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THE LAWS AND LEGAL ISSUES

AFFECTING PERSONS WITH DISABILITIES

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INTRODUCTION

Jean Vanier, in his book: "Befriending the Stranger" states as follows:

"In every society there are groups of people who are turned away by everybody. Outside the pyramid you find people with mental disabilities who are often considered "not fully human" and who can thus be eliminated before birth or "put away" after birth. Habits and attitudes of different societies may vary but you will find that every single culture rejects or marginalizes people with intellectual disabilities. Other attitudes exist of course. One day a friend of mine, who has a son with a very visible handicap, was sitting with him in a train station in France. One of the porters who was from Kabylia in Algeria came and asked: "Is he your son?" When she answered "yes". He told her: "You are lucky. In my village when a family has a child like yours we know that family is blessed by Allah".

1. **Statistics:**

At present there are approximately 480,000 people over the age of 65. In 2006 the proportion of Ireland's population aged 65 years and over was 11.1%. This compares with an EU average of 16.8%. According to population projections prepared by the National Council for Ageing and Older People the Irish proportion will rise to between 14.8% and 15.3% by 2021. By that date it is predicted that there could be as many as 720,000 people over the age of 65 living in the Republic.

The National Disability Survey of 2006 in relation to the 2006 Census, found that 9.3% of the population or 393,800 persons reported disability. The 75 and over age group accounted for 22% of all persons with disability and the 65 to 74 age group a further 14%. Persons living in a nursing home, hospital or children's home represented 8% of persons with a disability.

According to the 2006 Census, 37,746 people suffered from some form of dementia including alzheimer's disease. It is estimated that by 2026 there could be 70,000 people suffering from dementia. In the National Disability Survey it was found that a high proportion of adults with disability in private households felt supported by the attitudes of their family (90%), health and care staff (87%) and friends (79%).

Further, a recent study for the Alzheimer's Research Trust (ART) by Oxford University Researchers found that the cost of caring for dementia sufferers, mainly elderly people, is far higher than previously thought, and that dementia receives only a fraction of the funds spent on other important diseases. "The UK's dementia crisis is worse than we feared. This Report shows that dementia is the greatest medical challenge of the 21st century", ART Chief Executive, Rebecca Woods said.

Alzheimer's disease is the most common form of dementia, and Alzheimer's Disease International says some 35 million globally now suffer from it or other types of dementia. The number of cases globally are expected to almost double every 20 years and the cost of coping with the disease in ageing populations is forecast to rise dramatically.

2. **Areas of Concern and Areas for Law Reform:**

(a) **Voluntary Bodies and Accounts**

Tax payers give more than 1.5 billion in funding to voluntary groups who provide services for people with disabilities. However there is concern over the lack of transparency and accountability in how this money is spent by the not for profit organisations.

The Controller and Auditor General examined this area a few years ago and found a widespread failure among voluntary bodies to provide audited financial statements.

(b) **Care for the elderly**

Although only 4 to 5% of us will avail of a community hospital, nursing unit or nursing home, a major concern is inappropriate placement. Nursing Homes Ireland members have empty beds, although not always with the required supports, while clinically cured elderly patients occupy more costly acute facilities. The trend is for nursing home residents to be more dependent but there are about 9% of older people in residential care for social reasons. Research in 2006 found that nearly 30% of all long stay residents have low to medium dependency. Why should many of these not be in their own homes?

(c) **Home Help and Care Services**

The lack of National Standards governing delivery of home help and other home care services to thousands of older people across the state is putting those older people at an unacceptable risk according to a new report. Commissioned by the Irish Private Home Care Association, its says high profile adverse incidents in nursing homes and other residential care settings have led to regulation of that sector which only caters for around 5% of the over 65 population. "Home Care Services cater for about 12.5% of this population group but there are no standards or regulation."

(d) **People with Disabilities in Residential Care**

The state continues to provide a care system and it places some of the most vulnerable in society – people with intellectual disabilities, at a risk of abuse. Research shows that people with mental impairments are at a significantly higher risk of mistreatment in the general community. However residential homes for 8,000 people with intellectual disabilities is not subject to any form of independent inspection or regulation. About 4,200 people with intellectual disabilities are living in outdated institutions or group homes which need to be closed down or replaced, a report commissioned for the Health Service Executive is expected to conclude shortly.

In addition, Health Authorities are investigating hundreds of complaints of mistreatment, abuse or lapses in care for people with disabilities in residential

settings. More than 500 complaints have been made over the past two and a half years according to records seen by the Irish Times and reported by the Irish Times recently. The most serious incidents include allegations of abuse or physical assault by staff at a number of residential centres.

(e) **Advocacy for People with Disabilities**

Under the National Disabilities Strategy it was envisaged that an independent advocacy service would provide an advocate to help people with disabilities to have their voices heard, in particular with regard to complaints, reviews and assessments of need. A pilot programme was set up five years ago and almost fifty advocates are working across the country. They do not yet have statutory powers – which are sometimes needed and which were to form part of a personal advocacy service to be run by the Citizens Information Board. The results of official inquiries into past complaints of abuse have shown it takes extraordinary courage for staff in institutions to become whistleblowers and that even when they find that courage they can easily be silenced. External inspection and the availability of independent advocates are the way to ensure that high standards - which did exist in places - are maintained and bad practices are rooted out. Funding must be found for these essential services.

(f) **Elder Abuse**

There were 1,840 elder abuse referrals to the HSE in 2008. This is almost double the finding of referrals in 2007 (957). While 2007 does not reflect a full calendar year reporting, there is, nonetheless, a significant increase in referrals in 2008. There were 2,479 citations of alleged abuse in total and some referrals include more than one type of abuse.

In the referrals mentioned above, self-neglect was cited in 20% of all referrals and financial abuse was cited in 16% of cases. The Report of the Working Group on Elder Abuse of July 2009 identified financial abuse as the single most urgent area that needs to be addressed in the future. The view of professionals and others working with older people is that it is much more prevalent than the figures would suggest. The proposed Working Group for Financial Abuse with its independent chair should oversee the implementation of the recommendations that follow. It will work through the Office for Older People. In addition, the National Centre for the Protection of Older People should prioritise prevalence of financial abuse in Ireland and an understanding of the risk in mitigating factors. This can inform education, training, and prevention as well as feedback from Money Advice and Budgeting Service (MABS). Some specific recommendations are as follows by the Working Group:

(i) Implement recommendations to introduce a requirement for separate legal advice of parties involved in the transfer of assets within families to protect the interests of older people. It should be noted that at present the Law Society hopes to make it mandatory that there must be independent legal representation where a vulnerable person is transferring assets within

his or her family so that the vulnerable person making the transfer may be protected from undue influence or pressure.

(ii) Consider the feasibility and benefits of the proposed MABS initiative to provide a financial abuse intervention service.

(iii) Develop guidance for all professionals and groups interacting with older people to ensure that they can recognise the symptoms and triggers for financial abuse.

(iv) Financial institutions should liaise with the proposed Working Group on financial abuse to identity potential triggers to detect unusual financial transactions that may alert people to a possible misuse. These triggers should then form the basis of discussion with financial institutions to examine the scope for converting into system checks.

(v) The Department of Social and Family Affairs should develop a mechanism to regularly review agents of pension to ensure that this process is not being abused by an agent.

(g) **Joint Bank Accounts**

Where an older person or vulnerable person has opened a joint bank account with another person, eg. a younger relation or friend, then it should be made essential that the financial institution concerned, ensures that the older person or the vulnerable person receives independent professional advice before the account is opened. The operation of a joint bank account by a younger relation or family friend can often give rise to financial abuse.

(h) **UN Convention on the rights of people with disabilities:**

The Government has signed – but not ratified – the UN Convention of the rights of people with disabilities. A key – Article 19 - gives rise to the right of independent living.

It provides for "a range of in-home, residential and other community support services, including personal assistants necessary to support living and inclusion in the community and to prevent isolation or segregation from the community".

Professor Gerard Quinn, an expert on disability law, who played a key role in the drafting of the Convention, says it will have major implications for Ireland.

"My interpretation is that all institutions and mini-institutions would have to be phased out in favour of wrapping housing and services around individual needs and preferences. The key is how do we modernise the service delivery to ensure that can happen. There is a lot of learning to be done on how this can be done successfully".

(i) **Consent to Medical Treatment:** The Guide to Professional Conduct and Ethics for registered medical practitioners published by the Medical Council in 2009 discusses medical treatment and end of life care. In relation to medical treatment it states as follows:-

"Every adult with capacity is entitled to refuse medical treatment. You must respect a patient's decision to refuse treatment, even if you disagree with that decision. In these circumstances, you should clearly explain to the patient the possible consequences of refusing treatment and offer the patient the opportunity to receive a second medical opinion if possible."

"There is no obligation on you to start or continue a treatment, or artificial nutrition or hydration, that is futile or is disproportionately burdensome, even if such treatment may prolong life. You should carefully consider when to start and when to stop attempts to prolong life, while ensuring that patients receive appropriate pain management and relief from their stress."

You should respect the rights of patients to refuse medical treatment or the request of withdrawal of medical treatment. You should also respect a patient's Advance Healthcare Plan. (Also known as a living will or advance care directive).

(j) **Advance Care Directives:** In September 2009 the Law Reform Commission recommended that legislation should be provided for Advance Care Directives, ie. a legislative framework should be provided that deals with the advance expression of wishes of an individual in a healthcare or wider care setting. The Commission recommended appropriate legislative framework should be enacted for Advance Care Directives as part of the reform of the law on mental capacity in the Government Scheme of the Mental Capacity Bill 2008. The Commission recommended that an Advance Care Directive should be defined as "the expression of instructions or wishes by a person of 18 years with capacity to do so that, if (a) at a later time and in such circumstances as he or she may specify, a specified treatment is proposed to be carried out or continued by a person providing healthcare for him or her, and (b) at that time he or she lacks capacity to the consent to carrying out or continuation of the treatment, the specified treatment is not to be carried out or continued." The Law Reform Commission has published a draft Mental Capacity (Advance Care Directive) Bill of 2009 and there is no reason why this Bill could not be acted upon by the Government.

(k) **Mental Capacity Bill 2008:** The Government Scheme of a Mental Capacity Bill 2008, which was published in 2008, envisages two different types of third parties to assist vulnerable adults or incapacitated adults. The first type is a personal guardian appointed by the Court to assist a person with limited or no capacity and the second is a third party who assists a person with limited or no capacity with informal decision making. The Bill proposes that the Court of Protection (the High Court) may appoint a personal guardian if it has been decided that a person lacks capacity to make decisions concerning his or her personal welfare. The 2008 Scheme envisages that as far as practical, the personal guardian is an assisted decision maker involving the person concerned as much as possible in the

decision making process; where the person involved lacks any capacity, the personal guardian would be a substitute decision maker. The 2008 Scheme envisages that a personal guardian may be directed by the Court to make specific decisions, which may include decisions regarding the personal welfare of a person including the giving or refusing of consent to treatment. The Scheme provides that an Office of Public Guardian would supervise the role of personal guardians.

This Bill would update the Wardship legislation which is still governed by the Lunacy Act of 1871. At present no vulnerable adults have any proper legal protection and it is essential that the Mental Capacity Bill is published and passed without delay.

(l) **Attorneys - The Powers of Attorney Act 1996:** The legislation provides for Enduring Powers of Attorney. However, the legislation provides no proper supervision of attorneys and it is essential that legislation is passed to provide supervision of attorneys. It is quite feasible for attorneys to abuse their position and misuse the assets of the incapacitated person for whom they are acting. The Mental Capacity Bill proposes to provide a scheme whereby the Office of Public Guardian would supervise these attorneys.

Important Legislation and Legal Provisions Affecting Persons with Disabilities

1. **Disability Discrimination** – Since the late 1990's the concepts of Non-Discrimination and Equality Rights have been enforced in law for people with disabilities, with the passing of the Employment Equality Act in 1998 and the Equal Status Act in 2000. The 1998 Act is an employment related statute whereas the Equal Status Act relates to the provision of goods and services, accommodation and education.

   Section 30 of the 1998 Act implies that all employment contracts contain an equality clause. Therefore, even where a person with disability does not have a written contract the Act ensures that the guarantee of equal treatment is read into the contract.

   As stated above, the Equal Status Act relates to the provision of goods and services. The general principal is contained in section 5 of the Act which prohibits discrimination in the disposal of goods to the public.

   Both Acts prohibit discrimination on nine grounds including the ground of disability. The legislation prohibits direct, indirect discrimination, victimisation and harassment based on any of the prohibited grounds.

   The Equality Act 2004 amends the provisions on indirect discrimination.

   The Irish legislation has included a very broad definition of disability which has insured that the cases revolve around the issue of whether discrimination, harassment, victimisation or a failure to provide reasonable accommodation has occurred.

   The equality legislation also has an important role to play in the pursuit of equality for older people, as the equality legislation covers discrimination on age grounds. Allegations of discrimination on age grounds have made up to 20% of case files in the Equality Authority. The allegations of discrimination cover job advertisements, job interviews, promotion, dismissal, retirement ages and voluntary severance and redundancy packages.

2. **The Disability Act 2005** – The Department of Justice, Equality and Law Reform Guides states as follows:

   "The Act establishes a basis for:

   (a) An independent assessment of individual needs, a related service statement, and independent redress and enforcement for persons with disabilities;

   (b) Access to public buildings, services and information;

   (c) Sectoral plans for six key Departments which would ensure that access for people with disabilities would become an integral part of service planning and provision;

   (d) An obligation on public bodies to be proactive in employing people with disabilities;

(e) Restricting the use of information from genetic testing for employment, mortgage and insurance purposes.

(f) A centre for excellence in Universal Design."

3. **Citizen's Information Act 2007** – The Citizen's Information Act passed in 2007 gives the Citizen's Information Board (CIB) legislative responsibility for the development and delivery of advocacy services to people with disabilities, in particular the Personal Advocacy Service. This is in addition to the CIB's general advocacy role.

The 2007 Act put advocacy on a statutory footing for the first time. This Act changes Comhairle's name to "The Citizen's Information Board" and sets out the organisation's remit concerning advocacy. It envisages advocacy services as "supporting people with disabilities to identify and understand their needs and options, and secure their entitlements to social services". It sees the role of the advocate as assisting, supporting and representing the qualifying person with a disability to apply for and obtain a social service or to pursue a review or appeal. It also includes providing support and training to a qualifying person or his/or her family to promote his/her best interests.

Social Services are defined in the Act as:

"Any service provided by a statutory or voluntary body that is available to the public and includes but is not limited to, a service in relation to any of the following, health, social welfare, education, family support, housing, taxation, citizenship, consumer matters, employment and training, equality, asylum and immigration".

4. **Article 42 of the Irish Constitution**: In Ireland the primary basis for the right to education is Article 42 of the Constitution. The wording of the Article recognises the family as the natural educators of the child, and only minimum obligations are imposed on the State, such as to ensure a certain minimal standard of education is received by all children, to intervene in cases of parental failure in their duties towards children and to provide for free primary education. The presence of disability, regardless of the severity, does not diminish the state's obligation to provide for full primary education.

5. **The Education for Persons with Special Intellectual Needs Act 2004** – The **N**ational Disability Authority's Guide to the Act states as follows:

"The Act has a number of things:

(a) It sets out the aims and expected outcomes of education for persons with special educational needs.

(b) It outlines key elements of the process by which these ends are to be achieved.

(c) It describes the structures for implanting the provisions of the Act and establishes a new body, the National Council for Special Education (NCSE).

(d) It provides for appeals procedures in relation to decisions about the education of persons with educational needs and establishes an Appeals Board –

The legislation aims to ensure that children with special educational needs will be enabled to leave school with the skills necessary to participate to their ability, in society and to live independent lives."

The Act expands upon Article 42 of the Constitution by acknowledging that children with disabilities have a right to be educated in an exclusive environment and in a matter which is appropriate for their particular disability. It also provides an individual right to an educational assessment and requires schools to devise Educational Plans which will outline in detail how children with special needs are to be accommodated within the school. This Act also aims to promote the greater involvement of parents in the educational process for children with special educational needs, reflecting the philosophy in Article 42 of the Constitution.

6. **UN Convention of the Rights of Persons with Disabilities:** This Convention entered into force on the 3rd of May 2008. The Convention is the first International Human Rights Treaty of the 21st century. It does not confer any new rights to disabled people. Rather it re-affirms disabled people human's rights and spells out the positive steps Governments must take to make these rights an every day reality.

It provides a critical step in the journey from a "welfare" based approach to a "rights" based approach towards disability as it provides fresh impetus to initiatives to improve disabled people's freedom and opportunities.

While Ireland was among the first 40 countries to sign the Convention it has not yet ratified it. Ratification does not necessarily bind a State internally but does make it answerable to international bodies – in this instance for its disability laws and policies.

Professor Gerry Quinn has said "the real value of the Convention will be revealed in how Government, human rights organisations, services and organisations of and for people with disabilities internalise their values, principles and rules in moving Irish law and policy forward.

The Convention covers a very broad range of areas such as employment, accessibility, education, freedom from exploitation, independent living and a right to be recognised as a person before the law. A new UN Committee on the Human Rights of Persons with Disabilities has been established to assist periodic State reports on the progress made under the Treaty.

Professor Quinn states that the Convention "places a clear onus on the States to justify their policies – their progress or a lack of progress – in advancing the rights of their disabled citizens - it should be placed at the heart of State law and Policy".

Wills, Disability and Discretionary Trusts

1. **What are the requirements for a valid Will**

A Will must be in writing and must be signed by a Testator/Testatrix over the age of 18 years. The Testator must be of sound mind and sign the Will in the presence of two witnesses who in turn must sign the Will in the Testator's presence. If the Testator is unable to sign the Will then he/she can execute the Will by making a mark.

2. **Capacity – A Legal Test**

The formalities for a valid Will are set out in section 77 of the Succession Act 1965, which includes a requirement that the person "is of sound disposing mind".

When taking instructions for the making of a Will, it is therefore necessary to determine whether or not the client has testamentary capacity. Testamentary capacity and mental capacity are not one and the same. A person may have capacity for some legal purposes but at the same time lack capacity for others. Testamentary capacity is a legal test and requires a high level of capacity. Testamentary capacity, or broadly the test of "sound disposing mind", is set out in Banks v Goodfellow, 1870. The testator must understand:

(a) The nature of the act and its effects,

(b) The extent of the property of which he is disposing, and

(c) Be able to comprehend and appreciate the claims to which he ought to give effect.

Assessment of testamentary capacity can be a difficult matter. Eccentricity or capriciousness does not necessarily indicate a lack of testamentary capacity. Further, testamentary capacity is not an exact science. A client who is unwell may have lucid intervals and sufficient testamentary capacity at the time of instructions, but later become incapable when it comes to reviewing his/her Will for execution.

It is important to note that mental illness does not preclude testamentary capacity. Where a client with a known mental illness presents himself/herself to a solicitor and indicates a wish to make a Will, a solicitor must clearly establish the presence or absence of testamentary capacity. If in doubt, a medical opinion should be sought before proceeding. If the client is under the care of a consultant, his/her opinion may be the more relevant one, rather than the testator's general practitioner. However, it is the solicitor's obligation to determine whether or not the client has testamentary capacity. Medical evidence may be of assistance, but is not a substitute for a legal determination of capacity.

3. **Capacity to make a Will**

As stated above, people making a Will should have testamentary capacity both (a) when they give instructions to a solicitor for the preparation of their Will and (b) when they execute, or sign, their Will.

The English Text Book entitled "Assessment of Mental Capacity – Guidance for Doctors and Lawyers" published by the English Law Society and the British Medical Association is an excellent textbook which gives guidance primarily to doctors and lawyers as to the capacity which individuals require for different legal matters.

The chapter on the Capacity to make a Will refers to decided cases and sets out a checklist which Testators should be aware of as follows:-

(a) The nature of the Act:

People making a Will should understand:

(i) That they will die;

(ii) The Will shall come into operation on their death, but not before; and

(iii) That they can change or revoke the Will at any time before their death, provided they have the capacity to do so.

(b) **The effect of making a Will**

People making a Will should also understand:

(i) Who the Executor is or who the Executors are (and perhaps who they should be appointing as Executors);

(ii) Who gets what under the Will;

(iii) Whether a beneficiary's gift is outright or conditional (eg. where the beneficiary is entitled to the income from a lump sum during his or her lifetime or is allowed to occupy residential property from the rest of the beneficiary's life);

(iv) That if they spend their money or give away or sell their property during their life time, the beneficiaries might lose out;

(v) That a beneficiary might die before them; and

(vi) Whether they have already made a Will and, if so, how and why the new Will differs from the old one.

(c) **The Extent of the Property**

People making a Will should understand;

(i) The extent of all the property owned solely by them;

(ii) 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;

(iii) Whether there are benefits payable on their death which might be unaffected by the terms of their Will (insurance policies, pension rights, etc.) and

(iv) That the extent of their property could change during their lifetime.

(d) **The claims of others**

People making a Will should also be able to comprehend and appreciate the claims to which they ought to give affect, and the reasons for preferring some beneficiaries and, perhaps excluding others. For example possible beneficiaries:

(i) May already have received adequate provision from the person;

(ii) Be financially better off than the others;

(iii) May have been more attentive or caring than others; or

(iv) May be in greater need of assistance because of their age, gender or physical or mental problems.

4. Medical Report on Capacity to make a Will

If solicitors have any concern regarding the mental capacity of a client to make a Will the solicitor should obtain a medical report from a GP or specialist to ascertain whether the client has the necessary mental capacity to make the Will. If a person is unfortunate to suffer from Alzheimer's disease or Dementia, then on the death of that person, the death certificate will disclose that the person suffered from Alzheimer's disease or Dementia. As the death certificate will be examined by the Probate Office, the Probate Officer will always require an affidavit from a doctor confirming that when the deceased made their Will that they had the necessary capacity to make a Will at that time. Without such an Affidavit of Mental Capacity the Probate Officer will not accept the validity of the Will. If no doctor is available to give such an Affidavit of Mental Capacity then the Probate Officer may accept an Affidavit of Mental Capacity from a solicitor who prepared the Will.

5. Why Make a Will?

If you are married and die without making a Will, leaving a spouse and children, your spouse inherits two thirds of all you own (called your "estate") and your children inherit the remaining one third. If the family home is solely in your name, your children could ask for one third of its value, leaving financial problems for your surviving spouse. If you are single and die intestate, your estate is distributed among your next of kin, as set out in the Succession Act 1965.

6. Executors

In every Will, an Executor has to be appointed to carryout the wishes stated in the Will. The Executor must pay all the debts and liabilities that arise up to the date of death and that arise during administration of the estate.

7. Trustees

You may not wish your children to receive money directly but may wish to put a sum of money in a trust for them until they reach the age of 18 or older. You may also wish to remember a beneficiary who has a drink problem, a gambling problem, is irresponsible when it comes to money or has a disability. In any of these situations you need to appoint trustees (who can also be the Executors) who would hold the benefit on trust for the beneficiary until the beneficiary attains the age specified in the Will or for the lifetime of the beneficiary, whichever is specified in the Will.

8. Appointment of Guardians

If you and your spouse were unfortunate enough to be killed in an accident, leaving behind children under the age of 18 years, your relatives would have to apply to the court to have guardians appointed for your children. This can be avoided by naming guardians in your Will. A guardian is a person who you select to take over your role as parent in rearing your children under the age of 18 years. Therefore, the guardians have a different role from the trustees who manage the fund or the property that is held for the benefit of the beneficiary. Nevertheless, guardians or trustees may be the same persons. If you have a child with a learning disability then you may need to appoint guardians in your Will for the lifetime of this child. There is no proper legal recognition of guardians appointed for a child who is over the age of 18 years, even if that child has a disability.

9. Inheritance received by a child with an intellectual disability

If a beneficiary inherits either property or cash or other assets under a Will and that beneficiary is unable to manage his or her financial affairs because of an intellectual disability, then that beneficiary may have to be made a Ward of Court because of this inheritance. Legally, a beneficiary is not entitled to receive an inheritance in their own right if they have such a disability and when that individual is made a Ward of Court the inheritance or the cash is transferred to the Wards of Court Office who manage the property and/or the cash during the lifetime of the beneficiary.

When a beneficiary has an intellectual disability he or she is also likely to be in receipt of a state benefit, eg. disability allowance. Such a state benefit is means tested and if the beneficiary receives an inheritance then such an inheritance will be means tested and the result could be that the beneficiary has his or her disability allowance reduced substantially or revoked.

It is in order to avoid these two problems that it is strongly recommended that beneficiaries with a learning or intellectual disability should inherit property in a Discretionary Trust.

10. Discretionary Trusts

A Discretionary Trust is a mechanism by which a person, usually a parent, transfers property to two or more Trustees, normally relations or friends, who hold the property, the cash or the asset, on trust for that beneficiary until that beneficiary attains a specified age or for the lifetime of that beneficiary. The assets in the Trust are transferred into the names of the Trustees and the legal document creating the Discretionary Trust, eg. a settlement, created during a person's lifetime, or a Will, which comes into operation on the death of a person, give directions as to how the Trustees are to benefit the beneficiary named in the Discretionary Trust.

If the beneficiary is a child, eg., with special needs, then usually the Trustees will have a complete discretion to make distributions to the beneficiary whenever they decide. Usually the Trustees will not give a cash distribution to the beneficiary but will use the Trust Fund to spend on items for the beneficiary eg. on holidays, clothes, presents or other essential items. The trust document should give the Trustees a complete discretion to distribute both the capital in the trust and any income arising from the capital, ie. any income or interest accruing from the property or the cash, to the beneficiary at such times and in such amounts as the Trustees in their discretion think fit.

It is also useful if the Trustees have a discretion to pay any part of the capital and/or the income accruing to any person or persons, organisation, charity or institution caring for the named beneficiary. This would mean that the Trust Fund could be used to pay, eg. for improved accommodation of the beneficiary or to assist with the payment of a minibus which the beneficiary might be availing of, from the organisation, on a regular basis.

The trust document should also state what is to happen the Trust Fund on the death of the beneficiary. In most cases, the entire Trust Fund will not have been distributed to the beneficiary during the beneficiary's lifetime and the trust document has to specify what happens with the remaining part of the Trust Fund on the death of the beneficiary. Usually the trust instrument, eg. the Will, will specify that the Trust Fund is to be divided between the surviving siblings of the beneficiary, who are alive at that time. However, I am conscious that disability organisations caring for persons with disability, incur substantial costs each year for caring for such persons on a full time basis. I always recommend to parents that they might consider benefiting the organisation which is caring for the beneficiary at the date of the beneficiary's death so that the organisation will inherit all, or part, of the Trust Fund remaining on the death of the beneficiary.

11. Letter of Wishes

Where the Will creates a Trust for one or more beneficiaries, it is useful for the Testator to execute a letter which is addressed to the Trustees. This is a letter giving guidelines to the Trustees as to how they might operate the Trust for the benefit of the beneficiaries;
eg. when to distribute assets to each beneficiary and when to terminate the Trust if the Will has not specified this. The letter is not a legally binding document but is morally binding on the Trustees who would normally follow its direction. The Trustees are not obliged to show a copy of the letter of wishes to the beneficiaries.

12. Rights of the Surviving Children

A child, unlike a spouse, is not entitled to any specified share in a deceased's parent's estate as a right. However, Section 117 of the Succession Act allows the child to make an application to Court where the child would like a share or a greater share from his or her parent's estate than that provided under the Will.

In order to succeed with such a claim the Court must be of the opinion that the Testator has failed in his or her moral duty to make proper provision for the child in accordance with his or her means. In these circumstances, the Court may order that such provision should be made for the child out of the estate as the Court thinks "just". The Court is obliged to consider the matter from the point of view of a prudent and just parent and must take into account the position of each of the children of the Testator and any other circumstances that the Court considers to be of assistance in deciding what is as fair as possible to the child and to the other children.

Quite often an elderly parent may be cared for in their home for many years by an unmarried child. In this situation the elderly parent may recognise this contribution of the child by leaving the house to that specific child. However, if other children in the family are not well off, it may be possible to reach a compromise so that all the children benefit, eg. by leaving the house to the child still living at home provided that child gives some money to each of the other children in the family when he/she inherits the house from the deceased's parent.

If a child has a disability then obviously the parents will have to be very conscious as to what their moral and legal obligations are for benefiting this child under their Will. However, if a child, say, with special needs, is being cared for fulltime by an organisation or charity and that care is likely to continue for the duration of the child's lifetime, it may be that the parents may not have a great duty to make huge financial provision for that child, in their Will.

Special Trust for Permanently Incapacitated Individuals otherwise known as a Public Subscriptions Trust

Criteria to qualify as a Special Trust

Set out in Section 189A of the Taxes Consolidation Act 1997 as amended.

- The trust must be established exclusively for the benefit of a specified individual or individuals (named in the trust deed).
- That person must be permanently and totally incapacitated by reason of mental or physical infirmity from being able to maintain themselves.
- The trust must be a discretionary trust with funds to be exclusively used for the benefit of the specified individual for the duration of their lifetime.
- The trustees must be wholly independent from the specified individual – ie., they cannot be a relative, married to a relative or a relative of the individual's spouse.
- The funds placed in the trust cannot exceed €381,000.00 **or** if the fund contains more than €381,000.00 one person cannot have contributed more than 30% of the fund.
- The fund must be made up of "public subscriptions" that is money or property collected from the general public following an appeal on behalf of the named individual.
- On the death of the named individual the balance funds must be used for a charitable purpose or left to the Trustees of a charitable body or bodies.
- Revenue approval must be sought for the trust.

Tax benefits of qualifying as a Public Subscriptions Trust

<u>Income Tax</u>

Trustees
Under S.189A(2) TCA 97 any income accruing to the Trustees on the trust fund (that is funds collected from the general public and all monies or property derived from these public subscriptions) is exempt from Income Tax and PRSI and levies.

Incapacitated Individual
Under Section S189A(4)(b)(i) TCA 97 where the income received by the incapacitated individual directly from the trust or income derived from payments received from the trust exceeds 50% of the total income of the incapacitated individual (excluding disability benefit received in respect of the same injury or disability that gave rise to the public appeal) then the income received by the incapacitated individual from the trust or derived from payments received from the trust shall be exempt from Income Tax.

<u>Capital Gains Tax</u>

Trustees
Under S.189A (3) TCA 97 gains accruing to the trustees in respect of the trust fund are exempt from Capital Gains Tax.

Incapacitated individual
Under S.189A(4)(b)(ii) where the income of the individual received from the trust exceeds 50% of their total income as set out above gains accruing on assets acquired:

- with funds received from the trust
- with income derived from payments of the trust
- with funds received as proceeds from the sale of an asset acquired with funds as above

will be exempt from Capital Gains Tax but the incapacitated individual will be required to file the necessary CGT return and claim the exemption.

Deposit Interest Retention Tax

S.267 TCA 97 – gives an exemption from DIRT in respect of deposit accounts held by Trustee of Special Trusts for incapacitated persons where the funds on deposit are beneficially owned by specified permanently incapacitated individuals.

Capital Acquisitions Tax

S.82(3) CATA 2003 benefits taken by the incapacitated individual from such a trust are exempt from CAT and are not taken into account for accumulation purposes.

Stamp Duty

S.97B(7) SDCA 99 properties purchased by the trustees for the benefit of such an incapacitated individual qualify for "first time buyer's relief".

Legal Arrangements for Managing Financial Affairs of a Person who Becomes Unwell or Incapacitated

JOINT BANK ACOUNTS

It often happens that an older person opens a joint account with a relative or friend to enable that person to have access to his/her funds. It is a particularly useful means of dealing with one's financial affairs when an older person has mobility problems, is ill or is unable to take responsibility for maintaining an account on his/her own.

Opening the Account

Any person can open a bank account when that person has the necessary mental capacity. A bank or building society will not open an account if they believe the person opening the account is being coerced or unduly influenced by someone else. When an account is opened an account holder may authorise the bank to accept cheques if signed by another individual. There is a standard form that is signed by an account holder which gives a sample of the signature of the person being authorised.

Operating the Account

If it appears that an account holder does not understand the transactions involved in operating a bank account due to mental incapacity the account will be frozen. In this situation, the account can only be utilised if an enduring power of attorney is registered on behalf of the account holder or if the account holder is made a ward of court. However, if the only payments from an account are to a nursing home, the bank may be willing to give the benefit of any doubt as to the mental capacity of the account holder and continue to allow the payments.

If a joint account is opened, the bank can be authorised to honour cheques signed by both account holders or by only one. In the case of a joint account, the bank has a contractual duty to each account holder. If one account holder is mentally incapacitated, the legal authority to operate the account is revoked and the account cannot be used by the other joint account holder.
The production of a consistent signature is normal when operating a bank account. If the physical ability to sign becomes impaired, arrangements should be made for some form of mark to be accepted or for someone else to sign. The bank may require medical evidence of capacity in this situation. Direct debits or standing orders will also be cancelled if the account holder becomes mentally incapacitated.

Death of One Account Holder

If one of the persons holding a joint account dies, the question arises as to who is entitled to the beneficial ownership of the monies in the joint account. Definite legal considerations apply when determining this matter, depending on:

- the intention of the parties
- the extent or otherwise to which they contributed to the account

- the terms of their contract with the bank, e.g. where the bank is instructed that the money should be paid to the surviving joint account holder on the death of either party.

Recommendation

It is most advisable that if a person, particularly an older person, considers opening a joint bank account, they should leave written instructions with the bank and with their family as to who is to inherit the money on their death. Their intentions should also be made clear to the second person named in the account, and if possible referred to in their will.

AGENCY ARRANGEMENTS FOR SOCIAL WELFARE PAYMENTS

The Department of Social, Community and Family Affairs has the power under social welfare legislation to make payments to a third party acting on behalf of the recipient. The person to whom a social welfare benefit is payable may nominate another person to receive that benefit on his/her behalf.

An agent appointed under social welfare legislation may deal only with social welfare payments; he/she has no power to deal with other financial matters.

In practice, the Department of Social, Community and Family Affairs recognises different types of agents.

"Type 1" Agent

A "Type 1" agent can be appointed on a temporary or permanent basis. Under this type of agency, the money is payable to a person entitled and all correspondence relating to it is addressed to that person. Nevertheless, an agent is empowered to collect the money on behalf of the recipient and is under a legal duty to give it to the recipient.

Temporary Agency

A temporary "Type 1" agency can be created where the social welfare claimant signs the back page of each 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 recipient and the agent. The written authority created by the act of signing the form only entitles the agent to actually collect the money and hand it over to the person entitled to it.

Permanent Agency

The Department of Social, Community and Family Affairs may make pay¬ments to a person nominated by the recipient. If a recipient is unable to act, the Minister may appoint some other person to exercise rights on behalf of the person entitled under social welfare legislation.

"Type 2" Agency

A "Type 2" agency arises where a social welfare officer decides (usually as a result of representations from family members and medical practitioners) that an individual is incapable

of acting and that an agent should be appointed. A social welfare officer will usually call to visit the legally entitled recipient to assess the circumstances and the needs of that individual. The agent nominated is often a family member or the matron 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 will be directed to the appointed agent.

POWERS OF ATTORNEY

What is a Power of Attorney?

A power of attorney is a legal arrangement whereby one person (the donor) gives authority to another or others (the attorney/attorneys) to act on his/her behalf. The attorney under a power of attorney is required to act as if he/she were the donor. Decisions should be based, if possible, on the wishes expressed by the donor prior to becoming less able to deal with his/her affairs. The power can be general or limited. If it is general, the attorney can do anything that the donor could have lawfully done. However, if the power of attorney is limited, the attorney may have the authority to deal with only one matter, e.g. the sale of a house. The power could also stipulate that it is only to remain in force for a specified time, e.g. one year. The donor can still act on his/her own behalf after granting a power of attorney.

When are they Necessary?

Powers of attorney are frequently used when a person is going abroad, either for a long or short period of time, and that person has some legal transaction to complete here in Ireland while abroad. For example, the owners of a house might have to move abroad before their house in Ireland is sold and someone here in Ireland has to sell the house on their behalf after they have left.

Elderly people can also use powers of attorney to enable their business affairs to be dealt with by someone else. They are commonly used by elderly people who are confined to a house or nursing home and where, for instance, they are not mobile enough to visit their bank. In such situations, adult children or other relatives can be authorised, under the power of attorney, to operate bank and building society accounts and deal with investments on behalf of their relatives.

The Form and Operation of the Power of Attorney

The power of attorney consists of a legal document showing that the attorney has the power to act on the donor's behalf. It must be in writing and signed in the presence of a witness. A precedent form of power of attorney is set out in the Powers of Attorney Act 1996. However, legal advice should be obtained whenever a power of attorney is needed. The original power of attorney, or a copy certified by the donor or a solicitor to be true copies of the original, can be produced to banks, building societies, insurance companies, etc. as sufficient legal authority for the attorney to act on behalf of the donor in relation to the donor's affairs.

Appointing Attorneys

One or more people can be appointed attorneys by the donor. **If** two or more people are appointed, the document should state whether the attorneys are to act jointly or severally, i.e. the attorneys may either act together or independently of each other. **If** appointed jointly, all the

attorneys must make decisions jointly and one joint attorney cannot act on his/her own without the authority of the other attorneys. If one joint attorney dies or becomes mentally incapacitated or disqualified, the remaining attorneys may continue to act unless the power of attorney specifies otherwise. If two or more persons are appointed attorneys to act jointly and severally, then all the attorneys do not have to make decisions jointly and one attorney can act independently of the others, which the others are legally bound by. Joint and several attorneys should be appointed if one attorney goes abroad frequently or if one of the attorneys is elderly.

Who Should Be an Attorney?

The attorney can be a relative, friend, professional person or even a bank. The attorney should be a person whom the donor can trust and rely on. Sometimes the donor might prefer that his/her relatives or friends are not involved in his/her financial affairs and might prefer to appoint a professional advisor. Usually, however, a professional person will charge fees for acting as attorney.

Duties of Attorneys

If the attorney is a relative or a friend of the donor, there is generally no obligation on that person to act as attorney. Nevertheless, if the attorney is a professional person and is getting paid for acting as attorney, there may be a legal obligation on that attorney to act under the power of attorney. The attorney, if acting, must follow the terms of the power of attorney.

The attorney is obliged to act in good faith in all his/her dealings as attorney - he/she must not put himself in a position where his duty to the donor conflicts with a duty to someone else.
The attorney is obliged to keep accurate accounts and records. An attorney must use such skill as he/she possesses and show such care and skill as he/she normally would in conducting his/her own affairs. If the attorney is being paid, he/she must exercise the care, skill and diligence of a reasonable person or with proper professional competence if he/she is a professional person.

An attorney is not entitled to make a profit from acting as attorney without the consent of the donor.

The attorney cannot appoint someone else to act as attorney and must act personally in the performance of his/her duties. However, having decided on a course of action, an attorney has the authority to employ, if necessary, solicitors, estate agents, accountants, builders and so on to implement that decision.

An attorney is under a duty to keep the donor's affairs confidential, unless the donor authorises the attorney to disclose them.

Termination of Power of Attorney

The donor can cancel or revoke the powers of attorney at any time. It is advisable to do this in writing and inform the attorney and all financial institutions acting on the power of attorney.

If the power of attorney is for a stated period of time, it expires when that period comes to an end. Similarly, if the power is granted to authorise a single act, such as selling a house, it expires when the act is completed.

If the donor develops a mental illness, such as senile dementia or Alzheimer's disease, the power of attorney is no longer exercisable by the attorney. It was to obviate this defect that enduring powers of attorney were legalised under the Powers of Attorney Act 1996, which came into operation on 1 August 1996.

ENDURING POWERS OF ATTORNEY

What Is an Enduring Power of Attorney?

An enduring power of attorney (EPA) is a power of attorney which can only operate if the donor (the person who creates the document) becomes mentally incapable of managing his/her affairs. As long as the donor is well, the enduring power of attorney cannot be acted on by the attorney.

Why an Enduring Power of Attorney May Be Necessary

At present, there are approximately 480,000 people aged over 65. It is estimated that 5 per cent of people over 65 suffer from some form of senile dementia in Ireland and that there are over 37,000 suffering from Alzheimer's disease. It is, therefore, advisable that anyone over 65 should consider making an enduring power of attorney.

As already mentioned, an ordinary power of attorney can no longer be valid if the donor becomes mentally incapable of managing his/her affairs. In such a situation the donor would have to be made a ward of court where the financial affairs would be managed under the supervision of the wards of court office and the High Court, where appropriate. Wardship applications can be a stressful and expensive process, which can be avoided by making an enduring power of attorney. It is for this additional reason that legislation was introduced providing for enduring powers of attorney.

The Form of Enduring Power of Attorney

The form of an enduring power of attorney must be in the form as set out in the Ministerial Regulations applying to the Powers of Attorney Act 1996. The form is very different from the format of an ordinary power of attorney and if the correct format is not used, the EPA is defective and invalid.

Attorney Powers under the Powers of Attorney Act 1996

The Powers of Attorney Act 1996 provides that an EPA may give the attorney power to act on the donor's behalf in relation to anyone or more of the following:

- all or a specified part of the donor's property
- all or a specified part of the donor's business or financial affairs
- to do other specified things
- to make personal care decisions affecting the donor

- to make appropriate gifts to any of the donor's relations or friends or favourite charity of the donor

- to make any such powers subject to conditions and restrictions.

Personal Care Decisions

The power to give the attorney the right to make personal care decisions affecting the donor is a welcome additional power which was only inserted in the draft legislation at a late stage and after much lobbying. However, the donor is under no legal obligation to give the attorney power to make any personal care decisions and can limit the attorney's role to their business or financial affairs only. The donor can also restrict the number of personal care decisions the attorney can make.

Personal care decisions must be made in the donor's best interest and include making the following decisions:

- where the donor should live

- with whom the donor should live

- who the donor should and should not see

- what training or rehabilitation the donor should receive

- the donor's diet and dress

- who may inspect the donor's personal papers

- what housing, social welfare or other benefits the donor needs.

Where practical and appropriate, the attorney should consult with members of the donor's family or other interested persons regarding personal care decisions. The donor can also name a person or persons whom the attorney should consult before making any personal care decisions.

A Note of Caution

An enduring power of attorney is potentially extremely flexible and the power to impose restrictions and conditions may be very valuable. Nevertheless, the fact remains that the less authority that is given to the attorney by the donor in the enduring power of attorney, the greater the risk that the attorney would be unable to manage all 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 unduly restrictive conditions contained in the enduring power of attorney.

Regulations

Regulations under the 1996 Act provide for the following in relation to an enduring power of attorney:

1. The specific format of an EPA.

2. (a) The various options which the donor has when granting an EPA.

   (b) A statement signed by the donor that he/she has read the explanatory information regarding the creation of an EPA or has had it read to him/her.

3. (a) The duties and obligations which an attorney may have under EPA. (b) A statement signed by the attorney that he/she understands these duties and obligations.

4. The obligation on the attorney to keep adequate accounts.

5. The remuneration, if any, of the attorney who is entitled to out-ofpocket expenses, even if no form of remuneration is provided for in the EPA.

6. The execution requirements of an EPA.

7. A statement by a solicitor in the format provided that he/she is satisfied the donor understood the effect of the EPA.

8. A statement by a medical practitioner in the format provided that, in his opinion, the donor had the mental capacity at the time of execution to understand the effect of creating an EPA.

Who May Be Attorney?

The Act provides that an attorney under an EPA must:

- be over eighteen or be a trust corporation (as defined)
- not have been adjudicated bankrupt
- not have been convicted of an offence involving fraud or dishonesty or an offence against the personal property of the donor
- not be the owner of a nursing home or be employed by the nursing home where the donor resides.

An EPA in favour of a spouse shall cease to be in force if there is a subsequent legal separation between the spouses or certain other matrimonial proceedings between them.

A donor may also appoint more than one person to be an attorney and may specify that the attorneys are appointed to act either jointly, or jointly and severally.

Signing of an Enduring Power of Attorney

The donor must sign the EPA in the presence of a solicitor, who must then sign a certificate in the format, provided that he/she is satisfied that the donor understood the document. Sometimes the donor may be in the early stages of Alzheimer's disease but has lucid intervals. It might be

important to have the document signed in the presence of both the solicitor and the doctor in these circumstances. The doctor can then certify that the donor had the necessary mental capacity to understand the document when it was signed. The attorney(s) must sign the document after the donor in the presence of a witness, who can also be the same solicitor. In signing the EPA, the attorney confirms that he/she understands the obligations it imposes. The attorney also acknowledges the duty to register the EPA if the donor's mental health deteriorates to such an extent that the donor is or is becoming, mentally incapable of managing his/her affairs.

However, the attorney can withdraw his/her consent to act as attorney at any time before the EPA is registered. After the EPA is registered, the attorney can only be relieved of his/her duties as attorney with the consent of the court.

Notice of Execution of an EPA

Under the regulations, the donor is obliged to notify at least two people (who are not the attorneys) regarding the execution of the EPA. At least one of them is required by the regulations to be:

- the donor's spouse, ifliving with the donor
- a child of the donor, if the former does not apply
- a relative of the donor, if neither of the above apply. A relative is defined as a parent, brother, sister, grandchild, widow or widower of a child of the donor or a nephew or niece.

The other notice party can be a non-relative. An attorney cannot be one of the notice parties. If, for instance, the spouse and only son are the attorneys, then notice must be given to two others, of whom one must be a relative of the donor. The prescribed form of notice is contained in the Third Schedule of the Regulations. If there are no such relatives, the donor can nominate other parties. Whoever is nominated to receive the notice of execution of the enduring power of attorney by the donor will be entitled to receive notice of the application to register the enduring power of attorney when that time comes, unless they have died, become mentally incapable themselves or it is not possible to locate them.

Application of Registration

An enduring power of attorney cannot be acted on until registered. In practice, it would only be registered in a minority of cases. Section 9(1) of the Act states as follows:

If an attorney under an enduring power of attorney has reason to believe that the donor is or is becoming mentally incapable, the attorney shall, as soon as practicable, make an application to the court for registration of the instrument creating the power.

Under section 4 of the Act, mental incapacity in relation to an individual means incapacity by reason of a mental condition to manage and administer his/her own property and affairs. In summary, before the attorney has a duty to register the enduring power of attorney, it is necessary to prove two things:

1. that the donor is suffering from a mental disorder

2. that because of the mental disorder and mental incapacity, the person is incapable of managing and administering his/her property and affairs.

These two conditions do not automatically coincide. People suffering from a mental disorder might be quite capable of looking after their financial affairs and those who are not mentally disordered may be completely hopeless in running their affairs - they could be disorganised, uninterested, foolish, prodigal or just lazy.

A medical certificate from a doctor is required to prove that the donor is or is becoming incapable of managing his/her affairs.

A notice (in the form provided in the Fourth Schedule of the Regulations) of the attorney's application to register the EPA must be served on the donor and also on the people who were notified of the execution of the EPA and are named in it. Any person served with this notice can object to the registration by sending the grounds for objection to the wards of court office within five weeks on receipt of the notice.

If any of the people notified at that time are dead or are themselves mentally incapable or cannot be located, then the surviving "notice party" should be notified. If none of the original notice parties are alive or cannot be located or if they have all become mentally incapable, then at least three relatives should be notified. The Act contains a list of relatives to be notified, commencing with the donor's spouse and then passing on in descending order to the donor's children, parents, brothers or sisters. The full list is set out in Article 3 of Part 1 of the First Schedule to the Act.
Once the attorney has applied for registration, he/she may act on the EPA, namely to take action under the power to maintain the donor and prevent loss to the donor's property or savings. He/she may also make any personal care decisions that are authorised and cannot be deferred until the registration has been completed.

ADDITIONAL DUTIES OF AN ATTORNEY UNDER AN EPA

As well as making decisions regarding the business and financial affairs of the donor and personal care decisions (if permitted), the attorney has the following powers:

Needs

The attorney may use the donor's assets, savings or monies to provide for the donor's needs or the needs of any other persons, e.g. a spouse and children, if the donor would normally have provided for these needs. "Needs" is not defined but probably includes food, housing, clothing, education, holidays, etc. The amount to be spent on the needs for someone else other than the donor depends on what the donor would have done.

The question for the attorney to ask in all cases is: "What, on the assumption that the donor had full capacity, would he have spent on meeting the particular needs concerned?"

Gifts

The attorney may also make gifts if the EPA permits it. The gifts allowed by the legislation are normally gifts at Christmas, Easter, birthdays, weddings or gifts to a charity. An individual who receives gifts must be related to or connected with the donor. The value of any gift must not be unreasonable, taking into account, in particular, the extent of the donor's assets.

Keeping of Accounts

Under the legislation, an attorney is obliged to keep adequate accounts relating to the management of the property and affairs of the donor, and especially any expenditure incurred on behalf of the donor. The legislation does not specify what is meant by adequate accounts but, at a minimum, bank statements should be kept which record all financial transactions.

Advantages of an Enduring Power of Attorney

The advantages of an EPA are that the donor is able to choose the person who will deal with his/her personal affairs and/or make personal care decisions affecting him/her. It is relatively cheap and easy to set up and can be done with little formality. It is easy to operate, involves no annual fees and there is no need to produce annual accounts on a regular basis. The attorney is expected to use his discretion but there is a procedure whereby another person may challenge the conduct of the attorney.

Disadvantages of an Enduring Power of Attorney

The procedure can only be available if the donor has sufficient mental capacity to understand the nature of the document, and it ceases to operate if the attorney dies or becomes incapable (unless there are two attorneys appointed or a substitute attorney appointed). However, there is no effective supervision or obligation on the attorney to visit the donor regularly, and the attorney's authority may be challenged on each occasion that he purports to act.

In brief, an EPA is strongly recommended for anyone who wants to minimise the legal problems his/her family may face if he/she should become mentally incapacitated in the future.

WARDS OF COURT

One of the benefits of modern society is that with the improvement in healthcare, many people are living longer than in the past. Unfortunately, with the increase in the number of older people, there are more people in our society suffering from senile dementia or other illnesses that affect their mental capacity to look after their affairs. When this situation arises, an elderly person may have to be made a ward of court if no enduring power of attorney had been executed previously or if the elderly person does not have the sufficient mental capacity to make an enduring power of attorney.

A ward of court is a person who is declared to be of unsound mind and incapable of managing his/her person or property, i.e. the ward cannot look after himself/herself physically and cannot manage his/her finances and pay everyday bills.

What Does Wardship Mean?

The principle purpose of wardship is to protect the property of the ward and to manage it for the ward's benefit and the ward's dependants (if there are any). When a person has been taken into wardship it means that the President of the High Court is satisfied on the basis of the medical evidence available to him that that person should be deemed to be of unsound mind and is incapable of managing his/her affairs.

In a small number of cases, a person can be taken into wardship primarily for the protection of his/her person. This would usually arise in the case of a person suffering from a mental handicap rather than a psychiatric illness.

How Does a Person Become a Ward of Court?

In the majority of cases, i.e. where the person's savings or property is worth more than £5,000 (€6,348.69), a solicitor is instructed either by a social worker or often by a member of the proposed ward's family that a wardship application may be necessary. The first step is to obtain two medical reports from two medical practitioners, usually on oath, reporting on the health of the proposed ward. The reports should specify the particular medical condition from which the person is suffering, e.g. brain haemorrhage, Alzheimer's disease, senile dementia, etc. and whether this is likely to be long term. The reports should also state that the person is incapable of managing his/her affairs. The court will also appoint its own doctor to prepare a third medical report and if all the medical reports agree that the person cannot manage his/her personal affairs, then a wardship order will normally be made.

Who Can Apply to Make a Person a Ward of Court?

As mentioned, an application to bring a person to wardship is usually (but not always) made by a member of the family. The application can also be made by the proposed ward's solicitor or doctor or by the hospital authorities if the ward is a patient in a hospital. Any concerned person can notify the Registrar of wards of court of the need to bring someone into wardship, but does not necessarily have to make the actual wardship application.

The application for wardship must be sworn by the applicant and, in most cases, must be lodged in the wards of court office with two medical reports. The application must set out details of the medical condition, next of kin, assets and income of the proposed ward.

If the court is satisfied that there is sufficient medical evidence to consider making the person a ward of court, the court, i.e. the President of the High Court, will make an order (called an "Inquiry Order"). This simply means that the application for wardship should proceed further. The wards of court office will then ask one of its doctors, called a medical visitor, to examine the person and furnish a confidential report to the court. The court will then usually direct that a copy of the application should be served personally on the proposed ward, who is given seven days to object to any wardship order.
Where the proposed ward has objected to the application, an inquiry regarding his/her mental capacity may be held before a jury. Where no objection has been made, the judge will normally make an order in the following terms:

- that the person be taken under the wardship of the court

- that the ward be detained in a certain residence, nursing home or institution, usually where the ward is already residing

- that the applicant must now file a statement of facts, normally within 21 days.

The statement of facts is sworn by the applicant and sets out a number of matters, including who should be appointed committee of the ward and make suggestions as to what is to happen to the ward's property, e.g. whether the ward's house, if any, should be sold or let. It should also state the present and future cost of maintenance of the ward, e.g. the amount of the nursing home fees. An official of the wards of court office generally meets with the applicant's solicitor to agree on the terms of the wardship order, which is then submitted to the judge for formal approval.

The judge will normally appoint a committee of the person and of the estate of the ward. The committee is normally one or more close relations or friends. However, the ward's solicitor or even the general solicitor for minors and wards of court can act as committee where necessary. This may occur for example, where there is no suitable relative who is prepared to act or where there is a disagreement among a ward's relatives about how his/her affairs should be managed. The general solicitor is a qualified solicitor in the service of the State. The term "committee" is used because the affairs of the ward are "committed" to another person or persons. The committee may consist of one person. The committee has no inherent power or authority and can only act as specifically authorised by the court.

The committee of the person is similar to a guardian and has a duty to look after the physical welfare of the ward. This committee would apply to court regarding healthcare decisions of the ward. For example, under the legislation no general anaesthetic or operation affecting the ward should take place without the approval of the President of the High Court, unless emergency treatment is required.

The committee of the estate is similar to a trustee and can make representations to the wards of court office regarding the ward's property and investments. Nevertheless, the property of the ward is not transferred into the committee's name but is invested by the wards of court office on behalf of the ward. In practice, the duties and functions of the committee of the person and the estate often overlap and merge. Consequently, it is common practice for the same person (or persons) to be appointed both committee of the person and the estate. The committee will normally be authorised to transfer all monies in any bank account or building society account, etc. to the wards of court office for reinvestment under its control. Stocks and shares may be sold or, alternatively, control is given to the wards of court office. If a property is involved, the committee will be responsible for selling it or letting it and must account for the net proceeds of sale or the rental income to the wards of court office.

If there is a sale of property, the property cannot be sold for less than the reserve price placed on the property by the ward of court's valuer.

The committee is also entitled, when authorised, to receive monies and make payments, e.g. collect pensions, receive dividends, pay outgoings (maintenance fees to hospitals or nursing homes, etc.) or purchase items for the ward's benefit.

The committee must lodge all monies received on behalf of the ward to a bank account designated as a committee account. The committee must file annual accounts for all sums received and disbursed. Annual income tax returns must also be submitted by the committee on behalf of the ward to the inspector of taxes. The committee will also have to take out an insurance bond as a protection of the ward's assets if the committee is in receipt of the ward's income.

Can a Ward Resume the Management of His/Her Own Affairs?

The answer is yes. Any application by a ward to be discharged from wardship must be made to the Registrar of the wards of court in writing by the ward or his solicitor. Such an application must provide medical evidence that the ward is now of sound mind and capable of managing his/her affairs.

The President of the High Court will consider this application on the basis of the medical evidence available to him.

What Happens to a Ward's Property when He/She Dies?

On the death of a ward, after the discharge of his/her debts and when a grant of probate or administration has issued, his/her estate is distributed amongst the people entitled, either in accordance with the terms of the ward's will or among his/her closest next of kin if there is no will.

It is necessary for a formal application to be made to conclude the wardship proceedings. Pending this, the funds are made available by the court to pay expenses, such as funeral expenses, nursing home charges and probate tax.

The officials in the wards of court office are extremely helpful in discussing practical problems that may arise with the ward of court. Wardship proceedings can be stressful for both the next of kin and their solicitor, and the wards of court office is particularly sensitive in handling delicate matters which arise from time to time.

TRUSTS

The use of trusts or settlement is one way of handling the financial affairs of another person, whether or not that person is incapable of dealing with his/her own affairs.

A trust exists where a person (the trustee) holds the property of another (the settlor) for the benefit of named people (the beneficiaries). The beneficiaries may be the settlor or other people. The trust may be created by a will or a legal document which takes effect during the settlor's lifetime, normally a declaration of trust called a "settlement" .

Trustees hold and manage the trust property and may be given discretion to distribute capital and income for a particular beneficiary or beneficiaries. The trustees are normally given powers to purchase assets and services for the use or benefit of the beneficiaries rather than handing over the money. There is no supervision of the conduct of the trustees, as long as they carry out the terms of the trust. If they are given a wide discretion, there can be no complaint if they do not exercise this in the manner that others might wish.

A simple form of trust may arise where money is held in the name of another person who acknowledges, whether formally or informally, the true ownership. This is only suitable for relatively small sums of money because tax and other complications can arise.

It is possible for an elderly person prior to, but in the expectation of, becoming mentally incapable to transfer all money and assets to trustees under the terms of a settlement, whereby the trustees continue to manage the trust fund for the support and benefit of that person.

TYPES OF TRUSTS

Express Trust

This is the most common form of trust. In an express trust the subject matter and the object of the trust are clearly expressed. An express trust will usually provide instructions as to exactly how distributions are to be made for a named beneficiary or beneficiaries.

Discretionary Trust

A discretionary trust gives discretion to the trustees regarding how much of the trust fund is distributed, i.e. whether there is a capital sum distributed or whether all or part of the income from the capital is distributed. The discretionary trust will usually provide the trustees with the discretion to make distributions to one or more beneficiaries named in the trust at such times and in such amounts as the trustees think fit.

For a person who wishes to make arrangements for a child or adult with a disability, a discretionary trust may be useful. If the child or beneficiary is receiving a means-tested payment, distributions from the discretionary trust can be tailored to ensure that any distributions from the trust are not means-tested.

Most trusts, in practice, are created by a will and are normally created for the benefit of young beneficiaries or for a beneficiary or beneficiaries who have a disability, a drinking or gambling problem or who may be irresponsible when it comes to money.

There are tax implications when trusts are created and when distributions are made from a trust to a beneficiary. Professional advice must be obtained in relation to the creation of trusts as well as any distributions from trustees to a beneficiary under the trust.

The Advantages of a Trust

The advantages of a trust are that trustees are self-perpetuating and may be given wide discretionary powers. There is no need to pay fees or produce annual accounts to the court and the financial authority of trustees cannot be questioned. Trusts may also be used to avoid means testing for welfare benefits and contributions to the cost of local authority services.

The Disadvantages of a Trust

The disadvantages are that trusts cannot be set up by someone who is already incapacitated and the trustees only have authority over money placed in a trust. There is inadequate supervision

with little control over administration costs or the charges of professional trustees, and trustees have no obligation to consult or visit an incapacitated beneficiary and have no one to turn to for approval of their actions. Problems may arise over un spent income and tax repayments in the hands of the beneficiary. If the trustees are given discretion (and this may be desirable from many points of view), the exercise of this discretion cannot be questioned by or on behalf of the beneficiary.

COVENANTS

In certain circumstances, an individual may claim relief against an assessment to income tax if that person is making payments by way of a covenant to another person. In order to qualify for relief, there must be a legal obligation to covenant a sum of money for a period which is in excess of six years. The covenantor must not retain any control over the money covenanted. The advantage of the covenant is that those who pay tax at the maximum rate may use it to reduce their liability to tax while increasing the disposable income of another person. If that person pays tax at a lower rate a tax saving is realised. The laws relating to the making of covenants have been restricted in recent years. The only circumstances in which an older person can receive sums which are deductible from the covenantor's income are:

- if that individual is permanently incapacitated (mentally or physically)
- if that individual is over 65 years of age
- through payments which are part of a maintenance agreement between separated spouses.

The covenantor can claim relief in respect of covenanted amounts which do not exceed 5 per cent of the covenantor's income. An exception to this 5 per cent ceiling arises with regard to persons who are permanently incapacitated due to physical or mental incapacity (this exception only applies with reference to deeds of covenant executed after 8 February 1995). The Revenue Commissioners also have the discretion to waive this 5 per cent limit in the case of hardship.

The recipient of a covenanted amount may be liable to pay income tax on the sum covenanted. It is important to note that sums covenanted to persons in receipt of a Non-Contributory Pension or means-tested allowance may affect their entitlement to the allowance in question. Separate rules apply in relation to money covenanted to minors.

If an older relation requires additional income to live on, or to pay for a nursing home, a Deed of Covenant may be the most tax efficient method of achieving this result.

Medical Treatment

CONSENT TO TREATMENT

A doctor cannot compel his patient to accept treatment however convinced he may be that it is in the patient's best interests. No medical treatment should be given without the consent of the patient. Nevertheless, the question has to be asked: in what circumstances is the patient competent to give that consent and to what extent should the views or wishes of relatives and carers be taken into account?

There are situations where the patient is not competent enough to consent to treatment that could be given and which the doctor considers is needed or desirable. That treatment may be needed in an emergency or in order to preserve the life of the patient or it may be the kind of treatment that is a matter of personal choice. In what circumstances can the doctor proceed with the treatment without the patient's knowledge or approval?

No medical treatment should be given without the consent of the patient. However, consent may be implied, as when the patient presents himself for treatment, though even then it may be only a diagnosis that is requested. The Irish law relating to consent to treatment by patients was set out in the following paragraphs of the judgment of Mrs Justice Denham of 27 July 1995 in the case referred to as In re a Ward of Court:

> 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, e.g. 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 a 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. It is not necessarily a decision based on medical consideration. Thus, medical treatment may be refused for other than medical reasons. Such reasons may not be viewed as good medical reasons, or reasons most citizens would regard as rational, but a person of full age and capacity may make decisions for their own reasons.

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. In this instance, where the patient is a ward of court, the court makes a decision.

Capacity to Consent to Treatment

Determining whether a person is competent for the purposes of consenting to medical treatment is not a straightforward matter. It may be one of degree, depending on the reasons why the procedure is deemed necessary and the extent to which the patient can understand that necessity, taking into account all the essential issues. The complexity of the proposed treatment and the degree of understanding required will be different in each case. Capacity should, therefore, be assessed on each occasion and be continually reassessed with each particular treatment and at each stage of treatment.

Incompetent Patients

Often, when a patient is unconscious and incapable of consenting, hospital staff will consult the relatives of the patient. In strict legal terms, however, the consent of the patient's relatives to a particular procedure has no validity and the real legal issue for the medical staff is whether or not there is an immediate necessity for the procedure in question.

The extent to which a doctor is under a duty to comply with the previously expressed wishes of a patient raises complex issues, but there is no clear answer in Irish law to this dilemma. If the patient has expressly envisaged at some prior time a particular medical eventuality and leaves instructions that a particular treatment is not to be given, a doctor may be legally obliged to refrain from treatment despite the consequences of that course of action.

Medical Treatment of Seriously III Persons

The existing Irish law was summarised in the High Court judgment of Mr Justice Lynch of 5 May 1995 in the Ward of Court case. The following principles enunciated by Judge Lynch were not specifically approved in the Supreme Court judgments but neither were they stated to be incorrect. In his judgment, Judge Lynch set out the following principles:

As I understand the medical evidence, the present practice by the medical and nursing professions in relation to patients is as follows and is a lawful and proper practice:

1. A competent terminally ill patient is lawfully entitled to require that life-support systems be either withdrawn or not provided as the case may be.

2. In the case of an incompetent terminally ill patient, the carers, in agreement with appropriate surrogates, be they family or friends, bona fide acting in what they believe to be the best interests of the patient, may lawfully withdraw or refrain from providing life-support systems.

3. In the case of incompetent terminally ill patients, where the carers believe such assistance should be withdrawn or not provided but the surrogates disagree, a second medical opinion should be obtained from a suitably qualified independent medical practitioner. Ifhis opinion agrees with the carers, they may lawfully act accordingly, preferably having got the agreement of the surrogates with the aid of such second opinion; if his opinion agrees with the surrogates, the appropriate life-support systems should be maintained or provided, as the case may be.

4. In the case of an incompetent patient, whether terminally ill or not, where the surrogates believe that life-support systems should either be withdrawn or not provided and the carers disagree, such systems should be maintained or provided unless an order of the High Court to the contrary is obtained by the surrogates.

WARD OF COURT CASE

The only court decision in Ireland in this area concerned a ward of court who was not competent to make any decisions. In a landmark decision (in re a Ward of Court) on 27 July 1995 the full Supreme Court (by a four to one majority) upheld the earlier High Court judgement (of Judge

Lynch) consenting (on the application ofthe ward's family) to the withdrawal and termination of abnormal artificial means of nourishment from a ward of court in a near permanent vegetative state (PVS), thus ceasing to prolong her life.

The ward in this case was a woman in her mid-forties who some 23 years previously suffered very serious brain damage in the course of what should have been a routine gynaecological operation. Since then, she had been near PVS in an Irish hospital where she had been kept alive by means of a life-support feeding system.

In its deliberations, the Supreme Court considered whether the personal rights protected by the Constitution would include the right to refuse medical care or treatment and whether the right to life included the right to die a natural death (as opposed to having life terminated or death accelerated). The court decided that the ward's personal rights were not lessened or diminished by her incapacity, and that the responsibility for their exercise and vindication rested with the court (rather than the next of kin) to make the decision, with the first and paramount consideration being the well-being, welfare and interests of the ward. The Supreme Court majority accepted that the true cause of death in the event of withdrawal of nourishment would be the original injuries sustained.

The Supreme Court decision, even though grounded on the Irish Constitution, gave consideration to precedents from other common law jurisdictions where the issue of withdrawal of a life-support feeding system had been addressed. It appears that such decisions in those other jurisdictions have not resulted in a flood of court applications.

The legal kernel of the decision may be summarised as follows:

1. That in certain circumstances the (ward of court) patient who is fully PVS or near PVS may have artificial food and hydration withdrawn by order of court where there is no prospect of improvement, so that the patient can be allowed to die naturally, provided that the court decides that it is in the patient's best interests for this to happen.

2. That no such order can be made which might affect the old, the infirm or the mentally handicapped, although the dividing line between these categories of patient and a near PVS patient did not arise for a decision in the case.

3. While Judge Lynch (in the High Court) and Judge Denham (in her individual Supreme Court judgment) considered possible guidelines which could be followed by the courts in future cases, the overall majority decision did not lay down any such guidelines other than that the future decisions would have to be made with regard to the individual facts of each case.

During the course of its judgment, the Supreme Court discussed whether a "substituted judgment" test could be used. This means that the court puts itself in the place of the incompetent patient and decides what he/she would have wished in the particular circumstances. In the Ward of Court case, the Supreme Court did not follow this approach but it appears that this was largely because of the fact that there was insufficient evidence as to what the ward's views would have been on the matter. However, given the Supreme Court's emphasis on the importance of personal autonomy, it may be that where an incompetent person's views are clearly expressed these would

be given considerable weight by the court in future cases. This highlights the potential importance of "advance directives", which are considered below.

ADVANCE DIRECTIVES/LIVING WILLS

It is possible for persons to set out their views regarding future medical care by way of what are known as advance directives (also known as living wills). There is no legislation in relation to advance directives in Ireland and the legal position is quite unclear. An advance directive is basically a document whereby a person sets out the basis on which health care decisions should be made if he/she becomes mentally incapable or unable to participate in those decisions. For instance, the document might include the request that certain treatment should or should not be given in certain situations if the person is not competent to consent to or refuse such treatment at the time.

Obviously, an advance directive can only relate to lawful treatment (such as the withdrawal of medical treatment) and cannot relate to unlawful treatment, such as giving a lethal injection with no therapeutic effect and with the intention of terminating life.

Certain comments by members of the Supreme Court in the Ward of Court case suggested that the views expressed by a person in relation to future medical treatment (which could be set out in an advance directive) would be taken into account by the court in coming to decisions in relation to the termination of treatment. Nevertheless, the context to which these views relate and the extent to which they would be binding on medical professionals remains unclear.

In addition, there are of course, issues about how specific advance directives can be given, the considerable variation and the types of medical intervention which are now possible. In view of the uncertainties involved, a person wishing to draw up an advance directive (or living will) should seek both details and legal advice from his/her solicitor and discuss it with his/her doctor.

SAMPLE LIVING WILL

This Living Will

is made on the _____day of _____20
by me
of _____
born on _____

I wish these instructions to be acted upon if two registered medical practitioners are of the opinion that I am no longer capable of making and communicating a treatment decision and that I am:

- unconscious and it is unlikely that I shall ever regain consciousness
- suffering from an incurable or irreversible condition that will result in my death within a relatively short time
- so severely disabled, physically or mentally, that I shall be totally dependent on others for the rest of my life.

I refuse any medical or surgical treatment if:

- its burdens and risks outweigh its potential benefits
- it involves any research or experimentation which is likely to be oflittle or no therapeutic value to me

- it will needlessly prolong my life or postpone the actual moment of my death.
  I consent to being fed orally and to any treatment that may:

- safeguard my dignity

- make me more comfortable

- relieve pain and suffering, even though such treatment might unintentionally precipitate my death.

Signed by me _____

in the presence of _____

Name _____

Address _____

Occupation

MENTAL CAPACTIY BILL 2008

Introduction:

The Minister for Justice, Equality and Law Reform, Mr. Dermot Ahem T.D., announced on September 15th 2008 that the Government has approved his proposals for a Mental Capacity Bill, detailed provisions of the Bill will now be drafted by the Office of the Attorney General.

The main purpose of the Bill is to reform the existing Wards of Court system in so far as it applies to adults, and effectively replace it with a modern statutory framework governing decision making on behalf of persons who lack capacity. The Bill will replace the Lunacy Regulation (Ireland) Act 1871, currently the chief legislation in this area.

Announcing the publication, Minister Ahern said: "The Government recognises that the current system is outdated and is, furthermore, incapable of coping with the existing and projected demographic growth of persons who lack capacity. This legislation will provide greater protection for a range of adult persons; from those with intellectual disabilities, persons suffering from dementia or mental illness and persons who have acqurred brain injuries through trauma or accident."

A fundamental change from existing law and central to reform in the proposed Bill is in relation to what constitutes lack of capacity. The focus will be on the particular time when a decision has to be made and on the particular matter to which a decision relates, not on any general review of capacity to make decisions generally. This is a significant change from the current system, where a finding of incapacity applies to every decision a person may make and every legal transaction they may wish to enter into. In line with international best practice, as well as a recommendation of the Law Reform Commission, capacity will be understood as the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made.

Continuing, the Minister said: "An important aspect of the Scheme of the Bill is that it clarifies the law for carers who take on responsibility for persons who lack capacity. It provides statutory protection against liability for certain acts done in connection with the care or treatment of another person and allows for normal everyday decisions to be made on their behalf without reference to the court. However, certain decisions, such as the question of the withdrawal of artificial life-saving treatment, will be reserved to the High Court.

Provided the carer does not act negligently or criminally then no issue can arise in relation to the decisions they make on behalf of the person who lacks capacity."

In line with the "best interests" guiding principle in the proposed Bill, the first port of call for an incapacitated person will be assisted decision making. The person must, so far as is reasonably practicable, be permitted and encouraged to participate, or to improve his or her ability to participate, as fully as possible in any act done for him or her and any decision affecting him or her. The next step would be substitute decision making, whether by the court or by a personal guardian appointed by the court. It is anticipated that where court intervention is required the court would make once-off decisions and where a number of on-going decisions are required that a guardian will be appointed by the court for that purpose.

The High Court and the Circuit Court will have concurrent jurisdiction for making decisions on capacity and appointing personal guardians under the Bill. It is anticipated that a substantial proportion of applications will be heard in the Circuit Court, ensuring greater accessibility and lower costs. The Scheme aims to keep the costs of applications to the court as low as possible. The Minister will prescribe the fees payable while the rules of court on procedural matters must provide for the least expensive procedures consistent with justice.

The Scheme amends the Powers of Attorney Act 1996 to bring the provisions on enduring powers into line with the provisions of the Scheme.

Another key feature of the Bill is the establishment of an independent Office of Public Guardian, whose primary function will be to supervise persons appointed by the courts to perform guardianship or decision-making functions on behalf of incapacitated persons. In situations where there is no person willing or able to act as personal guardian for an incapacitated person, the Office will also act as a guardian of last resort.

The Bill will give effect to two important international Conventions as follows:

- The UN Convention on the Rights of Persons with Disabilities;

- The Hague Convention on the International Protection of Adults.

The Minister paid tribute to the work of the Law Reform Commission on its Consultative Paper and Final Report on Vulnerable Adults and the Law. His proposals are largely based on the Commission's recommendations. The Minister announced that he intends to jointly host a seminar on his proposals with the National Disability Authority in the coming months. He looks forward to a period of consultation on his proposals in the run up to publication of the Bill in 2009.

The scheme of the Bill is on the Department’s website: www.justice.ie

Main Legislative Impacts:

• The Bill will repeal and replace the Lunacy Regulation (Ireland) Act 1871.

• The Bill re-enacts the provisions of the Powers of Attorney Act 1996 and updates them in line with best practice.

The Bill represents an important part of the process towards ratification of the UN Convention on the Rights of Persons with Disabilities, which was signed by Ireland on 30 March 2007.

The Bill gives effect to the Hague Convention on the International Protection of Adults.

Guiding Principles of the Bill:

The Bill contains a number of guiding principles to assist both the Court and persons making a decision on behalf of an adult who lacks capacity. These principles follow both the Law Reform Commission's recommendations as set out in its 2006 Report on Vulnerable People and the Law and article 12 of the UN Convention on the Rights of Persons with Disabilities.

The statutory guiding principles will require that any act done or decision made on behalf of a person must be in that person's "best interests". They require that the possibility of regaining capacity be considered; that a person's participation in any act done or decision made affecting that person be encouraged as fully as possible; and that the person's past and present wishes, beliefs and values are considered as far as is reasonably ascertainable.

The Presumption of Capacity:

The Bill establishes that there is a presumption of capacity; that no intervention in the person's decision-making will take place unless it is necessary having regard to the individual needs and circumstances of the person. A person shall not be treated as unable to make a decision unless all practicable steps to help them make a decision have been taken without success. The Bill further provides that any act done or decision made under the Bill must be done or made in a way which is the least restrictive of a person's rights and freedoms.

Supported Decision Making:

The Bill provides that a person is entitled to supported or assisted decision making. The person must, so far as is reasonably practicable, be permitted and encouraged to participate, or to improve his or her ability to participate, as fully as possible in any act done for him or her and any decision affecting him or her.

Substitute Decision Making:

Where it is not possible to support a person in exercising capacity or making a decision, the Bill provides that the Court or a personal guardian appointed by the Court will act as the substitute decision maker on their behalf. It is anticipated that where substitute decision making is necessary, the Court would make once-off decisions and where a number of on-going decisions are required that a personal guardian will be appointed by the Court for that purpose.

Courts Jurisdiction:

The High Court and the Circuit Court will have concurrent jurisdiction to hear applications under the Bill. It is anticipated that a substantial proportion of applications will be heard in the Circuit Court, ensuring greater accessibility and lower legal costs. Decisions on certain matters will be restricted to the High Court, such as a decision concerning non-therapeutic sterilization, withdrawal of artificial life-sustaining treatment or organ donation.

Personal Guardians:

The Bill will create a new legal role of "personal guardian". Where a person has been found to lack capacity a personal guardian can be appointed by the High Court or the Circuit Court to make decisions concerning his or her personal welfare or property and affairs. The High Court or Circuit Court will always have the option of not appointing a personal guardian and making the decision or decisions itself where the matter is urgent and it is expedient for it to do so.

The powers conferred on a personal guardian will be as limited in scope and duration as is reasonably practicable in the circumstances. A personal guardian may have their appointment

revoked if they act in a manner which contravenes the authority conferred on him or her or if it is not in the person's best interests.

Powers of Personal Guardians:

Personal Welfare:

Personal Guardians will be given the same powers as donees under an Enduring Power of Attorney. However, their powers will also include: "Giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for the person who lacks capacity".

Persons who can be appointed Personal Guardians:

A personal guardian appointed by the Court can be an individual who has reached 18 years of age and is otherwise deemed suitable by the Court to be so appointed. A personal guardian is to be treated as acting as the agent of the person in respect of whom he or she has been appointed personal guardian in relation to anything done or decided by him or her within the scope of his or her appointment in accordance with this act. Where no suitable person is willing or able to act as personal guaidian the Court may request the public guardian to nominate a personal guardian and if the public guardian is not in a position to nominate a suitable person who is willing and able to act as personal guardian the Court may, as a last resort, appoint the public guardian to act as personal guardian.

A personal guardian may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to the person in respect of whom he or she has been appointed guardian.

Decisions on Capacity to be Subiect to Review at Regular Intervals:

Where the Court makes a declaration that a person lacks capacity to make a decision specified in the declaration or to make decisions on such matters as are described in the declaration, an application may be made, with the permission of the Court, at any time by an appropriate person for a review of that decision. In the event, the Court shall review the decision at intervals of such length, not being more than 36 months, as the Court considers appropriate.

Wills:

The law concerning the capacity of a person to make a Will which exists at the time this Act comes into force shall continue to apply and shall not be affected by this Act.

Where a person who has made a valid Will loses testamentary capacity, the High Court may acting on its own initiative or on application to it by the Office of the Public Guardian, alter the Will where exceptional circumstances have arisen since the loss of testamentary capacity and the interest of justice demands it and a Will so altered shall have the same force and effect as if the alteration had been made by the Testator in the manner required by the Succession Act 1965.

Matters confined to the Jurisdiction of the High Court:

Notwithstanding any power or function given to a Personal Guardian or a Donee under an Enduring Power of Attorney, the High Court shall have exclusive jurisdiction to determine any issues concerning a person who lacks decision-making capacity in connection with the following:

(a) Non-therapeutic sterilization.

(b) Withdrawal of artificial life sustaining treatment; or

(c) Organ donation.

Office of the Public Guardian:

The functions of the Public Guardian include:

(a) Establishing and maintaining a register of Enduring Powers of Attorney;

(b) Establishing and maintaining a register of Court Orders appointing Personal Guardians;

(c) Supervising donees appointed under an Enduring Power of Attorney;

(d) Supervising Personal Guardians;

(e) Receiving reports from Donees of Enduring Powers of Attorney and Personal Guardians appointed by the Court;

(f) Dealing with representations (including complaints) about the way in which a donee of an Enduring Power of Attorney or a Personal Guardian appointed by a Court is exercising his or her powers;

(g) To nominate for appointment, when requested to do so by a Court, a Personal Guardian of a person's circumstances where there is no other person willing or able to act as Personal Guardian.

The Scope of authority of Attorney under Enduring Power of Attorney:

Personal Welfare Decisions:

A personal welfare decision includes a decision on healthcare but:

(a) Does not extend to making decisions in circumstances other than those where the Donor lacks, or the Attorney reasonably believes that the Donor lacks, capacity;

(b) Extends to giving or refusing consent to the carrying out or continuation of treatment providing healthcare for the Donor;

(c) Does not authorize the refusing of consent to the carrying out of life sustaining treatment.

Application for Registration of an Enduring Power of Attorney:

If the Attorney under an Enduring Power has reason to believe that the Donor lacks, or shortly will lack, capacity, the Attorney shall as soon as practicable, make an application to the Office of Public Guardian for the registration of the instrument creating the power.

Office of the Public Guardian:

The Public Guardian will be independent in the performance of his or her functions and shall be appointed by the Government on the nomination of the Minister, he or she will be appointed for a six year term and can be re-appointed for a second or subsequent term.

In order to ensure that the new Office of Public Guardian is to fulfill its supervisory role on behalf of this particularly vulnerable group in society, the Bill creates the roles of general "general visitor" and "special visitor" who can be directed by the Office to visit the court-appointed persons or the person lacking capacity. The special visitor (who will be a registered medical practitioner) or the general visitor will also have powers to access records relating to the person who lacks capacity.

United Nations Convention on the Rights of Persons with Disabilities:

The Bill will enable the State to meet its obligations under the United Nations Convention on the Rights of Persons with Disabilities, signed by Ireland on the 30th March 2007, insofar as it relates to legal capacity issues. The Government had previously decided in March 2007 that the Convention be ratified by Ireland as quickly as possible, taking into account the need to ensure that all necessary requirements under the Convention are being met. To date, 130 states have signed up to the Convention and 34 have ratified it. The Bill will further ensure that Ireland is complying with its responsibilities under the European Convention on Human Rights.

Hague Convention on the International Protection of Adults:

The Bill will give effect to the Hague Convention on the International Protection of Adults. The Convention protects adults who lack capacity in international situations. It provides that the laws and jurisdiction of the state of "habitual residence" will have precedence over the laws and jurisdiction of the state of nationality or former habitual residence. The Convention will ensure the validity of acts in other jurisdictions by a person or court on behalf of a person who lacks capacity. At present the Convention has been ratified by two States: the United Kingdom and Germany. France, the Netherlands and Sweden have signed the Convention, a number of other states are expected to sign or ratify the Convention to coincide with the celebration of the 115th Anniversary of the Hague Conference on Private International Law on 18th September 2008.

The Nursing Home Support Scheme

Described by the Minister for Health as 'A Fair Deal' for all, the NHSS poses a number of legal issues for doctors, according to **John Costello** of Beauchamps Solicitors

The Nursing Home Support Scheme (NHSS) set up under the Nursing Homes Support Scheme Act 2009 (the Act) came into force on 27 October 2009. It sets up a new voluntary scheme of financial support for people who require long-term nursing home care and is often referred to as the 'Fair Deal'.

The scheme is the same for public and private care and anyone who is assessed as in need of long-term nursing home care who applies will now make a contribution to their care costs based on their means.

It does not cover short-term provision such as day care. Individuals already in receipt of subvention under the previous nursing home subvention scheme can retain their existing arrangements or opt to transfer to the new scheme.

The scheme involves a co-payment arrangement between the person and the State. Essentially, the person contributes up to 80 per cent of assessable income and up to 5 per cent of the value of any assets they own towards the cost of their care. The State will then pay the balance.

A person will never pay more than the cost of their care regardless of their means. Prior to nursing home selection, the scheme involves three main steps: a care needs assessment carried out by a healthcare professional to consider whether long-term nursing home care is appropriate; a financial assessment; and an optional step of an application for a nursing home loan (an interest free loan advanced by the Health Service Executive (HSE) to a person to help them meet the cost of contributions from assets such as their home so that a person does not have to sell it during their lifetime.)

However, the principal residence will only be included in the Financial Assessment for the first 3 years of the time in care i.e. the residence cannot be charged with more than 15% of the cost of care, regardless of the time in care, if a person avails of the nursing home loan.

Of the 3,000 applications received under the Act up to 20 November 2009 approximately 10 per cent of the applicants applied for the nursing home loan. More detail on the operation of the scheme was covered in the 11 July 2009 legal page of this journal.

Charging order

In order to benefit from the nursing home loan a person must consent to a charging order being placed against the asset in question. If a person is found to lack capacity they will not be able to consent to the creation of the charging order. They will therefore require a care representative appointed by the Circuit Court to act on their behalf.

In assessing whether a person has capacity, the starting point is to presume that the person has capacity until the contrary is established. It is important to note that assessment of capacity must be undertaken by two medical practitioners.

Assessing capacity

In order to assess whether a person has the capacity, the practitioner should try to establish the following:

(a) Does the person have a general understanding of what decision they need to make and why they need to make it?
(b) Does the person have a general understanding of the likely consequences of making, or not making, this decision?
(c) Is the person able to understand the information relevant to the decision?
(d) Is the person able to retain the information relevant to the decision, and use it and weigh it as part of the process of making a decision?
(e) Is the person able to communicate their decision by any means?

A person is considered not to have the capacity to make a decision if they are unable to:

(a) understand the information relevant to the decision; or
(b) Retain that information; or
(c) Use the information as part of the process of making the decision; or
(d) Communicate their decision by any means (including by means of a third party).

The basis for a practitioner's decision must also be set out.

Guidance

The HSE has guidance for practitioners and capacity issues on its website and the Nursing Home Support Scheme (Assessment of Capacity Report) Regulations 2009 prescribes the format of mental capacity reports for submission by the Circuit Court for practitioners and are available at http://www.dohc.ie/legislation/statutory_instruments/pdf/si20090409.pdf?direct=1.

● **John Costello,** Consultant, Beauchamps Solicitors.
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Conclusion

I believe the quality of a society is measured by how it treats the disabled, the vulnerable and the incapacitated in the community at large.

In 2003 Ireland hosted the World Special Olympics, when 7000 athletes from 150 countries took part. Towns across Ireland, North and South, became involved through a hosting programme for athletes. Tens of thousands of volunteers assisted with all the organisation.

This event showed the World that the Irish people have a unique spirit of generosity when called upon in times of need. Hopefully, this spirit will never be lost as we face our present enormous challenges and difficulties.