

## **PAUL BRADY & CO. SOLICITORS**

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### **Assisted Decision Making (Capacity) Act 2015**

The Assisted Decision Making (Capacity) Act 2015 is an extremely important piece of legislation and will bring about significant improvements in the lives of adults with intellectual disabilities.

The legislation provides the statutory framework for vulnerable individuals to make legally binding agreements, to assist them in making decisions about their welfare, property and affairs.

The key features of the legislation include:

- i. abolition of Ward of Court system and the repeal of the Lunacy Regulation (Ireland) Act 1871;
- ii. changing definition of capacity and the approach taken in identifying capacity;
- iii. establishment of the Decision Support Service (DSD) as part of the Mental Health Commission;
- iv. the provision of a multiple support structures for individuals who need assistance with decision-making;
- v. the Introduction of Advanced Healthcare Directives;
- vi. distinguishing between enduring powers of attorney made pursuant to the Powers of Attorney Act 1996 ("1996 EPAs") and enduring powers of attorney made pursuant to the 2015 Act ("2015 EPAs");
- vii. provision to allow for the adoption of the Hague Convention on the International Protection of Adults in Ireland which will assist with cross-border issues relating to capacity and decision-making.

We will provide some brief information on some of these points below but it is important to note that not all provisions of the Act have been commenced yet. It is anticipated it will be fully commenced by 2020.

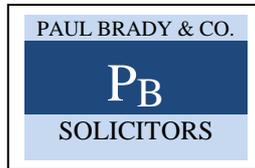
#### ***Capacity***

Part 1 of the Act, regarding capacity for decision-making has been commenced.

Capacity is defined as the ability to understand, at the time the decision is being made, the nature and consequences of the decision in the context of the available choices.

While capacity was previously based on a 'status' test, it is not based on a 'functional' test, which allows for changes to a person's capacity over time. A person who lacks capacity at a given time may regain that capacity and a person who lacks capacity to make a certain decision may have capacity to make another decision.

A person lacks the capacity to make a decision if they are unable:



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- i. To understand the information relevant to the decision;
- ii. To retain that information long enough to make a voluntary choice;
- iii. To use or weigh that information as part of the process of making the decision; or
- iv. To communicate their decision.

Decisions covered include financial & medical but does not apply to capacity to decide to marry or divorce, sexual relations, making a will or guardianship, which are all dealt with under different acts.

### ***Decision Support Service (DSD)***

Part 9 of the Act, regarding the establishment of the Decision Support Service (DSD) has also been commenced. The DSD will form part of the Mental Health Commission and will amongst other things:

- i. Promote awareness of the Act and the exercise of capacity by people who require or may in the near future require assistance;
- ii. Provide information to people in relation to their options under the Act; and
- iii. Supervise Decision-Making Assistants, Co-Decision Makers, Decision-Making Representatives, Designated Healthcare Representatives and Solicitors in the performance of their functions;

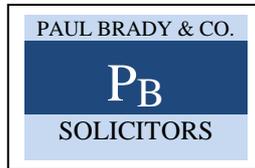
Parts 2-8, including the 'Assisted Decision-Making', 'Co-Decision-Making' and 'Representative Decision-Making' structures and the provisions regarding Enduring Power of Attorney are yet to be commenced.

### ***Assisted Decision-Making***

This is where a person who's capacity is in question or will be in question in the near future (the "Relevant Person"), chooses another person to assist them in making decisions. This involves drawing up a decision-making agreement to set out the decisions involved. The decision-making assistant will assist the Relevant Person making the decision by getting the information needed to make the decision, explaining it and getting the person's preference in relation to the decision. Ultimately the responsibility for making the decision will rest with the Relevant Person themselves.

### ***Co-Decision-Making***

This involves a Relevant Person choosing another person (usually a relative or friend) to jointly make certain decision with them. The co-decision-maker will get the information needed to make the decision, explain and advise on the decision and make decisions together with the Relevant Person appointing them. For example, an agreement or deed would only be valid once both the Relevant Person and their co-decision maker have executed it.



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#### ***Representative Decision-Making***

If a Relevant Person wishes to be a representative, they must apply to the circuit court for decision-making powers. A representative will only be appointed if an assistant or co-decision maker is not suitable or available.

#### ***Power of Attorney***

A power of attorney is where a Relevant Person gives another person(s) power to make decisions relating to personal welfare or property affairs, or both. An enduring power of attorney is designed to take effect at a future time when the person lacks capacity.

#### ***Wards of Court***

Although the Lunacy Act is repealed, all orders made under it remain in place for the time being. This means that a person who is a Ward of Court will remain a Ward of Court but this must be reviewed within 3 years of the Act commencing. This part of the Act is yet to commence. After this review former Wards must either resume their own affairs or move to one of the decision-making support structures mentioned above.

A Ward can apply for a review as can a relative or a person with an interest in the Ward's welfare. There will still be a Wards of Court system for minors (those under 18) but there will be no new adult Wards of Court once the Act commences.

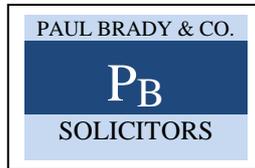
#### ***Enduring Power of Attorney***

The Act defines an Enduring Power of Attorney as an arrangement whereby a Donor (being the person who may lack capacity in the future) gives a general power to an Attorney (the person providing assistance) to act on their behalf. This may be in respect of all or some of the person's property and affairs, or to do specified things on the person's behalf.

Under the Act, an Enduring Power of Attorney will not come into force until

- i. the person lacks capacity in relation to one or more of the decisions set out in their Enduring Power of Attorney; **AND**
- ii. the Enduring Power of Attorney is registered with the Director of the DSD.

Following commencement of this part of the Act (not yet commenced), no new Enduring Power of Attorneys will be created under the Powers of Attorney Act 1996, however all existing Powers of Attorney under the 1996, at the date of commencement of this part of the 2015 Act, will continue to be valid, binding and have legal effect.



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#### ***Advanced Healthcare Directives***

An Advanced Healthcare Directive (AHD) is an advance expression made by a person with capacity which contains their will and preferences concerning medical treatment decisions which may arise if they later on lack capacity or are unable to express their preference. The AHD may be a stand-alone directive or the person may appoint a Designated Healthcare Representative to exercise such powers as conferred by the person under the Directive.

An AHD can contain a refusal of treatment, provided certain criteria are met, a request for a specific type of treatment in a specific circumstance, although not legally binding. The AHD will not be applicable where:

- i. The person still has capacity;
- ii. The treatment in question is different from that specified in the AHD
- iii. The circumstances in question are different from those specified in the AHD.

As mentioned, the Act has not as of yet been commenced in full. Should you require any further information on the Act or related matters, please contact us per the details below, to arrange a consultation.

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