psychiatric hospital or a resident in a residential care unit for people with mental disabilities, it is the standard practice of the Probate Office to request an affidavit from a doctor who attended the deceased at the relevant time. (This practice does not apply to residents of geriatric hospitals or long stay patients in general hospitals.) Where such an affidavit cannot be supplied, it may, theoretically, be possible to substitute for it an affidavit sworn by the solicitor who drew up the will, or by any other responsible person who can provide conclusive evidence of the testator's capacity. However, in practice, the matter is referred directly to the Court.

(4) *Contemporaneous Certification of Capacity*

2.28 It appears that contemporaneous certification of capacity is often unavailable in practice. In fact, it appears that such a certificate might even raise doubts as to a testator's capacity, raising the question as to why certification was considered necessary. However, if such a practice became more commonplace and particularly if it became the recommended practice for solicitors, the presentation of a Certificate of Capacity would not have the effect of raising doubts, but of dispelling them.

D Practice in the Solicitors' Profession

2.29 As already stated, the question of testamentary capacity only arises in a small number of cases.⁵⁶ This does not necessarily mean that all testators have such capacity. The difficulties in contesting a will on this basis – the problems with retrospective assessment, the difficulties inherent in all capacity assessments and, of course, the costs involved all militate against actions of this nature. The costs are usually paid out of the estate so there is little point in contesting a will where the value of the estate is only slightly greater than the likely costs of the action. If the will broadly accords with the outcome in an intestacy and there is no earlier will, there is no point in contesting it.

2.30 The majority of wills are drawn up by solicitors although their involvement is not essential. The Commission had discussions with some solicitors about how they dealt with clients whose capacity was in doubt. Some solicitors stated that, if the question of capacity was in issue, they would arrange to liaise informally with the client's medical practitioner, to obtain his opinion, and if necessary, a Certificate of Capacity, which would then be held on file with the will, as a precaution in case of a future challenge. Similar approaches may be adopted if the client is in hospital. Solicitors sometimes encounter difficulties where the medical and nursing staffs of hospitals have informed them that they are not permitted by hospital management to involve themselves in such legal matters as witnessing wills made in the hospital.

2.31 Solicitors are also increasingly conscious that when an elderly person is making either a will or an *inter vivos* transfer of property, best practice requires that instructions should not be taken in the presence of interested third parties, for example, the prospective beneficiaries.⁵⁷ The absence of contemporaneous notes of the meeting between the solicitor and client makes an assessment of the client's capacity more difficult. In *Moyles v Mahon*,⁵⁸ Smyth J stated that while he accepted the evidence of the solicitors in the case:

⁵⁶ Paragraph 2.01 above.

⁵⁷ The Law Society of Ireland's *Guide to Professional Conduct of Solicitors* (2nd ed 2002) deals with this issue.

⁵⁸ High Court (Smyth J) 6 October 2000.

“It is certainly desirable that there should be a fuller note than exists in this case...It is certainly desirable to have an attendance but it is not a mandatory requirement. If one of these solicitors had died, there might be grave difficulty in certain circumstances without a contemporaneous note.”⁵⁹

2.32 If the execution of suspect wills were a widespread problem which required to be addressed by law reform, the most logical way to redress this would be to increase the formal requirements for the creation of valid wills. For example, a doctor’s certificate certifying capacity might be required for everyone making a will just as such a certificate is required for any person executing an Enduring Power of Attorney.⁶⁰ Alternatively, it could be required for specific groups, for example, people who are dependent on others for care at home or who are living in long stay care. A presumption of incapacity could be enacted to apply to the relevant groups so that no will executed by a member of the group would be valid unless accompanied by a contemporaneous medical certificate. Alternatively, any gift made by such a person in favour of someone in a caring role might be rendered invalid unless accompanied by a Certificate of Capacity. Approaches like these could be suggested on the basis that it is easier to police wills at the time of their creation than to seek to examine them retrospectively. However, this seems a far too elaborate and draconian approach. It would be very difficult to categorise the people for whom such a certificate would be required and it is unlikely that all suspicious cases would be covered. It would probably be better to have policy guidelines for solicitors which would recommend the precaution of obtaining a certificate of capacity in doubtful cases as a matter of prudence.

2.33 In 1995, the British Medical Association and the Law Society in England produced a joint publication entitled “Assessment of Medical Capacity – Guidance for Doctors and Lawyers”.⁶¹ In discussing the duty of solicitors, it refers to the ‘golden rule’:

⁵⁹ High Court (Smyth J) 6 October 2000 at 19.

⁶⁰ See paragraph 3.19.

⁶¹ A Report of the British Medical Association and The Law Society *Assessment of Mental Capacity – Guidance for Doctors and Lawyers* (BMA Professional Division Publications 1995).

“that a solicitor, when drawing up a will for an elderly person or someone who is seriously ill, should ensure that the will is witnessed or approved by a medical practitioner. The medical practitioner should record his or her examination and findings and, where there is an earlier will, it should be examined and any proposed alterations should be discussed with the testator or testatrix.”⁶²

This ‘rule’ evolved in the United Kingdom through a sequence of cases which were recounted by Rimer J recently in *Re Morris (deceased); Special Trustees for Great Ormond Street Hospital for Children v Rushin*.⁶³ He referred to the guidance which had been given by Templeman J in *Re Simpson (deceased); Schaniel v Simpson*,⁶⁴ and which had later been recorded as follows:

“In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken: the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings. There are other precautions which should be taken. If the testator has made an earlier will this should be considered by the legal and medical advisers of the testator and, if appropriate, discussed with the testator. The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator. These are not counsels of perfection. If proper precautions are not taken injustice may result or be imagined, and great expense and misery may be unnecessarily caused.”⁶⁵

⁶² A Report of the British Medical Association and The Law Society *Assessment of Mental Capacity – Guidance for Doctors and Lawyers* (BMA Professional Division Publications 1995) at 35-6.

⁶³ Chancery Division 19 April 2000.

⁶⁴ (1977) 121 SJ LB 224.

⁶⁵ (1977) 127 NLJ 487.

2.34 The 1995 publication by the British Medical Association and the English Law Society sought to provide guidelines for both legal and medical practitioners as to the meaning of “testamentary capacity”. Such guidance, of course, would be crucial for medical practitioners in the event that they were asked to certify capacity on a regular basis. A checklist was provided, although it was emphasised that the list was not intended to be either authoritative or exhaustive. It was stated that people making a will should be able to understand:

“that they will die;

that the will shall come into operation on their death, but not before;

that they can change or revoke the will at any time before their death, provided they have the capacity to do so;

who the executor is or who the executors are (and perhaps why they should be appointed as executors);

who gets what under the will;

whether a beneficiary’s gift is outright or conditional;

that if they spend their money or give away or sell their property during their lifetime, the beneficiaries might lose out;

that a beneficiary might die before them;

whether they have already made a will and, if so, how and why the new will differs from the old one ...

the extent of all the property owned solely by them;

the fact that certain types of jointly-owned property might automatically pass to the other joint owner, regardless of anything that is said in the will;

whether there are benefits payable on their death which might be unaffected by the terms of their will...

that the extent of their property could change during their lifetime.”⁶⁶

It was stated that testators should also be able to comprehend and appreciate the claims of possible beneficiaries, and understand the legitimate reasons why they might choose to prefer some beneficiaries and exclude others, for example, where they had already made adequate provision for particular people, or where some of the potential beneficiaries were in greater need than others.⁶⁷ There is no equivalent publication in Ireland.

2.35 The Commission considers that there is merit in the practice of obtaining contemporaneous medical certification of capacity in appropriate cases but this should not be made a statutory requirement. It must be clear to the doctor providing the certificate that what is required is an assessment of the specific capacity to make a will and not a general assessment of capacity as is required in the case of an application for wardship. The Law Society’s current “Guide to Professional Conduct of Solicitors in Ireland”⁶⁸ does not specifically address this issue but the Commission is aware that discussions are taking place within the Law Society on the matter. The Commission is not aware of any guidelines available to the medical profession on the assessment of testamentary capacity. The Commission considers that such guidelines should be drawn up by the Law Society and the Medical Council for the assistance of both solicitors and medical practitioners.

2.36 *The Commission provisionally recommends that no additional formal requirements should be imposed either on testators in general or on particular categories of testators in respect of the execution of wills. However, the contemporaneous certification of capacity by a medical practitioner is desirable as a prudent precaution in cases of doubtful capacity and where a later challenge to a will appears likely.*

⁶⁶ A Report of the British Medical Association and The Law Society *Assessment of Mental Capacity – Guidance for Doctors and Lawyers* (BMA Professional Division Publications 1995) at 36-7.

⁶⁷ *Ibid.*

⁶⁸ Law Society of Ireland *A Guide to professional Conduct of Solicitors in Ireland* (Law Society of Ireland 2nd ed 2002).

2.37 *The Commission considers that guidelines on the assessment of testamentary capacity should be drawn up by the Law Society and the Medical Council for the assistance of both solicitors and medical practitioners.*

2.38 *The Commission is also of the view that Guidelines for solicitors should also note that contemporaneous notes be made by solicitors regarding the details of the meeting with the client when the issue of testamentary capacity is an issue.*

CHAPTER 3 ENDURING POWERS OF ATTORNEY

A Introduction

3.01 In September 1989, the Law Reform Commission published the second in its series of Land Law and Conveyancing Law Reports, which recommended the introduction of a system of Enduring Powers of Attorney (EPA) in Ireland.¹ This recommendation was implemented by the *Powers of Attorney Act 1996*.² The *Enduring Powers of Attorney Regulations 1996*³ set out the detailed rules regarding, among other things, the form of instruments creating EPAs, their execution, and the requirement to notify specified people.

3.02 A power of attorney is defined in the Act as an instrument signed by or by direction of a person (the donor), or a provision contained in such an instrument, giving the donee (the attorney) the power to act on behalf of the donor in accordance with the terms of the instrument.⁴ There are two types of powers of attorney; an enduring power of attorney and a general power of attorney. A power of attorney is an enduring power if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor, and if it complies with the procedural requirements for its creation.⁵ The essential difference between an enduring power of

¹ Law Reform Commission Report on *Land Law and Conveyancing Law (2) – Enduring Powers of Attorney* (LRC 31 – 1989).

² Hereinafter referred to as “the 1996 Act”.

³ *Enduring Powers of Attorney Regulations 1996* Statutory Instrument No 196 of 1996, partially amended by the *Enduring Powers of Attorney (Personal Care Decisions) Regulations 1996* Statutory Instrument No 287 of 1996.

⁴ Section 2(1) of the 1996 Act.

⁵ Section 5(1) of the 1996 Act.

attorney (EPA) and a general power of attorney is that the general power ceases to have effect if the donor becomes mentally incapable.

3.03 For people who have the foresight to put an EPA in place, the most significant advantage is that they have chosen their own substitute decision maker should they ever need one. This should mean that by their choice of attorney they can exercise or influence how and by whom decisions for them will be made if they should suffer the impairment or loss of mental capacity. If the EPA is properly executed and is not expressed in unduly restrictive terms, then the majority of decisions about the donor's property and personal care will be taken by a person chosen personally by the donor, a person in whom the donor has confidence. In most cases, it is not necessary to involve the courts in decisions which have to be taken, but the option of applying to the court for guidance is there.

3.04 There are two stages to an EPA. The first is when the document is executed. At this stage, it has no real legal effect. It is impossible to know how many EPAs have been executed to date. The second stage to an EPA is when an application is made to the Registrar of Wards of Court by the attorney to have it registered⁶. Registration does not occur until the donor of the EPA becomes or is becoming mentally incapacitated.⁷ If this eventuality does not occur the EPA may never come into effect. An increasing number of EPAs have been registered each year since the enactment of the 1996 Act. The following statistics have been supplied by the Wards of Court Office:

Year	Number Registered
1997	6
1998	28
1999	32
2000	64
2001	72

⁶ There are certain circumstances in which an EPA can be acted upon before registration – under section 7(2) of the *Powers of Attorney Act 1996* the attorney is given certain rights to take action prior to registration such as maintaining the donor or preventing loss to the donor's estate, and under section 8 of the same Act the court is given certain functions prior to registration.

⁷ Section 9 of the 1996 Act.

2002	86
2003	24 (up to 30 April 2003)

3.05 Clearly, on this trend, the EPA system is likely to become increasingly used. In the English Court of Protection, 15,000 applications to register enduring powers of attorney are received each year.⁸ EPAs in England only deal with property and affairs and do not deal with personal and health care decisions.⁹

3.06 This chapter deals with those aspects of the EPA system which are relevant to the proposed new system of guardianship outlined in Chapter 6 and with a number of practical issues which have been highlighted. It does not include a comprehensive examination of the Act.

(1) The Scope of an EPA

3.07 The Act provides that the appointed attorney may have power over the property, financial and business affairs and personal care decisions of the donor.¹⁰ The donor may make an EPA to cover one aspect only or may make a more general power. For example, the power may specify that the attorney has authority to make decisions about property and business affairs only or personal care only. The donor has greater scope in the property and business affairs as the authority can be unlimited whereas the scope of the personal care decisions is circumscribed by the legislation.

⁸ Statistics as quoted in *Masterman-Lister v Brutton & Co* [2002] EWCA 1889, paragraph 15.

⁹ *Enduring Powers of Attorney Act 1985*. New arrangements have recently been introduced in Scotland under the *Adults with Incapacity (Scotland) Act 2000*. This provides for Continuing Powers of Attorney which are for dealing with property and affairs and Welfare Powers of Attorney for personal and health care decisions.

¹⁰ Section 6 of the 1996 Act.

(2) *Property and Affairs*

3.08 The donor may give the attorney a general authority to deal with property and affairs or may specify precisely those areas over which the attorney is to have power. Section 6(1) of the Act provides:

“An enduring power may confer general authority...on the attorney to act on the donor’s behalf in relation to all or a specified part of the property and affairs of the donor or may confer on the attorney authority to do specified things on the donor’s behalf and the authority may, in either case, be conferred subject to conditions and restrictions.”¹¹

3.09 If the donor gives the attorney a general authority, then the attorney has the authority “to do on behalf of the donor anything which the donor can lawfully do by attorney.”¹² The attorney can exercise any of the donor’s powers or discretions as tenant for life within the meaning of the *Settled Land Act 1882*, unless the power expressly restricts the attorney’s powers to do so.¹³ The attorney may act, subject to any express conditions contained in the power of attorney, for his or her own benefit or for the benefit of any other person in so far as the donor might be expected to act for that person’s benefit.¹⁴ So, for example, the attorney may make provision for the donor’s dependants. Unless there is a specific provision to the contrary, the attorney may not make gifts of the donors property. Even where there is an express power to make gifts, this power should be confined to gifts of a seasonal nature, gifts such as birthday and anniversary gifts to people connected to the donor, and gifts to charities to which the donor made or might be expected to make gifts.¹⁵ The value of the gift should not be unreasonable bearing in mind the size of the donor’s estate.¹⁶

¹¹ Section 4 defines “affairs” in this context as business and financial affairs.

¹² Section 6(2) of the 1996 Act.

¹³ Section 6(3) of the 1996 Act.

¹⁴ Section 6(4) of the 1996 Act.

¹⁵ Section 6(5) of the 1996 Act.

¹⁶ *Ibid.*

3.10 The general authority may be subject to other restrictions. So, for example, the EPA may specify that the attorney has the right to sell the donor's property but may also specify that this is only to be done in certain circumstances, for example, provided that there is no dependant living in the property or provided that alternative arrangements have been made for the dependant. There may be problems if the power is too restrictive.¹⁷ It is quite likely that, at the time of execution, the donor would not have been able to foresee all the circumstances that could arise. If this is so, it may be necessary to make the donor a ward of court.¹⁸ This would mean that the EPA would not have served its purpose.

(3) Personal Care Decisions

3.11 The EPA may give the attorney the power, "to make any specified personal care decision or decisions on the donor's behalf".¹⁹ A personal care decision means a decision on any one or more of the following:

- (a) "where the donor should live;
- (b) with whom the donor should live;
- (c) whom the donor should see and not see;
- (d) what training or rehabilitation the donor should get;
- (e) the donor's diet and dress;
- (f) inspection of the donor's personal papers;

¹⁷ "An Enduring Power of Attorney can be extremely flexible, and the power to impose restrictions and conditions may be valuable. However the fact remains that the less authority given to the Attorney by the Donor, the greater the risk that the attorney would be unable to manage all of the property and affairs of the Donor. In this situation it is possible that the Donor may have to be made a Ward of Court because of the unduly restrictive nature of the conditions imposed in the Enduring Power." Gallagher *Enduring Powers of Attorney – Six Years Later* (Society of Trust and Estate Practitioners Ireland, Seminar and Conference Papers 2002).

¹⁸ Under the new scheme as outlined in Chapter 6 they could be made a Protected Adult.

¹⁹ Section 6(6) of the 1996 Act.

- (g) housing, social welfare and other benefits for the donor.”²⁰

3.12 Personal care decisions made by the attorney must be made in the donor’s best interests. The Act sets out what the attorney must take into account when making such decisions:

- “(i) so far as ascertainable, the past and present wishes and feelings of the donor and the factors which the donor would consider if he or she were able to do so;
- (ii) the need to permit and encourage the donor to participate, or to improve the donor’s ability to participate, as fully as possible in any decision affecting the donor;
- (iii) so far as it is practicable and appropriate to consult any of the persons mentioned below, their views as to the donor’s wishes and feelings and as to what would be in the donor’s best interests:

- (I) any person named by the donor as someone to be consulted on those matters;
- (II) anyone (whether the donor’s spouse, a relative, friend or other person) engaged in caring for the donor or interested in the donor’s welfare;
- (iv) whether the purpose for which any decision is required can be as effectively achieved in a manner less restrictive of the donor’s freedom of action.”²¹

In effect, the power of attorney must be used in a manner which reflects the donor’s wishes and respects the autonomy of the donor as far as is possible.

(4) Health Care Decisions

3.13 While the definition of ‘personal care’ does not include authority to make decisions on medical treatment or surgery it does include decisions which may have health care implications, for example, the decision as to where the donor should live. During the Oireachtas debates on the *Powers of Attorney Bill 1995*, an amendment to the Bill was proposed by the opposition which would have enabled a power of attorney to be granted in respect of health

²⁰ Section 4(1) of the 1996 Act.

²¹ Section 6(7)(b) of the 1996 Act.

care decisions. However the Government rejected this amendment. The Minister for Justice Equality and Law Reform stated in Dáil Éireann that

“the extension of the powers of an attorney to such matters would involve issues of the greatest sensitivity and that it would be wrong to amend the Bill before the matter had been researched thoroughly and there had been extensive consultations.”²²

Later, in the same debate, the Minister pointed out that health care, “can involve difficult operations, such as putting people on and taking them off life-support machines...it would have to be approached with a good deal of care and research.”²³

3.14 The Commission proposes that Personal Guardians should be entitled to take minor or emergency healthcare decisions on behalf of the Protected Adult.²⁴ The Commission considers that attorneys under EPAs should also be entitled to make these decisions if the specific authority is contained in the EPA. There should be provision for the donor to establish that the nature of such authority and its extent is understood.

3.15 *The Commission provisionally recommends that attorneys appointed under EPAs should have the same powers as Personal Guardians in relation to health care decisions unless this is specifically excluded by the donor.*

B Executing an EPA

3.16 The *Enduring Powers of Attorney Regulations 1996*²⁵ set out rules regarding, among other things, the form of instruments creating EPAs, their execution, and the requirement to notify specified people. The requirements in relation to notification are

²² Dáil Debates Volume 465 15 May 1996, Column 1126.

²³ *Ibid* at Column 1132.

²⁴ Outlined in Chapter 6.

²⁵ Statutory Instrument No 196 of 1996, which was partially amended by the *Enduring Powers of Attorney (Personal Care Decisions) Regulations 1996* Statutory Instrument No. 287 of 1996.

examined further below. The document creating the power must be in a particular format and must include the following:

- a statement by a registered medical practitioner verifying that that the donor had the mental capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power;
- a statement by the donor that the donor has read the information as to the effect of creating the power or that such information has been read to him or her;
- a statement by a solicitor that, after interviewing the donor and making any necessary enquiries, the solicitor is satisfied that the donor understood the effect of creating the power of attorney and the solicitor has no reason to believe that the document is being executed by the donor as a result of fraud or undue pressure;
- a statement by the attorney that the attorney understands the duties and obligations of an attorney and the requirements of registration.

(1) *Who May be Appointed an Attorney?*

3.17 The attorney may be an individual (or more than one may be appointed) or a trust corporation within the meaning of section 30 of the *Succession Act 1965*²⁶ but may not be one of the following:

- a person aged under 18 at the time the EPA is executed;
- a person who has been declared a bankrupt;
- a person convicted of an offence involving fraud or dishonesty or an offence against the person or property of the donor;
- a person disqualified under the Companies Act 1990;²⁷
- a person who is the owner of a nursing home (whether or not it is a nursing home within the meaning of the *Health (Nursing Homes) Act, 1990*) in which the donor resides, or a person residing with or an employee or agent of the owner, unless the attorney is a spouse, parent, child or sibling of the donor.²⁸

²⁶ Section 5(4) of the 1996 Act.

²⁷ Under Section 150 or Part VII of the 1990 Act.

²⁸ Section 5(4) of the 1996 Act.

3.18 If the appointed attorney is a spouse, the EPA is invalidated if the couple separate or divorce or the marriage is annulled.²⁹

(2) Registering an EPA

3.19 As already stated, the EPA does not usually come into effect until it is registered and that can only happen when and if the donor becomes or is becoming mentally incapacitated.³⁰ Attorneys are obliged to make an application for registration as soon as practicable if they have reason to believe that the donor is or is becoming mentally incapable.³¹ This application is made to the Registrar of Wards of Court.³² If the attorney has any concerns about the validity of the EPA, a court ruling can be obtained.³³ The attorney must produce evidence of the donor's declining capacity – this is in the form of a certificate from a registered medical practitioner that the donor is, or is becoming, incapable by reason of a mental condition of managing and administering his or her own property and affairs.³⁴

3.20 Before making this application the attorney must give notice of intention to do so to the donor and to the people who were notified of the execution of the EPA and are named in it.³⁵ The notice to the donor must state that the attorney proposes to make an application to register the EPA and that once the EPA is registered any revocation will be ineffective unless that revocation is confirmed by the court.³⁶ A notice to any other person entitled to notice must state that the attorney proposes to make an application to register the EPA, that it is possible to object to the registration, that any objection must be made to the Registrar of Wards of Court before the end of the period of 5 weeks from the day on which notice is given and must specify the

²⁹ Section 5(7) of the 1996 Act.

³⁰ Section 9 of the 1996 Act.

³¹ *Ibid.*

³² Section 9(1) of the 1996 Act.

³³ Section 9(3) of the 1996 Act.

³⁴ Section 9(4) of the 1996 Act.

³⁵ Section 9(2) Schedule 1 of the 1996 Act.

³⁶ Section 9(2) Schedule 1 paragraph 2(5) of the 1996 Act.

grounds on which an objection to registration may be made.³⁷ The grounds for objection are:

- (a) “that the power purported to have been created by the instrument was not valid;
- (b) that the power created by the instrument is no longer a valid and subsisting power;
- (c) that the donor is not, or is not becoming, mentally incapable;
- (d) that, having regard to all the circumstances, the attorney is unsuitable to be the donor’s attorney;
- (e) that fraud or undue pressure was used to induce the donor to create the power”.³⁸

3.21 To date, very few objections to registration have been made in Ireland. In *In the Matter of the Powers of Attorney Act 1996 on the application of Hamilton and Williams*,³⁹ an objection was made on the basis that the proposed attorneys were unsuitable. Morris P held that the lack of business skill was not a valid objection as the word “unsuitable” as used in the Act has no connection with the proposed attorney’s skill at managing the donor’s property. In an English case, *Re W*,⁴⁰ it was held that hostility towards the attorney on the part of other interested parties (in this case, the attorney’s siblings) did not mean that the attorney was unsuitable. Such hostility could, however, render the attorney unsuitable if it would impact adversely on the administration of the estate.

3.22 If no objection is made or the objection is overruled, then the EPA is registered. If there is an objection, if it appears that no one has been given notice of the application, or if there is reason to believe that appropriate enquiries might bring to light evidence on which the court could be satisfied that one of the grounds of objection was established, then the court must make such enquiries as it

³⁷ Section 9(2) Schedule 1 paragraph 2(5) of the 1996 Act.

³⁸ Section 10(3) of the 1996 Act.

³⁹ [1999] 3 IR 310.

⁴⁰ *In re W (Power of Attorney)* [2000] 1All ER 175.

considers appropriate. Registration may be refused on any of the grounds on which an objection may be based.⁴¹

3.23 The Court has the discretion to register an EPA even if it does not comply with all the formal requirements set out in the legislation⁴². It can do this if satisfied that:

“(i) the donor intended the power to be effective during any mental incapacity of the donor,

(ii) that the power was not executed as a result of any fraud or undue pressure,

(iii) that the attorney is suitable to be the donor’s attorney, and

(iv) that it is desirable in the interests of justice so to register the instrument”.⁴³

(3) *Revocation of an EPA*

3.24 At present, the legislation does not provide for any procedures for the formal revocation of an EPA prior to its registration.⁴⁴ Donors may consider that a power has been revoked simply by stating this to the relevant people or by destroying the instrument. In the absence of legislation, this may actually constitute a revocation but it is unsatisfactory that the situation is not clear. A will may be revoked but this requires the same formalities as the execution of a valid will. The Commission considers that similar formal requirements should apply to the revocation of an EPA. In

⁴¹ Section 10(2) of the 1996 Act.

⁴² Section 10(5)(b) of the 1996 Act. In *In the matter of an instrument creating an enduring power of attorney executed by Anna (otherwise Nancy) Reid...on the 11th day of December 1997 and in the matter of an application by Joan Cowan, Terry Reid and Geraldine O’Connor* High Court 22 March 2002 Finnegan P stated that where Section 5(1) of the *Powers of Attorney Act 1996* were not complied with “[o]nce the Court is satisfied of the intention and the other requirements of Section 10(5)(b) are complied with, the Court may register the instrument as an enduring power of attorney”.

⁴³ *Ibid.*

⁴⁴ The power may not be revoked after it is registered unless the revocation is confirmed by the Court – Sections 11(1)(a) and 12(3) of the 1996 Act.

some jurisdictions legal practitioners are obliged to inform clients at the time of the execution of an EPA that they are entitled to revoke before it is registered.⁴⁵ The Commission considers that this should also apply in Ireland.

3.25 *The Commission provisionally recommends that prior to its registration the revocation of an EPA should be governed by the same formal requirements as its execution and that solicitors be obliged to inform clients of their right to revoke.*

(4) Notice Parties

3.26 When an EPA is executed and subsequently when an application is made for registration, various people must be informed. The form which such notification must take is set out in the Third Schedule of the *Enduring Power of Attorney Regulations 1996*.⁴⁶ The notice of execution of an EPA must be given by the donor to at least two people, other than the attorney, named in the EPA.⁴⁷ One of them must be the donor's spouse, if living with the donor; if not, then a child of the donor or if the donor has no spouse or child then a relative of the donor.⁴⁸ A relative means a parent, brother or sister (whether of the whole or half blood) or grandchild of the donor, the widow or widower of a child of the donor or a child of the donor's brother or sister (whether of the whole or half blood).⁴⁹

3.27 The notice of application for registration must be given to, among others, the people named in the EPA⁵⁰. The legislation does not deal with what happens if the donor's spouse was named in the EPA but the couple have since separated or divorced. If any of the people concerned are dead or mentally incapable or cannot be located,

⁴⁵ The Law Commission of New Zealand's *Report on Misuse of Enduring Powers of Attorney* (No 71 2001) recommended that a solicitor must certify on the EPA document "that the donor has the right at any time to revoke the power of attorney and the ways in which such right may be exercised." At paragraph 45.

⁴⁶ *Enduring Power of Attorney Regulations 1996* Statutory Instrument No 196 of 1996.

⁴⁷ *Ibid* at paragraph 7.

⁴⁸ *Ibid* at paragraph 7(c).

⁴⁹ *Ibid* at paragraph 7(d).

⁵⁰ Schedule 1 paragraph 2 of the 1996 Act.

the notice must be given to the other person or people named.⁵¹ If all of them are dead, mentally incapable or cannot be located, then notice must be given in the following order to:

- “(a) the donor’s husband or wife;
- (b) the donor’s children;
- (c) the donor’s parents;
- (d) the donor’s brothers and sisters, whether of the whole or half blood;
- (e) the widow or widower of a child of the donor;
- (f) the donor’s grandchildren;
- (g) the children of the donor’s brothers and sisters of the whole blood;
- (h) the children of the donor’s brothers and sisters of the half blood”⁵².

3.28 Not more than three people are entitled to receive notice.⁵³ These three should be identified by reference to the category to which they belong, and selected according to the order of priority given above.⁵⁴ However, if a particular individual is entitled to be notified and that person belongs to one of the above categories, then all other individuals falling within that category should also be notified.⁵⁵ Before applying for registration, the attorney may apply to the court to dispense with the requirement to give notice to a particular person.⁵⁶ The court may grant such an application if it is satisfied:

- (a) that it would be undesirable or impracticable for the attorney to give such notice; or

⁵¹ Schedule 1 paragraph 2(1)(b) of the 1996 Act.

⁵² Schedule 1 paragraph 3(1) of the 1996 Act.

⁵³ Schedule 1 paragraph 3(3) of the 1996 Act.

⁵⁴ *Ibid.*

⁵⁵ Schedule 1 paragraph 3(4) of the 1996 Act.

⁵⁶ Schedule 1 paragraph 4(2) of the 1996 Act.

(b) that no useful purpose is likely to be served by giving it.⁵⁷

3.29 Some practitioners consider that the provisions outlined above as to notice requirements are unduly inflexible. They have argued that a person who wishes to create an EPA may, for legitimate reasons, wish to alter the ‘hierarchy’ of people to be notified of the execution or registration of the instrument. In effect, they argue that the donor should be able to choose the notice parties in the same way as the attorney is chosen. The donor must have mental capacity at the execution stage so the right to choose the notice parties seems reasonable. The execution of an EPA does not involve any change in legal status and does not affect the rights of spouses or dependants. Nevertheless, the Commission considers that the requirement to notify a number of people is a good safeguard against undue influence and it is practical to name people in the EPA who are to be notified of its registration if only to make such notification easier. The registration of an EPA does involve a major change of legal status and it may be important for family members – in particular, spouses and dependants – to be aware of this. In fact, there is a strong case for an obligation to inform the donor’s spouse of the registration of an EPA even if the spouse is not living with the donor. Spouses have legal obligations to each other while they remain legally married and, indeed, former spouses may even have some obligations towards each other after divorce. These obligations arise under family law and social welfare legislation. The donor may have obligations to dependants including minor children and adult children with disabilities. An attorney who is not aware of obligations to a spouse and dependants may do something, in good faith, which would militate against the enforcement of their rights.

3.30 While the Commission considers that notice requirements should be maintained at both the execution and registration stages, it also considers that the donor ought to have the power to exclude a named individual from the notice provisions.⁵⁸ The requirement to notify some family members should remain. The notice parties

⁵⁷ Schedule 1 paragraph 4(2) of the 1996 Act.

⁵⁸ The Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards Against Abuse* (No 88 2003) recommends that “[t]he donor may in the EPA exclude a family member from receiving the notice.” At 15.

should also include a “qualifying cohabitee” in accordance with the Commission’s forthcoming proposals on the laws on cohabitation.⁵⁹

3.31 *The Commission provisionally recommends that the requirement to notify various parties, including family members, of the execution and registration of an EPA remain but that the donor has the power to exclude a named individual and that a “qualifying cohabitee” be among those who must be notified.*

(5) Accountability of Attorneys

3.32 The High Court has general supervisory powers in relation to EPAs and attorneys may ask for directions if required.⁶⁰ Among other things, the court may give directions with respect to -

- “(i)the management or disposal by the attorney of the property and affairs of the donor;
- (ii) the rendering of accounts by the attorney and the production of the records kept by the attorney for that purpose;
- (iii) the remuneration or expenses of the attorney, whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive, or the payment of additional, remuneration;
- (iv) a personal care decision made or to be made by the attorney.”⁶¹

3.33 In practice, these issues are virtually never raised and there are some concerns about the lack of supervision of attorneys. The Working Group on Elder Abuse recommended that “adequate supervision and review be put in place for the EPA in the management of the older person’s finances and welfare to prevent possible abuse”.⁶² The Alberta Law Reform Institute recently issued a report on safeguarding against abuse by attorneys.⁶³ This report

⁵⁹ This Consultation Paper is expected to be published in 2003.

⁶⁰ Section 12(1) of the 1996 Act.

⁶¹ Section 12(2) of the 1996 Act.

⁶² Report of the Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002) at 21.

Available at: <http://www.doh.ie/pdfdocs/pof.pdf>.

⁶³ The Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards Against Abuse* (No 88 2003).

Available at http://www.law.ualberta.ca/alri/pdfs/final_rprts/fr88.pdf.

recognises the need to keep EPAs as simple, efficient and effective means of enabling people to make arrangements for dealing with their affairs but also recognises the need for safeguards.⁶⁴ The safeguards should not be so onerous that they will unduly inhibit the use of EPAs. The report includes a list of safeguards which apply in other countries. Some of the recommended safeguards are already in place in Ireland but others, mainly in relation to the attorney's accountability, are not. For example, in Ireland there is no requirement for attorneys to file accounts and no independent monitoring of the acts of the attorney.

3.34 The question arises as to whether the attorneys should be subject to the supervision of the proposed Office of the Public Guardian in a similar way to Personal Guardians.⁶⁵ The Australian Law Reform Commission⁶⁶ recommended that the body which presides over guardianship and management of property cases should also exercise control over attorneys appointed under the Enduring Powers of Attorney legislation and this is the practice in a number of Australian jurisdictions, in New Zealand and in Scotland.⁶⁷

3.35 The Irish Act and Regulations place a clear duty on an attorney to keep accounts in relation to the affairs of the donor of an

⁶⁴ “The downside of an EPA is that it turns over control of some or all of a donor's property and affairs to another individual, the attorney whom the donor, because of their mental incapacity or infirmity, cannot effectively supervise. It is possible for an attorney to abuse those powers by using the donor's assets for purposes other than the donor's benefit. For example, an attorney may apply a donor's assets for a purpose beneficial to the attorney rather than for a purpose beneficial to the donor, or an attorney may simply steal the donor's property. Or an attorney who will benefit from the donor's estate may refuse to use the donor's money for proper care of the donor.” *Ibid* at 2.

⁶⁵ Outlined in Chapter 6.

⁶⁶ Australian Law Reform Commission *Guardianship and Management of Property* (ALRC No 52 1989) at 4.75.

⁶⁷ The safeguards for donors of EPAs vary considerably in the different jurisdictions – see the Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards Against Abuse* (No 88 2003) and Roberts “The Enduring Power of Attorney: An Angel in Disguise or a Wolf in Sheep's Clothing” address to the 4th International Conference of Public Trustees and Public Guardians 2000 for an overview of the different arrangements for notification and supervision.

EPA, and a Court may require the production of those accounts. The Regulations provide:

“An attorney who is appointed to act on the donor’s behalf in relation to property and affairs of the donor shall keep adequate accounts of the management thereof and, in particular, of any expenditure to meet the needs of persons other than the donor or to make any gifts authorised by the enduring power.”⁶⁸

In practice, the Court is rarely involved and it can be argued that it would be helpful if accounts were routinely inspected to ensure that the powers conferred on an attorney have not been abused. On the other hand, the procedures for registration and notification do provide safeguards. The attorney is the personal choice of the donor and so should not be subject to the same degree of scrutiny as a court appointed Guardian.

3.36 No detailed guidance is given to attorneys on the meaning of “adequate accounts”. Such detailed guidelines should be provided by the proposed Office of the Public Guardian. The requirements should depend on the precise arrangements. If a spouse is the attorney and is living with the donor, then there should not be any requirement to keep detailed accounts of the costs of the donor’s maintenance – this would probably be unconstitutional as interfering with the right to marital privacy.⁶⁹ If the spouse is the joint owner of most of the property, the accounting requirements should be minimal. If the attorney is a child with whom the donor is living, then the Public Guardian should have the discretion to decide in what detail accounts should be kept. If the donor and the attorney had a joint account before the registration of the EPA, that arrangement should continue but the bank should be informed of the donor’s incapacity.⁷⁰ Detailed accounts of other dealings with property and affairs should be kept. If the donor is living in a long stay place, then accounts should be kept of the costs involved and of other dealings.

⁶⁸ *Enduring Power of Attorney Regulations 1996* Statutory Instrument No 196 of 1996 at paragraph 5.

⁶⁹ An unenumerated right which was identified in *McGee v the Attorney General* [1974] IR 284.

⁷⁰ See Chapter 5 for recommendations on the joint accounts and other protection arrangements.

3.37 Apart from the exceptions identified, the Commission considers that attorneys should be informed that the property and assets of the donor should always be kept separate, and clearly distinguishable, from all other property and assets.⁷¹ So, for example, money owned by a donor which is held by a bank or financial institution should be held in the name of the donor, in a separate account; the attorney should be entitled to access it in his capacity as attorney. The Alberta Law Reform Institute recommended that attorneys be required to prepare and maintain a list of property and rights over which they have taken control and a list of transactions involving the donor's property and rights.⁷² The Commission consider that this is a reasonable requirement and would not be unduly onerous. The Commission also recommends that the regulations should provide that the donor may nominate another person to receive the accounts of a donor, or the proposed Office of the Public Guardian could nominate such a person. If the attorney refuses to furnish accounts to a nominated person then the Public Guardian as part of the supervisory function would have a role in this regard. The imposition of a requirement to submit accounts at intervals for inspection would be both reasonable and appropriate and the Office should have the power to call for accounts if doubts have been cast on the attorney's activities.

3.38 *The Commission considers that the absence of supervision of the attorney's personal care role is just as important. In order to*

⁷¹ In addition to the provisions of the *Powers of Attorney Act 1996* there are well established common law rules that an attorney owes a principal such duties as:

not to profit from his position

to keep accounts and

to keep the principal's property separate from the property of the attorney.

Society of Estate and Trust Practitioners *Finance and Law for the Older Client* (Tolley's 2003) E1.68-1.76.

Similarly, in White *Commercial Law* (Thomson Round Hall 2002) at 147 it is stated:

"An agent must account to the principal for all the property of the principal he receives in the course of the agency. He must therefore keep his own monies and property separate from those of the principal, unless mixing is authorised."

⁷² The Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards Against Abuse* (No 88 2003) at 14.

ensure this supervision, the Commission considers that attorneys should be subject to the overall supervision of the proposed Office of the Public Guardian. The degree of supervision need not be as extensive as that for guardians, but the Public Guardian should have discretion to call for periodic reports if there are concerns about the need to protect the donor of an EPA.

(6) *Financial Institutions*

3.39 On the notification of a registered EPA financial institutions are ‘put on notice’ of the agency nature of the accounts and should deal with them accordingly. The Commission recommends that the Irish Financial Regulatory Authority, in line with the sentiment expressed in section 26 of the *Central Bank and Financial Services Authority of Ireland Act 2003* “to promote the best interests of users of financial services”, should promote an awareness amongst financial institutions as to the status of such accounts and what is the best practice in dealing with them.

(7) *Professional Advisor*

3.40 *The Commission is aware that the Law Society is currently considering guidelines that would be available to solicitors in relation to both the execution and registration of EPAs. Guidelines might include:*

At the time of execution:

to ensure instructions are taken from the donor of the EPA and advisors to act in the best interests of the donor;

to advise the donor as to whether it is appropriate in the donor’s circumstances to execute an EPA;

to discuss the scope of authority that the donor wishes to give the attorney; and

to advise the donor that the EPA can be revoked prior to registration.

At the time of registration:

to advise the attorney that the attorney must act in the best interests of the donor in relation to all decisions that affect the donor;

the attorney must not profit from position as attorney unless the EPA provides for remuneration;

to keep an account of all property and transactions in relation to the power of attorney;

to ensure that the donor's property is kept separate from the property of the attorney; and

to explain to the attorney the scope of the authority given in the EPA

C The EPA and the Proposed New Guardianship System

3.41 The proposals which are outlined in Chapter 6 for a new system of guardianship will, if implemented, have some consequences for the EPA system. For example, the role currently exercised by the Registrar of Wards of Court in relation to EPAs would be assumed by the Office of the Public Guardian. The Commission is recommending that the Office of Public Guardian would exercise a general supervisory role over attorneys.

3.42 At present, an EPA is not automatically invalidated if the donor becomes a ward of court but the court does have the power to invalidate it.⁷³ The Australian Law Reform Commission⁷⁴ addressed the issue of what is to happen if an attorney has been appointed and it is subsequently necessary to appoint a guardian. The options are that the attorney cease to act or that the attorney continue but be subject to the overall powers of the guardian. They recommended that this issue should be left to the Court or Tribunal to decide what is best in the particular case.⁷⁵

3.43 The Commission considers that an EPA should only be displaced by a Guardianship Order if this is absolutely necessary. It may be necessary because the scope of the attorney's authority is limited by the terms of the EPA, but this could be overcome by a

⁷³ Section 5(a) of the 1996 Act.

⁷⁴ Australian Law Reform Commission *Guardianship and Management of Property* (ALRC No 52 1989).

⁷⁵ *Ibid* at paragraph 4.77. The question of whether these issues should be dealt with by a Court or a Tribunal is addressed in Chapter 1.

court order. As an attorney's appointment involves the express choice of the donor, that choice should be respected as much as possible. The Tribunal should have the authority to decide in a particular case.

Encouraging the Creation of EPAs

3.44 There is no person, group or agency with responsibility for promoting the use of EPAs in Ireland. Such promotion is required in order to advise more people of the value of an EPA, to encourage them to execute one and to dispel any impression that their execution is difficult or complex. The Working Group on Elder Abuse recommended that there should be an awareness campaign among health, legal and social care professionals on the benefits of EPA for elderly people.⁷⁶ In New Zealand, the Public Trust Office has similar functions to the proposed Office of the Public Guardian but also has a wider remit in respect of encouraging people to make wills and EPAs and provides direct assistance to people to do these things.⁷⁷ The Commission considers that the Office of the Public Guardian should promote and encourage EPAs by providing information and advice on their execution. It should also provide guidelines on choosing an attorney, including the advice that, if no suitable person is available, then no EPA should be executed.⁷⁸

⁷⁶ Report of the Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002) at 20.

Available at <http://www.doh.ie/pdfdocs/pof.pdf>.

Similarly, recommendation No 3 in the Report of the Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards Against Abuse* (No 88 2003) states: "We recommend that the Government prepare and provide through appropriate outlets, on a sustained basis, a pamphlet or pamphlets that set out in simple and straightforward form information about EPAs...." at 16.

⁷⁷ See their website at <http://www.publictrust.co.nz>. The Public Trust Office is involved in a range of other areas as well but these are not relevant to this paper.

⁷⁸ "The advantage of an EPA is that it enables an honest attorney to look after the affairs of the donor efficiently. The downside is that it enables a dishonest attorney to misuse the money and property of the donor." The Alberta Law Reform Institute *Enduring Powers of Attorney: Safeguards against abuse* (No 88 2003).

3.45 *The Commission provisionally recommends that the proposed new Office of the Public Guardian should have a general supervisory role over attorneys appointed under EPAs and should give directions and guidance on the meaning of “adequate accounts”, that, except in specific circumstances, there should be a requirement that the property and assets of the donor should be kept separate, and clearly distinguishable from other property and assets and lists of all transactions should be maintained;*

- *that attorneys should submit accounts of the donor’s property and affairs to the Office of the Public Guardian when asked to do so or to a person nominated by the donor or the Public Guardian;*
- *that the functions currently exercised by the Registrar of Wards of Court be exercised by the proposed Office of the Public Guardian, that EPAs should only be replaced by Guardianship Orders where absolutely necessary and that the Office should actively promote the execution of EPAs;*
- *that the Irish Financial Services Regulatory Authority should promote awareness among financial institutions of the status of accounts in the name of donors of registered EPAs;*
- *that the Law Society’s guidelines to solicitors might include specific advices to be given to donors at the time of execution of an EPA and to attorneys at the time of registration of an EPA.*

D Making Wills

3.46 We have stated in Chapter Two that there is a presumption that, where a will is formally valid, the testator had legal capacity.⁷⁹ Brady⁸⁰ states that there is also a presumption that a person who suffered from an incapacitating mental illness continued to lack testamentary capacity at the time of execution. In *Banks v Goodfellow*,⁸¹ although the testator was suffering from delusions the Court held that he had testamentary capacity. When an EPA is registered, because the donor became or was becoming mentally incapacitated, the presumption of incapacity would appear to have arisen. In these circumstances if the donor of a registered EPA

⁷⁹ Paragraph 2.19.

⁸⁰ Brady *Succession Law in Ireland* (2nd ed Butterworths 1995) at 74.

⁸¹ *Banks v Goodfellow* (1870) LR 5 QB 549.

wishes to execute or amend a will, the Commission is of the view that what is required is clear evidence that the donor:

“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....”⁸²

and that a doctor’s certificate is required to assess the donor’s mental capacity. In *In the Goods of Corboy*⁸³ Budd J stated where there is evidence of illness then “nothing less than firm medical evidence by a doctor in a position to assess the testator’s mental capacity could suffice to discharge the onus of proving him to have been a capable testator”.⁸⁴ The Commission is in agreement with such a practice and recommends that if a donor of a registered EPA wishes to execute a will, legal and medical evidence be obtained that the donor has the capacity to do so.

3.47 *The Commission recommends that in the event that a donor of a registered EPA wishes to execute a will that legal and medical evidence be obtained that the donor had the capacity to do so.*

E Advance Care Directives, or Living Wills

3.48 EPAs are a form of personal directive. It is possible to stipulate various directives in an EPA. Discussion of personal directives (they are sometimes called advance directives or living wills) tends to concentrate on the end of life decisions whereas they can and do serve a much less dramatic and prosaic role. It should be possible to have various kinds of personal directives which are legally enforceable – provided the directions are themselves legal. They need not only be concerned with end of life decisions and, in any event, assisted suicide is a crime and so a directive dealing with this would not be enforceable. A personal directive or decision to refuse various

⁸² *Banks v Goodfellow* (1870) LR 5 QB 565.

⁸³ [1969] IR 148.

⁸⁴ *Ibid* at 167.

medical treatments, for example, a do not resuscitate directive, is normally enforced in the sense that, if given by a legally capable individual, it is regarded as the refusal of consent. A similar directive given while legally capable but whose implementation only arises while not capable may or may not be enforced – see the discussion on legal capacity for consent to medical treatment in Chapter 1.⁸⁵ Since it is possible to nominate another person to make personal and property decisions, it ought to be possible to make those decisions oneself and have them carried out by others if incapacity sets in. They could provide for practical decisions in relation to personal care and property – broadly the same issues as may be dealt with under an EPA.

3.49 The Law Commission of England and Wales, in its report entitled “*Mental Incapacity*”, considered the topic of “Advance Statements about Health Care”.⁸⁶ It proposed that new legislation should include a provision clarifying the law on ‘advance refusals of treatment’, whereby legally competent people may decide in advance that they do not wish to receive certain treatment in the event of their subsequent mental incapacity.⁸⁷ Having engaged in consultation with the public on the Commission’s recommendations, the Lord Chancellor published a Report in 1999 where it was stated:

“Given the division of opinion which exists on this complex subject and given the flexibility inherent in developing case law, the Government believes that it would not be appropriate to legislate at the present time, and thus fix the statutory position once and for all.”⁸⁸

3.50 In the Lord Chancellor’s Department’s earlier Consultation Paper, “Who decides? Making Decisions on behalf of mentally incapacitated adults”⁸⁹, it was recorded that:

⁸⁵ At paragraph 1.08-1.10

⁸⁶ Law Commission of England and Wales *Mental Incapacity* (No. 231 1995) at Part V.

⁸⁷ *Ibid* at 65-82.

⁸⁸ Lord Chancellor’s Department, *Making Decisions* (CM 4465) (The Stationery Office 1999), Introduction at paragraph 20.

⁸⁹ Lord Chancellor’s Department *Who Decides? Making decisions on behalf of mentally incapacitated adults*” (CM 3808) (The Stationery Office 1997).

“This was the area of the Law Commission’s work which aroused the greatest public concern, and it is clear that this is a matter on which many have deep rooted personal, moral, religious and ethical views. The Government does not believe that it would be appropriate to reach any conclusions in this area in the absence of fresh consultation – not just on the detailed plans put forward by the Law Commission, but also on the need for and the merits of legislation in this area generally.”⁹⁰

3.51 The Commission recognises that questions concerning the effect of advance refusals of treatment by individuals themselves raise important and contentious moral, legal and ethical questions. Clearly, past statements of the preferences of an individual might be taken into account by the Public Guardian or a Court or Tribunal in the event that they were called upon to make a major healthcare decision on behalf of a person who did not have legal capacity.⁹¹ For the

⁹⁰ Lord Chancellor’s Department *Who Decides? Making decisions on behalf of mentally incapacitated adults* (CM 3808) (The Stationery Office 1997), at paragraph 4.2.

⁹¹ The concept of “substitute decision-making” was addressed in *In Re Ward of Court* [1996] 2 IR 79, where the O’Flaherty J quoted from “*In Re*

purposes of the present Consultation Paper, however, the Commission considers that it is unnecessary to embark on a detailed analysis of these complex issues. Advance Care Directives and their effects may be considered more comprehensively in a future Paper.

Quinlan Revisited: The Judicial Role in Protecting the Privacy Right of Dying Incompetents” (1988) 15 *Hast Cnst LQ* 479, where it was stated:

“Since the right of self-determination can only be exercised by a person competent to evaluate her condition, a patient lacking this capacity forfeits her right of self-determination unless the surrogate decision-maker, standing in the place of the incompetent, asserts the patient’s preference ... Courts will rely on the substitute judgment doctrine only when the surrogate decision-maker demonstrates the incompetent person’s preferences with reasonable certainty. When the patient expresses a treatment preference prior to her loss of competence, the court views the surrogate as merely supplying the capacity to enforce the incompetent’s choice.” At 484-486.

While in the case, due to the fact that the Ward had not expressly stated her preference in the eventuality of being in a persistent vegetative state, and the court had to decide the case based on their evaluation of her best interests, it would appear that where a clear preference of the incapacitated person is established, the court will enforce that choice.

CHAPTER 4 THE WARDS OF COURT SYSTEM

A Introduction

4.01 The Wards of Court system is the main legal mechanism available for substitute decision making in Ireland.¹ The system operates for the protection of every person who does not have legal capacity but is not confined to elderly people. The majority of wards are adults who have been brought into wardship because they are considered to lack legal capacity. Minors (people under 18 years of age) lack legal capacity by definition and may be made wards of court if their circumstances require this. Wardship due to minority is not the subject matter of this Consultation Paper. Here the concern is with elderly people, but the proposals being put forward could have application for all people who are affected by the system.

4.02 The responsibility for the operation of the Wards of Court system in Ireland now rests with the President of the High Court and the system is administered by the Registrar and staff of the Office of Wards of Court. While traditionally, the main purpose of wardship was to protect the property and financial assets of wards for their

¹ The description of the system given here draws on the legislation, discussions with the staff of the Wards of Court Office and on a number of publications: *Wards of Court – An Information Booklet* (Department of Justice, Equality and Law Reform 1998); Ó Floinn and Gannon *Practice and Procedure in the Superior Courts* (Butterworths 1996); Costello “Wards of Court – A general guideline of the procedures involved” (1993) 87 *Gazette* 143; McLoughlin “Wardship: A Legal and Medical Perspective” (1998) 4 *MLJI* 61; McCarthy and Wrigley, “Wards of Court – A Review of Utilisation in a Psychiatry of Old Age Service” (1998) 4 *MLJI* 58; Costello and Doherty, Lecture on Wards of Court to The Law Society, Continuing Legal Education, 15 January 2003. The Courts Service website –

<http://www.courts.ie/Home.nsf/LookupPageLink/Courts+Opening>

– provides information on the wardship system and the forms required for applications.

benefit and that of their dependants (if any), as the jurisdiction developed an increasing number of people were taken under its jurisdiction to provide for their personal protection.

4.03 Approximately 150 to 160 individuals come into wardship every year, and the total number of wards is estimated at about 2,600. This number is increasing steadily. There were 141 applications for wardship in 2002 of whom 10 were minors. There were 59 applications in the first four months of 2003 and 54 of these related to adults. The staff of the Office estimate that 75-80% of the total population of wards are brought into wardship because of ‘senile dementia’ or some other mental infirmity associated with old age.²

B The Historical Evolution of the Irish Wards of Court System

4.04 The wards of court system originated in the Crown prerogative for the purpose of acting as guardian of people with legal disabilities. This is traditionally expressed in Latin as *parens patriae* – guardian of the people and, by inference, especially of those unable to look after themselves.³ In the Supreme Court case of *In the matter of a Ward of Court (withholding medical treatment) (No. 2)*,⁴ Hamilton CJ outlined how this responsibility came to be vested in the President of the High Court:

“Historically, the jurisdiction over wards of court and their estates attached to the British Crown as *parens patriae* and the administration of such jurisdiction was delegated to the Lord Chancellor of England. In practice the authority to administer the jurisdiction rested on a special entrustment under Sign-manual issued to each successive Lord Chancellor by a letter in lunacy. This jurisdiction was by the Lunacy (Ireland) Act, 1901, made exercisable by such judges of the Supreme Court as might be similarly entrusted under Sign-manual. By virtue of the terms of the Government of Ireland Act, 1920, the said jurisdiction

² Information supplied by the Office of Wards of Court.

³ For an interesting account of the feudal origins of wardship and its subsequent development in England see Lowe and White *Wards of Court* (2nd ed Barry Rose/Kluwer Law Publishers 1986) Chapter 1.

⁴ [1996] 2 IR 79.

became exercisable by the Lord Chief Justice of Ireland. By virtue of the provisions of s.19 of the Courts of Justice Act, 1924, there was transferred to the Chief Justice and made exercisable by him all such jurisdiction in lunacy and minor matters as had been formerly exercised by the Lord Chancellor of Ireland and was at the passing of the Act exercised by the Lord Chief Justice of Ireland...By virtue of the provisions of s.9, sub-s. 1, of the Courts of Justice Act, 1936, this jurisdiction was transferred to the President of the High Court or such judge of the High Court assigned in that behalf by him and was further vested in the President of the High Court by virtue of the provisions of s.9 of the Courts (Supplemental Provisions) Act, 1961.”⁵

4.05 There is what has become for practical purposes an unimportant sharing of authority with the Circuit Court, though only in “lunacy matters”, not the other categories of wards: section 22(2) of the *Courts (Supplemental Provisions) Act 1961*, confers concurrent jurisdiction on the Circuit Court in “lunacy matters”, but limits the Circuit Court jurisdiction to cases where:

“the property of the person alleged to be of unsound mind and incapable of managing his affairs does not exceed six thousand five hundred euro in value or the income therefrom does not exceed three hundred and seventy-five euro per annum.”⁶

These thresholds have not been increased since 1971, so the situation at present is that the vast majority of wardship matters come within the exclusive remit of the President of the High Court. Effectively, the Circuit Court only has jurisdiction in cases where the prospective ward has no property.

4.06 The wardship jurisdiction places the State (represented by the President of the High Court or a Judge assigned by him) in the role of substitute parent to any of its citizens who may need care. Hamilton CJ outlined the State’s role in *Re Ward of Court*:⁷

⁵ [1996] 2 IR 79 at 102-3.

⁶ As amended by section 2(3) of the *Courts Act 1971*.

⁷ [1996] 2 IR 79.

“When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction is subject only to the provisions of the Constitution: there is no statute which in the slightest degree lessens the court’s duty or frees it from the responsibility of exercising that parental care... In the exercise of this jurisdiction the court’s prime and paramount consideration must be the best interests of the ward.”⁸

4.07 While the wardship jurisdiction rests with the President of the High Court by virtue either of its devolution from the *parens patriae* prerogative or because of the inherent jurisdiction of the Court, the criteria for wardship and the procedure for bringing an adult into wardship are set out in the *Lunacy Regulation (Ireland) Act*

⁸ [1996] 2 IR 79 at 106. Presumably on the basis of this passage, the headnote writer (at 81) also reports the Supreme Court as having held:

“2. That when a person was made a ward of court, the court was vested with jurisdiction over all matters relating to the person and estate of the ward and in the exercise of such jurisdiction was subject only to the provisions of the Constitution.”

A cloud of obfuscation has surrounded the status of the crown prerogative in the United Kingdom, and, perhaps even more so, in Ireland. In the United Kingdom, the prerogative has been defined as “those rights and capacities which the King alone enjoys in contradistinction to others.” [Blackstone Commentaries Volume 1 at 239. See also, Wade “Procedure and Prerogative in Public Law” (1985) 101 LQR 180]. The prerogative developed in the King’s Conciliar Courts, but when these were uprooted following Parliament’s victory in the Seventeenth Century (English) Civil War, the jurisdiction to administer all the law (with some exceptions) became vested in the common law courts. As a result despite the prerogative’s origin outside the common law courts, by today it is recognised as a compartment of the common law and no one doubts that a prerogative may be uprooted, qualified, or superseded by statute. The wardship’s constitutionality is not in doubt. However there is no reason to jump from this proposition, much less the fact that it originated as an element of the prerogative, to the conclusion that it enjoys a higher status than ordinary law. Thus the existing frame-work for the wardship jurisdiction can certainly be changed without any concerns on the constitutional front. Hamilton CJ’s judgment just quoted includes the words “... there is no statute which in the slightest degree lessens the court’s duty or frees it from the responsibility of exercising that parental care.” There is no reason, from these words or their context or from the general law to read the statement of Hamilton CJ other than at its face value.

1871 and by Order 67 of the Rules of the Superior Courts 1986.⁹ The 1871 Act does not appear to confer jurisdiction but simply to set out criteria and procedures.

C The *Parens Patriae* Prerogative

4.08 There appears to be some disagreement as to whether the *parens patriae* jurisdiction still exists in Ireland.¹⁰ This is important because, if it does, then the President of the High Court or the Judge dealing with the case has alternative jurisdiction which would apply in cases that do not come within the terms of the procedural legislation. This would mean that a person who does not meet the criteria set out in the legislation could be made a Ward of Court and that the Court has potentially very wide powers to make decisions on behalf of wards or to provide for their protection.

4.09 It can be argued that the *parens patriae* jurisdiction did not survive the constitutional changes in Ireland in 1922 on the same basis on which another Crown prerogative was found to be unconstitutional in *Byrne v Ireland*.¹¹ In that case, the Crown prerogative of immunity from suit in tort was held to be

⁹ Wardship applications in respect of minors are brought under Order 65 of the same Rules.

¹⁰ See generally, Kelly *The Irish Constitution* (3rd ed Butterworths 1994) at 1132-40; Tomkin and McAuley "Re A ward of Court: Legal Analysis" (1995)1 MLJI 45.

Paradoxically, it is clear that the *parens patriae* jurisdiction has been significantly curtailed in the UK:

"The jurisdiction formerly exercised by the Crown as *parens patriae* in relation to persons who, by reason of unsound mind, were unable to manage their property or affairs ceased to be exercisable on the coming into force, on 1 November 1960, of the Mental Health Act 1959 and the revocation of the last warrant by which that jurisdiction had been assigned to the Lord Chancellor and the judges of the Chancery Division - see the observations of Lord Brandon of Oakbrook in *In re F (Mental patient: Sterilisation)* [1990] 2 AC 1, at 57D-58B. Since 1960 the position has been governed by the provisions of the 1959 Act (subsequently repealed and replaced by the Mental Health Act 1983) and the common law - *ibid*, page 58B-C." (Quoted from Chadwick LJ in *Masterman Lister v Brutton & Co and Jewell & Home Counties Dairies*, [2002] EWCA Civ 1889, paragraph 70.)

¹¹ [1972] IR 241.

unconstitutional. Walsh J,¹² in a judgment that was expressly approved by Blayney J in the subsequent case of *Webb v Ireland*¹³ stated:

“All royal prerogatives to be found in the common law of England and the common law of Ireland prior to the enactment of the Constitution of Saorstát Éireann, 1922, ceased to be part of the law of Saorstát Éireann because they were based on concepts expressly repudiated by Article 2 of that Constitution”

4.10 Even if the *parens patriae* jurisdiction did not survive past 1922, it can be argued that the legislation outlined in the passage quoted from Hamilton CJ at paragraph 4.04 provided a statutory basis for a new, but similar, jurisdiction which is now vested in the President of the High Court. Alternatively it may be that the President’s authority in this field should be grounded in the inherent jurisdiction of the Court, whereby the Court is empowered to step in to protect an individual’s personal rights under Article 40.3 of the Constitution.¹⁴ The inherent jurisdiction of the court rationale would leave at least some untidiness as regards the position of the 1871 Act. Hamilton CJ in the comments quoted above seems to imply that the wardship jurisdiction is unaffected by any statute and is subject only to the Constitution. Hamilton CJ did not mention the 1871 Act in his explanation of the devolution of the jurisdiction, probably because the Act was not relevant to the case as neither the status nor the property of the ward was in question – the issue related to the person of the ward. The 1871 Act does not confer jurisdiction, it regulates it, in some rather important practical ways. It provides for some specific limiting of the discretion of the Court; for example, section 63 sets out the circumstances in which the ward’s property may be sold. This section is, however, interpreted quite liberally – see paragraph 4.58 below. The 1871 Act, while it recognises that wardship may be

¹² [1972] IR 241, 274-5.

¹³ [1988] IR 353, 361. One view of the discontinuation of the prerogative is that the reasoning in *Byrne* was enough to cover all elements to the prerogative. Another view on these lines is based on *Webb* in which certain aspects of the prerogative were reincarnated in Ireland, not with the prerogative as the formal source but on the basis of Article 5 of the Constitution – “Ireland is a sovereign, democratic, independent state”.

¹⁴ Finlay CJ in *Re D* [1987] IR 449 referred to Article 40.3.2 of the Constitution as a possible source of jurisdiction.

necessary because the person is considered to be incapable of managing person or property, largely deals with the power of the Court over property issues; it does not deal with the issue of the withholding of medical treatment which arose in this case. In fact, there is no legislation dealing with how the Court is to determine issues related to the person, as opposed to the property, of the Ward. In the absence of such legislation, the Court has to rely on the *parens patriae* principle or the inherent jurisdiction of the Court.

4.11 In a subsequent case, *In re ED, a Ward of Court*,¹⁵ Hamilton CJ, while not mentioning the *parens patriae* principle, made comments about the very wide discretion available to the President of the High Court when exercising the wardship jurisdiction. Again, this case concerned the care and maintenance, rather than the property, of the ward. In a recent High Court decision *In re M, ex parte*,¹⁶ the Court held that, because of the urgency of the issue arising, it was not practical to use the procedures set out in the legislation. The Court applied the *parens patriae* principle and held that “jurisdiction in this matter has not been circumscribed by the Lunacy Regulation Act”.¹⁷ The person in question was taken into wardship in order that consent could be given to a life saving medical procedure. The woman had given her consent and then withdrawn it. While a sympathetic view would agree with the decision of the court, it is not at all clear that there was an adequate legal basis for it.

4.12 Order 67 of The Rules of the Superior Courts which deals with the procedure for taking people into wardship seems to envisage that the Judge has powers which do not derive from the legislation. Order 67, rule 3 provides:

“All originating applications to the Judge for the exercise by him of all or any of the powers by the Act or **otherwise conferred upon or possessed by him in respect of the persons or property of persons of weak or unsound mind**” (emphasis added)

4.13 To summarise: the authority of the courts to intervene may be based variously on: the *parens patriae* prerogative; the legislation

¹⁵ Supreme Court 4th March 1998.

¹⁶ High Court (Finnegan P) 24 October 2002.

¹⁷ *Ibid* at 2.

outlined in paragraph 4.04 or on the inherent jurisdiction of the court. The Commission is recommending, in Chapter 6, the enactment of modern legislation which would, among other things, clarify the powers of the responsible authorities.

D How A Person becomes a Ward of Court

4.14 The criteria for wardship and the procedure for bringing a person into wardship are set out in the 1871 Act and by Order 67 of the Rules of the Superior Courts 1986. The language used is archaic and the procedures are complex. It is legally correct to describe a person taken into wardship as a “lunatic”.¹⁸

(1) Criteria for Wardship

4.15 In order to be taken into wardship under the 1871 Act, a person must be declared to be of unsound mind and incapable of managing his/her person or property. Each of these conditions must be met. In a recent case, *In The Matter of Catherine Keogh*,¹⁹ a jury found that the proposed Ward was not of unsound mind but she was incapable of looking after her person and her property. Finnegan P. held that both requirements must be satisfied and, as they were not both satisfied in this case, the person could not be made a Ward of Court. The criteria for temporary wardship are different and are outlined in paragraphs 4.31-32.

4.16 As is outlined at paragraph 4.24, there are very few cases involving objections to wardship. Cases involving wardship issues – of which there are also very few reported – are mainly concerned with the medical treatment of the ward or with issues relating to the ward’s property and very rarely with the basic question of whether or not the status of wardship should apply. This means that there has been very little judicial consideration of what exactly each criterion means. Doctors and others have problems with the concept of “unsound

¹⁸ The Commission notes that the meaning of words can change over time and the modern understanding of that word is such as to render its use unacceptable – this is not simply a matter of political correctness but rather a recognition of its modern meaning and the inappropriateness of so describing people in need of protection. The description given here is expressed in modern language as far as possible.

¹⁹ High Court (Finnegan P) 15 October 2002.

mind”.²⁰ The problems in assessing legal capacity are examined in detail in Chapter 1. It may be that wardship proceedings are mainly taken in cases where legal capacity is clearly absent, for example, where the person is unconscious or otherwise unable to communicate decisions or where the person is in an advanced state of dementia. In other cases, it may be that the Judge is guided almost exclusively by the medical evidence.

4.17 Even if the person meets each of the criteria as set out, it seems that the Court has discretion as to whether or not wardship is the appropriate course of action. The Registrar of the Office of Wards of Court has said that meeting the criteria may not be sufficient – the Court must be satisfied that the person or the property of the proposed Ward is in need of protection, or that there is some benefit to the respondent in being taken into wardship.²¹ These additional criteria – while sensible and desirable – are not included in the 1871 Act and seem to derive from the *parens patriae* concept.

4.18 It is not clear what standard of proof is required. In general, as is outlined in Chapter 1, the onus of proving legal lack of capacity rests on the person asserting it and the standard of proof is the civil standard. However, the 1871 Act requires that the Judge conduct an inquiry. This approach has been accepted generally in the wardship jurisdiction, and hearings are of an inquisitorial, rather than an adversarial nature.²² The rules of evidence are generally also relaxed, as the hearing is administrative in nature.²³ Since there are so few objections, the issue does not seem to have arisen in Ireland. The question of the onus of proof was discussed in *In the matter of a Ward of Court (withholding medical treatment) (No. 2)*,²⁴ but this was not concerned with taking a person into wardship. There was a considerable divergence of opinion on the standard of proof.²⁵

²⁰ See paragraph 4.25 below.

²¹ Doherty (Registrar of Wards of Court) Lecture on Wards of Court to The Law Society Continuing Legal Education 15 January 2003.

²² See *Eastern Health Board v MK and MK* [1999] 2 IR 99.

²³ *Ibid.*

²⁴ [1996] 2 IR 79.

²⁵ See Tomkin and McAuley “Re A Ward of Court Legal Analysis” (1995) 1 MLJI 45.

However, it was literally a life and death issue so it is not clear whether the various Judges' comments would apply in all cases.

(2) *Procedures for Wardship*

4.19 The 1871 Act provides for a number of different procedures for bringing a person into wardship. Section 15 provides for the standard procedure, section 12 makes provision for emergency procedures, section 68 provides for people with little or no property and section 103 provides for temporary procedures. In practice, the section 15 procedure is the most important. There are certain requirements common to all procedures. If it is considered that a person needs to be made a ward of court, then an application must be made to the President of the High Court. The person who is seeking to have another made a Ward of Court is called the petitioner and the prospective Ward is the respondent. Anyone may present the petition – in practice, it is usually a family member and the procedure requires that a solicitor be used. If there is no one willing to be the petitioner, the procedure can be initiated by the Registrar of Wards of Court – see the Section 12 procedure below. The forms appropriate to the petition are provided in Appendix K of the Rules of the Superior Courts.²⁶ The President of the High Court usually deals with wardship issues personally but may assign another Judge to deal with the list or particular cases.

(a) *The Standard Procedure – Section 15*

4.20 The standard procedure is used in the majority of cases. In 2001, of the 191 wardship applications in respect of adults, 156 were made under this section. In 2002, 118 of the 131 applications in respect of adults were made under section 15. Section 15 of the Act states:

“Where the alleged lunatic does not demand an inquiry before a jury, or the Lord Chancellor²⁷ entrusted as aforesaid is satisfied by personal examination of him that he is not mentally competent to form and express a wish in that

²⁶ These are available on the Courts Service website:

<http://www.courts.ie/forms.nsf/WardsOfCourt?OpenPage>.

²⁷ Now the President of the High Court under section 61 of the *Courts (Supplemental Provisions) Act 1961*.

behalf, and it appears to the Lord Chancellor intrusted as aforesaid, upon consideration of the evidence adduced before him on the petition for inquiry, or proceeding upon such report and order as aforesaid, and of the circumstances of the case, so far as they are before him, to be unnecessary or inexpedient that the inquiry should be before a jury, and he accordingly does not in his order for inquiry direct the inquiry to be sped before a jury, then the Lord Chancellor intrusted as aforesaid shall, without a jury, take such evidence, upon oath or otherwise, and call for such information, and, if it shall seem to him necessary, require the production before himself of, and personally examine, the alleged lunatic, in order to ascertain whether or not the alleged lunatic is or is not of unsound mind, and shall, by an order to be made in the matter of the alleged lunacy, declare whether the alleged lunatic is or is not of unsound mind, and incapable of managing his person or property.”

4.21 This procedure is supplemented by Order 76 of the Rules of the Superior Courts 1986.²⁸ In simple language, the petitioner asks the Court to carry out an inquiry into whether or not the respondent is of unsound mind and capable or incapable of managing their person and property. In legal terminology, the petitioner “prays that an inquiry be had as to the soundness or unsoundness of mind of the respondent and his capacity or incapacity to manage his person and his property.”²⁹ In practice, the petition may include the Statement of Facts (see paragraph 4.37) but it must include the following details:

- the name, religion, age, description and marital status of the respondent (*ie* the person in respect of whom the application for wardship is made);
- the names, religion, descriptions and residences of his next-of-kin, and of the person(s) under whose care he is, or has been during the preceding 12 months, or with whom he resides;
- the nature and amount of his property and his debts;
- the name, religion, address and description of the petitioner, and his authority for presenting the petition; and

²⁸ *Rules of the Superior Courts* Statutory Instrument No 15 of 1986 as amended. For the remainder of the chapter, any reference to an Order will be a reference to an Order in the Rules, unless otherwise specified.

²⁹ Order 67 rule 4.

- an undertaking by the petitioner that, in the event that the petition is dismissed or does not proceed, he will pay the costs or expenses relating to any ‘visitation’³⁰ of the respondent or otherwise arising in relation to the inquiry before the court.

4.22 The petitioner must swear an affidavit that the information in the petition is correct and this affidavit must be attested by the petitioner’s solicitor. The petition must be accompanied by the supporting affidavits of two registered medical practitioners.³¹ The medical practitioners need not be specialists but, clearly, the opinion of specialists such as psychiatrists or geriatricians would be likely to carry greater weight. The medical affidavits must “support” the petition but the legislation does not specify precisely what they should cover. The Wards of Court office advise that they should contain the following information:

- The date on which and place at which the examination of the respondent took place; (the examination should have been carried out within a maximum of one month prior to the statement)
- A description of the response of the respondent to the examination, including, where relevant, references to symptoms, demeanour, answers to mental tests;
- A diagnosis of the respondent’s mental condition, where applicable;
- Any other observations relevant to the issue of the respondent’s mental capacity or incapacity;
- The opinion of the medical practitioner as to whether or not the respondent is of unsound mind and incapable of managing his/her affairs.³²

4.23 The Rules go on to provide that the originating petition, together with the two supporting medical affidavits, are lodged in the Wards of Court Office and the Registrar submits these to the President of the High Court. If the President is satisfied with the medical evidence, he makes an “inquiry order”. If not satisfied, the matter does not proceed further. If an inquiry order is made, one of

³⁰ See paragraph 4.23 below.

³¹ The term “registered medical practitioner” is defined in the *Medical Practitioners Act 1978* as amended.

³² Note on the Content of medical affidavits accompanying an application for wardship – available on the Courts Service website at:

<http://www.courts.ie/Home.nsf/Content/Court+Offices+Opering>.

the medical visitors of the President of the High Court (a panel of medical practitioners) examines the respondent and reports to the President of the High Court. This report is confidential to the court and is not shown to the respondent unless the court directs this. In practice, the court usually makes this report available if a respondent who is objecting requests to see it. The Office of Wards of Court then writes to the solicitor who initiated proceedings and directs that notice of the petition be served on the respondent. This notice must be served in all cases even if the respondent is unconscious or otherwise unable to acknowledge its receipt. The notice informs the respondent that there are seven days in which to object to the wardship proceedings and, if wished, to seek a hearing before a jury. If a notice of objection is not filed within the seven-day period, the case is listed for hearing.

4.24 In practice, there are very few objections to wardship petitions. The *Catherine Keogh*³³ case quoted above is one of the few in recent years. A respondent who wishes to object must sign the notice of objection and this must be witnessed by a solicitor. A hearing must then take place. This hearing may be before a Judge or before a Judge and a jury. A hearing before a jury is not automatic – it must be requested by the respondent within seven days and may or may not be granted. Initially, the respondent may be asked to appear before the Judge for a personal examination. The Judge may then order that an inquiry should be held before a jury and issues any necessary directions in relation to the conduct of the inquiry. Alternatively the judge may hold the inquiry without a jury. The Judge can do so when satisfied that the respondent is not mentally competent to “form and express a wish in that behalf”,³⁴ or when it appears to him from a consideration of the evidence and the surrounding circumstances that a jury inquiry is “unnecessary or inexpedient”.³⁵ The hearings are held in public but the names of the people concerned are not published except in cases where there is a jury hearing. The jury or the judge then make the decision as to whether or not the respondent is of unsound mind and capable of managing his/her person or property and a Declaration Order is made accordingly. This declares that the respondent is of unsound mind and is incapable of managing his/her person or property. (Technically, a

³³ High Court (Finnegan P) 15 October 2002.

³⁴ Section 14 of the *Lunacy Regulation (Ireland) Act 1871*.

³⁵ Section 15 of the 1871 Act.

Declaration Order could declare that the respondent is not of unsound mind and is capable of managing his/her person or property but this does not usually happen – if this is the conclusion, the petition is dismissed.)

E Problems with the Implementation of Section 15

4.25 The term “unsound mind” creates difficulties for many doctors. It is not a term which modern doctors would normally use. Under the *Mental Treatment Act 1945*, a person may be involuntarily detained in a psychiatric hospital either as a person of unsound mind or as a temporary patient. In practice, it is very rare for anyone to be admitted as a person of unsound mind.³⁶ This legislation is due to be replaced by the *Mental Health Act 2001*. The term unsound mind is not in the new legislation.³⁷ Section 5 of the 1871 Act requires hospital authorities to notify the Registrar of Wards of Court if a person is admitted because of unsound mind. Very few such notifications have been made in recent years probably because very few such admissions have occurred.

4.26 It would seem that the jury in the *Catherine Keogh* case mentioned at paragraph 4.15 were also reluctant to use this term to describe a person whom they considered to be incapable of managing her affairs. Doctors sometimes simply state that the respondents lack the mental capacity to manage their affairs. Sometimes doctors use phrases such as “suffers from a learning disability”. The staff of the Wards of Court office considers that this is too vague and imprecise and does not sufficiently support the petition. The current Registrar of Wards of Court states that the Court will not issue an inquiry order

³⁶ The *Report of the Inspector of Mental Hospitals 2001* (The Stationery Office 2002) gives the status of in-patients in public psychiatric hospitals and units on 31 December 2000 at 274. There were 128 persons of unsound mind among the total of 3,817 in-patients on that date. It is not clear if any of them were recent admissions. At 127, the Inspector recommends that some people still classified as of being of “unsound mind” should be reclassified as temporary or voluntary patients. An analysis of the inspection reports for the different hospitals and units shows that approximately 125 in-patients were wards of court – it is clear that significant numbers of these are not classified as being of “unsound mind” but it is not possible to tell how many are.

³⁷ The definitions in the new Act are considered in Chapter 1.

unless the term “unsound mind” appears on the medical affidavit.³⁸ This suggests that the Judge relies heavily on the medical evidence. It could be argued that the medical affidavit may support the petition without actually using the precise words of the statute. While “suffers from a learning disability” by itself is undoubtedly not sufficient to support a petition, the affidavit may contain enough information for the Judge to conclude that an inquiry is appropriate. At this stage, the medical evidence is required to support the conduct of an inquiry into, not to reach a conclusion as to, the state of mind of the respondent.

4.27 The fact that the medical opinions have to be in the form of an affidavit also causes problems. The procedure requires that the solicitor arrange for two separate medical examinations to be conducted. The doctors then issue reports which have to be drafted in affidavit form by the solicitor. These are then returned to the doctors for swearing and witnessing. By the time all this is done, there may be a significant lapse of time since the initial clinical examination, with a consequent risk that the respondent’s condition may have changed by the time the Court considers the issue.³⁹

F Section 12 Procedure

4.28 This procedure may be used where it is not feasible to use the section 15 procedure – for example, in cases of urgency or where a person (whether a family member or another) considers that a person needs to be taken into wardship but does not wish to start the proceeding themselves. The major difference is that there is no petition and the two medical affidavits are not supplied.

4.29 The case is brought to the attention of the Registrar of Wards of Court who effectively treats this as the start of the process. The Registrar asks one of the medical visitors to examine the proposed Ward. The report of the medical visitor is then treated as a petition for an inquiry and the process continues as described above. In 2001, 35 out of a total of 191 applications regarding adults

³⁸ Doherty (Registrar of Wards of Court) Lecture on Wards of Court to The Law Society, Continuing Legal Education, 15 January 2003.

³⁹ In practice this can be problematic because the affidavit has to be sworn within 30 days of the carrying out of the examination; this is the sort of formality which may be relaxed before a Tribunal.

suffering from incapacity were initiated in this way; in 2002, 13 of the total of 131 were section 12 applications and only two applications were made under this section in the first four months of 2003.⁴⁰

G Section 68 procedure

4.30 Section 68 of the 1871 Act provides for simpler proceedings in cases where the person has very little property. The most recent amendment to the legislation raised the threshold level to cases where the property is valued at less than €6348.69 or where the income from the property is less than €380.92 per annum.⁴¹ Applications under this section are very rare – there were none in 2001 or 2002. The procedure involved is simpler than the section 15 procedure.⁴² The petition must be supported by one medical certificate or affidavit, or the Registrar may initiate the proceedings. Notice of the application must be served on the respondent, and the latter may, within seven days, make an objection to the application. Where an objection to the petition is taken by the respondent or any other person notified of it, the Registrar must obtain a report from one of the medical visitors in respect of the respondent. The Registrar may also seek such a report in any case where he considers that the evidence in support of a section 68 petition is inconclusive or otherwise unsatisfactory. The Judge may then make an order without any further inquiry.

H Section 103 – Temporary Wardship

4.31 Section 103 provides for temporary wardship but is almost never used now. The section applies where it can be shown that a person is “of weak mind and temporarily incapable of managing his affairs”. The procedure requires a petition⁴³ similar to that which applies under section 15 but the supporting medical certificates need not be in affidavit form. The certificates should state that the

⁴⁰ This may be due to a change in practice in the Wards of Court Office.

⁴¹ Section 4 *Courts Act 1971*.

⁴² The forms to be used are set out in Order 67 and are available on the Courts Service website at:

<http://www.courts.ie/Home.nsf/Content/Court+Offices+Opering>.

⁴³ These forms are also contained in Appendix K of the Rules of the Superior Court.

respondent is “of weak mind and temporarily incapable of managing his affairs”. The certificate should state the nature of, and the reason for such incapacity and its probable duration. Notice of the petition must also be served upon the respondent.

4.32 Again, the Registrar arranges for an examination by a medical visitor. The visitor is required to inform the respondent that notice must be given within four days if there is to be an objection. The Judge may make “such order under the provisions of section 103 of the Act as he may consider expedient”, direct the petition to be set down for an *in camera* hearing,⁴⁴ or refer the matter back to the Registrar for further inquiry. Orders made on foot of a section 103 application might involve the appointment of a guardian to act during a finite period. This may not exceed six months, nor can it be renewed more than once.

I General Aspects

4.33 There are certain aspects which are common to each of the four procedures just outlined.

(1) *The General Solicitor for Minors and Wards of Court*

4.34 The General Solicitor for Minors and Wards of Court is a solicitor in the service of the state. The General Solicitor is appointed by the President of the High Court to act in certain wardship matters. The Office of the General Solicitor is a separate entity to the Office of Wards of Court and is not involved in all wardship cases but may be asked by the Court to fulfil various roles in respect of wards. The General Solicitor may be asked:

- to issue wardship proceedings in respect of a particular individual;
- to act as Committee for a particular ward;

⁴⁴ Section 106 of the Act specifies that the hearing of a petition for guardian should be held *in camera*. Wardship proceedings generally are not, as a matter of course, held *in camera*, although the names of parties to them are not published, except where there is a jury.

- to act as solicitor in matters involving wards, eg by instituting or defending proceedings on behalf of a ward,⁴⁵ or by dealing with conveyancing matters in relation to a ward's property;
- to act as opponent before the Taxing Master where a solicitor seeks to have the costs of bringing an individual into wardship measured by the Taxing Master; or
- to act as *amicus curiae* (literally, 'friend of the court'), in representing a particular interest in court proceedings which involve a particular ward or issues concerning wardship.

The General Solicitor charges legal costs on the same professional basis as other solicitors.

(2) *Statement of Facts*

4.35 As already stated, a statement of facts may be included in the originating petition. If not, the Judge, when making the wardship order, usually orders that one be lodged in the Registrar's office. The Statement of Facts is sworn by the petitioner or the solicitor and must include the following information:

- the ward's situation;
- the nature of their mental illness;
- who should be appointed committee of the person and of the estate;
- the property of the ward and its net value;
- the gross and net income of the ward;
- how the ward is being maintained, by whom and where;
- the present and future costs of maintenance;
- the debts of the ward;
- whether a receiver should be appointed over the ward's estate;
- whether the ward is known to have made any will, and if so, where it is.⁴⁶

J **Costs**

4.36 The staff of the Wards of Court Office estimate that the average cost of bringing a person into wardship in recent times is of

⁴⁵ For example, in *In the Matter of A Ward of Court, (Withholding medical consent)* [1996] 2 IR 79, the General Solicitor was appointed guardian *ad litem* to the Ward for the purposes of the legal proceedings.

⁴⁶ Order 67 rule 40.

the order of €4,500. Section 94 of the Act provides for the costs of the proceedings to be paid out of the Ward's estate and this is what usually happens. The legal costs are usually paid when all of the Ward's assets have been brought under the control of the Court. Further costs may arise if there are further issues to be decided after the person has been made a Ward. The Office of Wards of Court is part of the High Court and there is a levy charged on all Wards' incomes (known as a court percentage) which is paid to the State.⁴⁷ Stamp duty (€75) is charged when the declaration order is made.

4.37 As outlined in paragraph 4.21, the originating petition includes an undertaking by the petitioner to pay the costs or expenses relating to any visitation of the respondent or otherwise arising in relation to the inquiry before the court in the event that the petition is dismissed or does not proceed. The issue of costs arose in the case of *In the Matter of Catherine Keogh*.⁴⁸ In that case the petition was dismissed. While it would appear that the petitioner should have been liable for the costs, Finnegan P held that, while section 94 of the 1871 Act allowed the Lord Chancellor to direct costs to be paid out of the estate, it did not confer an "express power of ordering costs and enforcing payment against persons who may have presented a petition for inquiry improperly". The practice of the Courts since 1871 has been not to make the petitioner liable for the costs where the petition is presented *bona fide* – where there are reasonable grounds for alleging mental incapacity and where the petition is brought for the benefit of the proposed Ward.

K The Wardship Declaration

(1) The Committee of the Ward

4.38 At the same time as making a wardship order, the Judge normally makes an order appointing a Committee of the Ward. The Committee is the person to whom the supervision of the Ward's person and affairs is "committed" and, despite the name, is usually one person and frequently is a family member. Both a Committee of the Person and a Committee of the Estate may be appointed but usually the same person is appointed to both roles. The Committee

⁴⁷ The details are set out in *Supreme Court and High Court (Fees) (No2) Order 2001* Statutory Instrument No 488 of 2001.

⁴⁸ *In the Matter of Catherine Keogh* High Court 15 October 2002.

may not be the owner, the person in charge of, the medical superintendent of or an employee of a hospital or care facility where the Ward lives.⁴⁹

4.39 The power of the Committee is set out in the order and is limited by the precise terms of the order. The Committee may make decisions on behalf of the Ward in so far as those are authorised by the Court orders. The Judge may appoint a replacement Committee if the person appointed dies or becomes unwilling or unable to act. In the case of temporary wardship under section 103 (as described at paragraph 4.31) a Guardian is appointed rather than a Committee. In practice, the role and functions are broadly the same.

4.40 The Court Orders usually give the Committee power to collect the Ward's income and use it for the maintenance of the ward and of the ward's dependants and to deal with the Ward's property. If any matter arises which is not dealt with in the orders, the Committee can get guidance from the Office of Wards of Court and directions may be obtained from the Judge if necessary.

(a) Requirement for Committee to Account

4.41 The Committee may be authorised to receive money and make payments on behalf of a ward. The Committee may, for example, collect pensions or receive dividends and pay money for the Ward's maintenance or nursing home fees and may give the ward personal spending money. This money must be kept in a separate specific account and the Committee must account for these monies annually or as directed by the Registrar.⁵⁰

(b) Requirement for Committee to Enter into Security

4.42 A Committee who is in receipt of the Ward's income may be required to give security. This usually arises if the Ward has substantial income from, for example, an occupational pension or rental income and is usually done by entering a bond with an insurance company for twice the annual income of the Ward. This is to provide cover against the possible failure of the Committee to account for the Ward's money. The Commission understands that

⁴⁹ Order 67 rule 58.

⁵⁰ Order 67 rule 63.

there are problems in getting such bonds from insurance companies.⁵¹ In England, the Court of Protection operates a master policy for its clients.⁵²

(c) *Remuneration and Costs of Committee*

4.43 The costs incurred by the Committee in dealing with the Ward's assets may be recovered from those assets. Remuneration used only to be paid if there were special circumstances or for a special cause. This was changed in 2002 to allow the Judge to award remuneration on such terms and conditions as may be determined from time to time.⁵³ In practice, the committee may be allowed remuneration by reference to a scale of commissions on the various sources of income of the ward received by the committee.⁵⁴

(2) *Consequences of a Wardship Declaration*

4.44 The consequences of becoming a Ward of Court were stated by Hamilton CJ in *In the matter of a Ward of Court (withholding medical treatment) (No. 2)*:⁵⁵

“When a person is made a ward of court, the court is vested with jurisdiction over all matters relating to the person and estate of the ward....”⁵⁶

4.45 This suggests that Wards of Court effectively lose the right to make any decisions about their person and property. So, they may not enter binding contracts or institute or defend legal proceedings and they may not sell or buy property or have a bank account. It may

⁵¹ This information was supplied by practitioners.

⁵² Society of Trust and Estate Practitioners *Finance and Law for the Older Client* (Tolley's 2003) at F1.30.

⁵³ Order 67 rule 65 of as amended by *Rules of the Superior Courts (No 1) (Remuneration of Committees of Wards of Court)* Statutory Instrument No 208 of 2002.

⁵⁴ This information was supplied by the Office of the Wards of Court.

⁵⁵ [1996] 2 IR 79.

⁵⁶ *Ibid* at 106.

be possible for the Ward to make a will if the Judge is satisfied that the ward has the required capacity to do this.⁵⁷

4.46 The Ward's decision making is effectively taken over by the Court. The Court may give certain powers to make decisions to the Committee of the Ward. In practice, the Judge usually makes a number of orders at the same time as the wardship order – if the Statement of Facts is included with the originating petition. These orders mainly relate to property and money but occasionally, the order immediately required relates to the person of the Ward. If issues arise subsequently they may be dealt with by the Office of the Wards of Court if they are routine and non-contentious. Each Ward of Court's case is assigned to one of the Assistant Registrars in the Ward of Courts Office who acts as case officer and deals with all the correspondence which arises in relation to the case. Major or contentious issues are referred to the Judge for consideration and the Judge makes a decision and gives directions *in camera*. Sometimes a hearing may be required where, for example, there is an objection to the course of action being taken.

(3) Personal and Health Care Decisions

4.47 The immediate orders made are generally connected with the property and money of the Ward. The Committee of the Person oversees the personal welfare of the Ward from day to day. The Registrar is entitled to require the committee of the person to report at intervals on such issues as the Ward's "residence, physical and mental condition, maintenance, comfort and such other matters in relation to the Ward as he may wish to be informed of."⁵⁸ The committee is expressly prohibited from changing the Ward's residence, "except by leave of the Judge or Registrar".⁵⁹ Often, when individuals who are brought into wardship are living in a psychiatric hospital or care facility, an order is made that they should be detained there until further order.⁶⁰

⁵⁷ The capacity required is issue specific and is dealt with in more detail in Chapter 2.

⁵⁸ Order 67 rule 59.

⁵⁹ Order 67 rule 60.

⁶⁰ The interaction between mental health legislation and wardship issues is discussed further in Chapter 6.

4.48 There is no requirement that the health and personal social services providers be informed of the Ward's status. The fact of wardship may not be known to the Ward's doctor, health board staff or to the staff of any care facility in which the ward is living. Sections 57 and 58 of the 1871 Act provide for medical and legal visitors to visit wards from time to time and report to the President of the High Court on their state of mind, bodily health, general condition and care and treatment. Order 67 rule 50 provides that the President may order the registrar to make such visits. This does not seem to happen in practice.

4.49 In general, the Ward is considered not to be capable of giving consent to medical treatment. In *In Re a Ward of Court (withholding medical treatment) (No 2)* Denham J stated⁶¹:

“Medical treatment may not be given to an adult person of full capacity without his or her consent. There are a few rare exceptions to this, *eg* in regard to contagious diseases or in a medical emergency where the patient is unable to communicate. This right arises out of civil, criminal and constitutional law. If medical treatment is given without consent it may be trespass against the person in civil law, a battery in criminal law, and a breach of the individual's constitutional rights. The consent which is given by an adult of full capacity is a matter of choice ... If the patient is a minor then consent may be given on their behalf by parents or guardians. If the patient is incapacitated by reason other than age, then the issue of capacity to consent arises ... where the patient is a ward of court, the court makes the decision.”⁶²

This was a case in which the Ward clearly lacked the capacity to make such a decision. The Court was specifically requested to give a decision and the question of the Courts' powers in this respect was not in issue. In England, it has been held that a patient under the Mental Health Act may be capable of giving consent.⁶³

⁶¹ *In re a Ward of Court (withholding medical treatment) (No. 2)* [1996] 2 IR 79.

⁶² *Ibid* at 156.

⁶³ See paragraph 1.11. This capacity to consent does not necessarily relate to treatment for their underlying mental health problems, but refers to medical decisions not relating to that condition.

4.50 It seems that, in Ireland, the High Court has exclusive jurisdiction to grant or withhold consent to the treatment of a ward of court, subject to the principle that, in the case of an emergency, a doctor is entitled to take urgent action which is considered necessary to preserve the life and health of a patient. In practice, a request for consent – for example, to carry out an elective surgical procedure or administer an anaesthetic – is normally made by the clinical director of the hospital, or the surgeon concerned, to the Office of Wards of Court. The Registrar of Wards of Court has explained to the Commission that he is authorised by the President of the High Court to issue, in the latter’s name, consents to the carrying out of procedures that may be considered ‘non-controversial’, for example, routine investigative procedures, or treatment of fractures or other injuries. Other procedures, however, are considered to be ‘controversial’, and these are considered personally by the President of the High Court. These latter categories of procedures are those which may be regarded as non-routine, or which carry a more substantial risk to the patient, (examples given are the insertion of gastrostomy tubes or amputation of limbs). The second category also includes procedures to which the ward, if capable of indicating agreement, did not agree; or to which the next-of-kin did not agree, if the ward was personally incapable of indicating agreement. In such cases the President of the High Court seeks the advice of one of the members of his panel of Medical Visitors as to whether it would be appropriate to give the consent of the Court to the treatment.⁶⁴

4.51 It was emphasised by Hamilton CJ in the Supreme Court in *In Re a Ward of Court (withholding medical treatment) (No. 2)*⁶⁵ that:

“In the exercise of this jurisdiction the court’s prime and paramount consideration must be the best interests of the ward. The views of the committee and family of the ward, although they should be heeded and careful consideration given thereto, cannot and should not prevail over the court’s view of the ward’s best interest.”⁶⁶

⁶⁴ The practice of the Office of Wards of Court in relation to these matters is outlined in *The Application of Wardship to the Health Sector*, a lecture delivered by G.N. Rubotham, former Registrar of Wards of Court.

⁶⁵ [1996] 2 IR 79.

⁶⁶ *Ibid* at 106.

(4) *Lodgment of Ward's Funds to the Accountant's Office*

4.52 The Judge may order that all the Ward's funds which are in bank accounts or in other financial institutions be lodged into the Accountant's Office in the Four Courts.⁶⁷ This office provides forms of "privity"- these are forms which can be used to order the financial institutions concerned to transfer the funds to the Accountant's Office. The Accountant's Office then invests the funds as directed by the Wards of Court Office. Existing stocks and shares of the ward may be kept but normally they are reinvested as directed by the Registrar. When the ward's money is taken into the Accountant's Office, it must be lodged in Trustee Authorised Investments. It was recently reported that approximately €800 million is held by the various courts services on behalf of 22,000 minors and wards of court and that "these funds have been lodged mainly in low-risk relatively low-return deposit accounts across a number of financial institutions generating a return of about 4 per cent per annum".⁶⁸

4.53 The Wards of Court office is obliged by law and by its role as guardian to take a "conservative" approach to management of Wards' money. This approach has been criticised:⁶⁹

"The structures in place in relation to management of property are quite inadequate. In modern wardship practice, some estates under the administration of the wards of court office involve large sums of money and require sophisticated investment techniques."⁷⁰

4.54 A more active and sophisticated approach has been adopted in recent times, but it remains to be seen if this produces a better result. The range of trustee authorised investments has been significantly expanded by the *Trustee (Authorised Investments) Order 1998*.⁷¹ This allows investments to be made in, among other things, managed funds and unit trusts.

⁶⁷ Section 30 *Lunacy Regulation (Ireland) Act 1871*.

⁶⁸ *The Irish Times* 22 April 2002.

⁶⁹ Ní Chulacháin "Wardship: Time for Reform?" (2000) *Bar Review* 239.

⁷⁰ *Ibid* at 240.

⁷¹ Statutory Instrument No 28 of 1998.

4.55 In November 2001, a firm of investment consultants was appointed to review funds management and funds accounting in the Courts Service and to advise on best practice. The consultants recommended the establishment of an investment committee. This recommendation was approved by the board of the Courts Service in January 2002. The new committee, which met for the first time in April 2002, is chaired by the President of the High Court and includes the Director of Finance of the Courts Service and Accountant of the High Court (both positions being combined at present), the Registrar of Wards of Court and an Assistant Registrar in the Wards of Court Office, a Judge of the Circuit Court, a County Registrar, a Judge of the District Court, the Chief Clerk of the Dublin Metropolitan District Court, and a representative from the National Treasury Management Agency. The role of the Investment Committee is advisory rather than mandatory. Its mandate is to review investment strategies, set best practice guidelines for Court officers, and advise on the appointment of investment managers and advisors.

(5) Sale of Property

4.56 The Ward retains ownership of any property and money although these may be dealt with or used in accordance with the orders made by the Court. Section 63 of the *Lunacy Regulation (Ireland) Act 1871* sets out the circumstances in which the property of a ward may be sold. It provides that, where it appears to the Court to be just and reasonable, or for the benefit of the ward, an order may be made for the sale or mortgaging of land or stock. This must be:

“for the purpose of raising money to be applied...for or towards all or any of the purposes following:

1. The payment of the lunatic’s debts or engagements;
2. The discharge of any incumbrances on his estates;
3. The payment of any debt or expenditure incurred or made after inquisition...for (the ward’s) maintenance or otherwise for his benefit;
4. The payment of or provision for the expenses of his future maintenance;

5. The payment of the costs of applying for, obtaining, and executing the inquiry, and of opposing the same;
6. The payment of the costs of any proceeding under or consequent on the inquisition, or incurred under order of (the Judge); and
7. The payment of the costs of any such sale, mortgage, charge, or other disposition as is hereby authorised to be made.”⁷²

4.57 A strict reading of the section suggests that the court may order a sale only where the object of the sale is to fund expenditure. No provision is made for situations where a sale might be desirable, for example, to realise funds for a long-term investment, or to prevent a vacant property from becoming dilapidated, or being vandalised. In such circumstances the property may be uninsurable, and it is unlikely to be in the interests of good estate management that the property should be left idle. It seems that in practice this section has been interpreted loosely or the Court takes the view that its jurisdiction is not fettered by the Act. The Information Booklet published by the Wards of Court Office states:

“Where it is necessary to sell a house to provide for Nursing Home expenses or to prevent it being vandalised, the Committee will be authorised by the Court to put the property on the market.”⁷³

4.58 In the *Matter of JR, A Ward of Court*,⁷⁴ the Committee of the Ward wanted to sell the Ward’s house because it was dilapidated. The issue before the Court was not the matter of actually selling the property, but what rights the Ward’s cohabitee had in the property. Costello P. held that the cohabitee of a Ward of Court was entitled to rely on the promise made by the Ward that she would have a right of residence in his house. The Ward had made a will in favour of his cohabitee. The Court ordered the sale of the house but also ordered

⁷² Section 63 *Lunacy Regulation (Ireland) Act 1871*.

⁷³ *Wards of Court – An Information Booklet* (1998 Department of Justice Equality and Law Reform), 10.

⁷⁴ [1993] ILRM 657.

that a suitable house be bought out of the proceeds, in the Ward's name but with a right of residence for his cohabitee.

4.59 The Committee is usually required to attend to the tax affairs of the Ward. The Office of Wards of Court employs an Accountant who helps with the tax affairs if necessary.

(6) *Lodgment of Ward's Will in Wards of Court Office*

4.60 Any person who has possession of the will of a ward may be directed by the Registrar or the Judge to deposit it for safe custody in the Wards of Court Office.

4.61 *No recommendations are made in relation to the existing system as the Commission is suggesting that it be abolished.*

CHAPTER 5 PROTECTION AGAINST ABUSE

A Introduction

5.01 The extent of abuse of elderly people in Ireland is not known but there is very little doubt that it exists. A preliminary study was carried out for the National Council on Ageing and Older People in 1998.¹ This study includes a review of the literature from other countries. The Working Group on Elder Abuse was established to advise the Minister for Health and Children on what is required to address effectively and sensitively the issue of elder abuse. The Working Group reported in September 2002.² The Working Group acknowledged that the size of the problem in Ireland is not known but that it is likely to be on a par with other developed countries. Studies show that about three to five per cent of older people living in the community suffer abuse at any one time, while there are no figures available for the incidence of abuse in long stay care.

5.02 There is no one universally accepted definition of elder abuse. The Commission accepts the definition adopted by the Working Group:

“A single or repeated act or lack of appropriate action occurring within any relationship[,] where there is an expectation of trust[,] which causes harm or distress to an older person or violates their human and civil rights.”³

¹ O’Loughlin and Duggan *Abuse, Neglect & Mistreatment of Older People: An Exploratory Study* (National Council on Ageing and Older People 1998).

² Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002).

³ *Ibid* at 25.

The Working Group pointed out that this definition excludes self-neglect and abuse by strangers. They recognised that abuse also arises from inadequacy of care as a result of a lack of resources. Abuse may be physical, sexual, psychological, discriminatory, financial or material or may arise from neglect or acts of omission. The Working Group defined financial or material abuse as including theft, fraud, exploitation, pressure in connection with wills, property or inheritance or financial transactions, or the misuse or misappropriation of property, possessions or benefits. Neglect and acts of omission include ignoring medical or physical care needs, failure to provide access to appropriate health, social care or educational services, or the withholding of the necessities of life, such as medication, adequate nutrition and heating.

5.03 Abuse may be perpetrated by the State. The failure to provide access to appropriate health and social care is recognised as an abuse and this may be the responsibility of the State. It is officially accepted that the services available to older people are inadequate.⁴ The Ombudsman's report on Nursing Homes Subventions outlines what was, in effect, financial abuse by the State against elderly people in long stay care.⁵ This resulted, partly at least, from a lack of clarity as to the entitlement of elderly residents to free or subsidised care. The government has been committed to clarifying entitlements in this area for some time but this has yet to be done.⁶

5.04 Forms of abuse are almost unlimited and it is appropriate that the legal machinery for preventing or remedying abuse should be diverse and wide ranging. In many cases, abuse may be a criminal offence, such as assault or theft. In other cases, there may be a civil

⁴ See Department of Health and Children 2001 Health Strategy *Quality and Fairness - A Health System for You* (Stationery Office 2001) <http://www.doh.ie>; and Mangan *Older People in Long Stay Care* (Human Rights Commission 2003).

⁵ Office of the Ombudsman *Nursing Home Subventions – An Investigation by the Ombudsman of Complaints regarding Payment of Nursing Home Subventions by Health Boards*. (Office of the Ombudsman 2001) See <http://www.ombudsman.ie>.

⁶ Mangan *op cit* fn 4.

law remedy including remedies under the equality legislation.⁷ The criminal and civil law apply to all adults on an equal basis and people should not be treated differently on the basis of age alone. However, there are differences in capacity to access legal remedies and the law should take such differences into account. Elderly people may be vulnerable because of physical or mental infirmity, because of physical or financial dependency or because of fear or insecurity, and the law should provide remedies where such vulnerability is exploited. The Working Group on Elder Abuse recommended that the “response to elder abuse be placed in the wider context of health and social care services for older people”.⁸ The Commission agrees with this recommendation. This chapter is concerned solely with legal redress mechanisms in the case of financial and material abuse and domestic violence.⁹ These mechanisms are important but they do not and cannot provide a total response to abuse of elderly people. The legal mechanisms which are described here do not apply exclusively to elderly people but they are examined from the point of view of their effectiveness in protecting vulnerable elderly people.

B Protection against Financial Abuse

5.05 Financial abuse of elderly people may arise because of their inability to deal personally with their finances or because they have chosen to have another person deal with their finances. The inability may arise because of physical infirmity or a lack of transport and other services, or from a perception that financial dealings are more complex than they actually are or from mental infirmity. The choice may not always be a totally free one in that they may have been influenced or persuaded by another person to allow an allegedly more qualified or more able person to look after their finances. It may simply make life easier to have, for example, a joint account with

⁷ Discrimination on the basis of age is outlawed under the *Employment Equality Act 1998* and the *Equal Status Act 2000*. See <http://www.equality.ie>.

⁸ Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2003) at 17.

⁹ It is not proposed to examine the full range of criminal and civil remedies which may be available but only those of particular relevance to elderly people.

another person but the full implications of the access to and use of the funds in the account may not be realised by the elderly person. The closure of local post offices and the move by financial institutions towards more automated and internet banking mean that individual customers have fewer personal dealings with financial institutions. Individual customers may not be known to the bank staff, may rarely ever meet them and, as a result, there may be inadequate policing of their dealings with the bank. The risk factors for financial abuse of elderly people are outlined in detail by the Hong Kong Guardianship Board on its website.¹⁰

(1) Joint Bank Accounts

5.06 Many elderly people open joint bank accounts with a family member, a carer or another person usually for the purposes of making access to money more convenient. It is clear that people opening such accounts do not always fully understand the nature of the transaction being undertaken. The concern here is with accounts which are opened and funded by one person (the donor) but with two named holders. The account may be opened purely for convenience or it may be the intention of the donor that the other named joint account holder be the ultimate beneficiary of the money in the account. Different arrangements may apply to the use of the account during the lifetime of the donor but these arrangements are not always conclusive as to the intention of the donor. The account may be endorsed as payable to the donor only or to the survivor. Such an account is clearly not opened solely for convenience and it would appear that the intention is to benefit the survivor. The account may be endorsed as payable to either the donor or the other named person. In these cases, the likelihood is that the account was opened for convenience but there is no indication of the intention of the donor with regard to the survivor being the ultimate beneficiary. There is anecdotal evidence to suggest that joint accounts which are intended for the convenience and benefit of the donor are not always used in this way. The question also arises as to what happens to such an account if the donor becomes incapacitated and what happens to the money in the account when the donor dies.

¹⁰ See <http://www.adultguardianship.org.hk>.

5.07 The law on joint bank accounts was set out in *Lynch v Burke*.¹¹ In this case, the deceased had opened a joint bank account in her own name and that of her niece. All lodgements were made by the deceased and the account deposit book was endorsed as payable to the deceased only or survivor. O'Hanlon J in the High Court found that it was the clear intention of the deceased that, when she died, the money in the joint account would go to her niece. However, he held that, on the basis of the earlier Supreme Court decision of *Owens v Greene*,¹² the transaction was an invalid gift in that it constituted an unsuccessful attempt to make a testamentary disposition otherwise than by will. On appeal, the Supreme Court reversed this finding by overruling the previous authority of *Owens v Greene*. O'Flaherty J, speaking for the Court, held that the niece was entitled to the money by virtue of the contract between her and the bank or alternatively as a gift, which should be upheld as being a gift subject to a contingency (the donor's death). The money in the joint account was not held on an implied or resulting trust for the estate of the deceased as trusts are vehicles for ensuring that the genuine intention of the donor is effected and could not be invoked in order to defeat the clear intention of the donor.

5.08 It can thus be established that what happens to the money in the account when the donor dies is essentially a question of the intention of the donor. This case does not resolve the issue of what happens if the donor becomes incapacitated. If the money in the account is payable to the donor or the named person, then the named person may continue to draw from the account by virtue of the contract with the bank. There may be an informal agreement between the donor and the named person that the named person would continue to draw on the account for the care and maintenance of the donor if the donor should become incapacitated. The legal status of such an agreement is uncertain. If the account was opened for convenience only, then any withdrawal from the account should be purely for the care and maintenance of the donor and so the situation might be covered by the proposed general authority to act reasonably.¹³ The named person does not have an Enduring Power of

¹¹ [1995] 2 IR 159.

¹² [1932] IR 225.

¹³ See paragraphs 6.92 - 6.94.

Attorney.¹⁴ Any common law power of attorney would cease to exist once incapacity set in.

5.09 Although there does not seem to be any direct authority on the point in this jurisdiction, the suggestion has been made that such an arrangement could be seen as one of agency¹⁵ – the donor has expressly appointed the named person as the agent. The agency need not be in writing although written agreements would clearly be preferable especially if they set out the terms under which the agency is to operate. The named person only has authority over the funds in the account to the extent agreed by the principal. The relationship of agent and principal ends if the principal becomes mentally incapacitated.¹⁶

5.10 *The Commission considers that financial institutions should be obliged to give clear information or possibly warning notices to people (other than spouses) opening joint accounts. Alternatively, the new Irish Financial Services Regulatory Authority¹⁷ could be asked to issue codes of conduct and to encourage financial institutions to provide different kinds of joint accounts. These could provide for greater clarity about the purpose of the account, with endorsements to the effect that the other named person is the agent of the donor, a statement of the donor’s intention that the named person is or is not to be the ultimate beneficiary and for specific instructions about the authority of each signatory. For example, it could provide that the second named account holder would only be entitled to withdraw a certain amount each week or that the first named holder would have to be contacted personally if there was any attempt to withdraw over a certain amount.*

5.11 *The Commission considers that financial institutions should be encouraged to provide “protected accounts” specifically for elderly people who want to have arrangements for another person to be authorised to draw from their account. Such “protected accounts”*

¹⁴ See Chapter 3.

¹⁵ See Cheshire Fifoot & Furmston *The Law of Contract* (Butterworths 14th ed 1996) at 526-534. .

¹⁶ *Drew v Nunn* (1879) 4 QBD 661.

¹⁷ See paragraph 5.14 below.

could be subject to greater scrutiny than ordinary accounts with a check being made in respect of any unusual transactions or large withdrawals, including the regularity of such withdrawals. Financial institutions could be obliged to inform customers of the existence of the proposed Office of the Public Guardian¹⁸ and of the services available there for the protection of vulnerable persons.

(2) Financial Products Aimed at Elderly People

5.12 Concern has been expressed by organisations representing older people¹⁹ and by solicitors about the aggressive marketing of specific financial products directly to elderly people. These products may put older people in danger of losing their homes or of not having enough money to fund care of themselves in later years should they become dependent. Such products include equity release schemes, cheque book mortgages and schemes whereby older people – usually parents – give guarantees or borrow against the equity in their own homes in order to assist younger people in buying houses. These products, in themselves, may be quite useful and socially desirable as they allow elderly people to use the value of their assets for their own care (or for their own enjoyment) or to facilitate the younger generation in buying their own homes. However, there are risks for older people. It was suggested by some voluntary organisations that the advertising campaign for one particular product could encourage the blackmailing of parents by their children.²⁰ Parents may need all of their assets to fund long term care either at home or in a long stay place. Age Action Ireland has pointed out:

“Parents in their later years may well need money to finance the cost of their care, whether in their own houses or in nursing homes. Already the number of people in need of care is increasing while the number willing to do the caring is falling. Anything which might deplete their resources should be scrutinised. If nothing else, parents could be

¹⁸ As proposed in Chapter 6.

¹⁹ See, for example, Age Action Ireland press releases on the issues – <http://www.ageaction.ie>.

²⁰ Irish Countrywomen’s Association and Age Action Ireland quoted in *Irish Examiner* 25 March 2003.

facing huge maintenance bills on their houses, and uncertain pensions in the current climate.”²¹

(3) *Warnings in Relation to Guarantees*

5.13 Where elderly people enter into equity release schemes or mortgage or guarantee or similar arrangements in order to assist their children, financial institutions should be obliged to issue stark warnings about the possible consequences of such transactions. Currently, the *Consumer Credit Act 1995* obliges mortgage lenders to give warnings about the risk of losing a home. This warning:

“WARNING YOUR HOME IS AT RISK IF YOU DO NOT KEEP UP PAYMENTS ON A MORTGAGE OR ANY OTHER LOAN SECURED ON IT”

must appear on all information documents, application forms for a housing loan and documents approving a housing loan. This warning would appear in some of the cases being considered here as they would come under the terms of the Act. The Commission considers that a more strongly worded warning should be obligatory in the case of arrangements for equity release or loan guarantees. This warning should point out, not only that the person’s home is at risk, but that the person’s ability to finance future needs may also be at risk. Financial institutions should be obliged to ensure that the elderly people concerned have independent legal advice before entering such arrangements – the advice given to banks in *Royal Bank of Scotland v Etridge*²² could be applied to elderly people as well.²³

²¹ See <http://www.ageaction.ie>.

²² [1997] 3 All ER 628; see paragraph 5.38.

²³ In *Etridge*, Lord Nicholls stated, “if a bank is not to be required to evaluate the extent to which its customer has influence over a proposed guarantor, the only practical way forward is to regard banks as ‘put on inquiry’ in every case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks he is running by standing as surety.” *Ibid* at 475-76.

(4) *The New Regulatory Regime*

5.14 The law in respect of the regulation of the financial services industry and in particular in relation to the protection of consumers of financial services has recently been amended. The *Central Bank and Financial Services Authority of Ireland Act 2003* came into effect on 1 May 2003. Among other things, this Act transferred the powers in relation to consumer credit which were exercised by the Director of Consumer Affairs under the *Consumer Credit Act 1995* to the new Irish Financial Services Regulatory Authority (IFSRA).²⁴ The Act does not provide for any changes in the substantive law on consumer protection. However, it was enacted from a partial perception that the previous regulatory arrangements placed the emphasis on prudential issues, and so to redress the balance, consumer protection is now more part of its focus.²⁵

5.15 The Act provides that the IFSRA is the regulator of financial institutions. In carrying out its functions, it has a number of obligations which are relevant to the protection of people who are vulnerable to financial abuse. These include:

- an obligation to promote the best interests of the users of financial services in a way which is consistent with the orderly and proper functioning of financial markets and the orderly and prudent supervision of the providers of financial services.
- an obligation to take action to increase awareness among members of the public of the financial services that are available and of the costs, benefits and risks associated with providing these services.²⁶

There is a Consumer Director within the IFSRA. The IFSRA describes one of its main tasks as “helping consumers to make

²⁴ The Director of Consumer Affairs continues to be responsible for the monitoring and investigation of complaints in relation to the advertising of credit.

²⁵ Report of the Implementation Advisory Group on a Single Regulatory Authority for Financial Services (Stationery Office 1999).

²⁶ Section 26 *Central Bank and Financial Services Authority of Ireland Act 2003*.

informed and responsible decisions on their financial affairs in a safe and fair market”.²⁷ It is also proposed to establish a statutory Ombudsman for the financial services. The legislation is not yet published.²⁸ There is a voluntary, industry financed Banking Ombudsman and an Insurance Ombudsman at present. It is not clear if these will continue in existence when the statutory scheme is put in place.

5.16 The Commission considers that these regulatory changes provide an opportunity for the financial services industry to reassess its arrangements for the protection of potentially vulnerable customers. The new regulatory authority should consider adopting and implementing codes of practice which would bring greater protection for vulnerable people and better redress mechanisms for customers who may have been exploited.

5.17 The question of whether this protection should be provided statutorily or by voluntary codes arises. The current Code of Practice for the Credit Institutions²⁹ is quite vague and unspecific in its statement of obligations to customers; it would not be of much help to the elderly people with whom this paper is concerned. The Irish Bankers Federation (IBF) and the Irish Mortgage and Savings Association (IMSA)³⁰ strongly support voluntary codes of conduct.³¹

²⁷ See the IFSRA website <http://www.ifsra.ie>.

²⁸ The proposed legislation is listed in Section B of the Government’s legislative programme issued on 6 May 2003. The purpose of the proposed *Central Bank and Financial Services Authority of Ireland (No. 2) Bill* is described thus: “To establish a statutory Financial Services Ombudsman and Industry and Consumer Consultative Panels, as recommended in the Report of the Implementation Advisory Group on the establishment of a Single Regulatory Authority for the financial services sector and to provide for miscellaneous amendments to financial services legislation”. Publication is expected in mid to late 2003.

See:

<http://www.taoiseach.gov.ie/taoiseachgov/legislation/index.asp?lang=ENG&loc=-1>.

²⁹ Issued June 2001 by the Central Bank using its powers under the *Central Bank Act 1989*, Section 117. See <http://www.centralbank.ie>.

³⁰ The Irish Bankers’ Federation (IBF) is the representative body for the banking sector in Ireland. The Irish Mortgage and Savings Association is

The IBF Code of Practice on bank restructuring (branch closures) does recognise the need to educate the most vulnerable groups in the use of alternatives to personal banking – the code specifically mentions elderly customers in this context.³²

5.18 One possible approach could be that which exists under the *Criminal Justice Act 1994* in relation to money laundering. This Act provides that financial institutions “shall take reasonable measures to establish the identity of any person for whom it proposes to provide a service.”³³ The Act does not state what may or may not represent reasonable measures and does not provide for the making of regulations. Guidance Notes have been issued to assist the institutions.³⁴ A similar arrangement could be made in respect of vulnerable elderly people – the financial institutions could be required to provide protection against misuse of their funds while the IFSRA could issue guidelines about how to do this. This would have the advantage of statutory rights combined with flexibility.

5.19 The Commission provisionally recommends that financial institutions

- *be obliged to provide more comprehensive information and warnings about the nature and effects of joint accounts;*
- *be encouraged to provide special protected accounts for people who may wish to use them;*
- *be obliged to inform customers of the existence of the Public Guardian’s office and of the services available there;*
- *be obliged to issue warnings about the consequences of equity release schemes and of providing guarantees and similar backing for loans;*
- *be obliged to ensure that elderly customers entering equity release or loan guarantee arrangements have independent legal advice.*

affiliated to the IBF – its members are building societies and mortgage lenders. See <http://www.ibf.ie>.

³¹ <http://www.ibf.ie>.

³² *Ibid.*

³³ Section 32(3) *Criminal Justice Act 1994*.

³⁴ See <http://www.finance.gov.ie/Publications/otherpubs/monlaun.htm>.

5.20 *The Commission provisionally recommends that the new regulatory authority for the financial services industry consider adopting and implementing codes of practice which require greater protection for vulnerable people and better redress mechanisms for customers who have been exploited.*

(5) *Social Welfare Agency Arrangements*

5.21 The main source of income of elderly people in Ireland is a social welfare pension³⁵ so clearly the arrangements for collecting the pension are very important. The Department of Social and Family Affairs encourages its customers to have their payments paid directly into bank accounts so the issues addressed above in relation to financial institutions are relevant here as well. The majority of pensions are still payable by means of books of payable orders which are cashed at post offices or other financial institutions. The Department has arrangements in place for the appointment of agents to collect social welfare pensions in particular circumstances. These arrangements may be withdrawn if the Department has reason to believe that the payment is not being used for the benefit of the claimant.³⁶ The arrangements only concern the social welfare pension and do not give the agent any authority over the pensioner's other income. The Department recognises different types of agents and divides them loosely into two categories:

³⁵ Layte, Fahey and Whelan *Income, Deprivation and Well-Being Among Older Irish People* (National Council on Ageing and Older People 1999). There are two kinds of social welfare old age pension payable from age 66. The Contributory Old Age Pension is payable to people who have enough social insurance contributions. People who do not qualify for the contributory pension but who pass a means test may qualify for the Old Age Non-Contributory Pension. Some recipients of Widow's or Widower's Pensions and of Invalidity Pensions may also be aged 66 or over.

³⁶ The relevant legislation is Part VI of the *Social Welfare (Consolidation) Act 1993*, as amended, and Chapter 2 of Part VI of the *Social Welfare (Consolidated Payments Provisions) Regulations 1994* Statutory Instrument No 417 of 1994 as amended. The operation of the system is explained in the Department's Freedom of Information Section 16 Manual:
See http://portal.welfare.ie/foi/paymentissues_foi.xml.

(a) *“Type 1” Agent*

5.22 A “type 1” agent may be appointed on a temporary or permanent basis. The pension is payable to the person entitled and all correspondence relating to it is addressed to the pensioner. However, an agent is empowered to collect the money on behalf of the pensioner and is under a legal duty to pay it over to the beneficiary.

(b) *Temporary Agency:*

5.23 A temporary type 1 agency may be created where the pensioner signs the back page of each pension voucher. Payment by means of a temporary type 1 agency by the post office official is discretionary. The voucher must be signed on each occasion by both the claimant and the agent. The signing of the form entitles the agent to collect the money and hand it over to the principal. In practice, such agents are usually family members or other formal or informal carers and there is frequently an agreement between the agent and the pensioner that the agent spend some of the money in a certain way, for example, on household goods.

(c) *Permanent Agency:*

5.24 The Department may make payments to a person nominated by the pensioner, or where the pensioner is unable to act, the Minister may appoint some other person to exercise rights on behalf of the pensioner. The appointed agent is entitled to collect the money on behalf of the pensioner and is also required to do all that needs to be done as respects the claim or entitlement.

(d) *“Type 2” Agent*

5.25 A type 2 agency arises where a social welfare officer decides (usually as a result of representations from family members and medical practitioners) that a pensioner is incapable of acting and that an agent should be appointed. A social welfare officer usually visits the pensioner to assess the circumstances and needs. The agent nominated is often a family member or the person in charge of a nursing home or hospital. A type 2 agency often arises in the context of mental incapacity and all correspondence in respect of the social welfare payments is directed to the agent. In the case of a Ward of Court or an Attorney appointed under a valid Enduring Power of

Attorney, the Department make payments directly to the Committee of the Ward (if the Committee is authorised by the Court to receive payments) or to the Attorney by nominating the Committee or the Attorney as agent for the social welfare recipient.

5.26 While these arrangements are statutorily based, they seem to be implemented in a fairly informal way. This, of course, has advantages in that it provides a flexible means of ensuring that elderly people can obtain their pension money, but it can also give rise to problems. The agency arrangements allow a person involved in the running of a care facility in which the person is living to have the right to collect an elderly person's social welfare pension. This seems inappropriate and inconsistent with the Ward of Court legislation and the EPA legislation which do not allow a person associated with a care facility in which the person lives to be the Committee or the Attorney.

5.27 *The Commission provisionally recommends that the social welfare agency arrangements be changed to prevent a person associated with a care facility collecting a social welfare pension. The Commission also recommends that any social welfare agency arrangements be notified to the proposed new Office of the Public Guardian.*³⁷

C Property Transactions

5.28 The strict application of the common law required that deeds of transfer of property, once properly executed, would be considered binding. However, in practice, this often proved an unsatisfactory approach as it did not allow for situations where people needed protection from exploitation or improvident transactions. Over time, the courts developed a general equitable approach to ameliorate the harsh consequences of common law rules. This allowed them to set aside transactions which would never have been entered into, but for the vulnerability of one party. This approach gradually came to be applied in a wide variety of situations, where a transaction had been brought about by one party taking advantage of the weaker position of the other. These include situations where an

³⁷ As outlined in Chapter 6.

elderly or infirm person was unfairly prevailed upon to enter a property transaction – whether by gift or will or sometimes in contracts. In this section, the equitable doctrines of undue influence and unconscionable transactions are briefly analysed, particularly as they apply to transactions involving vulnerable elderly people. The two doctrines are different but they are interrelated and it is common for both to be pleaded in the same proceedings. In cases involving wills, it is common to plead testamentary incapacity³⁸ as well as undue influence. The plea of undue influence, if persisted in and unsuccessful, may affect the eventual order in respect of costs.

(1) Undue Influence

5.29 The equitable doctrine of undue influence³⁹ allows a court to declare invalid any transfer of property – whether by gift, inheritance or, to a lesser extent, by contract - where it is apparent that a person in a dominant position has abused this position by improperly prevailing upon a vulnerable property owner in order to secure the transaction. In the 19th Century case of *Allcard v Skinner*, which centred on the doctrine, it was asserted that:

“...to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.”⁴⁰

5.30 In order for a case to be successful, there must be a significant benefit to the recipient, a significant disadvantage to the

³⁸ See Chapter 2.

³⁹ See generally, Clark *Contract law in Ireland* (4th ed Sweet & Maxwell 1998) Chapter 13; Delany *Equity and the Law of Trusts in Ireland* (2nd ed Round Hall Sweet & Maxwell 1999) Chapter 16 at 580-599; Draper “Undue Influence: A Review” [1995] Conv 176; Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988).

⁴⁰ (1887) 36 Ch D 145, 182.

plaintiff, and the recipient must have exercised such domination over the plaintiff that his judgment has become clouded.⁴¹

(2) *Presumed and Actual Undue Influence*

5.31 There are two broad categories of undue influence: presumed and actual undue influence. In cases of actual undue influence, commonly referred to as “class 1”, “it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.”⁴²

5.32 The other category of undue influence, presumed undue influence, arises in the case of certain relationships of trust and confidence. In such cases, the evidential burden shifts from the complainant to the other party, who has to prove that no undue influence was exerted in the case.⁴³ Within the category of presumed undue influence, there are two distinct classes, which were identified by Slade LJ in *Bank of Credit and Commerce International SA v Aboody*⁴⁴ and elaborated upon by Lord Browne-Wilkinson in the celebrated case of *Barclays Bank plc v O'Brien*.⁴⁵ The first, Class 2A, is where a certain relationship exists which as a matter of law raises the presumption that undue influence has been exercised. The second, Class 2B, exists where “the complainant proves the *de facto* existence of a relationship under which the complainant reposed trust and confidence in the wrongdoer.”⁴⁶

5.33 Once a relationship giving rise to a presumption of undue influence is established, and it is shown that a substantial benefit has been obtained, the onus lies on the recipient to establish that the gift or transaction resulted from the “free exercise of the donor’s will.”⁴⁷

⁴¹ *R (Proctor) v Hutton* [1978] NI 139.

⁴² *Per* Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien* [1993] 4 All ER 416, 423.

⁴³ *R (Proctor) v Hutton* [1978] NI 139, 146.

⁴⁴ [1990] 1 QB 923.

⁴⁵ *Barclays Bank plc v. O'Brien* [1993] 4 All ER 416, 423.

⁴⁶ *Ibid.*

⁴⁷ *Gregg v. Kidd* [1956] IR 183, 196.

This presumption can be rebutted by reference to two factors; first, by examining whether independent legal advice has been received,⁴⁸ and secondly, whether it can be shown the gift was a spontaneous and independent act, or that the donor acted of his or her own free will when deciding to make the gift. As Shanley J stated in *Carroll v Carroll*⁴⁹:

“Where the presumption exists, it may be rebutted by evidence which establishes on the balance of probability that the transaction was the consequence of the exercise of the donor of his own free will and not the result of undue influence. Such evidence may be evidence that the donor had independent legal advice – or competent and honest lay advice.”⁵⁰

5.34 In cases of undue influence, the donor usually does not lack legal capacity but is disadvantaged in some way relative to the recipient. In *Carroll v Carroll*,⁵¹ the donor of the property was physically infirm - he was suffering from severe arthritis, a heart complaint, a hearing deficit and poor sight. He was not mentally infirm but he was described as ‘devastated’ because of the death of his wife the previous year.⁵² In the case, the plaintiffs sought to set aside a transaction by which an elderly father had transferred his sole main asset to his son. It was found to be a case where undue influence was presumed, and the transaction was set aside on the basis that the presumption had not been rebutted by the defendant by reference to the question as to whether the father had acted of his own free will in transferring the property. Particular regard was paid to the fact that the father had transferred practically all his assets and had received neither adequate nor independent advice on the matter. In the recent decision of *Meredith v Lackschewitz-Martin*⁵³ the Court pointed out that at the time of the transaction, the mother was 92 and

⁴⁸ *Carroll v. Carroll* [1999] 4 IR 241 (SC).

⁴⁹ *Carroll v Carroll* [1998] 2 ILRM 218 (HC).

⁵⁰ *Ibid* at 229.

⁵¹ [1999] 4 IR 241.

⁵² *Ibid* at 244.

⁵³ Chancery Division (David Mackie QC) 11 June 2002.

had suffered a series of medical setbacks which diminished her capacity to impose her will. She had become increasingly subject to the influence of her children, and less able to disagree with them. In the absence of adequate independent legal advice, the transaction was set aside.

(3) *Undue Influence and Third Parties*

5.35 The principles of undue influence outlined above also extend to cases where a vulnerable party is induced by another person to enter into a contract with a third party. Typically, the third party is a financial institution, and the cases have tended to involve wives who incur obligations as a result of undue influence by their husbands. However, it is clear from the case law that the doctrine is not confined to the husband and wife relationship⁵⁴, and can be extended to dealings involving elderly and vulnerable people.⁵⁵ This aspect of the law could become important in the future as the practice of parents giving guarantees for loans taken out by their children or mortgaging their own homes to subsidise the purchase of their children's property becomes common.

5.36 A number of legal issues arise in this area,⁵⁶ such as whether the husband and wife relationship gives rise to a presumption of undue influence, or whether wives should be a specially protected class. However, the focus of the discussion in this Paper relates to the circumstances in which the financial institution, in the absence of

⁵⁴ *Barclay's Bank plc v O'Brien* [1993] 4 All ER 417, 428; *Royal Bank of Scotland v. Etridge (No 2)* [2001] 4 All ER 449, 476.

⁵⁵ In *Royal Bank of Scotland v Etridge (No 2)* [2001] 4 All ER 449, 458 Lord Nicholls stated:

“The types of relationship...in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various...The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence....None of these descriptions is perfect. None is all embracing.”

⁵⁶ Identified by Delany *Equity and the Law of Trusts in Ireland* (2nd ed Round Hall Sweet and Maxwell 1999) at 587.

actual knowledge on its part of the debtor's improper conduct, should be fixed with constructive notice of this conduct.

5.37 A number of issues need to be addressed to answer this question. First, in what circumstances will a bank be 'put on inquiry' and what steps should it take when in this situation. This in turn raises the issue of the content of the legal advice which should be given in such circumstances and the related question of the independence of this advice.

5.38 The recent case of *Royal Bank of Scotland v Etridge (No 2)*⁵⁷ greatly clarified the law in England in relation to these issues. Lord Nicholls, in addressing the question as to when the bank is 'put on enquiry', stated that this occurs whenever a wife offers to stand surety for the husband's debts.⁵⁸ Once put on enquiry, there are steps which the bank must take. Lord Nicholls stated that the bank must:

“...take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction.”⁵⁹

While in *O'Brien*, the Court recommended that the bank should have a private meeting with the wife, “...at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice”⁶⁰, in *Etridge*, Lord Nicholls accepted that it is not the general practice of banks to hold such a private meeting.⁶¹

5.39 The court in *Etridge* set out clearly what the content of legal advice given by a solicitor to the wife should be. Typically, the advice which a solicitor should give should cover the following at a minimum:

⁵⁷ [2001] 4 All ER 449.

⁵⁸ While the case does extend to non-marital relationships, the husband and wife example will be used throughout.

⁵⁹ [2001] 4 All ER 449, 467.

⁶⁰ [1993] 4 All ER 417, 429-430.

⁶¹ [2001] 4 All ER 449, 467.

“(1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them...

(2) He will need to point out the seriousness of the risks involved...[and] discuss the wife’s financial means...including...any other assets out of which repayment could be made if the husband’s business should fail...

(3) [He] will need to state clearly that the wife has a choice. The decision is hers and hers alone...

(4) [He] should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the [transaction].”⁶²

These points are in line with what the Commission is suggesting regarding guidelines for solicitors.⁶³

5.40 A related issue is the question of the independence of the solicitor. As Lord Nicholls noted, “Commonly, in practice, the solicitor advising the wife will be the solicitor acting also for her husband either in the particular transaction or generally.”⁶⁴ He went on to note that ordinarily, the bank can rely on the solicitor’s confirmation that he has advised the wife appropriately, but in every case the solicitor must consider carefully whether there is any conflict of duty or interest and whether it would be in the wife’s interests for him to accept instructions from her. Relying on Lord Browne-Wilkinson’s judgment in *Barclay’s Bank plc v O’Brien*⁶⁵ Lord Scott went on to note that if the solicitor is acting for both parties, and the bank suspects impropriety on the part of the husband, the institution

⁶² [2001] 4 All ER 470.

⁶³ See paragraph 5.63.

⁶⁴ [2001] 4 All ER 449, 471.

⁶⁵ [1993] 4 All ER 417.

should “insist on advice being given to the wife by a solicitor independent of the husband.”⁶⁶

5.41 The final question to be addressed is as to what types of relationship these guidelines apply. In *O’Brien*, Lord Browne-Wilkinson stated that the principles he set out applied “where, to the creditor’s knowledge, the surety reposes trust and confidence in the principal debtor in relation to his or her financial affairs.”⁶⁷ Lord Nicholls in *Etridge* stated that in his view, the only practical solution was to regard banks as being put on enquiry where the relationship between the surety and the debtor is a non-commercial one.⁶⁸

5.42 In Ireland, the most recent statement on third parties and undue influence comes from *Ulster Bank v Fitzgerald*⁶⁹ The primary difference between the approaches in the two jurisdictions is that in *Ulster Bank*, O’Donovan J held that there was no question of the bank being put on enquiry merely because of the relationship between the parties. He stated:

“...I heard no evidence whatsoever to suggest that [the bank manager], or, indeed, any other representative of the Plaintiff Bank had even an inkling that there were difficulties in the marriage of [the defendants] or that there was any other reason why [the wife] might not have been a free agent; in the sense that she did not do so of her own free will when she executed the said guarantee.”⁷⁰

5.43 An issue that remains unclear as a result of O’Donovan J’s conclusion that the bank was not put on inquiry, is whether the steps taken by it, namely a private meeting at which the meaning of the guarantees had been explained and at which the wife had been told that she ‘could obtain’ legal advice would have sufficed if it had been deemed to have been put on notice. Mee⁷¹ suggests:

⁶⁶ [2001] 4 All ER 449, 506.

⁶⁷ [1993] 4 All ER 417, 431.

⁶⁸ [2001] 4 All ER 449, 476.

⁶⁹ High Court (O’Donovan J) 9 November 2001.

⁷⁰ *Ibid* at 7.

⁷¹ (2002) 27 Ir Jur 292.

“It is unclear whether (had he reached a different conclusion on the notice question) O’Donovan J would have regarded the steps taken by the bank in *Fitzgerald* as sufficient to allow the guarantees to be enforced. It is arguable, in light of the comments which he did make in the matter, that he might have leaned towards that conclusion.”⁷²

5.44 Thus, the primary difference between the approaches in both jurisdictions is that in Ireland, there is a higher threshold in relation to when a bank is put on enquiry, to the point that the bank is only on notice “when it has actual or constructive knowledge of facts which indicate that the principal debtor spouse has used duress, or been guilty of misrepresentation, to procure the signature of the [guarantor spouse].”⁷³ Academic opinion on the likely future approach of Irish law differs. Mee⁷⁴ asserts that “English law represents a not unreasonable basis for the development of Irish

⁷² (2002) 27 Ir Jur 292 at 302.

⁷³ Breslin “Undue Influence: Guarantor’s Equitable Right or Creditor’s Contractual Obligation? – *Royal Bank of Scotland v Etridge*” (2002) 2 CLP 35, at 40 where he writes:

“None the less, as far as Irish law is concerned, the reasoning in *O’Brien* has not commended itself. Murphy J said in *Bank of Nova Scotia v Hogan* [1996] 3 IR 239, 247-248:

“Notwithstanding that the relationship of husband and wife has been held not to raise a presumption of undue influence, some special status does appear to have been accorded to wives in a variety of decided cases ... The consequence appears to be that whilst the matrimonial relationship as such does not give rise to a presumption of undue influence it may be possible to identify circumstances in a particular case which would more readily raise that presumption in favour of a wife than any outside party. I confess that I do not find the conclusions of the House of Lords in this regard satisfying either as a matter of legal logic or fully acceptable as an analysis of the rights or capabilities of women generally and married women in particular.”

Given that the consequence of the interpretation of *O’Brien* by the House of Lords in *Etridge* is to apply the doctrine of constructive notice automatically to perhaps the most common form of bank guarantee, without any analysis of the underlying circumstances or evaluation of the evidence, there is a cogent case for adhering to traditional equitable principles (imprecise though their application may be) in determining the respective rights of the guarantor and the bank.”

⁷⁴ (2002) 27 Ir Jur 292.

law”,⁷⁵ while Breslin⁷⁶ is of the opinion that “it would appear that the relevance of decisions of the U.K. courts on the issue of undue influence is on the wane, given the now apparent fundamental differences in approach as between the Irish courts and the House of Lords.”⁷⁷

5.45 These cases all suggest that if financial institutions do not take certain steps, guarantees entered into by vulnerable people on behalf of others may not be enforceable. It is also clearly in the interests of the financial institutions themselves to establish that the transactions were freely entered into by the people concerned. This means that a financial institution which accepts a guarantee from an elderly person, in favour of a younger relative, for example, would be regarded as having been “put on inquiry” where the transaction was not “on its face” to the advantage of the elderly person, and where the bank was aware of the existence of a relationship between the elderly person and the debtor which would give rise to the risk of undue influence. In such cases, following the rules laid down in *Etridge*, the bank must take reasonable steps to satisfy itself that the vulnerable person has understood in a meaningful way, the practical implications of the proposed transaction. Otherwise, the bank could be fixed with constructive knowledge of the undue influence, and the transaction might later be set aside by a court, at the behest of the elderly person. There has been no Irish decision on what constitutes adequate independent legal advice in this narrow context of a vulnerable party who is induced by another person to enter into a contract with a third party. It would appear to be sensible for banks to follow the advice given in *Etridge*.

(4) The Views of the Legal Profession

5.46 With regard to the requirement of independent legal advice, the Commission consulted with some experienced legal practitioners in the course of preparing this Consultation Paper. Practitioners said that they find claims of undue influence more difficult to evaluate than, for example, cases of alleged testamentary incapacity. Whereas

⁷⁵ *Ibid* at 306.

⁷⁶ (2002) 2 CLP 35.

⁷⁷ *Ibid* at 41.

it might be possible to form an accurate view of whether a client had sufficient capacity to transact or make a will on the basis of even a single interview, it would often be more difficult to detect evidence of undue influence without a detailed understanding of complex relationships between family members. It is also more difficult for a solicitor to assemble evidence of undue influence since medical evidence only one factor. The practitioners expressed a desire for clear practice guidelines to assist them in problematic and suspicious cases. They were in agreement that it should be standard practice to send away accompanying relatives in order to take instructions from an elderly donor or testator in a private consultation, and the Commission endorses this view. Even if elderly clients express a preference that their relatives should remain, it seems essential that solicitors should have an opportunity to consult privately with elderly clients in order to ensure, so far as possible, that instructions received represent the clients' own genuine wishes.

5.47 The current *Guide to Professional Conduct of Solicitors in Ireland*⁷⁸ addresses some of the issues. It states, "A solicitor shall take instructions directly from the client. Where instructions are first received from a third party, the instructions should be confirmed directly with the client".⁷⁹ It further states:

"A solicitor shall not accept instructions which he suspects have been given by a client under duress or undue influence. Particular care should be taken where a client is elderly or otherwise vulnerable to pressure from others. A solicitor will usually, but not always, see a client alone. In the case of suspected duress or undue influence the solicitor should ensure that the client is seen alone."⁸⁰

The Guide deals specifically with voluntary transfers:

"Where a solicitor acts for both parties to a voluntary transfer of property or a transfer of property at consideration other than full market value, the transferor should be advised in appropriate cases, preferably in writing, to obtain

⁷⁸ Law Society of Ireland *A Guide to Professional Conduct of Solicitors in Ireland* (2nd ed 2002).

⁷⁹ *Ibid* at page 8.

⁸⁰ *Ibid* at page 9.

independent advice as to the implications of the transaction before any documentation is executed.”⁸¹

The Guide has a similar statement in respect of “circumstances where the terms of the transfer incorporate onerous obligations on the part of the transferor and if the transferor has not been independently advised.”⁸²

5.48 While these guidelines do recognise and address the issues involved, the Commission considers that more detailed guidelines would be helpful to practitioners. The Commission considered whether there should be legally binding rules on the matter as there is evidence in court cases which suggests that some solicitors are willing to act for both sides even when it is clear that one party is in a vulnerable position. However, it is difficult to see how such rules could be well expressed in legislation or how all aspects could be covered. Proposed guidelines for solicitors are outlined below at paragraph 5.63.⁸³

(5) Unconscionable Transactions

⁸¹ Law Society of Ireland *A Guide to Professional Conduct of Solicitors in Ireland* (2nd ed 2002) at 14.

⁸² *Ibid.*

⁸³ Any such guidelines should take cognisance of the principles enunciated in *Grealish v. Murphy* [1946] IR 46; *Gregg v. Kidd* [1956] IR 183; *McCormack v Bennett* (1973) 107 ILTR 127 as being the touchstones of first resort consulted by practitioners. Examples of the principles set out in these Irish cases are:

1. The principles of undue influence should not be confined to any stated form of relationship as this would fetter that wide jurisdiction to relief against all manner of constructive fraud which Courts of Equity have always exercised;
2. The Courts usually expect that a donor who is in some way ‘infirm’ has had a complete explanation of the nature and effect of the transaction from an adviser who himself knew all the relevant circumstances.
3. The fact that independent advice may be flawed, because the adviser did not know all the relevant circumstances, does not prevent the Court holding on other evidence that a deed was made entirely of the free will of the donor.

See, Farrell *Irish Law of Specific Performance* (Butterworths 1999) at chapter 9 for a useful synopsis.

5.49 Property transactions may be set aside under the equitable doctrine of unconscionable transactions (or “unconscionability”). The term “improvident” has frequently been used by the Irish courts in referring to unconscionable transactions. However, improvidence in itself does not necessarily mean the transaction should be set aside – it may constitute evidence that the transaction was unconscionable but it is not conclusive. In *McCormack v Bennett*,⁸⁴ while the transaction was *prima facie* an improvident one, it was upheld by Finlay J in the light of the evidence, including the fact that the donor had independent legal advice. In many cases in which the Irish courts have described a transaction as improvident, a finding of undue influence has already been made so the necessity to show that the transaction was unconscionable did not arise. For example, in *Carroll v Carroll*⁸⁵ the transactions were considered improvident as well as being the result of undue influence.

5.50 In *Grealish v Murphy*,⁸⁶ the elderly plaintiff had surrendered irrevocably his fee simple in land, in return for a life interest and some personal covenants, which were backed by inadequate security or sanctions. The plaintiff was described by Gavan Duffy J as a “poor old victim of his circumstances...living under rather dismal conditions”,⁸⁷ and possessed of mental powers which had “never since childhood attained the normal powers of an adult”.⁸⁸ The Court decided to set aside, as improvident, a settlement which would have had the effect of leaving the plaintiff “for the remainder of his life very much at the mercy of a rather impecunious young man, who had no ties of blood and was still unproved as a friend.”⁸⁹ In *McGonigle v Black*,⁹⁰ Barr J considered that “a combination of bereavement, inability to cope, loneliness, alcoholism and ill-health”⁹¹ had rendered

⁸⁴ (1973) 107 ILTR 127.

⁸⁵ *Carroll v Carroll* [1999] 4 IR 241.

⁸⁶ [1946] IR 35.

⁸⁷ *Ibid* at 37.

⁸⁸ *Ibid* at 39; it appears that this transaction could have been set aside for incapacity – see Chapter 1

⁸⁹ *Ibid* at 45.

⁹⁰ High Court (Barr J) 14 November 1988.

⁹¹ *Ibid* at 11.

one of the parties vulnerable to manipulation by the other, with the result that a “grossly improvident transaction”⁹² had been concluded between them.⁹³

5.51 Improvidence may arise where provision for the donor’s future needs is clearly compromised and put at risk. In *Hammond v Osborn*,⁹⁴ the transaction in question left the donor with a small amount of cash. It was held that consideration had not been given as to whether his remaining assets would be “sufficient to satisfy his future needs”.⁹⁵ The transaction in this case was set aside because of undue influence.

(6) Criticisms of these Doctrines

5.52 Over the years, there have been many cases of undue influence and/or unconscionable transactions involving vulnerable elderly people but relatively few have been reported. It would seem that elderly people are frequently in such situations but may not be in a position to take any legal action. The case may be difficult to establish and depends very much on the evidence which can be adduced. The costs of such cases are often considerable and the gain may not be significant enough to encourage litigation. Cases involving third parties such as financial institutions are more likely to be pursued as they involve avoiding a cost which would otherwise be incurred. Cases, in so far as they involve abuse or exploitation of elderly people, may serve the interests of the disappointed or self-considered successors rather more than those of the elderly people. They are frequently taken by the disappointed successors after the deaths of the elderly people. Although it is open to them to do so, it is axiomatic that elderly people who are operating under undue influence are unlikely to be in a position to seek redress.

⁹² *McGonigle v Black* High Court (Barr J) 14 November 1988 at 11.

⁹³ *Ibid.*

⁹⁴ [2002] EWCA Civ 885.

⁹⁵ *Ibid* at paragraph 29.

(a) *Legal Capacity*

5.53 The application of the doctrines of undue influence and unconscionable transactions involves a form of substitute decision making in cases where the person whom the doctrines seek to protect had legal capacity. In fact, many of the people in the cases involving elderly donors had impaired legal capacity but, nevertheless, it would seem that they would not meet the criteria for wardship at present or even for the new system of guardianship which is proposed in Chapter 6. It is unlikely that a will to the same effect as the gift in *Carroll v Carroll*⁹⁶ would have been set aside on the grounds of lack of capacity since the elderly man was not mentally infirm. .

(b) *Intergenerational Policy Issues*

5.54 In *Carroll v Carroll*,⁹⁷ Denham J recognised that the reason the equitable law to protect a frail person is “one of public policy”.⁹⁸ At the same time, public policy supports the transfer of assets to the younger generation. Public policy as expressed in the Social Welfare Acts, the Tax Acts and in schemes such as the Early Retirement Scheme for farmers favours such transfers – particularly to children. Under the *Social Welfare Consolidation Act 1993*, the rules for the calculation of means of applicants for the old age non-contributory pension provide that if an applicants deprive themselves of income and property in order to qualify for the pension, that income or property is considered to be part of the applicant’s means.⁹⁹ However an exception is made for land transferred to a child or children. The legislation limits this exception to land with a rateable valuation below €38.10. In practice, the Department of Social and Family Affairs treats transfers by elderly people and transfers to family

⁹⁶ [1999] 4 IR 241.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 257.

⁹⁹ Third Schedule Part 11 paragraph 3; Farmers and other self-employed people did not generally start to pay social insurance until 1988. This means that they did not become eligible for Contributory Old Age Pensions until 1998. Self employed people who are aged about 70 in 2003 are the first generation to qualify for Contributory Old Age Pensions and, therefore, are the first self-employed generation who may not be unduly concerned about the means test for the Non Contributory Old Age Pension.

members more generously. The Department's Freedom of Information Section 16 Manual states:

“A transfer is generally accepted where the farm or business is transferred due to advanced age and/or failing health of the claimant or where the transfer is considered to be part of a genuine family settlement.”¹⁰⁰

5.55 Apart from the thresholds at which Capital Acquisitions Tax applies, it operates in a more favourable way to transfers in favour of family members than others.¹⁰¹ Farms and businesses which are transferred to family members have their market value considerably reduced for the purposes of CAT with clawback provisions if they are disposed of by the beneficiary within a certain period. Until 2001, the rate of gift tax was lower than inheritance tax so there was a public policy which favoured *inter vivos* transactions over testamentary transfers. Section 599 of the *Taxes Consolidation Act 1997* provides for relief from Capital Gains Tax on transactions where a person aged 55 or over disposes of assets to a child. The Early Retirement Scheme¹⁰² for farmers provides a financial incentive for older farmers to transfer their farms to younger farmers.

(c) *Reform of the Law*

5.56 Any change in the law in relation to these doctrines in respect of undue influence and unconscionable transactions would have profound consequences for property and contract law. The considerations which have been addressed here relate to specific situations but the full ramifications of any change would need to be addressed. Article 43 of the Constitution protects the private property rights of citizens. In Article 40.3.2, the State pledges itself, “as best it may”, to protect these rights from unjust attack, and in the event of

¹⁰⁰ See http://portal.welfare.ie/foi/meansassessment_foi.

¹⁰¹ *Capital Acquisitions Tax Consolidation Act 2003*.

¹⁰² Council Regulation (EC) No 1257 of 1999, 17 May 1999 *On Support for Rural Development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and Amending and Repealing Certain Regulations*; explained in the Department of Agriculture, Food and Rural Development publication *Early Retirement (ERS2) 2000*, revised version May 2002; <http://www.gov.ie/daff/Areasofl/ERS/ERS.Amend.final.doc>.

injustice, to “vindicate” them. Article 43.2 stipulates that the exercise of such rights “ought, in civil society, to be regulated by the principles of social justice”, and entitles the State to “delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good”.

5.57 There are very few restrictions on the right to buy, sell, mortgage, make a gift of or bequeath property. Such restrictions as exist relate generally to the obligation to support spouses and children. Spouses have specific rights to inherit (both under a will and on intestacy)¹⁰³ but there is no obligation on an owner to retain property in order that a spouse may inherit.¹⁰⁴ Children have specific rights on intestacy. They do not have specific rights if a valid will has been made but may make a claim under certain circumstances.¹⁰⁵ It is worth stating clearly that people who have made adequate provision for their children are entitled to make a gift or bequeath their property (subject to the rights of spouses) in any manner they think fit. This should continue to be the case for all people including the elderly.

5.58 Among the reform options that could be considered is to put the current law on a statutory basis. This might perhaps result in greater certainty but there is no guarantee of this. Statutory drafting is not a science and it may be impossible to draft in language that would protect vulnerable people in specific situations while allowing the flexibility necessary to protect them in situations which have not yet come to light. Common law deriving from many cases and the wisdom distilled over the years has developed definite principles which can be applied to the facts of individual cases.

5.59 One possibility is to treat “care agreements”¹⁰⁶ differently from other contractual obligations or gifts (depending on their

¹⁰³ Section 111 of the *Succession Act 1965*.

¹⁰⁴ However section 121 of the *Succession Act 1965* does provide that a disposition of property made within three years before the death of a person made for the purpose of defeating or substantially diminishing the share of the disposer’s estate can be deemed by the Court never to have had effect.

¹⁰⁵ Section 117 *Succession Act 1965*.

¹⁰⁶ The British Columbia Law Institute has published “Private Care Agreements Between Older Adults and Friends or Family Members”

nature). “Care agreements” in this context means arrangements whereby a person gives property or assets to another person in return for care in old age. They could give rise to greater obligation on solicitors to ensure legal competence and genuine consent. There could be an obligation on solicitors to inform the proposed Office of Public Guardian in any case where they had concerns and to inform the people concerned about the existence of this Office and the assistance they could get from it in the same way as solicitors are obliged to inform people about the availability of mediation services in cases of marriage breakdown. However, the concept of care agreements would not capture all the circumstances in which undue influence may arise. The suggested obligations on solicitors could, perhaps, be incorporated into practice guidelines.¹⁰⁷

5.60 It is clear that greater efforts need to be made to prevent people becoming embroiled in situations where they are clearly disadvantaged while, at the same time, maintaining their right to deal with their money and property as they wish. This requires the availability of better community services which facilitate people to live independent lives, greater advocacy services to empower elderly and vulnerable people to make genuinely independent decisions and greater vigilance on the part of solicitors and the financial services industry. The issues of community and advocacy services are mentioned again in Chapter 6. The role of solicitors in protecting vulnerable people is examined further below.¹⁰⁸

5.61 *The Commission provisionally recommends that the current law on undue influence and unconscionability remain as it is. The Commission considers that any attempt to legislate comprehensively in this area would be as likely to create problems as to solve them. The guidelines for solicitors which are outlined below and the proposals which the Commission sets out in Chapter 6 should, if implemented, reduce the likelihood of vulnerable people being exploited and may reduce the need for the application of these doctrines.*

March 2002 which addresses the issues arising in such agreements.
http://www.bcli.org/pages/projects/elderly/Rep_Care_Agreements.html.

¹⁰⁷ See paragraph 5.63 below.

¹⁰⁸ At paragraphs 5.62-5.63.

D The Role of Solicitors in Financial and Property Transaction

5.62 It is clear from the above that the existence of independent legal advice is a crucial element in assessing whether or not any transaction involving a vulnerable person was entered into freely. The Commission considers that guidelines should be available to solicitors to help in their dealings with vulnerable elderly people in respect of financial and property transactions.

5.63 *The Commission provisionally recommends that detailed guidelines should be considered to assist solicitors and other professionals in dealing with financial and property transactions, including gifts of property and guarantees for loans, for vulnerable elderly people. These guidelines should assist solicitors in detecting and dealing appropriately with suspected cases of undue influence and in advising elderly clients as to the consequences of their actions in respect of their own future care. These guidelines should be formulated and updated by the relevant professional bodies in consultation with the proposed Office of the Public Guardian and not laid down in legislation. The Guidelines should deal with the following issues:*

- ***Who is the client?*** – solicitors should clearly establish that either the donor of a gift of property or the recipient is the client, but should not act for both, unless the issue of conflict of interest is clearly and separately explained and each agrees, separately, to use the same solicitor. The same principle applies if there is a third party involved. This requires that clients are interviewed alone even if they express a wish to have another person present. It also requires that the solicitor act in the best interests of the client and not of the other party or parties to the transaction. The solicitor should clearly establish what the best interests of the client are.
- ***Is the gift appropriate in the client's circumstances?*** – Clients are entitled to make inappropriate gifts provided this is done freely and on the basis of an informed understanding of the situation.. The solicitor should find out as much as possible about the clients' circumstances including their knowledge and understanding of the consequences of the transaction being proposed, their overall financial situation and their possible

future care costs. The solicitor should advise as to whether the making of a gift is likely to impoverish the client. Among other considerations, the solicitor should try to establish:

- Is the gift is being given in the expectation that care will be provided and, if so, can this arrangement be made legally enforceable. Are all the details of the care arrangements clarified between the parties, for example, if there is a right of residence, is there agreement about who pays for the maintenance of the property and what happens if long stay care is required; have arrangements been made for the resolution of any disputes which may arise between the donor and the proposed carer.

- Is the gift being given in the expectation that this may result in the client qualifying for a means tested payment such as a social welfare non-contributory pension or a nursing home subvention? If so, the solicitor needs to explain that the making of such gifts may be ignored in and for the purpose of the means test.

- Is the client giving away money or property in the expectation that the state will provide any necessary care services. If so, is the client aware that the maximum state subvention to nursing homes costs is about one quarter of the cost of a private nursing home in some parts of the country.

- **Alternative measures** – *the solicitor should investigate whether or not the client's intentions could be equally well effected by, for example, making a will or executing an Enduring Power of Attorney;*
- **Record of advice** – *the solicitor should ensure that a record of the client's instructions and the advice given are kept and should send a written note to the client of the advice, explaining the nature and effect of the proposed transaction. In determining the instructions from the client the solicitor should ascertain (as far as possible) the precise wishes of the potential donor.*
- **Legal Capacity** – *the solicitor should make an assessment of the legal capacity of the client to enter the proposed transaction and,*

*if in doubt, should arrange for a medical assessment. The doctor should be informed of the relevant test of legal capacity.*¹⁰⁹

- **Office of the Public Guardian** – *the solicitor should advise the client about the existence of, and the services provided by, the proposed Office of the Public Guardian.*

E Domestic Violence

5.64 The main impetus behind the introduction of domestic violence legislation was the need to provide legal mechanisms for the protection of spouses and children. The legislation also applies to other domestic relationships. The long title of the *Domestic Violence Act 1996* describes it as follows:

“An Act to make provision for the protection of a spouse and any children or other dependent persons, and of persons in other domestic relationships, whose safety or welfare requires it because of the conduct of another person in the domestic relationship concerned...”.

5.65 The relevant other domestic relationships are:

- a parent in respect of a non-dependent adult child where they are residing together
- any adult in respect of a co-resident adult where the basis of the relationship is not primarily contractual

These new categories were introduced in the 1996 legislation largely in response to concerns about elder abuse.

5.66 An elderly person who is being abused by a co-resident (for example a family member or resident carer or any other person with whom the relationship is not mainly contractual) may apply for a safety order or protection order. However, only parents may apply for a barring order and there are property considerations as well – a person may not get a barring order against another person who has a greater interest in the property in which they both live. So, while a parent may apply for a barring order against an abusive son or daughter if the parent owns or mainly owns the house, this is not

¹⁰⁹ See Chapter 1.

possible if the son or daughter has the major property interest in the house. An elderly person who has a greater property interest may apply for a barring order against a son or daughter living in the same house but not against the partner of that son or daughter. In certain circumstances, the health board may apply for the relevant orders on behalf of a person who is entitled to apply. These circumstances are set out in section 6 of the Act. These are where the health board -

- becomes aware of an alleged incident or series of incidents which in its opinion puts into doubt the safety or welfare of a person (the "aggrieved person");
- has reasonable cause to believe that the aggrieved person has been subjected to molestation, violence or threatened violence or otherwise put in fear of his or her safety or welfare;
- is of the opinion that there are reasonable grounds for believing that a person would be deterred or prevented as a consequence of molestation, violence or threatened violence by the respondent or fear of the respondent from pursuing an application for a safety order or a barring order on his or her own behalf or on behalf of a dependent person; and
- considers, having ascertained as far as is reasonably practicable the wishes of the aggrieved person that it is appropriate in all the circumstances to apply for an order.

The court, when deciding on a health board application, must also take into account the wishes of the adult aggrieved person.

5.67 In practise, this legislation is very rarely used by people other than spouses and children, and health board initiated cases are rare. Many older people in abusive situations may not have the resources, whether financial, physical or mental, to take legal action against their abusers and their vulnerability may arise from their dependence on the abuser. Elderly people who are being abused may fear the alternative – one alternative being institutional care – more than they fear the abuse. Further legal mechanisms will not address this concern. The best way to address it is to ensure the availability of appropriate community services. Health Boards may be unwilling to take cases because they would then have further responsibilities for providing services to the elderly people concerned.

5.68 It is not clear how this legislation could be improved and made more usable by abused elderly people. The Commission puts forward proposals for a new system of protection for vulnerable elderly people.¹¹⁰ This includes proposals for co-ordination between the domestic abuse legislation and the new system. These include:

- an obligation on health boards to inform the Office of Public Guardian¹¹¹ of suspected or known cases of domestic violence;
- arrangements for the Court dealing with domestic abuse to invoke the adult care or intervention orders proposed. The *Domestic Violence Act 1996* provides that the court may invoke the child protection mechanisms available under the *Child Care Act 1991* in appropriate cases. This proposal provides for a similar arrangement for adult care orders;
- arrangements for co-operation between the Garda Domestic Violence Unit and the Office of the Public Guardian in relevant cases.

5.69 The Working Group on Elder Abuse recommended:

“Legislation is needed to provide for Garda access in situations where there is a concern that elder abuse is taking place but where access is not available in order to get consent. Current legal provisions do not include access in these situations. This legislation should give power to An Garda Síochána, where there are reasonable grounds to suspect that elder abuse has taken place, to enter on any premises, if needs be by force, to gain access to the older person in order to interview them. Such an interview would be in order to establish if they wish to consent, or are in a position or able to give consent, to further investigation and intervention for their protection and welfare. This provision should stipulate that for the purposes of such interview

¹¹⁰ See Chapter 6.

¹¹¹ The Office of Public Guardian is a central feature of the proposed new system outlined in Chapter 6.

and/or assessment the Gardaí may be accompanied by health and social personnel as appropriate.”¹¹²

5.70 The Gardaí do have the power to arrest without warrant and to enter premises by force if necessary if they have reasonable grounds for believing that a person is in breach of an order under the *Domestic Violence Act 1996*.¹¹³

5.71 *The Commission considers that there is a need for mechanisms to protect elderly people who are being abused or in danger of being abused in a domestic situation. It is considered that the proposals in relation to intervention and adult care orders in Chapter 6 are appropriate. The Commission acknowledges that, as suggested by the Working Group on Elder Abuse, that in certain cases of suspected abuse of the elderly, the proposed right of entry on premises should be given by legislation to An Garda Síochána to be used in liaison with health and social services personnel as appropriate.*

¹¹² Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002) at page 19.

¹¹³ Section 18 of the 1996 Act.

CHAPTER 6 NEW SYSTEM FOR PROTECTING VULNERABLE ADULTS

A Introduction

6.01 A new system for the protection of vulnerable adults is needed because most of the existing mechanisms are unsatisfactory and are not comprehensive. The Enduring Power of Attorney (EPA) system is relatively new and underused. It is not sufficiently promoted but it has the potential to be a very useful mechanism as it facilitates the retention of as much autonomy as possible for vulnerable adults. The Wards of Court system is cumbersome and outdated. The language and concepts used in the legislation are inappropriate to the current understanding of mental illness, mental impairment and legal capacity. The basis of the jurisdiction is not clear, the procedures involved are lengthy and too many decisions have to be referred to the President of the High Court. The powers and duties of the appointed Committee are not clear and the legislation does not deal at all with how decisions about the person of the Ward are to be made. The method of dealing with the Ward's money is very cumbersome and inefficient. There is no formal connection between the system and the providers of services to elderly people. There is no adequate system for the protection of elderly people who may have legal capacity but who are abused and unable, for whatever reason, to have access to legal remedies and the appropriate social services. There is no single body which has overall responsibility for actively ensuring the protection and welfare of vulnerable elderly people.

6.02 In a number of jurisdictions, modern systems for substitute decision making and protection for vulnerable elderly people have been introduced in particular, in Scotland, New Zealand, Australia

and Canada.¹ Law Reform Commissions in other countries have examined the issues in some detail. In particular, a number of papers have been published in England and Wales and in Scotland.² The proposals outlined here have been informed by the work published by these Commissions and by the legislation in place in a number of countries.

6.03 Gordon and Verdun-Jones' criticisms of Canadian guardianship laws³ are telling in an Irish context (where the laws are even more out of date than in Canada). Among other things, the

¹ Canada and Australia are Federal States with a number of states, provinces and territories each of which has its own legislation. Reference is made throughout this Chapter to particular pieces of legislation.

² The Law Commission of England and Wales published four Consultation Papers in the early 1990s: *Mentally Incapacitated Adults and Decision-Making: An Overview* (No 119 1991); *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (No 128 1993); *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, (No 129 1993); and *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* (No 130 1993). A final comprehensive Report presenting the Law Commission's proposals for reform of the law relating to mental incapacity was published in 1995 *Mental Incapacity* (No 231 1995). The Lord Chancellor's Department in England responded to this series of publications by issuing a Consultation Paper, *Who Decides?: Making Decisions on behalf of Mentally Incapacitated Adults* (CM 3808) (Lord Chancellor's Department 1997), in which it sought views from interested parties on the approach which it proposed to take to the Commission's recommendations. This consultation process culminated in the issuing of *Making Decisions* (CM 4465) (Lord Chancellor's Department 1999), a Report outlining the British government's proposals in this area

The Scottish Law Commission published its *Report on Incapable Adults* in 1995 (CM 2692) (No 151 1995). The Scottish Office published a consultation paper *Managing the Finances and Welfare of Incapable Adults* in 1997. See <http://www.scotland.gov.uk/rightmoves/docs/mfia-01.htm>. This accepted many of the recommendations of the Law Commission. Before introducing the Bill which subsequently became the *Adults with Incapacity (Scotland) Act, 2000*, the Scottish Executive published a policy statement *Making the Right Moves* 1999. <http://www.scotland.gov.uk/rightmoves/docs/mrmm-01.htm>.

See <http://www.scotland.gov.uk/justice/incapacity>.

³ Gordon and Verdun-Jones *Adult Guardianship Law in Canada* (Carswell 1992).

authors argue that the guardianship laws have failed to adapt to modern medical, social and cultural norms and very often do not reach the right balance between the adult's right to autonomy and self determination and the right to receive the most effective but least restrictive and intrusive form of assistance, support or protection necessary to meet the needs of the particular adult. They also point to evidence of paternalism. This is evidenced by inadequate arrangements for procedural fairness, too much discretion being available to social services personnel and legislation which is too closely and inappropriately related to the values underpinning child protection legislation.

6.04 In this Chapter, proposals for a new system to provide for substitute decision making and protection of vulnerable elderly people are set out. As far as possible, these proposals try to address the inadequacies of the current Irish system and take into account the criticisms of other systems. The issues are examined from the point of view of elderly people who did have legal capacity but whose capacity is lost or impaired and also elderly people who may retain legal capacity but are abused or neglected and unable to access remedies. In addition, any new system might have to be adapted to address the needs of other vulnerable adults. However, as emphasised at paragraph 2 of the Introduction of this Paper, the Commission has not examined all the issues arising for people, for example, who have developmental disabilities or who never had legal capacity, but considers that the proposals outlined can be adapted to suit other vulnerable adults.

B Overview of Proposals and General Principles

(1) Overview

6.05 Adults who require protection may need physical protection and/or they may need a mechanism for substituted decision making. The Australian Law Reform Commission⁴ distinguished between a substitute decision making model and a care model. The proposals outlined here involve a combination of these. The legislation and

⁴ Australian Law Reform Commission *Guardianship and Management of Property* (ALRC No 52 1989).

services must cater for a wide variety of needs. A vulnerable elderly person may require help to carry out decisions or to deal with everyday activities but may not need help with making decisions; may need services, support and assistance but may not need a guardian; may need to have one substitute decision but may not need a general substitute decision making mechanism; may need protection but not the transfer of decision making powers which is inherent in guardianship. Such a person may be at considerable risk of abuse but may be perfectly capable of making decisions, if the environment is such as to enable those decisions to be made without fear or intimidation. It is likely that there are many situations in which a person who has lost or impaired legal capacity is cared for by a spouse or family member and that carer gradually starts to take substitute decisions or assists the person to make decisions, and ultimately is the informal substitute decision maker. This person either may not need any intervention, or may need protection from the financial or physical abuse of a carer. The system must be capable of ensuring that the needs of the person are met in the most appropriate manner.

6.06 The proposals outlined here would provide for different orders to meet different needs and a general authority to act reasonably to meet the needs of people who do not require an elaborate protection system but whose carers need legal protection for decisions and actions made in the interests of a vulnerable person and in good faith. In other jurisdictions there is a range of different words used to describe the people with whom this consultation paper is concerned. Here the words used are similar to those used in the health and social services and are as non judgmental and neutral as possible.

6.07 *The Commission provisionally recommends that the legislation should deal with “adults who may be in need of protection” and, if a decision is made that a person is in need of protection, then that adult becomes a “Protected Adult”. An adult may be in need of protection even if legally capable. There should be two strands:*

- *a substitute decision making system which it is proposed to call Guardianship⁵ This would provide for the making of Guardianship orders in the case of people who do not have legal capacity and who are in need of guardianship (people who have a decision making disability) and the appointment of Personal Guardians who would make some of the required substitute decisions;*
- *an intervention and personal protection system which would provide for specific orders - services orders, intervention orders and adult care orders. These would be available for two broad categories of people: those who have legal capacity but who need protection and are unable to obtain this for themselves, and those people who do not have legal capacity but who do not need guardianship (probably because there is no need for a substitute decision maker because no decisions require to be made).*

The system would be supervised by a new independent Office of the Public Guardian with specific decision making powers, the power to require the provision of certain services and an overall supervisory role over Personal Guardians and over attorneys under registered EPAs. The Public Guardian would be subject to the Tribunal and Protected Adults would always have the right to appeal to the Tribunal against all substitute decisions. The rest of this chapter sets out the details of how this new system should work. The Commission emphasises that all the proposals in the rest of this chapter are provisional recommendations and welcomes detailed submissions from any interested party on all of the elements proposed here.

(2) General Principles

6.08 The Commission considers that the principles underlying the new system should be respect for human and constitutional rights, co-ordinated and integrated services and legislation which should be simple, usable and allowing for flexibility to meet individual needs.

⁵ The Commission considered whether “guardianship” was the appropriate name to use. It can be argued that the concept is more usually associated with children and is inappropriate to adults. However, it is the concept used in most other jurisdictions and there is no obvious alternative that does not have paternalistic overtones.

(a) *Respect for Human and Constitutional Rights*

6.09 The legal provisions and proposed reforms of the structures must provide for protection mechanisms which respect the dignity and the human and constitutional rights of elderly people. These rights derive from the Constitution of Ireland, the general law of Ireland, the law of the European Union, the European Convention on Human Rights and human rights instruments drawn up by the United Nations and other international bodies⁶. Among the relevant rights are the right to equality and non-discrimination, the right to bodily integrity, the right to protection of the person, the right to personal liberty, family rights, the right to personal and marital privacy, the right not to be subjected to inhuman and degrading treatment and property rights. The Commission considers that the practical expression of these rights means that:

- age alone cannot be a criterion for protection or intervention;
- the protection and intervention mechanisms should be limited to providing a solution for the specific manifest problem and should not involve unnecessarily large scale intervention - the intervention should be the minimum intervention consistent with the maximum preservation of the right to autonomy and self determination. The Tribunal should be able to choose the most appropriate mechanism and not simply be confined to the mechanism sought;
- people who have legal capacity should continue (within reasonable extended grounds) to have the right to make

⁶ Among the relevant UN instruments are the *UN Principles for Older People*, 1991 which outlines 18 principles under the headings of Independence, Participation, Care, Self-fulfilment and Dignity. Among other things, at paragraphs 17 and 18 it provides that “older people should be able to live in dignity and security and be free of exploitation and physical or mental abuse” and “older people should be treated fairly, regardless of age, gender, racial or ethnic background, disability, financial situation or any other status, and be valued independently of their economic contribution”.

At the UN Second World Assembly on Ageing in 2002, an International Plan of Action was agreed. The aim the International Plan of Action is to ensure that people are able to age with security and dignity and to continue to participate in their societies as citizens with full rights. The objectives include the full realisation of all human rights and fundamental freedoms of all older people. See <http://www.un.org>.

choices even if conventional wisdom considers those choices to be imprudent or even risky;

- if the needs of a vulnerable person can be met by a less intrusive solution – for example, by the provision of social services - then that solution should be made available;
- substitute decision making should take account of the known wishes of the person as much as possible;
- families, particularly spouses, should have a right to have a say, if this is practical and consistent with the best interests of the elderly person;
- there should be procedural fairness in the way the legal mechanisms operate, as practicable, expedient and personal, that is, people who are affected should have the right to be represented, to be heard, to have a personal advocate, the right to legal aid and the right to an adequate appeal system.

(b) *Co-ordinated and Integrated Legislation and Services*

6.10 The Working Group on Elder Abuse recommended that “the response to elder abuse be placed in the wider context of health and social care services for older people.”⁷ The Commission agrees with this recommendation. This Consultation Paper is primarily concerned with legal mechanisms and responses to the needs of vulnerable elderly people. These mechanisms are essential but they are not sufficient. It is important to place them in the context of health and social care services because the required protection cannot be guaranteed by legal mechanisms alone and the need for protection would be considerably reduced if adequate health and social care services were available. The Commission further considers that, if there is an obligation to intervene in the life of an adult, there should be a further obligation to provide services and resources. Adults who are legally capable have the right to refuse services - a right to care and treatment should not be turned into an obligation to receive them.

6.11 The legislation and the new system must take account of existing and planned provisions dealing with mental health issues, the rights of people with disabilities and rights to health and social services. It must be part of a co-ordinated and integrated package of

⁷ Working Group on Elder Abuse *Protecting Our Future* (Stationery Office 2002).

supports available to vulnerable elderly people. At the same time, it must have a clear and distinct focus and be in a position to ensure the provision of services. The Commission considered whether it would be possible to provide for the protection of vulnerable elderly people by extending the remit of an existing body and concluded that this would not be a satisfactory solution. The Commission considers that the service providers such as the health boards should not be the overall supervisory body as one of the requirements is that the provision of services be independently assessed and monitored. The Mental Health Commission is concerned with people who are mentally ill and with the standards of psychiatric services. While it is clear that it will have a role in the new system which is proposed, it would be inappropriate to extend its role to cover people who are not mentally ill as this would dilute its focus on people who need specific services and it would cause further public confusion about the different needs of people with intellectual disabilities and those with dementia. A separate system, as proposed in this Paper, is required to meet the distinctive, common and individual needs of vulnerable elderly people. The service providers would have to act in co-ordination with this system.

(3) *The Services Context*

6.12 Elderly people are eligible for or entitled to a range of health, social, community, housing and long stay services⁸ but it is officially accepted that the services are inadequate in many respects.⁹ There are shortages of relevant personnel including: geriatricians,

⁸ The Department of Health and Children has overall responsibility for most of the health, community care and long stay services. The Department takes the view that people are “eligible” for services under the Health Acts but that this does not equate with “entitled”. The Ombudsman strongly disputes this view – see *Nursing Home Subventions – An Investigation by the Ombudsman of Complaints regarding Payment of Nursing Home Subventions by Health Boards* (Office of the Ombudsman 2001). See <http://www.ombudsman.ie>.

⁹ For a full listing of the services available see Comhairle *Entitlements for the Over Sixties* (23rd edition 2002); Various NCAOP publications include assessments of the adequacy or otherwise of various services – See <http://www.ncaop.ie>; the Department of Health and Children’s *2001 Health Strategy* includes an acceptance of the inadequacy of some of the services and plans for their improvement www.doh.ie.

specialists in the psychiatry of old age, social workers specialising in older people, public health nurses, home helps and occupational therapists. From the point of view of the proposals in this Consultation Paper, the following are the most relevant feature of the services available.

6.13 Every person aged 70 and over is entitled to free GP services.¹⁰ The health boards are obliged to provide public health nursing or community nursing services. In theory, all elderly people are entitled to avail of public health nursing services (sometimes called community nursing service). In practice, there are not enough public health nurses to provide adequate services and they have to prioritise.¹¹ Health boards may provide home help services. Priority is given to elderly people in the allocation of home help services but the service is discretionary and there are not enough home helps for all of those who need them.¹² Clearly, GPs, community nurses and home helps are the most important service providers from the point of view of protecting vulnerable adults.¹³ There are relatively few social workers dealing with elderly people but, where they are available, they also would have a role.

6.14 The legislation governing entitlement to public long stay services is not at all clear and there are not enough public long stay

¹⁰ *Health (Miscellaneous Provisions) Act 2001*. Technically, they are entitled to “full eligibility” for the health services, including GP, free prescribed drugs and a range of community care services.

¹¹ Ruddle, O’Donoghue and Mulvihill *The Years Ahead Report: A Review of the Implementation of its Recommendations* (National Council on Ageing and Older People 1997).

¹² *Ibid.*

¹³ GPs are the most frequent providers of information on services to elderly people and public health nurses are also important sources of information – see *Meeting the Health, Social Care and Welfare Services Information Needs of Older People in Ireland* (National Council on Ageing and Older People 2002). GPs are independent contractors who have contracts with health boards to provide services to eligible people. Public health nurses are health board employees. Home helps may be employed by health boards or by voluntary organisations with financial assistance from health boards.

places to meet the demand.¹⁴ There is no external inspection system for public long stay care at present but it is expected that the remit of the Irish Social Services Inspectorate will be extended to this sector in the near future. Elderly people may qualify for a subvention for a private nursing home if they are dependent and if they pass a means test.¹⁵ The health boards are obliged to monitor and inspect private nursing homes to ensure they meet the standards set out in the legislation. The inspection systems could be important in ensuring that adequate care and protection are provided for protected adults. An appeal system should be built in to ensure that decisions are not arbitrary, inconsistent with other regulations and unsympathetic to the needs of some elderly residents.

6.15 Most of the people with whom this Consultation Paper is concerned have disabilities and so may be affected by the proposed legislation on rights for people with disabilities. The *Disability Bill 2001* is being redrafted at present.¹⁶ It is expected that it will provide for a range of services and rights for people with disabilities. For this Paper, the relevant services are assessments of need and advocacy services. Under the Bill as initially proposed, the health boards would have an obligation to provide an assessment of need in the case of a person with a disability who applies for a health service and would then be obliged to provide the appropriate services. There would be a statutory independent appeals system for people who were

¹⁴ Mangan *Older People in Long Stay Care* (Human Rights Commission 2003); Nursing Home Subventions – An Investigation by the Ombudsman of Complaints regarding Payment of Nursing Home Subventions by Health Boards (Office of the Ombudsman 2001).

¹⁵ *Health (Nursing Homes) Act 1991* and its regulations.

¹⁶ The Bill was withdrawn in 2002 because of opposition by groups representing people with disabilities. The opposition was mainly concerned with Section 47 of the Bill which provided that there would be no right of action against a public body which failed to comply with any duty to be imposed by the Act. A consultation process was put in place to bring forward proposals for a new Bill. That process was completed in February 2003 and the proposals are now (June 2003) being considered by the Cabinet Sub Committee on Social Inclusion. It is expected that a new Bill will be produced in Autumn 2003. The Disability Legislation Consultation Group published their proposals for the new legislation *Equal Citizens: Proposals for Core Elements of Disability legislation* in February 2003. See <http://www.nda.ie>. The description given here is based on the original Bill as published in 2001.

not satisfied with the assessment or with the action taken as a result of it. The health board would have to ensure that, as far as possible, the person with a disability is involved in the assessment, has access to relevant information about it, including information on possible treatment, therapy or other service to be provided. Where the person is unable to be involved because of disability or age, a representative should be involved – this may be a personal advocate - a concept which is explained in paragraph 6.17.

6.16 How would the machinery proposed in this chapter and the assessment of need under the Bill operate in relation to each other? Clearly, the ‘assessment of need’ could help to establish whether a particular adult required substitute decision making or protection orders. It could determine, for example, that the provision of appropriate services would render the need for guardianship or protection unnecessary. So, the Tribunal could decide, in an appropriate case, that an order for the provision of specific services would best meet the needs of the individual concerned. The personal advocacy service could assist elderly people who are afraid or intimidated, could assist in establishing the capacity of the person and could explain the various options available as clearly as possible.

6.17 Under the Bill as originally proposed, certain people with disabilities would be entitled to avail of personal advocacy services. The people who would be entitled include those who would be unable to obtain or have difficulty in obtaining access to a service without the help of a personal advocate or people who would be unable to represent themselves where there are reasonable grounds for believing that there is a risk to their welfare, health or safety. Advocacy in this context includes:

- representing, supporting or training people with disabilities for the purpose of helping them to promote their best interests in relation to matters affecting their welfare and quality of life;
- for that purpose, supporting or training their families, carers or other persons, or members of organisations or groups representing their interests; and
- representing, helping or supporting people to gain access to a service provided by a statutory body or voluntary body, but does not include representation in legal proceedings. There is no formal provision at present for advocacy services but some

voluntary organisations do provide such a service.¹⁷ A personal advocacy service could be particularly useful and necessary for people who have difficulty in making decisions or in communicating decisions and for people who are neglected or abused.

6.18 It could be argued that the new system which is being proposed in this Consultation Paper should itself be able to provide services for vulnerable people in need. The Commission considers that this would involve an attempt to duplicate already scarce services and resources and would be wasteful. Instead, the new system should act in co-ordination with the service providers where that is possible and suitable and should, in appropriate cases, be in a position to order the service provider to provide specific services.

C The Scheme in General

(1) Unified System for Person and Property

6.19 Some jurisdictions have separate arrangements for guardianship of the person and of the property.¹⁸ However the Commission considers that a unified system is most appropriate because decisions on property are very often directly related to decisions on the care of the person. The system where necessary, could make orders dealing with the property only or the person only but have a capability of dealing with all aspects of the elderly person's life. Similarly, it could appoint more than one person as Personal Guardians with specific responsibilities for aspects of the protected person's life. However, if this happens, the Personal Guardians should be required to co-operate in ensuring the best interests of the protected person. In some jurisdictions, there is separate legislation dealing with protection for neglected or abused adults and with the type of intervention orders which are being proposed here. The Commission considers that the total package of

¹⁷ Comhairle are expected to publish a report on advocacy services by the end of 2003.

¹⁸ Sometimes the person appointed to care for the person is called a guardian (a welfare guardian in New Zealand) while the person appointed to deal with the property is called a trustee, a manager, a Protective Commissioner or a committee.

measures is best presented in a unified way where all the options available can be taken into account.

(2) Notification to Health Boards and Other Agencies

6.20 If an order is made by the Tribunal, notification of the order should be sent to the health board of the area where the Protected Adult lives. If the Protected Adult lives in a long stay place, then that place and the relevant inspectorate should also be informed. There should be mandatory procedures to ensure that health boards inform the relevant personnel including the GP and the public health nurse who have responsibility for the Protected Adult. Health boards and other relevant agencies should then have a statutory obligation to monitor the health and welfare of Protected Adults and to ensure that relevant services are provided for them. In relevant cases, the local Gardaí should also be informed.

D Guardianship

(1) Introduction

6.21 Subject to two conditions, Guardianship Orders may be made in respect of adults in need of protection if that is appropriate for their needs. The two conditions are that they do not have legal capacity,¹⁹ and that they are in need of protection either in the substitute decision making sense, or in the personal protection sense. People would be considered in need of substitute decision making and be taken into guardianship if they are legally incapable and, as a result of that incapacity, are unable to make decisions about their property and affairs or are unable to make personal and health care decisions. When assessing whether or not a person is unable to make decisions, the Tribunal should take into account any assessment of need carried out by the health board and the possibility that the person's decision making needs could be met by the provision of health care, social or advocacy services. The Tribunal must also consider what is necessary from the point of view of the best interests of the elderly person, which may not coincide with the viewpoints of members of

¹⁹ The issue of legal capacity and its possible definition is dealt with in Chapter 1.

the family, possible successors, or professionals. If no substitute decision is necessary, then guardianship is not necessary and it is not necessary to make a decision on capacity. Similarly, if it is likely that the person will recover capacity and a decision can be postponed, then perhaps no guardianship order should be made for the time being and this can be kept under review should circumstances change.

6.22 Protected Adults who have been taken into guardianship lose the legal right to make decisions about their property and person. That right is given to a substitute decision maker. The Commission proposes that the substitute decision making mechanism would have four levels – in ascending order the Personal Guardian, the Public Guardian, the Tribunal and the Court. All would be required to have regard to the same general considerations – these are outlined in paragraph 6.24.

6.23 If and when a Guardianship Order is made, the Tribunal would appoint a Personal Guardian. The Personal Guardian should have a standard set of powers which would be part of the normal Guardianship Order. The Tribunal could vary these by not granting some or by adding others in the light of the Protected Adult's circumstances. The Tribunal may make a range of other orders, most importantly the three 'Specific Orders',²⁰ depending on the particular needs of the protected adult. The general principle we have followed in deciding which body should exercise each power is that decision making should be at the most informal and least costly level consistent with the Protected Adult's rights and the seriousness of the decisions to be made. The Personal Guardian should be able to make all the routine decisions, subject to the general supervision of the Public Guardian. Certain more crucial decisions should be reserved for the Public Guardian and it should be possible to appeal to the Tribunal and further, if necessary, to the Court against any decision of the Personal Guardian or the Public Guardian.

6.24 The substitute decision maker's first and paramount consideration should be the promotion and protection of the welfare and best interests of the Protected Adult. The Protected Adult's wishes, in so far as they can be ascertained, should be taken into

²⁰ Described in paragraphs 6.79-6.91.

account as much as possible.²¹ The New Zealand legislation²² requires welfare guardians to:

- Promote and protect the welfare and best interests of the person for whom they are acting;
- Encourage the person for whom they are acting to develop and exercise any capacity they have;
- Encourage the person for whom they are acting to act in their own interest wherever possible;
- Assist the person to be, as much as is possible, a part of the community;
- Consult the person, and others, that the welfare guardian considers are interested in and competent to advise on the personal care and welfare of that person, including any relevant voluntary welfare agency.²³

The Commission considers that the substitute decision maker under the proposed legislation should have similar responsibilities towards the Protected Adult. Thus the first principle to guide the substitute decision-maker should be the best interests of the Protected Adult. After that, there should be concern for the spouse or any dependents of the Protected Adult. In all but a minority of cases, usually where there are substantial assets, these two precepts will suffice. In this minority of cases, the question should be settled by reference to what a reasonable person in the circumstances of the Protected Adult would be expected to do. We believe that these principles are broadly similar to those which are followed at present in respect of property decisions of wards of court.

(2) *The Personal Guardian*

6.25 The Personal Guardian should be an adult – that is, aged 18 or over. Before appointment, the Tribunal must be satisfied that the proposed Personal Guardian is a fit and proper person to act as Guardian and will act in the Protected Adult’s best interests, and that

²¹ The Law Commission of England and Wales in its first Consultation Paper *Mentally Incapacitated Adults and Decision-Making: An Overview* (No 119 1991) called this “substituted judgment”.

²² *Protection of Personal and Property Rights Act 1988*.

²³ Section 18(4) of the Act.

there is no conflict of interest. There can be more than one Personal Guardian for a Protected Adult if the Tribunal sees this as necessary. Certain people should be debarred from being Personal Guardians – broadly the same people as are prevented from being attorneys under EPAs.²⁴ More generally, there is the obvious point that people with a personal interest of their own should not be appointed as guardians: this is a consideration which is taken into account in selection of the Committee under the present Ward of Court regime. No doubt the experience built up in the context of this regime can be drawn upon in operating the proposed system. People connected with long stay care facilities in which the person is living should not be Personal Guardians. Where the spouse is suitable, then the spouse with whom the Protected Adult is living should be appointed the Personal Guardian. In many cases, if the person in need of protection is living with a spouse and their property and money are largely jointly owned, guardianship may not be necessary at all. However, if it is necessary and the spouse is willing and capable of being Personal Guardian, then there would need to be very good reasons not to appoint the spouse. If the spouse is not appointed the Personal Guardian because the spouse is unwilling or considered unsuitable because of infirmity or otherwise by the Tribunal, the appointed Guardian should be obliged to keep the spouse informed of decisions as they are being made. While the Personal Guardian need not be living in Ireland, in many cases this may be considered to be essential.²⁵ If there is no one who is willing and qualified to act, the Public Guardian may be the Personal Guardian – in such cases, appeals may be made to the Tribunal in respect of decisions which may normally be appealed to the Public Guardian.

6.26 The Personal Guardian could have the power to make the following decisions. These are standard powers in many jurisdictions:

- where the Protected Adult is to live and with whom;

²⁴ Paragraph 3.17.

²⁵ Obviously, the Personal Guardian can only live in another jurisdiction if the terms of the Guardianship Order of the Tribunal on appointing the Guardian are limited in nature.

- day to day care of the Protected Adult if that is required including the hiring of a carer, home help or other domestic help;
- normal day to day decisions including the diet and dress of the Protected Adult;
- day to day decisions on spending of money for maintenance and social activities;
- decisions about the maintenance of any dependants of the Protected Adult including arrangements for the education of children and young adult dependants and the payment of any educational fees and day to day personal spending money;
- with whom the Protected Adult is to consort;
- whether the Protected Adult should be involved in social activities, work, training, education, rehabilitation, and, if so, the nature and extent of the involvement;
- whether the Protected Adult should apply for any licence, permit, approval or other consent or authorization required by law;
- to start, compromise resist or settle any legal proceedings on behalf of the Protected Adult;
- to consent to any necessary routine or minor medical treatment;
- any other matters specified by the Tribunal and required by the Guardian to protect the best interests of the Protected Adult.

6.27 It is important that the Personal Guardian be empowered to apply to the Public Guardian and, if necessary, to the Tribunal and further to the Court if guidance in exercising or carrying out any of these powers is needed.

(3) *Accountability of the Personal Guardian*

6.28 There must be mechanisms in place to ensure that the Personal Guardian carries out the duties involved in the best interests of the Protected Adult and does not use any of the powers inappropriately. At the same time, the accountability requirements should not be so onerous that suitable people would be unwilling to take on the role. A suitable person should not be excluded from being a Personal Guardian because of poor literacy or numeracy skills. Personal Guardians should be required to sign a declaration that they

will act, at all times, in the best interests of the Protected Adult. Each report to the Public Guardian should include a declaration that they have so acted.

6.29 The Personal Guardian should be obliged to give a report on the welfare of the Protected Adult and an account of the property, income and expenditure, to the Office of the Public Guardian. It should be possible for the Personal Guardian to give this report orally and have it transcribed by the Office. This should be done as frequently as ordered by the Tribunal at the time of appointing the Personal Guardian but it is suggested that the filing of an annual report and account would be appropriate initially in most cases. As a safeguard, the Public Guardian should have the power to call for an account at any time.

6.30 The Tribunal should have the power to name certain people who are to be informed of certain decisions by the Personal Guardian or of issues referred to the Public Guardian for decision. This could arise, for example, where there is family conflict about what is in the best interests of the Protected Adult.

6.31 As already stated, the health board must be informed when a person is taken into guardianship. There should be a legal obligation on the health board to monitor the care being given to the Protected Adult. If the Protected Adult is living in the community, the public health or community nurses should have responsibility for monitoring health and welfare and, if necessary, they should arrange to report to the Public Guardian. The Personal Guardian should be obliged to cooperate with the public health nurse and, if necessary, the GP in this monitoring. The inspection systems for long stay care should be legally required to have particular regard to Protected Adults who are living in long stay homes and to report to the Public Guardian if necessary.

6.32 The Tribunal should have the power to discharge Personal Guardians if they are unable to act, or if they are acting inappropriately, and to appoint another person or the Public Guardian as the Personal Guardian.

(4) *Compensation for the Personal Guardian*

6.33 Some jurisdictions allow compensation for dealing with the Protected Adult's affairs but not with personal care and health decisions. This is implicitly suggesting that the property role is more important than the role in relation to personal and health care. The Commission does not accept that this is so and sees no logic in having a different compensation regime for the two activities. If the Protected Adult is living with the guardian, the guardian may be eligible for a Carer's Allowance or Carer's Benefit²⁶ from the Department of Social and Family Affairs. If there is no such entitlement, then the Tribunal could allow an appropriate payment commensurate with the Protected Adult's income. If the Protected Adult is not living with the guardian, then the payment need only cover the expenses involved in making the necessary decisions including, in appropriate cases, the costs of employing a legal advisor or accountant to assist and advise the Personal Guardian who has to make complex or difficult decisions.

(5) *The Public Guardian*

(a) *Introduction*

6.34 The establishment of a new independent Office of Public Guardian is a central feature of the proposed new system of protection for vulnerable adults. Its primary role would be to oversee and supervise the arrangements for substitute decision making and protection for Protected Adults and to make specific decisions in relation to those adults. It should also have a wide-ranging advice, support and advocacy role for vulnerable elderly people. While it will take over many of the functions currently exercised by the Registrar of Wards of Court, it is not envisaged simply as the

²⁶ Carer's Allowance is a means tested payment to carers who are providing full time care and attention to people who are so incapacitated as to need such care. Carer's Benefit is a social insurance benefit paid to people who give up work in order to care for an incapacitated person. Not all protected adults would meet the incapacity criteria. The current weekly amount (from January 2003) of Carer's Allowance is €129.60 if caring for one person and aged under 66; Carer's Benefit is €139.70 if caring for one person. See *Supporting Carers, A Social Policy Report* Comhairle 2002 See <http://www.comhairle.ie>.

successor to this office but rather as a new office with new functions and more extensive powers. It would gradually take over responsibility for existing wards and take over the funds currently held by the Office of Wards of Court on behalf of wards. The Commission recommends that the Office should be separate from the Courts Service.

6.35 The Office should be headed by the Public Guardian who would be an independent office holder with the status of the Ombudsman or the Comptroller and Auditor General. The Office should have its own expenditure vote and the Public Guardian should be Accounting Officer. A contribution to the cost of services provided by the Public Guardian should be made by the Protected Adult. However, in the majority of cases, the Protected Adult will not have any assets from which to make a contribution.

(b) *Other Jurisdictions*

6.36 A similar office exists in a number of other jurisdictions. The role of the proposed Public Guardian is carried out by Public Trust in New Zealand.²⁷ This is a trustee organisation set up in 1873 which provides independent, professional advice and a wide range of legal and financial services to citizens. It has a much wider remit than is being proposed for the Office of the Public Guardian. For example, it helps people to make wills or advise them in respect of their taxes, as well as giving authority in relation to decision making.

6.37 In Western Australia, the Public Advocate is an independent statutory officer appointed under the *Guardianship and Administration Act 1990* to promote and protect the rights and best interests of adults with decision-making disabilities.²⁸ The Public Advocate is administratively accountable to the Department of Justice. The main activities of the Public Advocate of Western Australia are:

- the provision of information, training and advice on guardianship and administration and other ways of protecting

²⁷ See <http://www.publictrust.co.nz>.

²⁸ See <http://www.moj.wa.gov.au>.

- the rights and best interests of adults with decision-making disabilities including the Enduring Power of Attorney;
- the provision of advocacy including information, representation and recommendations at hearings of the Guardianship and Administration Board and in the community in respect of the best interests of adults with decision-making disabilities;
- the decision maker of last resort.²⁹

6.38 The Queensland Law Reform Commission³⁰ proposed that there be an Office of the Public Advocate which would be separate from that of the Adult Guardian (the Public Guardian in other Australian jurisdictions)³¹. It would be concerned with systemic advocacy on behalf of people with a decision-making disability, taking part in proceedings about the protection of the rights and interests of people with a decision making disability and promoting public awareness about the rights and interests of people with a decision making disability. The Office of the Adult Guardian was to be the substitute decision maker of last resort, although when it was given this role, it could delegate day-to-day decision making authority to another person. This office was to be concerned with the personal welfare of the person with a decision making disability and was to investigate complaints about neglect, obtain help from the service providers for an adult who needed a service and provide information and advice to substitute decision makers. The issue of the possible amalgamation of the roles of the Public Advocate and the Adult Guardian was addressed in the Report. The Commission noted that in other Australian states, these two functions ('systemic advocacy' and 'decision-maker of last resort for personal welfare decisions') had in fact been combined in a single statutory office. In the Commission's view, the reason for this approach was an economic one, and the Commission stated that it was 'mindful of resource implications'.³² However, the submissions received after publication of the Draft

²⁹ See <http://www.moj.wa.gov.au>.

³⁰ Queensland Law Reform Commission *Assisted and Substituted Decisions: Decision-making by and for People with a Decision-Making Disability* (No.49 1996).

³¹ There are Public Guardians in New South Wales, the Northern Territory, Western Australia and Tasmania.

³² Queensland Law Reform Commission, *Op cit* fn 30 at 194.

Report had, by and large, endorsed the Commission's preliminary view that, to minimise potential conflict of interest, it was essential that the decision-making role should be separated from the advocacy role. One advocacy organisation had commented:

“[w]hile the functions of a protective service (Adult Guardian) and advocacy are closely related, when these are carried out within one agency ... conflict of interest will occur. For example, [a protective service provider] could not be expected to advocate on behalf of a person who believes they are getting a raw deal from [the protective service provider]”.³³

6.39 Public Guardians in other Australian states perform similar functions to those envisaged in Queensland³⁴ in relation to the welfare of the adults with whom they are concerned. For example, the Office of the Public Guardian in New South Wales describes its role as follows:

“The Office of the Public Guardian acts as a substitute decision maker for a person who has a disability, an incapacity to make their own decisions, and a need for a guardian when appointed to do so. The Public Guardian makes decisions in such areas as accommodation, services and consenting to medical and dental treatment... The Public Guardian is commonly appointed as guardian by the Guardianship Tribunal.”³⁵

6.40 The other office which is a common feature of Australian guardianship systems is one which deals with the management of property and financial affairs. In New South Wales, the person occupying this office is known as the ‘Protective Commissioner’.

³³ Queensland Law Reform Commission Assisted and Substituted Decisions: *Decision-making by and for people with a Decision-Making Disability* (No 49 1996) at 422-3.

³⁴ *The Queensland Powers of Attorney Act 1998* provided for the appointment of the Adult Guardian and the *Queensland Guardianship and Administration Act 2000* provided for the appointment of the Public Advocate – See <http://www.justice.qld.gov.au/guardian/home.htm>.

³⁵ See <http://www.agd.nsw.gov.au/opg1.nsf/pages/whatwedoindex>.

Although this position and that of ‘Public Guardian’ of New South Wales is in fact held by the same person, the Office of the Protective Commissioner and the Office of the Public Guardian are distinct agencies which function separately from each other, with separate staff. However, they are housed in the same building and co-operate on many levels. The Protective Commissioner is appointed to “protect and administer the financial affairs and property of people unable to make financial decisions for themselves and when there is no other person suitable or able to assist.”³⁶ The website of the Office explains that it provides “a wide range of legal, technical, financial, specialist disability and other services”, and advises in relation to:

- protecting assets and legal rights
- facilitating the buying and selling of a home;
- organising an adequate cash flow to pay bills;
- liaising with financial and legal institutions;
- managing a business;
- making investments.³⁷

(c) *Proposed Powers of Public Guardian*

6.41 The Commission considers that the Public Guardian should have the functions and powers which are exercised by Public Guardians, Public Trustees and Public Advocates in the Australian jurisdictions. It is proposed that the Public Guardian should have a range of powers including

- the power to approve the disposal or acquisition of property and the active management of assets in accordance with the terms of the Guardianship Order;
- the power to deal with the money and assets of Protected Adults in specific cases, in accordance with expert financial advice and in the light of the circumstances of the Protected Adult;
- the power to apply for an injunction to prevent the disposal of assets or to freeze assets in cases where there is suspicion of financial abuse, unconscionable behaviour or improvidence;
- the power to approve certain healthcare decisions;

³⁶ See <http://www.agd.nsw.gov.au/opcc.nsf/pages/opc-section1>.

³⁷ See <http://www.agd.nsw.gov.au/opg1.nsf/pages/whatwedoindex>.

- the power to make intervention orders as described in paragraphs 6.84-6.86;
- the power to make services orders as described in paragraph 6.87;
- the power to apply to the Tribunal for adult care orders;
- the power to require the appropriate service provider – usually the health board - to provide a specific service where a Protected Adult is assessed as being in need of that service.

(d) *Decision Making Powers of Public Guardian*

6.42 The Public Guardian should take those decisions which have not been delegated to the Personal Guardian and which are not reserved to the Tribunal. These include many of the routine decisions which are currently made by the President of the High Court in wardship cases. It should be possible to appeal any of the Public Guardian's decisions to the Tribunal. The Public Guardian should have a panel of medical, psychiatric, geriatric, legal and financial or other experts to provide relevant advice on any issues which arise. The Public Guardian would be the Personal Guardian in cases where there is no one else willing or able to act. It should be possible for people to appoint the Public Guardian as the attorney under an EPA and to make provision for the payment of the Public Guardian's costs.

(e) *Supervisory Role*

6.43 The Public Guardian should play a supervisory role in relation to all Personal Guardians and all Personal Guardians should be required to report to the Public Guardian. Attorneys operating under EPAs³⁸ should be subject to the general supervision of the Public Guardian. The Public Guardian should also be a source of advice and assistance to Personal Guardians to help them carry out their obligations. Any person should be able to contact the Office of the Public Guardian to express concern about the possible abuse of a vulnerable elderly person or about any perceived inadequacies, ineptitudes or worse of Personal Guardians.

³⁸ See Chapter 3.

(f) *Interaction with Service Providers*

6.44 Health boards should be obliged to inform the Office of Public Guardian of suspected or known cases of domestic violence or other abuse of elderly people. There should be arrangements for co-operation between the Garda Domestic Violence Unit and the Office of the Public Guardian in relevant cases. The Office should also interact with the Mental Health Commission³⁹ and the proposed Mental Health Review Board⁴⁰ in respect of Protected Adults who also come under the remit of these bodies.

6.45 The Department of Social and Family Affairs should be obliged to notify the Public Guardian of any pension collection arrangements which are in force. The Department should be able to continue the agency arrangements without the necessity of having the person taken into guardianship but it should be obliged to end the practice of allowing people involved in running long stay care to be the agents. Each pension collection agency agreement should be reviewed by the Public Guardian every two years.

6.46 The Public Guardian should be authorised to access the personal records of a protected adult under the *Freedom of Information Act 1997* and the data protection legislation where such access is required in the best interests of the protected adult. If exercising this power, the Public Guardian must inform the Protected Adult and the Personal Guardian, who can appeal the decision to access information to the Tribunal.⁴¹

6.47 There should be a mechanism whereby anyone may complain to the Public Guardian about the abuse of an elderly person. The Public Guardian would then have the power to have this investigated either by using the mechanism of intervention orders as described in paragraphs 6.84-6.86. In cases of financial abuse, the Public Guardian should have the power to apply for an injunction from the Court to temporarily freeze money or prevent the disposal of assets. This would then allow for intervention to ensure that the

³⁹ Under the *Mental Health Act 2001*.

⁴⁰ Under the *Criminal law (Insanity) Bill 2002*.

⁴¹ Relevant records include bank records and tax and social welfare records.

choices are being made by the elderly person or to prevent any further exercise of undue influence or fraud. If money or assets are missing, the Public Guardian could have the power to mediate in order to try to recover them.

(g) General Education and Advocacy Role

6.48 The Office of the Public Guardian should have a broad educational and advocacy role in relation to vulnerable elderly people. It should promote the use of EPAs among the public, provide information and advice on the guardianship and protection systems, and be a central resource on all matters relating to the protection of vulnerable elderly people. It should provide a general information and awareness service on issues affecting vulnerable elderly people – this should be done by using all the appropriate communications media including a website. The Public Guardian should issue codes of practice and general advice and guidelines to a range of people dealing with vulnerable elderly people including solicitors, financial institutions, doctors, health boards and other social care staff and anyone involved in assessing the legal capacity of an elderly person.⁴²

(6) The Tribunal

6.49 In Chapter 1, the Commission made the basic recommendation that a Tribunal, rather than a Court, should make the decision about the general legal capacity of an individual.⁴³ The main functions of the Tribunal will be to determine issues of general legal capacity, make Guardianship Orders, appoint Personal Guardians, make Adult Care Orders and to act as a platform for appeal from decisions of the Public Guardian.

(a) Decision on Capacity

6.50 Any person, including the person who may be in need of protection, the health board, the Public Guardian or a body with specific responsibilities such as the Mental Health Commission

⁴² See, for example, the *Guidelines on Financial Abuse* (Hong Kong Guardianship Board 2003).

⁴³ See paragraphs 1.43-1.49 for a discussion of the advantages of a Tribunal over a Court.

should have the right to apply to the Tribunal for an order that the person in question be taken into guardianship and/or be the subject of an intervention, services, or adult care order. The application could be grounded on an assessment of need (as per the Disability Bill) or a GP's certificate (without an affidavit).⁴⁴ Notification of the application should be sent to a number of people on the same basis as notification of the registration of an EPA.⁴⁵ While an intervention order or a services order can be made by the Public Guardian, the Tribunal should have the authority to make a Guardianship or Adult Care Order.⁴⁶

6.51 The Tribunal would then conduct an inquiry including, if considered appropriate, getting a relevant assessment of need, for example, from a health board or the Mental Health Commission. In making its decision, the Tribunal should consider all the options available⁴⁷ and not just the one requested and make an order accordingly.

6.52 The procedure involved should be as informal as possible. However, in line with the general law of administrative procedure, the rules of constitutional justice⁴⁸ as these operate to protect the person who may be the subject of the order as well as, where appropriate, third parties, such as family members, must be observed. In particular, the subject of the proposed order must have the following rights:

- to be informed of the application and the right to object;
- to have a personal advocate to explain the issues involved;⁴⁹

⁴⁴ The assessment of capacity is made by the Tribunal, with reference to the certificate of the GP and its own expertise. See paragraphs 1.43-1.49.

⁴⁵ See paragraphs 3.26-3.30 for a discussion of the notification requirements for EPAs.

⁴⁶ Clearly, the Tribunal can also make a decision to make a person the subject of an Intervention Order or a Services Order.

⁴⁷ ie a Guardianship Order, a Specific Order, or no order at all.

⁴⁸ Hogan and Morgan *Administrative Law in Ireland* (3rd ed Round Hall Sweet and Maxwell 1998) at Chapter 9.

⁴⁹ See paragraph 6.17.

- to be notified of any hearing at which capacity, needs or decision making abilities are being assessed;
- to be heard, to produce witnesses and to ask questions of all other participants;
- to have legal representation at any hearing if necessary;
- to review documents;
- to be given the reasons for a decision;
- to appeal against any decision.

6.53 If the person who may be in need of protection objects to the application or if a spouse objects, then a further assessment should be arranged. This should be carried out by a geriatrician, psychiatrist, specialist in the psychiatry of old age or the appropriate expert, depending on the nature of the grounds of objection. This further assessment should then be considered by the Tribunal and a hearing may be arranged. Hearings should not be held *in camera* but the person's identity should be protected.

6.54 If a Guardianship Order is made, the subject of the order should have 28 days to lodge an appeal against the order in the Circuit Court. Between the order being made and the appeal heard, the appellant would be subject to the order only to the limited extent necessary to ensure personal protection.

(b) Appeal Body for Decision of the Public Guardian

6.55 The Tribunal will act as a forum for the appeal from any decision of the Public Guardian. This would include any decision made by the Public Guardian acting as a substitute decision-maker for the Protected Adult, and a decision to make a person the subject of an intervention order or a services order. These appeals can be taken by the Personal Guardian, the person who is the subject of the order or a family member or individual persons whom the Tribunal regards as having a valid interest the matter of the person's best interests and welfare of the person.

(c) Decision-making Powers Reserved to the Tribunal

6.56 When making a Guardianship Order, the Tribunal should set out in the Guardianship Order precisely what the terms of the order are, including what authority the Personal Guardian has in relation to the Protected Adult. The Order can be specific, such as the sale of

property, or general, such as the day-to-day care of the Protected Adult. Any issue not set out in the Order should be referred either to the Public Guardian or the Tribunal. Certain non-routine and major health care decisions would be reserved to the Tribunal. The Commission welcomes submissions as to what health care decisions should be reserved to the Tribunal.

(7) *The Court*

6.57 The Court is the ultimate appeal body from any decision made by the Tribunal or the Public Guardian. The Tribunal should also be authorised to refer questions to the Court for consideration and advice.

6.58 Certain major health care decisions should be specifically reserved to the President of the High Court or a judge appointed by him, such as turning off a life-support machine, or organ donation.

(8) *Decision-Making Powers of the Various Bodies in Guardianship*

6.59 In most jurisdictions, the Personal Guardian (under whatever name) may not make certain decisions and these are reserved to an equivalent of the Public Guardian or to the Court or Tribunal. For example, in New Zealand,⁵⁰ the Personal Guardian may not make substitute decisions on, among other things, marriage, divorce or adoption. The Australian Law Reform Commission specifically mentioned the following as decisions which the Personal Guardian should not be authorised to make: to marry, to vote in an election, to make a will, to consent to adopt a child and to give consent to a prescribed medical procedure.⁵¹

6.60 If the question of marriage or divorce arises, the issue should be considered by the Tribunal and the person's capacity to make such a decision should be specifically assessed. There should be no presumption of capacity or incapacity to marry. The question of adoption is most unlikely to arise in the case of the people with whom

⁵⁰ *Protection of Personal and Property Rights Act 1988* section 18(1).

⁵¹ Australian Law Reform Commission *Guardianship and Management of Property* (ALRC No 52 1989) at paragraph 4.40.

we are concerned. The question of making a will is examined further at paragraphs 6.77-6.78 . There is a common law rule that people who are not mentally competent are not entitled to vote. In practice, there are no arrangements for assessing the capacity of people on the electoral register but the Presiding Officer could, in theory at least, refuse to allow a mentally incompetent person to vote. There are arrangements in place for assisted voting by people with physical disabilities and there are safeguards to ensure that the vote is the genuine choice of the person.⁵² A Protected Adult who wishes to vote and who satisfies the normal requirements of the electoral law should be allowed to do so. There should be no arrangement for a substitute decision maker in respect of the franchise or right to vote.

6.61 Legislation needs to spell out the various categories of decisions that will be made by the Personal Guardian, the Public Guardian, the Tribunal and the Court respectively. The Commission particularly welcomes submissions as to what decisions should be reserved to each of these levels.

(a) *Health Care*

6.62 Health care decisions may be categorised into emergency, minor or routine, major and special medical procedures. The Personal Guardian could be entitled to give consent to emergency and minor treatment. This could be an automatic power or it could be particular to the Guardianship Order. Emergency medical procedures, that is to say, procedures which are necessary to save a person's life, may not require consent but this is not absolutely clear. In the *White Paper on a New Mental Health Act*,⁵³ it was explained that under common law, the administration of treatment to a person without their informed consent is unlawful, unless the treatment is 'urgently necessary'.⁵⁴ The common law doctrine of necessity has provided a basis for medical staff lawfully to administer treatment which is necessary to preserve the life and health of a patient, for example, in emergency situations where patients are unconscious and are therefore unable to give consent. The same doctrine would be

⁵² See <http://www.environ.ie>.

⁵³ Department of Health *White Paper on a New Mental Health Act* (The Stationery Office 1995).

⁵⁴ *Ibid* at 61.

relied on by a doctor who, for example, performed necessary surgery on an elderly patient with dementia who was unable to understand the nature of the proposed treatment, and was therefore unable to give an informed consent to it.

6.63 Although it has traditionally been common practice for doctors in such situations to seek written consent from the nearest available relative, perhaps a son or daughter, there is in fact no legal basis on which a relative can give consent on behalf of a mentally incapable adult. In *Re A Ward of Court (Consent to Medical Treatment)*,⁵⁵ Denham J. said that the only circumstances in which consent is not required are in respect of treatment for contagious diseases or in a medical emergency where the patient is unable to communicate. This formulation was approved by Hardiman J in *North Western Health Board v HW and CW*⁵⁶ This does not cover all emergency medical procedures and is not the same as the analysis in the White Paper. In some jurisdictions, the doctor is automatically the substitute decision maker. In Scotland, the doctor has a general authority to give necessary treatment to a mentally incapable person.⁵⁷ In New Zealand, the Personal Guardian may not refuse consent to the administration of any standard medical treatment or procedure intended to save the protected person's life or to prevent serious damage to that person's health.⁵⁸ It has already been noted in Chapter 1 that the general law on medical consent may need to be addressed. In the context of the proposals being outlined here, it is recommended that the proposed new legislation should state, for the avoidance of doubt, that medical professionals are entitled to perform emergency medical procedures in the case of a protected adult if the guardian is not available to give consent and in the case of any adult

⁵⁵ [1996] 2 IR 79.

⁵⁶ [2001] 3 IR 622. This is not part of the *ratio* in either case. But it is the only statement on proxy consent available.

⁵⁷ See section 47 *Adults with Incapacity (Scotland) Act 2000*, where a medical practitioner who has certified that an adult cannot consent to treatment shall, at section 47(2), “during the period specified in the certificate, authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult.”

⁵⁸ *Protection of Personal and Property Rights Act 1988* section 18(1)(f).

who is unable to communicate a decision, where it is medically necessary and in the best interests of the person.

6.64 The legislation should not specify precisely what is meant by minor or routine medical procedures because it is likely that this concept will change over time. At present, minor or routine healthcare decisions might include, for example, the carrying out of routine medical or dental investigations, the treatment of acute infections or of chronic ailments such as arthritis, the administration of vaccines such as flu vaccine or even surgical procedures which do not deal with life threatening problems but which are likely to enhance the quality of life such as hip or other joint replacement. Emergency healthcare decisions might include the treatment of injuries, for example, the treatment of fractures, whether surgical or otherwise. Instead, the Commission considers that this should be the subject of an agreement between the Medical Council and the Office of the Public Guardian and the legislation should specify some at least of the procedures which are considered to be major or special and decisions on these procedures should be made by the Tribunal.

(b) Best Interests

6.65 In any decision about health care, the Personal Guardian, Public Guardian or Court/Tribunal has to take account of the protected person's best interests. In doing so, consideration should be given to the following, among other matters,:

- the wishes of the protected person, so far as they can be ascertained;
- what would happen if the proposed procedure were not carried out;
- what alternative treatments are available;
- whether it can be postponed because better treatments may become available.

(9) Refusal of treatment

6.66 The legislation also needs to address what happens if the Protected Adult objects to being treated. The Australian Law Reform Commission's outline of this issue and its conclusion are helpful:

“...ideally, the treatment should not be carried out. However, patients often express negative feelings or show negative reactions to medical or dental treatment, particularly injections. Should this be taken as an express lack of consent? The difficulty here is that there are so many levels of objection, some stemming from irrational (though nonetheless real) fear and yet others stemming from a careful assessment of the pros and cons. The Commission's final view is that a guardian who can legally give consent to medical treatment on behalf of a patient should also be able to override lack of consent by the patient. Further, where a guardian has the power to give a consent for medical or other treatment or procedure, then the person subject to the order should not be competent to give consent.”⁵⁹

The Commission agrees with these views.

(a) *Personal Care Decisions*

6.67 The distinction between personal care decisions and health care decisions is not always clear cut. In this context, personal care includes routine decisions about dress and diet and where the Protected Adult is to live. The Personal Guardian should have the general power to decide where the Protected Adult lives but should be obliged to inform the Public Guardian of any change of permanent residence. This requirement should not apply to brief periods of respite care, temporary admission to an acute hospital or a temporary stay (of less than, for example, two months duration) with friends or family members.

(b) *Day to day Maintenance*

6.68 There are two alternatives here. The Protected Adult may be living with the Personal Guardian, in which case the Personal Guardian is responsible for day to day maintenance. In order to avoid complex accounting arrangements, it should be possible for the Public Guardian to make a maintenance order providing that the Personal Guardian can avail of a moderate sum from the protected person's

⁵⁹ Australian Law Reform Commission *Guardianship and Management of Property* (ALRC No 52 1989) paragraph 4.51.

income for maintenance purposes. This could be modelled on the maintenance orders made in family law cases and the amount would be related to the person's needs and means. If the Protected Adult is living elsewhere in the community, the maintenance order could be made to the person who is providing day to day maintenance.

6.69 The other likely alternative is that the Protected Adult is living in a long stay care place. In this case, the order could be for an amount of personal spending money to be given by the Personal Guardian to the Protected Adult. The payment to the long stay care place would also be paid by the Personal Guardian but this would be a formal payment with receipts.

6.70 The Personal Guardian should be able to access the Protected Adult's funds for small funds for other purposes including, for example, the costs of maintenance of property, the making of gifts to family and friends – to the extent allowed under an EPA. These expenditures would have to be vouched.

6.71 The Personal Guardian would be responsible for claiming any social welfare or other benefits on behalf of the Protected Adult.⁶⁰ The Office of the Public Guardian should keep Personal Guardians informed of any relevant changes in entitlements. The Personal Guardian would also be responsible for making tax returns on behalf of the protected adult. The Revenue Commissioners could be asked to provide a specific service for Personal Guardians to facilitate them in making proper and correct returns in cases where it would not be usual to employ an accountant for the purpose.⁶¹ In appropriate cases, the Personal Guardian should have the power to employ and pay an accountant.

⁶⁰ See social welfare agency arrangements paragraphs 5.21-5.26.

⁶¹ Current (2003) Income Tax exemption limits are €15,000 for single people and €30,000 for a married couple (section 2 *Finance Act 2003*). The main source of income of elderly people is a social welfare pension. The maximum social welfare contributory old age pension for a single person is approximately €8,200 per annum at present with small extra amounts payable to people aged 80 and over and people living alone (section 2 *Social Welfare Act 2002*). The numbers of elderly people who are in the tax net is quite small so this is unlikely to be an administrative problem.

6.72 The Personal Guardian should have the power to decide whether the protected person may apply for a driving licence. People aged 70 or over are obliged to provide periodic evidence of their capacity to drive in order to get a driving licence.⁶² The Personal Guardian's role would be to decide on whether to apply, not on whether or not the licence should be granted. Application for, and retention of a driving licence poses a particular problem in the case of older people. On the one hand, it is good if the older person can continue the independence which a driving licence affords; but on the other hand, other road users need to be protected. This issue is distinct from almost all the other issues covered in this Paper in that it concerns protecting the public from a possible danger posed by an elderly person, rather than the other way around. The first and most elementary rule ought to be that a person about whom a decision of incapacity has been made should not continue to hold a driving licence; after such a decision no licence should be granted or if one is in existence, it should be withdrawn. The Commission recommends that the relevant provision of section 28 of the *Road Transport Act 1961* should be amended to effect this change.

(c) *Extent of Money and Property Decisions*

6.73 All property decisions, just as with all other decisions, should be made in the best interests of the Protected Adult. The Personal Guardian should have the power to make routine decisions about money and property. The practice whereby the money of the Protected Adult is automatically collected and lodged in the Wards of Court system should be ended, and a decision on the financial arrangements of the Protected Adult should be made in the light of the person's specific circumstances. The money and assets would normally be held in the Protected Adult's name and the Personal Guardian would be authorised to have access to money to the extent necessary to fulfil the obligations of guardianship. This means that the Personal Guardian should, for example, have the authority to collect the protected person's pension, collect income from any other

⁶² The standards of physical and mental fitness required for drivers are set out in the *Road Traffic (Licensing of Drivers) Regulations 1999* Statutory Instrument No 366 of 1999. The Department of the Environment and Local Government issued a Guide to Medical Practitioners *Medical Aspects of Driver Licensing* in 1999. This is a guide to the doctor's duties in assessing the capacity to drive.

source, make financial arrangements for dependants, maintain any property, collect rents from property, arrange for the leasing of any property which the Protected Adult is unable to manage or use and, subject to the approval of the Public Guardian, sell property where that is necessary because the Protected Adult needs the money for maintenance or other necessary purposes or because the upkeep and management of the property is unduly costly or onerous.. In respect of many of these powers, the Public Guardian would exercise a specific control, as outlined in the next paragraph, in addition to the general power surveillance. The Commission realises that the power of the Personal Guardian to have access to funds from the Protected Adult's account could be open to abuse, and recommends that the question of how the assets should be held should be at the discretion and direction of the Public Guardian.

6.74 If there are minor dependants or dependants who have disabilities, the financial arrangements for them should be made in consultation between the Personal Guardian and any parent or guardian or through the mechanisms of the legislation on maintenance of spouses and children, or the judicial separation or divorce legislation depending on the family circumstances. If the dependants are not minors, and are, for example, students, the Personal Guardian should have the power to pay educational fees and to give maintenance payments in accordance with the Protected Adult's means. In particular cases, the money and assets could be collected and managed by the Public Guardian rather than the Personal Guardian. This could arise, for example, where a suitable person is willing to be the Personal Guardian but is not willing to manage money or assets greater than the amounts necessary for daily living or where there is a family conflict about the use of money or assets.

6.75 When the Personal Guardian has charge of the Protected Adult's money or assets, the Public Guardian should have to be informed about decisions in relation to money and property involving an amount above a threshold figure and should have to give consent to any decisions to sell property. The threshold figure should not be set out in legislation but should be set out in the Guardianship Order. The figure would vary depending on the exact circumstances of the Protected Adult, and factors affecting when the Public Guardian's consent would be required would also vary. The only income of many elderly people is their social welfare pension so clearly there is no

need for detailed property orders in their case.⁶³ A decision to sell property should always require the approval of the Public Guardian. The Public Guardian should have the power to order the sale of any property where the proceeds are needed by the protected adult for care and maintenance.⁶⁴ Any will made by the Protected Adult may be used as evidence of their intentions with respect to their property if it displays such intentions but there is no obligation to ensure the retention of property or assets in order that they be disbursed in accordance with the will. Section 67 of the *Lunacy Regulations (Ireland) 1871* provides that if the property of the Ward is sold, any surplus funds, remaining after the discharge of the debts for which the moneys have been raised, should be reserved for the benefit of any legatees or devisees for whom the property was intended. The Commission recommends that a similar provision should be contained in the proposed legislation.

6.76 The Personal Guardian should have the power to engage and pay relevant professionals to assist in dealing with the Protected Adult's property and money. In appropriate cases, the Public Guardian could have the power to insist on the involvement of a professional advisor to assist a Personal Guardian.

(d) *Making Wills*

6.77 The Protected Adult may be legally capable of making a will. A decision on such capacity should be made by the Tribunal. In some jurisdictions, the Court or Tribunal has the power to make a will on behalf of a Protected Adult. This issue may arise even if the Protected Adult has already made a will. The circumstances may have changed and it may be desirable to make arrangements for situations which were not envisaged when the original will was made. Property may have been sold and the will as expressed may no longer reflect the testator's intentions. The Commission considers that, in exceptional cases, the Tribunal should have the power to execute a statutory will on behalf of a Protected Adult where the intention of the existing will cannot be put into effect.

⁶³ Information about the income of elderly people is given at paragraph 5.21.

⁶⁴ Similarly, the approval to sell a specific property may be part of the initial Guardianship Order made by the Tribunal.

6.78 If there is no will, then the estate will be distributed in accordance with the rules on intestacy as provided for in the *Succession Act 1965*. If the Tribunal has the power to make a will on behalf of a Protected Adult who has made no will, this would effectively mean that the statutory intestacy rules would be ousted. It could, perhaps, be established that the distribution of the Protected Adult's estate on intestacy would be fundamentally unjust to a particular person.⁶⁵ For example, if a child (whether a minor or not) of the Protected Adult has a disability which results in an inability to earn a living, the Tribunal may consider that a just and prudent parent would make particular provision for that child. If the Protected Adult had a pattern of support for children, for example, by providing significant assistance with housing or setting up a business and one child had not yet benefited from this generosity, it may be unfair to distribute the estate on intestacy. Nevertheless, if the Protected Adult had died suddenly, the intestacy rules would apply. On balance, the Commission cannot recommend that the Tribunal should have the power to change the existing statutory rules.

E Specific Orders

(1) Introduction

6.79 Here we outline three types of what we refer to as 'Specific Orders'.⁶⁶ These may be granted where the adult does not have legal capacity but does not need substitute decision-making arrangements, but may need protection or intervention to ensure a safe and reasonably comfortable environment. They may also be available to adults who do have legal capacity but who are still in need of protection.

6.80 A person who lacks legal capacity may be taken into guardianship which will provide protection to the person and their property. However, some people who lack legal capacity may not need the full guardianship regime, for example, they may only need

⁶⁵ There is no equivalent to a Section 117 application in intestacy. Perhaps this issue should be addressed but it is not considered here.

⁶⁶ Specific as opposed to the more general order established by a Guardianship Order.

one decision made or they may need personal protection but not substitute decision making.

6.81 Secondly, there are also people who have legal capacity but who, nevertheless, are in need of protection. Their need for protection may arise because they are abused or intimidated, being subjected to undue influence, they may live in fear of losing their home or their carer and they may be unable to access relevant services or appropriate legal remedies. Adults who have legal capacity are entitled to make decisions which seem to others to be unconventional, eccentric, unwise, inappropriate or entirely contrary to their own best interests. They are entitled to live in unhealthy conditions provided the health of others is not endangered. They are entitled to choose to continue to live with an abuser and to dissipate their money and other assets if they wish. However, the question arises as to what genuine choice is available to people who may have limited financial resources and are, perhaps, physically ill or disabled and unaware of their rights to services or legal remedies. It is possible that such vulnerable people may make different decisions when presented with real options. If, having had the choices outlined to them, they still opt to continue their lives as before then little further can be done for them, other than to keep their situation under review.

(2) *The Approach in Other Jurisdictions*

6.82 A number of Canadian jurisdictions have arrangements for intervention in the case of abused or neglected adults. The definitions vary from one jurisdiction to another. For example, in Newfoundland, the definition of neglected adult includes adults who are incapable of caring for themselves because of physical or mental infirmity, adults who are not receiving proper care and attention and adults who refuse, delay or are unable to make provision for proper care and attention.⁶⁷ The Nova Scotia legislation provides for “adults in need of protection.”⁶⁸ The definition of neglected adult is similar to that in Newfoundland and the definition of abused includes adults who are victims of physical or sexual abuse or mental cruelty and who are not capable of protecting themselves because of physical disability or mental infirmity and who refuse, delay or are unable to

⁶⁷ *Neglected Adults Welfare Act S.N. 1973*, No 81 section 2(i).

⁶⁸ *Adult Protection Act R.S.N.S 1989 c. 2* section 3(b) .

make provision for their protection.⁶⁹ In Prince Edward Island, the definition includes financial abuse – abuse is defined as “offensive mistreatment, whether physical, sexual, mental, emotional, material or any combination thereof, that causes or is reasonably likely to cause the victim severe physical or psychological harm or significant material loss to his estate”.⁷⁰ The British Columbia legislation also includes financial abuse in its definition of abused or neglected adult.⁷¹

6.83 The Law Commission of England and Wales proposed the imposition of a duty on local authorities, where they had reason to believe that a vulnerable person in their area was suffering or was likely to suffer significant harm or serious exploitation, to make such inquiries as they considered necessary to enable them to decide whether such suffering, or likelihood of suffering, in fact existed, and whether community care services should be provided, or other action

⁶⁹ *Ibid.*

⁷⁰ *Adult Protection Act R.S.P.E.I. 1988* (as amended) Section 1; Section 3 of this Act includes a statement of its guiding principles as follows: “This Act is to be administered with respect for the following guiding principles:

(a) society has an obligation to afford its members, regardless of individual abilities or conditions, the opportunity to have security and the necessities of life;(b) persons afflicted with disability that impairs their capacity to care for themselves deserve that quality of necessary treatment, care and attention that is most effective and yet least intrusive or restrictive in nature;

(c) although the capacity to express it may be diminished by disability, adults have a need for self-determination and to have their person, estate and civil rights protected;

(d) an adult is entitled to live in the manner he wishes and to accept assistance or not, provided it is by his conscious choice and does not cause harm to others;

(e) any intervention to assist or protect a person should be designed for the specific needs of the individual, limited in scope, and subject to review and revision as the person's condition and needs change;

(f) in relation to any intervention to assist or protect a person the paramount consideration shall be the best interests of that person.

Abused or neglected adults received assistance under the Adult Protection Programme in Prince Edward Island in 2001. See <http://www.sppd.gc.ca>.

⁷¹ *Adult Guardianship Act R.S.B.C 1996* section 1.

taken, to protect the person.⁷² It recommended that provision should be made for ‘step-by-step emergency intervention’ in such cases. Initially, an officer of a local authority would have the power to enter and inspect premises and interview a person in private. A Court order could be obtained in order to get entry. If the officer considered that an assessment process would be necessary to assess whether the person concerned was in fact at risk, or whether community care services should be provided, and the person concerned refused to cooperate, a Court Order requiring such an assessment to be carried out could be obtained. If necessary, the Court could order that a person be removed from his or her residence for the purposes of carrying out such an assessment.

(3) *Specific Orders*

(a) *Intervention Orders*

6.84 Intervention orders could be available in cases where a once-off decision is needed or where intervention is needed to protect the person. One possible formulation of the criterion for these orders is that the person needs a specific decision made on their behalf or is abused or neglected and is unable, because of physical or mental disability or social or economic dependency to avail of social services or appropriate legal remedies. Of course, the overriding concern is that the person’s best interests require access to such services or remedies. Another possible formulation is that protection from abuse is necessary and the person, while perhaps legally capable in the decision making sense, is unable due to fear, intimidation or other factors personally to initiate the protective mechanisms. In either case, the order would only be made if it could be shown:

- (I) *either, that the order being sought would result in a substantial benefit to the person, or*
- (II) *that the best interests of the person require that the order be made, and*

⁷² Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 9.16.

(III) *that an order is necessary, that is, there are no other less intrusive mechanisms available to deal with the manifest problem and the order is the least restrictive form of intervention available.*

6.85 An Intervention Order is an order which could be made by the Public Guardian. It could be an order for the sale of property or for the signing of a document if the person lacks the capacity to make the decision and guardianship is not necessary.⁷³ It could be an order to complete the sale of property where the person has legal capacity but is physically unable to complete the transaction. It could involve intervention for the purposes of investigating whether there was abuse or neglect.⁷⁴ In the case of abuse or neglect at home, it could order the health board to investigate the conditions under which a particular person is living. The health board could also have the power to initiate this independently and then report to the Public Guardian. This investigation would be carried out, informally if possible, by a health board official and a public health nurse. They would, among other things, interview the person privately. If the person objected or if they were otherwise obstructed and they were of the view that the intervention should be continued, then the Public Guardian could apply to the Circuit Court for a continuation of the intervention. This order could give the health board the power to enter the premises and make such inquiries as they considered expedient. It could also authorise the Gardaí to accompany the health board staff if necessary. This could then lead to the exercise by the health board of its powers under the domestic violence legislation.⁷⁵ In the case of financial

⁷³ Such an intervention order is available in Scotland – Section 53(1) of the *Adults with Incapacity (Scotland) Act 2000* states:

“(1) The sheriff may, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, make an [intervention] order....”

⁷⁴ A broadly similar arrangement to that suggested here is included in the British Columbia legislation under the *Adult Guardianship Act R.S.B.C 1996* sections 46 to 51.

⁷⁵ See paragraph 5.66 for an account of the powers of the health board under the 1996 Act.

abuse, the intervention order could require an investigation by a financial institution or by the Consumer Director of the Irish Financial Services Regulatory Authority⁷⁶ or it could temporarily freeze all transactions on the person's account.

6.86 In Scotland, the Public Guardian may grant authority for individuals to have access to and use of ("intrmit with") the funds of an adult who does not have legal capacity.⁷⁷ This is designed for dealing with situations where access to the funds is needed for normal care and maintenance but the full panoply of guardianship is not considered necessary. The legislation includes detailed safeguards to avoid any abuse of the funds. The Commission considers that such an intervention order should be available in certain cases.

(b) *Services Order*

6.87 Some intervention orders will only be effective if there are alternative acceptable living arrangements available to the people concerned. If, having received a report as a result of the Intervention Order, the Public Guardian is of the view that the person's needs can be met by the provision of specific services then an order could be made requiring the relevant service provider to supply the service.⁷⁸ The person in need of protection may have their needs met by being able to obtain specific services. These might be a nursing service, transport to a day care or similar service, a home help service, an advocacy service or a long stay place. If the person refuses to accept the service and is legally capable, then the intervention should end.

(c) *Adult Care Orders*

6.88 An Adult Care Order is an order that an adult be removed from their residence and taken to another home or a care facility. Such an order could only be made by the Tribunal. If, having received a report as a result of the Intervention order, the Public Guardian is of the view that the person needs to be removed from their environment temporarily or permanently, then the Public

⁷⁶ See paragraph 5.14-5.15.

⁷⁷ Section 25 of the *Adults with Incapacity (Scotland) Act 2000*.

⁷⁸ See British Columbia legislation *Adult Guardianship Act R.S.B.C 1996* sections 54 to 59 for analogous provisions.

Guardian could apply to the Tribunal for an Adult Care Order. All of the procedural safeguards which apply in guardianship proceedings would apply here as well. The adult in question should be notified and have legal aid if required. If the adult objects to the order being made and the Tribunal considers that the adult is legally capable and is making genuine choices, then no order should be made. If in the course of proceedings for adult care orders, the adult and the Public Guardian agree on new living arrangements which the Public Guardian considers appropriate, then the proceedings should end but the Public Guardian should continue to monitor the situation for a period.

6.89 It could be argued that the Adult Care Orders being proposed would inevitably infringe the human rights of a person with legal capacity. However, a recent decision of the European Court of Human Rights suggests that this would not be so. In *H.M.v Switzerland*⁷⁹ The European Court of Human Rights considered whether a Swiss protection arrangement along the lines proposed here was repugnant to the European Convention on Human Rights.

6.90 Section 397 of the Swiss Civil Code concerns the withdrawal of liberty on grounds of welfare assistance. It states “[a]n elderly or incapacitated person may be placed or retained in a suitable institution on account of mental illness, mental weakness, alcoholism, other addictions or serious neglect, if the person cannot otherwise be afforded the necessary personal care.” The suitable institutions are psychiatric clinics, therapeutic homes or foster homes. In this case, the applicant was placed in a foster home on account of neglect. She argued that this placement was contrary to Article 5(1)(e) of the Convention. This article reads:

“(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;”

⁷⁹ Application No 39187/98 26 February 2002 *HM v Switzerland*.

6.91 The Court held by six votes to one that there had been no violation of the Article. The applicant's placement in a foster home was not a deprivation of liberty within the meaning of this article but was a "responsible measure taken by the competent authorities in the applicant's interests."⁸⁰ The applicant was placed in the home "in her own interests in order to provide her with the necessary medical care, as well as satisfactory living conditions and hygiene."⁸¹ Judge Gaukur Jörundsson agreed that there had been no violation of the Article held that while there was a deprivation of liberty within the meaning of the Article, it was justified on the basis that the applicant was of unsound mind.

(d) *General Authority to Act Reasonably*

6.92 Many people take decisions and actions on behalf of others without any formal legal authorisation, and the Commission is of the opinion that this situation should be given a formal statutory basis.⁸² The English Law Commission, in its Consultation Papers⁸³ and in its Report entitled *Mental Incapacity*, pointed out that there was:

"a strong case for clarifying in statute the circumstances in which decisions can be taken for people who lack capacity, but without anyone having to apply for formal authorisation."⁸⁴

⁸⁰ Application No 39187/98 26 February 2002 *HM v Switzerland* at paragraph 48.

⁸¹ *Ibid.*

⁸² The situation referred to here is the normal care situation where one person provides care for an Elderly Person, where there will be no need for a Guardianship Order or a Specific Order.

⁸³ The Law Commission of England and Wales published four Consultation Papers in the early 1990s: *Mentally Incapacitated Adults and Decision-Making: An Overview* (No 119 1991); *Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction* (No 128 1993); *Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research*, (No 129 1993); and *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* (No 130 1993).

⁸⁴ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 4.2.

6.93 The common law principle of necessity was thought to provide some legal basis for such actions, particularly in the context of medical treatment, but the precise scope of the principle was, in the English Commission's view, "far from clear", and it recommended that a statutory provision should clarify its scope and set "firm and appropriate limits to informal action."⁸⁵ The draft provisions suggested by the Law Commission of England and Wales were:

"...it should be lawful to do anything for the personal welfare or health care of a person who is, or is reasonably believed to be, without capacity in relation to the matter in question if it is in all the circumstances reasonable for it to be done by the person who does it,"⁸⁶

And:

"... where reasonable actions for the personal welfare or health care of the person lacking capacity involve expenditure, it shall be lawful for the person who is taking the action to pledge the other's credit for that purpose or to apply money in the possession of the person concerned for meeting the expenditure; and if the person taking the action bears the expenditure then he or she is entitled to be reimbursed or otherwise indemnified from the money of the person concerned."⁸⁷

The Commission considers that such provisions should be included in the proposed Irish legislation. The legislation should specify that those decisions which are not within the scope of a Personal Guardian do not fall within the scope of the general authority. It should also be provided in the legislation that the general authority cannot authorise the use or threat of force to coerce a person into doing something to which they object, nor can it authorise the detention or confinement of the person.

⁸⁵ Law Commission of England and Wales *Mental Incapacity* (No 231 1995) at paragraph 4.2.

⁸⁶ *Ibid* at paragraph 4.4.

⁸⁷ *Ibid* at paragraph 4.10.

F Conclusion

6.94 The Commission has developed the proposals outlined in this Chapter with a view to establishing an effective system for the protection of vulnerable adults. The Commission is conscious that *the proposals involve the introduction of significant changes in the legal arrangements governing the care of vulnerable adults and, if implemented, could have important consequences for the lives of many elderly people. The new arrangements include provisions for intervention in the lives of people who do not have legal capacity and also in the lives of those who do but, nevertheless, are in need of protection. As already stated, all of the proposals are provisional and the Commission welcomes submissions from all interested parties, in particular from people directly involved in the care of elderly people.*

CHAPTER 7 SUMMARY OF RECOMMENDATIONS

7.01 The Provisional recommendations contained in this paper may be summarised as follows:

A Chapter 1 Legal Capacity

7.02 If the issue of capacity arises in a specific context, the question should be decided by the Courts in accordance with the law as it exists at present. [Paragraph 1.54].

7.03 There should be a statutory presumption of capacity. [Paragraph 1.54].

7.04 The decision on general legal capacity should be made by a Tribunal composed of a Judge as chairman with appropriate medical and lay personnel, and with an appeal to the Circuit Court. They should conduct an inquiry into the person's capacity on a non adversarial basis. [Paragraph 1.54].

7.05 There should be guidelines available to people who are assessing capacity to ensure that the assessment is a genuine objective assessment of capacity and is not affected by issues such as literacy, conventional views of values or other irrelevant matters. [Paragraph 1.54].

7.06 There should be a detailed definition of general legal incapacity which includes mental disorder broadly as defined in the *Mental Health Act 2001* and mental disability. [Paragraph 1.54].

B Chapter 2 Capacity to Make a Will

7.07 No additional formal requirements should be imposed either on testators in general or on particular categories of testators in

respect of the execution of wills. However, the contemporaneous certification of capacity by a medical practitioner is desirable as a prudent precaution in cases of doubtful capacity and where a later challenge to a will appears likely. [Paragraph 2.36].

7.08 Guidelines on the assessment of testamentary capacity should be drawn up by the Law Society and the Medical Council for the assistance of both solicitors and medical practitioners. [Paragraph 2.37].

7.09 Guidelines for solicitors should also note that contemporaneous notes be made by solicitors regarding the details of the meeting with the client when the issue of testamentary capacity is an issue. [Paragraph 2.37].

C Chapter 3 Enduring Powers of Attorney

7.10 Attorneys appointed under EPAs should have the same powers as Personal Guardians in relation to health care decisions unless this is specifically excluded by the donor. [Paragraph 3.15]

7.11 The revocation of an EPA should be governed by the same formal requirements as its execution and that solicitors be obliged to inform clients of their right to revoke.[Paragraph 3.25]

7.12 The requirement to notify various parties, including family members, of the execution and registration of an EPA should remain but that the donor has the power to exclude a named individual and that a “qualifying cohabitee” be among those who must be notified. [Paragraph 3.31].

7.13 The Commission considers that the supervision of the attorney’s personal care role is just as important as the supervision over their role over the financial and property affairs of the donor. In order to ensure this supervision, the Commission considers that attorneys should be subject to the overall supervision of the proposed Office of the Public Guardian. The degree of supervision need not be as extensive as that for guardians, but the Public Guardian should have discretion to call for periodic reports if there are concerns about the need to protect the donor of an EPA. [Paragraph 3.38].

7.14 The Commission is aware that the Law Society is currently considering guidelines that would be available to solicitors in relation to both the execution and registration of EPAs. Guidelines might include:

At the time of execution:

- to ensure instructions are taken from the donor of the EPA and advisors to act in the best interests of the donor;
- to advise the donor as to whether it is appropriate in the donor's circumstances to execute an EPA;
- to discuss the scope of authority that the donor wishes to give the attorney; and
- to advise the donor that the EPA can be revoked prior to registration.

At the time of registration

- to advise the attorney that the attorney must act in the best interests of the donor in relation to all decisions that affect the donor;
- the attorney must not profit from position as attorney unless the EPA provides for remuneration;
- to keep an account of all property and transactions in relation to the power of attorney;
- to ensure that the donor's property is kept separate from the property of the attorney; and
- to explain to the attorney the scope of the authority given in the EPA

[Paragraph 3.40]

7.15 The proposed new Office of the Public Guardian should have a general supervisory role over attorneys appointed under EPAs and should give directions and guidance on the meaning of "adequate accounts". [Paragraph 3.45].

7.16 Except in specific circumstances, there should be a requirement that the property and assets of the donor should be kept separate and clearly distinguishable from other property and assets and lists of all transactions should be maintained. [Paragraph 3.45].

7.17 Attorneys should submit accounts of the donor's property and affairs to the Office of the Public Guardian when asked to do so

or to a person nominated by the donor or the Public Guardian. [Paragraph 3.45].

7.18 The functions currently exercised by the Registrar of Wards of Court should be exercised by the proposed Office of the Public Guardian, that EPAs should only be replaced by guardianship orders where absolutely necessary and that the Office should actively promote the execution of EPAs. [Paragraph 3.45].

7.19 The Irish Financial Services Regulatory Authority should promote awareness among financial institutions of the status of accounts in the name of donors of registered EPAs. [Paragraph 3.45].

7.20 The Law Society's guidelines to solicitors might include specific advices to be given to donors at the time of execution of an EPA and to attorneys at the time of registration of an EPA. [Paragraph 3.45].

7.21 In the event that a donor of a registered EPA wishes to execute a will legal and medical evidence should be obtained that the donor had the capacity to do so. [Paragraph 3.47].

D Chapter 4 The Wards of Court System

7.22 No recommendations are made in relation to the existing Wards of Court system as the Commission is suggesting that it be abolished. [Paragraph 4.61].

E Chapter 5 Protection Against Abuse

7.23 Financial institutions should be obliged to give clear information or possibly warning notices to people (other than spouses) opening joint accounts. Alternatively, the new Irish Financial Services Regulatory Authority could be asked to issue codes of conduct and to encourage financial institutions to provide different kinds of joint accounts. These could provide for greater clarity about the purpose of the account, with endorsements to the effect that the other named person is the agent of the donor, a statement of the donor's intention that the named person is or is not to be the ultimate beneficiary and for specific instructions about the

authority of each signatory. For example, it could provide that the second named account holder would only be entitled to withdraw a certain amount each week or that the first named holder would have to be contacted personally if there was any attempt to withdraw over a certain amount.[Paragraph 5.10]

7.24 Financial institutions should be encouraged to provide “protected accounts” specifically for elderly people who want to have arrangements for another person to be authorised to draw from their account. Such “protected accounts” could be subject to greater scrutiny than ordinary accounts with a check being made in respect of any unusual transactions or large withdrawals, including the regularity of such withdrawals. Financial institutions could be obliged to inform customers of the existence of the proposed Office of the Public Guardian and of the services available there for the protection of vulnerable persons. [Paragraph 5.11].

7.25 Financial institutions should

- be obliged to provide more comprehensive information and warnings about the nature and effects of joint accounts
- be encouraged to provide special protected accounts for people who may wish to use them
- be obliged to inform customers of the existence of the Public Guardian’s office and of the services available there
- be obliged to issue warnings about the consequences of equity release schemes and of providing guarantees and similar backing for loans
- be obliged to ensure that elderly customers entering equity release or loan guarantee arrangements have independent legal advice [Paragraph 5.19].

7.26 The new regulatory authority for the financial services industry should consider adopting and implementing codes of practice which require greater protection for vulnerable people and better redress mechanisms for customers who have been exploited. [Paragraph 5.20].

7.27 The social welfare agency arrangements should be changed to prevent a person associated with a care facility collecting a social welfare pension. The Commission also recommends that the social

welfare agency arrangements be notified to the proposed new Office of the Public Guardian. [Paragraph 5.27].

7.28 The current law on undue influence and unconscionability should remain as it is. The Commission considers that any attempt to legislate comprehensively in this area would be as likely to create problems as to solve them. The guidelines for solicitors which are outlined below and the proposals which the Commission sets out in Chapter 6 should, if implemented, reduce the likelihood of vulnerable people being exploited and may reduce the need for the application of these doctrines. [Paragraph 5.61]

7.29 Detailed guidelines should be considered to assist solicitors and other professionals in dealing with financial and property transactions, including gifts of property and guarantees for loans, for vulnerable elderly people. These guidelines should assist solicitors in detecting and dealing appropriately with suspected cases of undue influence and in advising elderly clients as to the consequences of their actions in respect of their own future care. These guidelines should be formulated and updated by the relevant professional bodies in consultation with the proposed Office of the Public Guardian and not laid down in legislation. The Guidelines should deal with the following issues:

- **Who is the client?** – solicitors should clearly establish that either the donor of a gift of property or the recipient is the client, but should not act for both, unless the issue of conflict of interest is clearly and separately explained and each agrees, separately, to use the same solicitor. The same principle applies if there is a third party involved. This requires that clients are interviewed alone even if they express a wish to have another person present. It also requires that the solicitor act in the best interests of the client and not of the other party or parties to the transaction. The solicitor should clearly establish what the best interests of the client are.
- **Is the gift appropriate in the client's circumstances?** – Clients are entitled to make inappropriate gifts provided this is done freely and on the basis of an informed understanding of the situation.. The solicitor should find out as much as possible about the clients' circumstances including their knowledge and understanding of the consequences of the transaction being

proposed, their overall financial situation and their possible future care costs. The solicitor should advise as to whether the making of a gift is likely to impoverish the client. Among other considerations, the solicitor should try to establish:

- Is the gift is being given in the expectation that care will be provided and, if so, can this arrangement be made legally enforceable. Are all the details of the care arrangements clarified between the parties, for example, if there is a right of residence, is there agreement about who pays for the maintenance of the property and what happens if long stay care is required; have arrangements been made for the resolution of any disputes which may arise between the donor and the proposed carer.
 - Is the gift being given in the expectation that this may result in the client qualifying for a means tested payment such as a social welfare non-contributory pension or a nursing home subvention? If so, the solicitor needs to explain that the making of such gifts may be ignored in and for the purpose of the means test.
 - Is the client giving away money or property in the expectation that the state will provide any necessary care services. If so, is the client aware that the maximum state subvention to nursing homes costs is about one quarter of the cost of a private nursing home in some parts of the country.
- **Alternative measures** – the solicitor should investigate whether or not the client’s intentions could be equally well effected by, for example, making a will or executing an Enduring Power of Attorney;
 - **Record of advice** – the solicitor should ensure that a record of the client’s instructions and the advice given are kept and should send a written note to the client of the advice, explaining the nature and effect of the proposed transaction. In determining the instructions from the client the solicitor should ascertain (as far as possible) the precise wishes of the potential donor.
 - **Legal Capacity** – the solicitor should make an assessment of the legal capacity of the client to enter the proposed transaction and,

if in doubt, should arrange for a medical assessment. The doctor should be informed of the relevant test of legal capacity.

- **Office of the Public Guardian** – the solicitor should advise the client about the existence of, and the services provided by, the proposed Office of the Public Guardian. [Paragraph 5.63]

7.30 There is a need for mechanisms to protect elderly people who are being abused or in danger of being abused in a domestic situation. It is considered that the proposals in relation to intervention and adult care orders in Chapter 6 are appropriate. The Commission acknowledges that, as suggested by the Working Group on Elder Abuse, that in certain cases of suspected abuse of the elderly, the proposed right of entry on premises should be given by legislation to An Garda Síochána to be used in liaison with health and social services personnel as appropriate. [Paragraph 5.71]

F Chapter 6 A New System for Protecting Vulnerable Adults

7.31 The Commission provisionally recommends that legislation should deal with “adults who may be in need of protection” and, if a decision is made that a person is in need of protection, then that adult becomes a “Protected Adult”. An adult may be in need of protection even if legally capable. There should be two strands:

- a substitute decision making system which it is proposed to call Guardianship. This would provide for the making of Guardianship orders in the case of people who do not have legal capacity and who are in need of guardianship (people who have a decision making disability) and the appointment of Personal Guardians who would make some of the required substitute decisions.
- an intervention and personal protection system which would provide for specific orders - services orders, intervention orders and adult care orders. These would be available for two broad categories of people: those who have legal capacity but who need protection and are unable to obtain this for themselves, and those people who do not have legal capacity but who do not need guardianship (probably because there is no need for a substitute decision maker because no decisions require to be made).

The system would be supervised by a new independent Office of the Public Guardian with specific decision making powers, the power to

require the provision of certain services and an overall supervisory role over Personal Guardians and over attorneys under registered EPAs. The Public Guardian would be subject to the Tribunal and Protected Adults would always have the right to appeal to the Tribunal against all substitute decisions. The rest of this chapter sets out the details of how this new system should work. The Commission emphasises that all the proposals in the rest of this chapter are provisional recommendations and welcomes detailed submissions from any interested party on all of the elements proposed here. [Paragraph 6.07].



The Law Reform Commission

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APPENDIX A LIST OF LAW REFORM COMMISSION PUBLICATIONS

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