WELSH STATUTORY INSTRUMENTS

2009 No. 266 (W.29)

MENTAL CAPACITY, WALES

The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009

Made - - - -	*11 February 2009*
Laid before the National Assembly for Wales - -	*13 February 2009*
Coming into force - -	*1 April 2009*

The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 35(2) and (3), 65(1) of, and paragraphs 138(1), 142 to 144, 145, 147, 148, 165, 166 and 182(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005(**1**) and by sections 12 and 204 of the National Health Service (Wales) Act 2006(**2**).

PART 1

Title, commencement and application

1.—(1) These Regulations are called the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009 and come into force on 1 April 2009.

(2) These Regulations apply in relation to Wales.

Interpretation

2.—(1) In these Regulations—

"the Act" ("*y Ddeddf*") means the Mental Capacity Act 2005;

"best interests assessor" ("*asesydd lles pennaf*") means a person selected to carry out a best interests assessment under paragraph 38 of Schedule A1 to the Act;

"donee" ("*rhoddai*") is a person who has a lasting power of attorney or a registered enduring power of attorney conferred on them by the relevant person.

(2) For the purpose of these Regulations "supervisory body" ("*corff goruchwylio*") includes a Local Health Board exercising supervisory functions in accordance with regulation 3.

(**1**) 2005 c. 9. Schedule A1 was inserted by section 50(5) of the Mental Health Act 2007 c. 12.
(**2**) 2006 (c. 42).

PART 2

Supervisory functions

Supervisory functions exercisable by Local Health Boards

3.—(1) Each Local Health Board will exercise the supervisory functions—

(a) in relation to any person who is, or is likely to be, accommodated in a hospital (whether NHS or independent hospitals) in its area for the purposes of receiving relevant care or treatment(**3**); and

(b) where the Local Health Board commissions relevant care or treatment for a person in a hospital (whether a NHS or independent hospital) in England in relation to that hospital.

(2) Where Welsh Ministers commission relevant care or treatment for a person who is, or is likely to be, accommodated in a hospital (whether a NHS or independent hospital) in England the supervisory body will be the Local Health Board for the area in which that person is usually resident.

(3) Subject to any directions given by Welsh Ministers, the supervisory functions exercisable by a Local Health Board may, by arrangement with that Board, and subject to such restrictions and conditions as the Board may think fit, be exercised—

(a) on behalf of that Board by a committee, sub-committee or officer of the Board;

(b) jointly with another Local Health Board;

(4) "Supervisory functions" ("*swyddogaethau goruchwylio*") has the same meaning as in Schedule A1, paragraph 165(3) of the Act.

PART 3

Appointment — general

Appointment procedure

4.—(1) A person is to be selected for appointment as a representative in accordance with Part 4.

(2) A person is to be appointed as a representative in accordance with Part 5.

Commencement of appointment procedure

5. The procedure for appointing a representative must begin as soon as—

(a) a best interests assessor is selected by the supervisory body(**4**) for the purposes of a request for a standard authorisation(**5**); or

(b) a relevant person's representative's appointment terminates, or is to be terminated in accordance with regulation 14, and the relevant person remains subject to a standard authorisation.

Eligibility of a person to be a representative

6.—(1) A person is eligible to be appointed as a representative if they are—

(**3**) "relevant care or treatment" is defined in paragraph 7 of Schedule A1 to the Act.
(**4**) The identity of the supervisory body is determined in accordance with paragraphs 128, 180, 181 and 182 of Schedule A1 to the Mental Capacity Act 2005 ("the Act").
(**5**) "standard authorisation" is defined in paragraph 8 of Schedule A1 to the Act.

(a) 18 years of age or over;

(b) able to keep in contact with the relevant person(**6**);

(c) not prevented by ill-health from carrying out the role of the representative;

(d) willing to be the relevant person's representative;

(e) not financially interested in the care home(**7**) or independent hospital(**8**) where the relevant person is, or is to be, detained;

(f) not a relative of a person who is financially interested in the care home or independent hospital where the relevant person is, or is to be, detained;

(g) not providing services to, or not employed to work in, the care home where the relevant person is, or is to be, detained;

(h) not employed to work in the hospital(**9**) where the relevant person is, or is to be, detained in a role that is, or could be, related to the relevant person's case; and

(i) not employed to work in the relevant person's supervisory body in a role that is, or could be, related to the relevant person's case.

(2) For the purposes of this regulation a "relative" ("*perthynas agos*") means:

(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse, former spouse, civil partner or former civil partner, or

(b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person's spouse, former spouse, civil partner or former civil partner.

(3) For the purposes of this regulation—

(a) "spouse" ("*priod*") or "civil partner" ("*partner sifil*") includes a person who is not married to or in a civil partnership with a person but is living with that person as if they were, and

(b) a person has a financial interest in a care home or independent hospital where that person is a partner, director, other office-holder or major shareholder of the care home or independent hospital that has made the application for a standard authorisation.

(c) "major shareholder" ("*prif gyfrannddaliwr*") means—

(i) any person who holds one tenth or more of the issued shares in the care home or independent hospital, where the care home or independent hospital is a company limited by shares, and

(ii) in all other cases, any of the owners of the care home or independent hospital.

PART 4

Selection

Selection by the relevant person

7.—(1) This regulation applies where the relevant person has capacity in relation to the question of which person should be his or her representative.

(2) The relevant person may select a person for appointment as his or her representative.

(**6**) "relevant person" is defined in paragraph 7 of Schedule A1 to the Act.
(**7**) "care home" is defined in paragraph 178 of Schedule A1 to the Act.
(**8**) "independent hospital" is defined in paragraph 175(3) of Schedule A1 of the Act.
(**9**) "hospital" is defined in paragraph 175(1) of Schedule A1 to the Act.

(3) Where the relevant person may select a person in accordance with paragraph (2) but does not do so, regulation 10 applies.

Selection by a donee or deputy

8.—(1) This regulation applies where the relevant person does not have capacity in relation to the question of which person should be his or her representative.

(2) Where—

(a) the relevant person has a donee or deputy(**10**), and

(b) it is within the authority of the donee or deputy to do so,

the donee or deputy may select a person to be appointed as a representative.

(3) Where a donee or deputy may select a person in accordance with paragraph (2) but does not do so, regulation 10 applies.

Approval by the best interests assessor or supervisory body

9.—(1) A person selected in accordance with regulations 7(2) or 8(2) must be approved by the best interests assessor or the supervisory body.

(2) Where the best interests assessor or supervisory body does not approve a person selected—

(a) they may approve another person selected in accordance with regulations 7(2) or 8(2); or

(b) the best interests assessor may select a person in accordance with regulation 10.

Selection by the best interests assessor

10.—(1) This regulation applies where—

(a) a person has not been selected for appointment as representative in accordance with regulations 7(2) or 8(2), or

(b) the best interests assessor or supervisory body has not approved a person in accordance with regulation 9.

(2) The best interests assessor may select a person to act as a representative for the relevant person.

(3) If the best interests assessor is unable to select a person for appointment as a representative, regulation 11 applies.

Selection by the supervisory body

11.—(1) This regulation applies where a person has not been selected in accordance with regulations 7(2), 8(2) or 10(2).

(2) The supervisory body must select a person to be appointed as a representative for the relevant person.

(3) Where a person who is selected in accordance with paragraph (2) will be acting in a professional capacity

(a) that person must have appropriate training and experience, and

(b) the supervisory body must be satisfied that there is in respect of that person—

(i) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997(**11**); or

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

(**11**) 1997 c. 50. Sections 113A to 113D are inserted by section 163 of the Serious Organised Crime and Police Act 2005 (c. 14).