

Country report **Ireland**

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In the new series National Reports at the Family & Law forum (<https://www.familyandlaw.eu/>) a first series of national reports is published.

FL-EUR (<https://fl-eur.eu/>), Family Law in Europe: An Academic Network, was established at a Founding Meeting in Amsterdam on 1-2 February 2019. FL-EUR currently unites over 35 prominent experts, both academics and public officers, in the field of family & law from 32 European jurisdictions. The purpose of FL-EUR is close academic cooperation amongst the experts, and between the experts and other stakeholders in the field of family and law, aimed at:

1. accumulation and dissemination of knowledge of both family law in the books and in action;
2. promotion of comparative and multidisciplinary research and education in the field of family and law;
3. learning from one another's experiences; and finally,
4. providing up-to-date comparative data for European, supranational and national bodies.

The FL-EUR members selected 'Empowerment and Protection of Vulnerable Adults' as its first working field, since this is a highly topical field of law. Ageing societies in Europe are confronted with an many legal issues arising out of the empowerment and protection of vulnerable adults. Based on initial quick scans of all jurisdictions, FL-EUR's coordinating group has drafted a questionnaire in close cooperation with the FL-EUR's members. The coordinating group consists of Prof. Masha Antokolskaia, Prof. Nina Dethloff, Prof. Jane Mair, Prof. Maria Donata Panforti, Prof. Wendy Schrama, Dr. Katrine Kjørheim Fredwall, Prof. Frederik Swennen, Prof. Paula Távora Vítor, Dr. Velina Todorova and Prof. Michelle Cottier. They are supported by the Secretary Rieneke Stelma-Roorda.

Country reports for all jurisdictions have been produced by country reporters. The country reports have been reviewed by at least one Member of the Coordinating Group. Language and contents of the countries reports fall under the responsibility of the country reporters. The reports are representing the law as it stands in 2022.

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

IRELAND

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SECTION 1 - GENERAL

- 1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and ex lege measures if applicable. Also address briefly any interaction between these measures.**

This report will discuss both state-ordered (e.g. wardship; the Nursing Homes Support Scheme; certain Agency Arrangements) and voluntary measures (e.g. Enduring Powers of Attorney; Advance Healthcare Directives; certain Agency Arrangements; and the Nursing Homes Support Scheme) which currently exist in this jurisdiction, aimed at facilitating those adults that do not enjoy the capacity to make decisions pertaining to their own welfare, property, finances and medical treatment. The report will also explore the impact of the Mental Health Act 2001 on decision-making.

This questionnaire was completed at a time of legal flux in the State. As discussed throughout this report, several impactful reforms are reportedly imminent, contingent on the full commencement of the [Assisted Decision-Making \(Capacity\) Act 2015](#) (“**the 2015 Act**”). The 2015 Act was enacted to meet Ireland’s obligations under the European Convention of Human Rights (the “**ECHR**”), the Hague Convention on the International Protection of Adults (the “**Hague Convention**”), and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (the “**CRPD**”).

The 2015 Act provides for the much-needed modernisation of the law as it pertains to adults who require, or may require in the future, assistance in decision-making. The Act contemplates both voluntary and state-ordered assistance with a wide range of issues, including, but not limited to:

- Custody, control and management of property;
- Sale, exchange, mortgage, gift etc. of property;

- Acquisition of property;
- Carrying on of business;
- Discharging debt and liabilities;
- Providing for other persons;
- Conduct of court proceedings;
- Applying for benefits;
- Accommodation;
- Education and training;
- Social services;
- Healthcare;
- “...other matters relating to the relevant person’s wellbeing”¹

Significantly, the 2015 Act seeks to repeal the [Lunacy Regulation \(Ireland\) Act 1871](#), abolishing the current wardship system that operates thereunder. Currently, on admission to wardship, a person is declared to be: “*of unsound mind and incapable of managing his or her person or property*”.² The person at the centre of an application, who lacks decision-making capacity, is consequently made a ward of court. As a ward of court, decisions including those related to the ward’s personal welfare, their ability to enter legal relations and to contract, and their financial affairs are removed from their personal remit. The wardship process is administered and managed by the Ward of Court Office in the Courts Service of Ireland.

The 2015 Act places on a statutory footing, for the first time, the creation of [Advance Healthcare Directives](#). It will also modify the operation of Enduring Powers of Attorney in this jurisdiction.

Provision for a new office called the Decision Support Service (the “DSS”) is also made under the 2015 Act. The DSS is to be overseen by a Director, a new office established within the Mental Health Commission. The DSS, once operational, will operate to support the decision-making needs of those with capacity issues. The decision supports provided for and overseen by the DSS will ensure that those with capacity difficulties are afforded dignity, autonomy and support. Decision support arrangements, may be broken down further into three tiers:

a) Decision-making assistance

This type of agreement permits the appointment of a trusted other as a decision-making assistant. Said decision-making assistant will aid the decision maker in amassing information to be weighed, explaining the meaning of said information, and considering the options available.

¹ Assisted Decision-Making (Capacity) Act 2015, s 2.

² Lunacy Regulation (Ireland) Act, 1871, s. 6.

b) Co-decision-making

If a person is unable to make certain decisions on his/her own, they can appoint a trusted other as a co-decision-maker. This arrangement provides legal authority to the co-decision-maker to make certain, enumerated decisions jointly with the appointer. Said decisions may pertain to the appointer's personal welfare, property, money etc.

c) Decision-making representation order

This type of arrangement is court-ordered. Where a person has issues with making decisions even with support, the Circuit Court may appoint a decision-making representative to make certain decisions on the person's behalf, but taking into account the person's wishes. Where possible, the court will appoint as representative someone known to the person suffering from capacity issues. However, if there is no one willing or able to act, the court may appoint someone from the DSS's panel of trained experts to act as a representative.

Notwithstanding the 2015 Act having been signed into law by the President of Ireland in December, 2015, a number of sections of the 2015 Act have not yet been commenced, including:

- Part 3- Assisted Decision Making
- Part 4- Co-Decision Making
- Part 7- Enduring Power of Attorney
- Part 8- Advance Healthcare Directives
- Part 10- Detention Matters

The above areas include the repeal of the aforementioned wardship regime. As such, until the 2015 Act is fully commenced, the wardship system remains in place.

The [Assisted Decision-Making \(Capacity\) Bill 2022](#) ("the **2022 Bill**") was introduced in May 2022 aimed at amending the 2015 Act so as to facilitate the commencement of its remaining, uncommenced sections and improving the safeguarding provisions therein. The 2022 Bill was passed by the House of Representatives in Ireland, Dáil Éireann, and is currently being debated before the Upper House of the legislature, Seanad Éireann, Third Stage.

It should be noted that *ex lege* measures do not exist in Ireland.

2. Provide a short list of the key terms and definitions that will be used in the country report. As explained in the General Instructions above,

please provide terms in their English translation and in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: curatele; Russia: опека - opeka].

DSS- Decision Support Service.

EPA- Enduring Power of Attorney.

HSE- Health Service Authority. The HSE is the publicly funded healthcare system in Ireland and provides health and personal social services to service-users within the State.

NOK- Next of Kin.

NSO- National Safeguarding Office. It, as part of the HSE Quality and Patient Safety Community Healthcare, leads the implementation of safeguarding policy in the HSE.

ECT - Electro-convulsive therapy is a procedure, done under general anaesthesia, in which small electric currents are passed through the brain, intentionally triggering a brief seizure. ECT seems to cause changes in brain chemistry that can quickly reverse symptoms of certain mental health conditions.

RSC - Rules of the Superior Courts

The Registrar - Registrar of Wards of Court

The LRC – The Law Reform Commission

1871 Act - Lunacy Regulation (Ireland) Act 1871

1996 Act- Powers of Attorney Act 1996

2001 Act- Mental Health Act 2001.

2009 Act- Nursing Homes Support Scheme Act 2009

2015 Act- Assisted Decision-Making (Capacity) Act 2015, being the Principal Act.

2022 Bill- Assisted Decision-Making (Capacity) Bill 2022, aimed at amending the 2015 Act in order to facilitate the commencement of the remaining parts of the 2015 Act.

3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.

The results of the most recent State census (2022) are still pending release. In the 2016 census, the total number of adults aged over 65 years of age was recorded as 637,567.³ In 2018, the Central Statistics Office estimated that the number of people aged over 65 in Ireland will reach approximately 1.6 million by 2051.⁴

Every year, the Health Service Authority (the “HSE”) publishes a National Safeguarding Office Annual Report which provides an overview of HSE safeguarding operations and data for that year. As may be seen from the 2021 report, a total of 11,640 safeguarding concerns were reported to the HSE Safeguarding and Protection Teams last year.⁵ 7,835 of said cases related to adults aged between 18 and 64 years and 3,671 related to adults in excess of 65 years of age.⁶ The figures represent a 10% increase in safeguarding concerns compared to the revised data recorded in 2020.⁷ The report tenders, as a partial explanation for this increase, the reopening of services and easing of public health restrictions in 2021 when compared with the earlier waves of the COVID-19 pandemic.⁸

The report records that in 2021, there were 13,791 abuse types alleged in relation to the 11,640 safeguarding concerns reported.⁹ A sample breakdown, which reflects the NSO’s reported figures may be found below.¹⁰ As can be seen, both

3 Central Statistics Office, ‘Census of Population 2016- Profile 3 An Age Profile of Ireland’ (Central Statistics Office) <https://www.cso.ie/en/releasesandpublications/ep/p-cp3oy/cp3/agr/> accessed 20 September 2022.

4 Central Statistics Office, ‘Press Statement Population and Labour Force Projections 2017-2051’ (Central Statistics Office) <https://www.cso.ie/en/csolatestnews/pressreleases/2018pressreleases/pressstatementpopulationandlabourforceprojections2017-2051/> accessed 20 September 2022, 16.

5 Health Service Executive, ‘National Safeguarding Office Annual Report 2021’ (2021) <https://www.hse.ie/eng/about/who/socialcare/safeguardingvulnerableadults/national-safeguarding-annual-report-2021.pdf> accessed 20 September 2022, 16.

6 Ibid.

7 Ibid, 30.

8 Ibid.

9 Ibid, 25

10 Ibid, 56.

psychological and physical abuse constitute the main kinds of abuse reported.¹¹ While alleged cases of physical abuse seem to decrease across the three demographics represented in the graph below, the statistics illustrate that in both the 65-79 year age bracket and the 80+ age bracket the instances of alleged financial abuse and neglect increase with age.¹²

Abuse Types	18-64 Years	65-79 Years	80+ Years
Physical	3058 (34%)	696 (24%)	343 (17%)
Sexual	434 (5%)	52 (2%)	58 (3%)
Psychological	4105 (46%)	1166 (41%)	592 (30%)
Financial	497 (6%)	454 (16%)	348 (18%)
Neglect	574 (6%)	316 (11%)	279 (14%)
Discriminatory	15 (0%)	2 (0%)	7 (0%)
Institutional	165 (2%)	36 (1%)	19 (1%)
Self-Neglect	111 (1%)	148 (5%)	316 (16%)
Total	8959	2870	1962

[Source: HSE National Safeguarding Office Annual Report 2021.](#) Page 26

According to the 2021 report, in 13% of individual cases reported, more than one type of abuse was alleged.¹³

According to departmental estimates, in excess of 200,000 adults in Ireland with decision-making capacity difficulties may benefit from the reforms due to be introduced by the 2015 Act.¹⁴ However, as Áine Flynn remarks in her forward to the anthological text *“The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections”*:

“It would be wrong, however, to presume that any one of those 200,000 people will necessarily come within the ambit of the Act. That will depend on their individual circumstances. Equally, it would be a mistake to think that this legislation

¹¹ Ibid.

¹² Ibid, 21.

¹³ Health Service Executive, (n 12) 27.

¹⁴ Dáil Deb 1 June 2022, vol 1023, col 2.

*is targeted at or belongs to a particular cohort of people. Any of us could experience difficulties with our decision-making capacity in the future due to illness or injury. Therefore, this really is an Act for everyone”.*¹⁵

4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.

ECHR: The European Convention on Human Rights became part of Irish law in 2003 when the European Convention on Human Rights Act 2003 came into effect

CRPD: The Irish Government signed the Convention in 2007 and ratified it in 2018. The 2015 Act seeks to give further effect to the Convention, in particular the State’s obligations under Article 12 thereof.

Hague Convention: The Irish Government signed the Convention in 2008 but has yet to ratify it.

5. Briefly address the historical milestones in the coming into existence of the current framework.

As stated, a cornerstone of Ireland’s current approach to assisted decision-making is the wardship system, which is based on the 1871 Act. The legislation is Victorian and includes antiquated terminology such as “*lunatics*” and “*idiots*”.¹⁶ The operation of the regime is also problematic, being informed almost exclusively by the principle of substitution rather than the empowerment or support of adults with capacity difficulties.

Activists have been campaigning for the reform of the wardship system since the early 2000s. In 2003, the Law Reform Commission published a [Consultation Paper on the Law and the Elderly](#). The Consultation Paper made a number of recommendations, including that the wardship system be abolished¹⁷ and a new system put in place to protect vulnerable adults.¹⁸

15 Áine Flynn, ‘Forward’ in Mary Donnelly and Caoimhe Gleeson (eds) *The Assisted Decision-Making (Capacity) Act 2015: Personal and Professional Reflections* (Donovan Print 2021) ix.

16 Lunacy Regulation (Ireland) Act 1871, s 91.

17 Law Reform Commission, *Consultation Paper on Law and the Elderly* (LRC CP 23-2003) 204.

18 *Ibid.*, 208.

In 2006, the Law Reform Commission published their [Consultation Paper on Vulnerable Adults and the Law](#). The Consultation Paper recommended that capacity legislation be enacted, in circumstances where existing legislative and judicial consideration of capacity matters had been piecemeal rather than systemic to date.¹⁹ It was suggested that the proposed capacity legislation repeal the Marriage of Lunatics Act 1811²⁰ and review the Powers of Attorney Act 1996.²¹

A number of Bills aimed at facilitating the process of ratifying the CRPD were conceived but subsequently lapsed between 2007-2013. Eventually, the Assisted Decision-Making (Capacity) Bill 2013 was introduced and became the 2015 Act, once signed into law by the President on 31 December 2015.

6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.

Ireland's first report to the CRPD Committee ("the **Committee**") was submitted in 2020 and was titled: [Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities](#). Responding to progress made in relation to Article 12 of the CRPD, the authors highlighted the fact that notwithstanding the right to equality before the law afforded to all persons under the Irish Constitution, Ireland had made a declaration in respect of Article 12 to wit:

*"... its understanding that the Convention permits supported and substituted decision-making arrangements that provide for decisions to be made on behalf of a person, where such arrangements are necessary, in accordance with the law, and subject to appropriate and effective safeguards. To the extent that Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Ireland reserves the right to permit such arrangements in appropriate circumstances and subject to appropriate and effective safeguards."*²²

19 Law Reform Commission, Consultation Paper on Vulnerable Adults and the Law: Capacity (LRC CP 37-2005) 62.

20 Ibid, 157.

21 Ibid, 105.

22 Department of Children, Equality, Disability, Integration and Youth 'Initial Report of Ireland under the Convention on the Rights of Persons with Disabilities' (2021) < <https://www.gov.ie/en/publication/75e45-irelands-first-report-to-the-united-nations-committee-on-the-rights-of-persons-with-disabilities/>> 22-23.

The rationale for said declaration seems to have been the justification and/or preservation of Part 5 of the 2015 Act, which allows for substitutive measures in the form of Decision-making Representation Orders, as aforesaid.

The Report updates the Committee on the work being done to commence the 2015 Act and establish the DSS. It also provides an overview of the main reforms to be introduced by the Act:

“The ADMC Act provides for the appointment of legally recognised decision-making supporters to support a person with capacity issues in maximising their decision-making powers. Compliance with the Act by decision-making supporters in the performance of their functions will be supervised by the Director of the DSS...The ADMC Act provides for the presumption of capacity and the protection and promotion of a person’s will and preferences. It also provides for the individual’s right of autonomy and self determination to be respected through an Enduring Power of Attorney and an Advance Healthcare Directive, made when the person has decision-making capacity and designed to come into effect when they lose capacity. It provides for legally recognised decision-making supporters to support a person with capacity difficulties. It introduces a functional assessment of capacity, thereby moving away from a status-based approach. The new definition takes an issue-specific and times specific approach, focusing on the particular time when a decision has to be made and on the particular matter to which the decision relates. This allows for situations where the loss of capacity is temporary or partial and where there may be fluctuations in capacity...Part 6 of the ADMC Act provides for the abolition of wardship and for the phased transition from adult wardship to the new decision-making support arrangements under the ADMC Act.”²³

Another document of note is the Law Reform Commission’s [Issue Paper on Regulatory Framework for Adult Safeguarding](#).²⁴ The Issue Paper sought submissions from consultees before April 2020 on a range of issues pertaining to adult safeguarding.

In December 2017, the National Safeguarding Committee published a Report which reviewed [Current Practice in the use of Wardship for Adults in Ireland](#). The review underscored the delay in the full commencement of the 2015 Act. The report also included the Committee’s recommendations for changes to the wardship procedure, which included a functional legal test for capacity; consideration of a

²³ Department of Children, Equality, Disability, Integration and Youth, (n29) 23.

²⁴ Law Reform Commission, Issue Paper Series: A Regulatory framework for adult safeguarding (LRC IP 18-2019).

respondent's will and preference during decision making; and centralised guidelines covering the procedure.²⁵ Said recommendations were adopted by the legislature in the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021, which has subsequently become the 2022 Bill.

7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.

Some crucial sections of the 2015 Act have already been commenced. Section 7(1) of the 2015 Act, for example, was commenced in February 2021. This repealed the Marriage of Lunatics Act of 1811, which made it unlawful for wards of court to marry under any circumstances. This will be explored in more depth later in this Report.

However, as stated, at the time of writing, the following parts of the act remain uncommenced:

- Part 3- Assisted Decision Making
- Part 4- Co-Decision Making
- Part 7- Enduring Power of Attorney
- Part 8- Advance Healthcare Directives
- Part 10- Detention Matters

In November, 2021, the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 was published. It was aimed at amending the 2015 Act and facilitating its commencement. A completion date of June 2022 was given for the legislation, with the DSS to be fully operational by 2022. The Joint Committee on Children, Equality, Disability, Integration and Youth conducted a consultation on the Heads and subsequently published its report on the Bill in April 2022.

As aforesaid, the 2022 Bill was published in May 2022. The Bill was passed by the House of Representatives in Ireland, Dáil Éireann, and is currently being debated before the Upper House of the legislature, Seanad Éireann, Third Stage.

The Bill's [Explanatory Memorandum](#) dated 30th May, 2022 summarises the amending measures as follows:

²⁵ National Safeguarding Committee, 'Review of current practice in the use of wardship for adults in Ireland' (2017) <<https://www.safeguardingireland.org/wp-content/uploads/2018/10/Wardship-Review-2017.pdf>> Part 8.

- *Technical and procedural amendments to allow for the commencement of the 2015 Act in order to bring an end to wardship in Ireland and provide for a functional model of capacity assessment for relevant persons;*
- *Amended definitions of personal welfare and treatment decisions, to allow for participation by persons with capacity difficulties in health research and to clarify for medical professionals which person has authority to make decisions regarding actual medical treatment or clinical care where another person has capacity difficulties;*
- *Improved safeguarding provisions throughout the 2015 Act;*
- *Amendment of the 2015 Act to streamline or to tighten existing provisions in order to improve safeguards, reduce bureaucracy for those using options under the Act and to enable the DSS to undertake its role more effectively. This includes streamlining the processes to allow the DSS to draw up its own forms and to give greater control over the DSS's own administrative procedures to the Director;*
- *Additional powers have been given to the DSS Director to investigate issues and seek informal resolution of complaints. The property management role for the Director contained in the original Act has been removed. The Director will provide for the remuneration of panel member decision-making representatives where there are insufficient assets in the estate of the relevant person;*
- *The Bill has been used to progress some provisions formerly included in the Disability (Miscellaneous Provisions) Bill 2016, which lapsed at the dissolution of the last Dáil. These provisions include other measures required for closer compliance with the UNCPRD, such as the monitoring structure that is required under the Convention in Ireland. The Bill also provides for the percentage of people with disabilities in the public service to be doubled from 3% to 6%, along with the repeal of certain statutory provisions to facilitate greater participation in public and civic life for people with disabilities;*
- *A new system for enduring powers of attorney (EPAs) whereby the enduring power of attorney will be created by the relevant person and registered with the DSS while s/he has capacity, enabling any problems with the enduring power of attorney to be resolved with the person herself / himself. The enduring power of attorney will come into effect through a notification process by the attorney to the DSS when the relevant person has lost capacity;*
- *Strengthened protections for the rights of wards when their wardship is reviewed and they are discharged from wardship and / or migrated to the 2015 Act's structures; and*

- *The removal of provisions permitting the use of restraint in private settings.*²⁶

At the time of writing, the 2022 Bill is before the Seanad Third Stage. On the 28th September, 2022, several amendments were tabled for debate (80 in all) at this Committee stage. Approximately 50% of the amendments listed appeared to be government proposed amendments. The session concluded at the halfway point, meaning that the amendments were discussed up to amendment 39. Further debate is likely to follow in the coming weeks, which unfortunately heralds further delay in the Bill’s enactment and the full realisation of the reforms promised by the 2015 Act

SECTION II – LIMITATIONS OF LEGAL CAPACITY

- 8. Does your system allow limitation of the legal capacity of an adult? N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.**
- a. on what grounds?
 - b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?
 - c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?
 - d. can the limited legal capacity be restored and on what grounds?
 - e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?
 - f. are there any other legal instruments,²⁷ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

It should be noted, as Flynn states, that in this jurisdiction, mental capacity has often been used interchangeably with the concept of legal capacity:

“In modern times, mental capacity has been used as a proxy for legal capacity in many instances –meaning that, if a person does not meet a certain standard of

²⁶Assisted Decision-Making (Capacity) (Amendment) Bill 2022, Explanatory Memorandum.

²⁷ Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

decision-making ability, legal recognition of the validity of that individual's decision will be removed from the person and vested in a third party, who generally makes a decision based on the perceived 'best interests' of the person."²⁸

Despite Flynn's statement above, in the High Court case of *Fitzpatrick v. K (No.2)*²⁹ the court held that decision-making capacity should be defined on a functional basis; on the person's ability to understand the nature and consequences of a decision in the context of available choices at the time the decision has to be made. The test was subsequently applied in *Governor of X. Prison v. PMcD*.³⁰

Since the decision in *Fitzpatrick*, the functional approach has been adopted by the HSE in its National Consent Policy.³¹ It has also been given statutory effect by the 2015 Act.³²

However, in practice, there are a number of examples of measures which do not adopt this nuanced approach and which curtailed legal capacity significantly and automatically by virtue of a lack of mental capacity. Examples include:

Mental Health Act 2001

Section 57 of the [Mental Health Act 2001](#) (the "2001 Act"), deals with the issue of capacity with reference to whether an adult can consent to treatment for a so-called "*mental disorder*".³³ A limitation of legal capacity to make decisions as to one's treatment can therefore follow if one's mental capacity is considered to be lacking under the Act. Further, the issue of legal capacity to exercise one's liberty may be invoked if the individual is involuntarily admitted to an approved centre under the Act.

According to section 3(1) of the 2001 Act, the term "*mental disorder*" under the Act covers: "*mental illness, severe dementia or significant intellectual disability*" where:

28 Eilíonóir Flynn, 'Mental (in)capacity or legal capacity? A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland' (2013) 64(4) NILQ <<https://nilq.qub.ac.uk/index.php/nilq/article/view/369/263>> accessed 20 September, 2022, 486.

29 [2008] IEHC 104, [2009] 2 IR 7.

30 [2015] IEHC 259, [2016] 1 ILRM 116.

31 Health Service Executive, 'National Consent Policy 2022' (2022) <https://www.hse.ie/eng/about/who/national-office-human-rights-equality-policy/consent/documents/hse-national-consent-policy.pdf>> accessed 23 September, 2022.

32 Assisted Decision-Making (Capacity) Act 2015, s 3(2).

33 Mental Health Act 2001, s 57.

- a. *because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or*
- b. *i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.*³⁴

The terms “harm” and “impaired” judgment as espoused in section 3 of the 2001 Act are not elucidated further in the Act, nor have they been definitively determined by the courts.

The terms used in section 3(1) is further defined in subsection (2):

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

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

*“significant intellectual disability” means a state of arrested or incomplete development of mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.*³⁵

If a patient lacks the capacity to consent to treatment, such treatment may be administered if it is in their best interests. The tenets of dignity, bodily integrity, privacy and autonomy are also cited as important guiding principles under the Act. Section 4 of the Act states as follows:

“4. — (1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.

³⁴ Ibid, s 3(1)

³⁵ Mental Health Act, 2001, s 3(2).

(2) Where it is proposed to make a recommendation or an admission order in respect of a person, or to administer treatment to a person, under this Act, the person shall, so far as is reasonably practicable, be notified of the proposal and be entitled to make representations in relation to it and before deciding the matter due consideration shall be given to any representations duly made under this subsection.

(3) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.”³⁶

Unfortunately, little guidance is provided in the text of the Act as to what is meant by “best interests”.

Provision is made in sections 8 and 9 of the 2001 Act for the involuntary admission of a person suffering from a mental disorder under section 3, to an approved centre. Although section 57 of the 2001 Act introduces a capacity test for consent to treatment, there is no such capacity test associated with involuntary admission to a psychiatric facility:

“8. — (1) A person may be involuntarily admitted to an approved centre pursuant to an application under section 9 or 12 and detained there on the grounds that he or she is suffering from a mental disorder.”

Section 8 explicitly disallows the involuntary admission of a person to an approved centre by reason only that said person is suffering from a personality disorder; or socially deviant; or is addicted to drugs or intoxicants.³⁷ The use of the word “or” throughout this list, rather than “and/or” may create uncertainty where a person is suffering from more than one of the enumerated exceptions. Section 9 of the 2001 Act states that an application for a recommendation for involuntary admission of a person to an approved centre may be made to a registered medical practitioner by any one of the following:

- a) the spouse or civil partner or a relative of the person,
- b) an authorised officer,
- c) a member of the Garda Síochána, or
- d) subject to the provisions of subsection (2), any other person.

Under section 9(2), an application for a recommendation is not permitted by:

- a) a person under the age of 18;
- b) an authorised officer or member of the gardaí who is a relative or spouse or civil partner of the person;

³⁶ Ibid, s 4.

³⁷ Ibid, s 8(2).

- c) a member of the governing body, or the staff, or person in charge, of the approved centre concerned;
- d) an authorised person (subject to certain caveats);
- e) any person with an interest in the payments (if any) to be made in respect of the taking care of the person concerned in the approved centre concerned;
- f) any registered medical practitioner who provides a regular medical service at the approved centre concerned
- g) the spouse or civil partner, parent, grandparent, brother, sister, uncle or aunt of any of the persons mentioned in the foregoing paragraphs (b-f) whether of the whole blood, of the half blood or by affinity.³⁸

Under section 12 of the Act, a member of the Irish police force, an Garda Síochána, may take a person into custody and enter any dwelling or premises by force or otherwise if he has reasonable grounds for believing that a person suffering from a mental disorder is present, and that because of the mental disorder there is a serious likelihood of the person causing immediate and serious harm to himself/herself or other persons.³⁹ Upon taking that person into custody, an application must be made for a recommendation forthwith.⁴⁰ It should be noted that if an application for a recommendation is refused by the registered medical practitioner, the person should be released from custody immediately.⁴¹

Upon examination of the person the subject of the application by a registered medical practitioner and where said practitioner is satisfied that that person is suffering from a mental disorder, he/she shall make a recommendation that the person be involuntarily admitted to an approved centre specified by him/her.⁴² Said recommendation shall be sent by the registered medical practitioner to the clinical director of the approved centre and a copy of the recommendation shall be given to the applicant.⁴³

Although, as seen above, a person suffering from a mental disorder may be admitted to a psychiatric treatment centre involuntarily, without their consent, upon admission, capacity to consent comes to the fore. Part 4 of the 2001 Act deals with the issue of capacity to consent to treatment.

38 Mental Health Act 2001, s 9.

39 Ibid, s 12(1).

40 Mental Health Act 2001, s12(2).

41 Ibid, s 12(4).

42 Ibid, s 10(1).

43 Ibid, s 10(4).

Section 56 of the 2001 Act defines consent as that “*obtained freely without threats or inducement*”⁴⁴ where:

(a) *the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and*

(b) *the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment.*⁴⁵

It is of note that the consultant psychiatrist is the individual who decides if the patient is capable of understanding the proposed treatment. This has the potential to create conflicts of interests where the consultant psychiatrist who is charged with assessing capacity is also the professional proposing the treatment that the patient does not wish to undergo. There does not seem to be a mechanism under the 2001 Act for the review of a decision by the consultant psychiatrist or to challenge the decision.

The common law standard for capacity to consent to medical treatment other than psychiatric treatment is as espoused in the English case of *Re C*⁴⁶ and affirmed in *Fitzpatrick*⁴⁷:

Is the patient’s capacity so reduced by his illness that he does not sufficiently understand the nature, purpose and effects of the proffered treatment.

This is predicated on a three-stage approach to decision making: first, comprehending and retaining treatment information; second, believing it and; third, weighing it in the balance to arrive at a choice.

The standard of capacity to consent to psychiatric treatment under the 2001 Act is set out in section 57 of the 2001 Act:

“The consent of a patient shall be required for treatment except where, in the opinion of the consultant psychiatrist responsible for the care and treatment of the patient, the treatment is necessary to safeguard the life of the patient, to restore his or her health, to alleviate his or her condition, or to relieve his or her suffering, and by reason of his or her mental disorder the patient concerned is incapable of giving such consent.”

44 Mental Health Act 2001, s 56.

45 Ibid, s 56.

46 [1994] 1 All ER 819.

47 [2008] IEHC 104, [2009] 2 IR 7.

The wording of this section seems to suggest that “*capable*” adult patients have the right to refuse treatment even if same is necessary to safeguard the life of the patient, to restore his/her health, to alleviate his/her condition or to relieve his/her suffering.

Section 57 is further qualified by sections 58-60 of the 2001 Act which pertain to the use of certain specific treatments e.g. electro-convulsive therapy (“ECT”).

The Act provides for Mental Health Tribunals which review admission orders and renewal orders.⁴⁸ Legal representation is assigned to the patient unless he/she chooses to engage their own for the purposes of the Tribunal.⁴⁹ If the Tribunal affirms an admission or renewal Order, the patient will remain in the approved centre, regardless of consent. If the Tribunal revokes the admission or renewal Order, the patient is free to leave the approved centre or can continue to stay as a voluntary patient. An appeal lies to the Circuit Court against a decision of a Tribunal to affirm an admission or renewal order, on the grounds that the patient is not suffering from a mental disorder.⁵⁰

Wardship

The wardship system (as discussed more fully in section III of this Report) involves a status-based approach to capacity, as opposed to a functional approach. An adult is adjudged a ward of court and lacking the legal capacity to make all decisions viz his/her property and personage if, under the Lunacy Regulation (Ireland) Act 1871, the President of the High Court makes a finding that said adult is of “*unsound mind*”.⁵¹ A Committee is then appointed to assist in managing the ward’s affairs. In this way the operation of this state-ordered measure automatically results in a restriction of legal capacity.

It is possible to discharge a ward from wardship. Any application by a ward of court to be discharged must be made to the Registrar of Wards of Court (“the **Registrar**”) in writing by the ward or by a solicitor instructed by him/her. This is followed by a formal application for discharge. An application must be supported by medical evidence to the effect that the ward is now of sound mind and capable of managing his/her own affairs. It is the President of the High Court who rules on such an application.

48 Mental Health Act 2001, s 17 and s 18.

49 Ibid, s 17.

50 Ibid, s 19.

51 Lunacy Regulation (Ireland) Act 1871, s 6.

9. Briefly describe the effects of a limitation of legal capacity on:
- property and financial matters;
 - family matters and personal rights (e.g. marriage, divorce, contraception);
 - medical matters;
 - donation and wills;
 - civil proceedings and administrative matters (e.g. applying for a passport);

a) Property and Financial Affairs

The property and financial affairs of a person who lacks legal capacity to make decision thereon may be dealt with by a designated other on foot of an Enduring Power of Attorney (“the **EPA**”). The catalysing event in such arrangements under the [Power of Attorney Act 1996](#) is the loss of mental capacity on behalf of the Donor. EPAs are discussed in more detail in section IV of this report.

There is also scope in the law for individuals to nominate agents to represent them in certain dealings with third parties (“**agency arrangements**”). For example, under [Social Welfare Guidelines](#) an agency arrangement can be made either by the recipient or the Department of Social Protection to facilitate payments of the recipient’s social welfare payments, either on a short-term (temporary agent) or enduring basis.⁵² The legal status of a social welfare agency relationship is unique when compared with other, more general agency relationships (e.g. third party mandate in a bank), in that it may be put in place or may subsist if the recipient becomes mentally incapable, thereby losing legal capacity to deal with his/her social welfare payments.

Section 21 of the [Nursing Homes Support Scheme Act 2009](#) (“the **2009 Act**”) provides for the appointment of a care representative where a person seeking a nursing home place lacks legal capacity to make an application for Ancillary State Support due to some mental incapacity.⁵³ This is discussed more fully below. The discreteness of the section’s purpose is highlighted in section 21(8) of the 2009 Act, which states as follows:

“An order under this section shall not be construed as making a determination as respects the capacity of the relevant person concerned otherwise than in relation to a matter to which this section applies and which is specified in the order.”

⁵² Department of Social Protection, ‘Operational Guidelines: Payment-related issues’ (2021) <https://www.gov.ie/en/publication/eb1410-operational-guidelines-payment-related-issues/#> accessed 22 September 2022.

⁵³ The Nursing Homes Support Scheme Act 2009, s 21.

b) Marriage

As stated above, section 7(1) of the 2015 Act was commenced in February 2021. This repealed the Marriage of Lunatics Act of 1811, which made it unlawful for wards of court to marry under any circumstances. Under section 7(1) of the 2015 Act, wards of court are no longer prohibited from marrying by virtue only of their being wards. If there is a question about a person's capacity to marry, this may be subject to an application to the Circuit Court. Critically, any finding of incapacity to marry will be treated as a discrete and separate finding; it will have no implications in relation to an individual's decision-making in other areas of their personal, medical or financial life.

c) Medical Matters

Under current Irish law, an adult that enjoys decision-making capacity may consent to and refuse medical treatment.

In *Fitzpatrick*⁵⁴, Ms. Justice Laffoy summarised the body of case law pertaining to medical treatment and capacity alongside the constitutional framework within which same must be determined. She stated the test for assessing the capacity to refuse medical treatment as follows:

"1) There is a presumption that an adult patient has the capacity, that is to say, the cognitive ability, to make a decision to refuse medical treatment, but that presumption can be rebutted.

2) In determining whether a patient is deprived of capacity to make a decision to refuse medical treatment whether-

- a. By reason of permanent cognitive impairment, or*
- b. Temporary factors, for example, factors of the type referred to by Lord Donaldson in In re T. (Adult refusal of medical treatment) [1993] Fam. 95,*

*the test is whether the patient's cognitive ability has been impaired to the extent that he or she does not sufficiently understand the nature, purpose and effect of the proffered treatment and consequences of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made."*⁵⁵

⁵⁴ [2008] IEHC 104, [2009] 2 IR 7.

⁵⁵ [2008] IEHC 104 p. 42-43, [2009] 2 IR 7 [84].

The court also held that a patient's cognitive ability will have been impaired to the extent that he/she is incapable of making a decision to refuse the treatment if the patient:

“(a) has not comprehended and retained the treatment information and, in particular, has not assimilated the information as to the consequences likely to ensue from not accepting the treatment,

b) has not believed the treatment information and, in particular, if it is the case that not accepting the treatment is likely to result in the patient's death, has not believed the outcome is likely, and

*c) has not weighed the treatment information, in particular, the alternative choices and the likely outcomes, in the balance in arriving at the decision”.*⁵⁶

Where an individual, under the age of 18 years, does not enjoy the capacity to make a decision regarding their medical treatment, their parents or legal guardians may provide consent on their behalf. However, for adults who do not enjoy such capacity, the HSE National Consent Policy is informative.⁵⁷

Legal capacity to consent to psychiatric medical treatment and its interaction with mental capacity under the Mental Health Act 2001 is discussed more fully above.

d) Donation and wills

In the area of probate law, the interaction between mental capacity and legal capacity is also evident. Under the [Succession Act 1965](#), a person must “*be of sound disposing mind*” in order to make a will.⁵⁸

In the case of *Banks v. Goodfellow*⁵⁹, which has been approved in this jurisdiction, the judge elucidated what it means to have testamentary capacity:

- a) The individual must be capable of understanding the nature of the act of making a will and its effects; and
- b) The individual must be capable of understanding the extent of their estate; and

⁵⁶ Ibid.

⁵⁷ Health Service Executive, (n 37).

⁵⁸ Succession Act 1965, s 77.

⁵⁹ (1870) LR 5 QB 549.

- c) The individual must be capable of calling to mind those persons who might be expected to benefit from her estate and decide whether or not to benefit such persons.

Further, the testator must not have a mental illness that would influence them to make bequests that they would not otherwise have made.

It should be noted that testamentary capacity may vary depending on a testator's lucidity of mind. A testator who enjoys a period of lucidity while, for example, giving instructions as to content, may later lose testamentary capacity when it comes to reviewing the will for execution.

When there is a doubt regarding testamentary capacity, a medical opinion is often sought before proceeding. However, it is the solicitor's duty and not the medical practitioner's duty to determine whether or not the testator has testamentary capacity.

Subject to the consent of the Court Office, a ward of court may make a will if:

- a) they express a wish to do so; and
- b) there is medical evidence that they are capable of making a valid will; and
- c) the solicitor instructed by the ward is satisfied that they are capable of making a valid will.

This underlines the fact that although a person may be adjudged as being of "*unsound*" mind suffice to being made a ward of court, he/she can still enjoy a "*sound disposing mind*" suffice to enjoying legal capacity to make a valid will.

e) Civil proceedings and administrative matters

A ward of court will generally require authorisation from the President of the High Court to institute litigation. A person lacking mental capacity may enjoy legal capacity to sue by his Committee if so appointed, or may sue by what is termed a "*next friend*" if no Committee is appointed. A person lacking mental capacity may have legal capacity to defend proceedings by his Committee if so appointed, or by a *guardian ad litem*.

10. Can limitation of legal capacity have retroactive effect? If so, explain?

Capacity to make a will or to marry is often assessed retrospectively. For example, in probate law, a GP may be called upon to evaluate a testator's testamentary capacity by providing a retrospective opinion. If the testator's legal capacity

is found to be lacking, then the validity of a will may lapse. Capacity to consent to medical procedures or to engage in litigation may fall to be assessed either in the present or retrospectively. The ward of court system and the EPA scheme, require that legal capacity be assessed in the context of the present and for the future.

11. Which authority is competent to decide on limitation or restoration of legal capacity?

The deciding authority depends on the context. For example, with regards treatment for those persons admitted to an approved centre for psychiatric care, section 56 of the 2001 Act provides that a consultant psychiatrist, responsible for the care and treatment of a patient, makes the decision as to whether the patient has the legal capacity to consent to treatment. The test for consent is set out above. As stated previously, it is of note that the consultant psychiatrist responsible for the care and treatment of a patient is the decider here. This has the potential to create conflicts of interests where the psychiatrist who is charged with assessing capacity is also the professional proposing the treatment that the patient does not wish to undergo. There does not seem to be a mechanism under the 2001 Act for the review of a decision by the consultant psychiatrist or to challenge the decision.

Under the 2001 Act, it is the Mental Health Tribunal which reviews admission orders and renewal orders.⁶⁰ In this way, the limitation of a patient's legal capacity to exercise his/her right to liberty is subject to the decision of a Tribunal. An appeal lies to the Circuit Court against a decision of a Tribunal to affirm an admission or renewal order on the grounds that the patient is not suffering from a mental disorder.⁶¹

With regard to wardship, it is the President of the High Court who decides whether an individual is of "*unsound mind*" suffice to be declared a ward of court. Where a ward recovers his/her capabilities, the ward can make an application to the High Court to be discharged from wardship. This can be carried out personally or via a solicitor that has been instructed by the ward for this purpose. On hearing the application, the judge may direct that a further medical examination take place prior to discharging the ward.

12. Who is entitled to request limitation or restoration of legal capacity?

As regards wardship, there is no bar as to who may petition a court to make a person a ward of court. The ward can apply for his/her discharge from wardship.

⁶⁰ Mental Health Act 2001, s 17 and s 18.

⁶¹ *Ibid*, s 19.

With regard to the 2001 Act, section 9 sets out who can apply for a recommendation for involuntary admission, as aforesaid.

An admission Order may last for up to 21 days initially.⁶² A renewal Order may extend this time by a further 3 months.⁶³ This renewal Order must be made by the consultant psychiatrist and is only valid if the psychiatrist concerned has, not more than one week before the making of the Order, examined the patient concerned and has determined that the patient continues to suffer from a mental disorder.⁶⁴ A further renewal Order may be made for up to 6 months and subsequently up to 12 months at a time.⁶⁵ A Mental Health Tribunal is tasked with reviewing a patient's case every time an admission or renewal Order is made. An additional review may be requested after 3 months.

Section 57 affords the consultant psychiatrist with the ability to limit legal capacity as regards medical treatment, where the patient is deemed incapable of giving consent, as discussed.

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:

- a. a requirement of legal representation of the adult;**
- b. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
- c. requirement of a specific medical expertise / statement;**
- d. hearing of the adult by the competent authority;**
- e. the possibility for the adult to appeal the decision limiting legal capacity.**

Wardship

Applications for wardship are made by petition to the Office of the Registrar of Wards of Court

("the **Office**") and subject to the strictures of the Rules of the Superior Courts, ("the **RSC**").⁶⁶ The RSC are those procedural rules which govern civil and criminal practice in the Supreme Court, the Court of Appeal and the High Court of Ireland. Under Order 67 of the RSC, where a petition is made pursuant to section

⁶² Ibid, s 15(1).

⁶³ Ibid, s 15(2).

⁶⁴ Ibid, s 15(4).

⁶⁵ Ibid, s 15(3).

⁶⁶ RSC Ord 67.

15 of the Lunacy Regulation (Ireland) Act 1871, the adult at the centre of proceedings is termed the “*respondent*” for the duration of the proceedings. The President of the High Court exercises the jurisdiction of the High Court in wardship matters pursuant to section 9 of the [Courts \(Supplemental Provisions\) Act 1961](#).⁶⁷

The operation of the wardship regime will be more thoroughly discussed later. By way of overview, the Office has provided the following overview as to how the regime operates:

*“The purpose of wardship is to protect the person and the property of an individual when they lack the capacity to do so themselves. When an adult is taken into wardship it means that the President of the High Court is satisfied on the basis of the medical evidence available that the person should be deemed to lack capacity and is incapable of managing his/her own affairs... If there are concerns that an adult lacks capacity to manage their own affairs a Solicitor can be instructed to make an application to have the person made a Ward of Court. The concerned person, usually a family member or friend, can instruct a solicitor to make the application... After the President of the High Court has made the Declaration Order bringing a person into wardship a Committee is appointed to act on behalf of the ward. Generally, the proceeds of accounts held in financial institutions are lodged in to Court. The Committee is requested to submit proposals in relation to a dwelling house or lands (if any).”*⁶⁸

Notice of said application must be served personally on the respondent. Two medical affidavits are required to ground a petition for wardship. Traditionally, the medical reports that the petitioner relies on are not provided to the respondent.⁶⁹

The respondent has the right to object and any objection must be in written form, made to the Registrar of Wards of Court and be lodged in the Office within 7 days of the notice being served. A period of time will be permitted, upon receipt of any objection, to submit medical evidence in order to support any objection. The National Safeguarding Committee has noted the fact that the right to object is dependent on whether the respondent fully understands the nature of the application, which is more difficult without access to the grounding medical reports.⁷⁰

⁶⁷ Courts (Supplemental Provisions) Act 1961, s 9.

⁶⁸ Courts Service of Ireland, ‘Office of the Wards of Court’, Information on wardship for adults’ (2022) < <https://www.courts.ie/wardship-adults> > accessed 29 September 2022.

⁶⁹ The National Safeguarding Committee, (n 32) 10.

⁷⁰ The National Safeguarding Committee, (n 32) 10.

If the President of the High Court is satisfied with the medical evidence, he will conduct an inquiry into the capacity of the respondent before a determination. The inquiry usually involves a consultant psychiatrist visiting on the respondent, examining the respondent and providing a report to the President of the High Court. However, there are no guidelines requiring a consistent standard of assessment.⁷¹

As discussed, for people who are involuntarily detained under the 2001 Act, legal aid is provided for the purpose of preparing and engaging with Tribunal hearings. Similarly, legal aid will be available under the 2015 Act when commenced. However, legal aid is not available for the purpose of wardship applications. The legal costs of a wardship application in most cases are paid out of the ward's own estate. Such costs include solicitor's fees, medical report fees and stamp duty. In the recent Supreme Court case of *AC v. Cork University Hospital*⁷², Ms. Justice O' Malley criticised the current wardship regime and its procedural underpinnings. The court held that the absence of legal aid available to the woman at the centre of the case, Ms. C, and many like her was: "*a matter of real concern, given the consequences of a wardship order.*"⁷³ The court also underscored the vital importance of adequately considering the voice of the person concerned in wardship proceedings and for the person to be involved in decisions that directly impact upon them.

There is only an ad hoc system of review of wards.⁷⁴ Order 67 Rule 50 RSC provides that: "*The Registrar shall, in accordance with any general or special direction to be given by the Judge, visit periodically every mental hospital and institution in which a ward is resident, and as occasion may require, every ward in private care.*"⁷⁵

There is no clear guidance around conflicts of interest e.g. that a petitioner might have a conflict in bringing a petition, unless the respondent objects.⁷⁶

Mental Health Act 2001

The Mental Health Act 2001 defines who may apply for an involuntary detention order, and arguably more importantly, who may not apply (see above).

⁷¹ Ibid 12.

⁷² [2019] IESC 73, [2020] 2 IR 38.

⁷³ [2019] IESC 73 [396], [2020] 2 IR 38 [400].

⁷⁴ The National Safeguarding Committee, (n 32) 12.

⁷⁵ RSC Ord 67, r 50.

⁷⁶ The National Safeguarding Committee, (n 32) 12.

As discussed, a person is detained in an approved centre under an admission order. Within 24 hours of the admission order being made, the consultant psychiatrist who made the order must send a copy to the Mental Health Commission⁷⁷, and give notice in writing to the person detained⁷⁸ setting out as follows:

- which section of the Mental Health Act 2001 he or she is being detained under⁷⁹
- that he or she is entitled to legal representation⁸⁰
- a general description of his or her proposed treatment during his or her detention⁸¹
- that he or she is entitled to communicate with the Inspector of Mental Health Services⁸²
- that he or she will have his or her detention reviewed⁸³
- that he or she is entitled to a Circuit Court appeal⁸⁴
- that he or she may be admitted as a voluntary patient if he or she indicates his or her wish to be so admitted.⁸⁵

The Mental Health Commission orders a review in the form of a Mental Health Tribunal of each admission order⁸⁶ at which the person is entitled to his or her own legal representative.⁸⁷

The person is reviewed by a consultant psychiatrist in advance of the Mental Health Tribunal.⁸⁸ The person's legal representative receives a copy of the consultant psychiatrist's report.⁸⁹ Prior to a tribunal convening, there is a constant obligation on the treating psychiatrists to revoke detention, should the consultant consider that the individual is no longer suffering from a mental disorder.⁹⁰

14. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:

a. property and financial matters;

77 Mental Health Act 2001, s 16(1)(a).

78 Ibid, s 16(1)(b).

79 Mental Health Act 2001, s 16(2)(a).

80 Ibid, s 16(2)(b).

81 Ibid, s 16(2)(c).

82 Ibid, s 16(2)(d).

83 Ibid, s 16(2)(e).

84 Ibid, s 16(2)(f).

85 Ibid, s 16(2)(g).

86 Ibid, s 17.

87 Ibid, s 17(1)(b).

88 Ibid, s 17(2).

89 Ibid, s 17(1)(c).

90 Ibid, s 28(1).

- b. personal and family matters;**
- c. care and medical matters.**

As discussed above, mental capacity is intrinsically linked to legal capacity in this jurisdiction with regard to:

- a. the wardship process,
- b. involuntary in-patient care at a psychiatric facility,
- c. medical treatment;
- d. the ability to marry;
- e. the ability to create a will;
- f. the ability to participate in litigation.

15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?

As previously stated, the term “*mental capacity*” has often been used and treated synonymously in this jurisdiction with the concept of legal capacity. As discussed by the National Safeguard Committee, many of the measures available to those who require decision-making assistance do not allow for different degrees of decision-making capacity, denying legal capacity in an absolute manner from the get-go.⁹¹

The UN Committee on the Rights of Persons with Disabilities (hereinafter “the UN Committee”) has stated that:

“States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.”⁹²

Flynn highlights that the CRPD demands that all people irrespective of their decision-making abilities: “...should enjoy ‘legal capacity on an equal basis- that

⁹¹ The National Safeguarding Committee, (n 32) 20.

⁹² UNCRPD ‘General Comment 1’ in ‘UN Doc Article 12: Equal recognition before the law’ (2014), CRPD/C/GC/1, p.2.

*is, the right to be recognised as a person before the law, and the subsequent right to have ones' decisions legally recognised".*⁹³

In May 2017, the High Court held that the Mental Health Act 2001 was incompatible with Article 5.4 of the European Convention on Human Rights, which provides for the right to a speedy review of detention.⁹⁴ The Mental Health (Renewal Orders) Bill 2018 was published, and the [Mental Health \(Renewal Orders\) Act 2018](#) was signed into law. Its focus was to permit a lawful basis for the reception, detention and treatment of persons who are detained involuntarily on renewal orders under section 15(3) of the Mental Health Act 2001.

Critically, for the purposes of this part of the report, section 8 of the 2015 Act adopts a presumption of capacity; that an adult is to be presumed to have the capacity to undertake decisions autonomously. Under section 3 of the Act, it promotes a functional approach to capacity, in that a person is deemed as lacking capacity to make a specific decision if they are unable to: understand the relevant information; retain this information for the required time; use and weigh this information as part of a decision-making process; or communicate their decision by any means. As discussed, in the event that concerns exist about a person's capacity, the 2015 Act provides for a range of decision support measures. Under the 2015 Act, legal aid will be afforded to those with capacity issues seeking the court's assistance with decision-making.

Until the 2015 Act has been fully commenced, the existing wardship regime will subsist. Once the 2015 is commenced the Courts Service have noted that: *"all wards of court will be discharged from wardship and where appropriate, the relevant person will then transition to one of the new supports under the 2015 Act."*⁹⁵

The case of *AC v. Cork University Hospital*⁹⁶ was of considerable importance in the area of wardship. It concerned an elderly woman who had been "detained" by Cork University Hospital allegedly against her wishes and against the wishes of her adult children. The Supreme Court held that under the doctrine of necessity, a hospital had the right to legally detain a person in circumstances where there was a concern that the patient would be at risk if discharged. This right was only temporary, however. The Court set out a number of guidelines to be followed in subsequent cases. Some of these findings and recommendations are set out below:

93 Eilionóir Flynn, 'Mental (in)capacity or legal capacity? A human rights analysis of the proposed fusion of mental health and mental capacity law in Northern Ireland', (2013) 64(4) NILQ, 64 485, 485.

94 [2018] IECA 123, [2018] 3 IR 710.

95 Courts Service of Ireland, (n 77).

96 [2019] IESC 73, [2020] 2 IR 38.

1. Whether a person has decision-making ability or not does not in any way diminish their constitutional rights including their right to liberty.⁹⁷
2. The fact that a person may not have the ability to make a decision about a particular matter does not mean that their wishes in relation to it can be totally disregarded.⁹⁸
3. A person always has the right to have their voice heard or represented in any process concerning them.⁹⁹
4. In principle, when the risk to a person is from a third party (for example a family member) it is far better that any legal measures are taken against that party rather than restricting the rights of the person at risk in order to deal with it.¹⁰⁰
5. The requirement in the Lunacy Regulation (Ireland) Act 1871 for a person to be of “*unsound mind and incapable of managing their own affairs*”, without giving a definition of what this means, is cause for concern.¹⁰¹
6. Wardship does not allow for fluctuating capacity or for a person to be able to make some decisions but not others.¹⁰²
7. All Medical Reports which the Wardship Court is to rely on to make a person a ward of court should be shared with the person to enable them to be challenged.¹⁰³
8. The absence of separate legal representation for the person in the wardship court, given the major consequences of wardship for a person, is a concern and may render the process unfair.¹⁰⁴
9. There are difficulties in finding any procedural path by which a wardship order can be appealed and the right to apply to be discharged from wardship is not in itself an appeal.¹⁰⁵

SECTION III – STATE-ORDERED MEASURES

Overview

97 [2019] IESC 73 [394].

98 Ibid [322].

99 Ibid [397].

100 Ibid [381].

101 Ibid [376].

102 Ibid [247].

103 Ibid [372].

104 Ibid [368].

105 Ibid [370].

- 16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.¹⁰⁶ Pay attention to:**
- a. can different types of state-ordered measures be applied simultaneously to the same adult?**
 - b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
 - c. does your system provide for interim or ad-hoc state-ordered measures?**

Wardship

As stated above, the current wardship regime in Ireland is based on the Lunacy Regulation (Ireland) Act 1871 (“the **1871 Act**”). Section 6 of this Act defines a ward as “*a person who has been declared to be of unsound mind and incapable of managing his person or property.*”¹⁰⁷

If there are concerns that an adult lacks capacity to manage his/her own affairs, a solicitor may be instructed by a concerned person to make an application to the President of the High Court to make said adult a ward of court.¹⁰⁸ Where a lack of capacity is found, following a medical assessment, the High Court will then proceed to appoint a Committee to assist in dealing with the ward’s affairs on his/her behalf. In accordance with the Courts (Supplemental Provisions) Act 1961, the Office and Registrar of Wards of Court have a statutory responsibility for managing the affairs of wards. The court will make decisions based on the ‘*best interests*’ of the ward, but there is no obligatory consultation as to the ward’s preferences or wishes. Where funds (e.g. the proceeds of a sale of the ward’s property) are lodged in Court they are placed under the control of the Accountant of the Courts of Justice. The Registrar directs the Accountant to invest the ward’s funds in accordance with the Courts Service investment protocol. A Receiver may also be appointed where necessary or expedient over the ward’s property.¹⁰⁹

When the 2015 Act is fully commenced, all existing wardships will be reviewed and wards will migrate out of wardship within three years of commencement. In place of the wardship system, persons with capacity difficulties will have access to new decision support options. The DSS once operational will support relevant persons in this regard.

¹⁰⁶ Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship – [opeka]).

¹⁰⁷ Lunacy Regulation (Ireland) Act, 1871, s. 6.

¹⁰⁸ RSC Ord 67, r 2.

¹⁰⁹ RSC Ord 67, r 70.

Temporary Wardship

Section 103 of the 1871 Act provides that where it is established to the satisfaction of the court that a respondent is: “*of weak mind and temporarily incapable of managing his affairs*” a Guardian may be appointed for the respondent and/or their property.¹¹⁰ In the court Order appointing said Guardian, it shall be specified the nature and extent of the powers to be exercised by such Guardian. Upon making of such an Order, the respondent is referred to as a “*temporary ward of court*”. In this way, this Order is an interim state-ordered measure.

The use of section 103 is rarely used in practice.¹¹¹ As such, I do not propose to examine the mechanism at length.

The Nursing Homes Support Scheme

Section 21 of the Nursing Homes Support Scheme Act 2009 (“the **2009 Act**”) provides for the appointment of a care representative where a person seeking a nursing home place lacks capacity to make an application for Ancillary State Support.¹¹² Under section 15 of the 2009 Act, Ancillary State Support is defined as “*monies advanced by the Executive by way of loan*”.¹¹³ It is often referred to as a ‘*Nursing Home Loan*’ or “*Nursing Home (Fair Deal) Loan Scheme*”. The support provides that a person in nursing home care (“**care recipient**”) does not have to pay their contribution during their lifetime. Instead, the HSE pays the nursing home on the care recipient’s behalf, subject to a charge being placed on the care recipient’s property/land. Money expended by the HSE for care is then repaid after the death of the care recipient, or the sale/transfer of the care recipient’s property.

Section 21 does not apply where:

- a) the adult in question is a ward of court; or
- b) the adult in question has appointed a person to be his or her attorney under an EPA and
 - i. the attorney is not prohibited or restricted by the terms of the power from performing any matter to which section 21 applies, and
 - ii. the EPA has been registered and the registration has not been cancelled,

or

¹¹⁰ Lunacy Regulation (Ireland) Act, 1871, s 103.

¹¹¹ National Safeguarding Committee, (n 32) 27.

¹¹² The Nursing Homes Support Scheme Act 2009, s 21.

¹¹³ Ibid, s 15.

- c) in respect of whom another person is permitted by law to act on behalf of that person to a matter to which section 21 of the 2009 Act applies, notwithstanding that the person concerned does not have the capacity to make a decision in relation to such a matter.¹¹⁴

Under section 21 of the 2009 Act, a care representative is appointed solely for the purposes of applying for said Ancillary State Support on the care recipient's behalf, if he/she lacks capacity to do so.¹¹⁵ A care representative may also be appointed to consent on the care recipient's behalf to the creation of a charge over said interest.¹¹⁶

In this way the remit of a care representative is limited. He/she cannot access or deal with the property of an adult who lacks capacity. Rather, he/she is constrained to making and facilitation of the aforementioned Application for State Support. Indeed, section 21(7) states as follows:

“An order under this section appointing a care representative shall not permit the care representative to make any decision or take any action on behalf of the relevant person unless that decision is one to which this section applies and is specified in the order”.

The discreteness of the section's purpose is highlighted again in subsection (8), which states as follows:

“An order under this section shall not be construed as making a determination as respects the capacity of the relevant person concerned otherwise than in relation to a matter to which this section applies and which is specified in the order.”

Further, section 21(9) states as follows:

“An order made under this section shall not otherwise affect the power of the relevant person concerned to deal with his or her property and affairs.”

The Law Society of Ireland has recommended the repeal of sections 21 and 22 of the 2009 Act on the commencement of Parts 3, 4 and 5 of the 2015 Act.

Start of the measure

Legal grounds and procedure

¹¹⁴ Ibid, s 21(3).

¹¹⁵ Ibid, s 21 (1)(a).

¹¹⁶ Ibid, s 21 (1)(b).

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

Wardship

As stated above, the current wardship regime in Ireland is based on the 1871 Act. Section 6 of this Act defines a ward as *“a person who has been declared to be of unsound mind and incapable of managing his person or property.”*¹¹⁷

Temporary Wardship

Section 103 of the 1871 Act provides that it must be established to the satisfaction of the court that a respondent is: *“of weak mind and temporarily incapable of managing his affairs.”*¹¹⁸

The Nursing Homes Support Scheme

Section 21(4) of 2009 Act states that where a relevant person *“does not, for the time being, have the capacity to make a decision in relation to a matter to which this section applies”*¹¹⁹ an application may be made to the court for an order appointing a care representative in relation to said matter. If the court is satisfied that the relevant person is *“incapable”*¹²⁰ for the time being of making such a decision as aforesaid, and the court *“determines that it is in the best interests of the relevant person concerned having regard to-*

- a) *The expressed wishes (if known) of the relevant person concerned,*
and
- b) *The circumstances of the relevant person concerned,*

*the court may appoint a person to be a care representative.”*¹²¹

A person is considered not to have capacity to make a decision under section 21 of the 2009 Act if he/she is unable to:

- a) understand the information relevant to the decision;
- b) retain that information;

117 Lunacy Regulation (Ireland) Act, 1871, s. 6.

118 Ibid, s 103.

119 The Nursing Homes Support Scheme Act 2009, s 21(4).

120 Ibid, s 21(5).

121 Ibid, s 21(5).

- c) use or weigh that information as part of the process of making the decision;
- d) communicate his/her decision by any means or, if the decision requires the act of a third party, to communicate by any means with that third party.¹²²

The court can appoint more than one person to be a care representative.¹²³

18. Which authority is competent to order the measure?

As aforesaid, the President of the High Court or Judge of the High Court to which power is conferred, shall determine wardship or temporary wardship applications.

Applications under section 21 of the 2009 Act are determined by a Judge of the Circuit Court pursuant to section 21(39) of the 2009 Act and the [Circuit Court Practice Direction, CC10](#). Geographical jurisdiction shall inform the circuit wherein proceedings are brought.¹²⁴

19. Who is entitled to apply for the measure?

Wardship

Under the current wardship regime, there are no restrictions or limitations as to who may instruct a solicitor to make an application for wardship or temporary wardship application. Usually, however, petitioners are family or friends of the adult in question.

The Nursing Homes Support Scheme

As per section 21(20) of the 2009 Act, a care representative must be of full age and capacity and, in the view of the court, is a “*fit and proper person*”.¹²⁵

Under section 21(12) of the 2009 Act, persons belonging to the following classes of persons may apply to be appointed as a care representative;

- a) Where the relevant person is a member of a couple, the other member of the couple;

¹²² Ibid, s 21(43).

¹²³ Ibid, s 21(6).

¹²⁴ Ibid, s 21(39).

¹²⁵ The Nursing Homes Support Scheme Act 2009, s 21(20).

- b) A parent of the relevant person;
- c) A child of the relevant person;
- d) A sibling of the relevant person (whether full or half sibling);
- e) A niece or nephew of the relevant person;
- f) A grandchild of the relevant person;
- g) A grandparent of the relevant person;
- h) An aunt or uncle of a relevant person;
- i) A person, other than a person who is:
 - a. The proprietor of a nursing home in which the relevant person resides or is likely to reside, or
 - b. One of the registered medical practitioners who examined the relevant person and prepared a report referred to in section 21(18).

and who appears to the court to have a good and sufficient interest in the welfare of the relevant person.¹²⁶

This list operates in descending priority per section 21(13).¹²⁷ However, a person of greater priority may consent in writing to an application by the appointment of a person with lesser priority.¹²⁸ Consent is not a prerequisite however, and an application may be made by a person described in the aforementioned list at the expense of a person of equal or greater priority without the latter's consent subject to each person of equal/greater priority being put on notice of said application. Indeed, section 21(15) of the 2009 Act states that the court shall not be bound by the giving of consent as described.¹²⁹ Subsection (17) provides for the dispensing of the aforementioned consent requirement.¹³⁰

The court shall not appoint a person to be a care representative if that person has been adjudicated as bankrupt (unless same has been discharged or the adjudication annulled), or a person convicted of an offence involving fraud or dishonesty, or a person who has been convicted of an offence against the person or property of the care recipient.¹³¹

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

Wardship

¹²⁶ Ibid, s 21(12).

¹²⁷ Ibid, s 21(13).

¹²⁸ Ibid, s 21(13).

¹²⁹ Ibid, s 21(15).

¹³⁰ Ibid, s 21(17).

¹³¹ Ibid, s 21(21).

With regard to the wardship procedure, the respondent has the right to object and any objection must be in written form, made to the Registrar and be lodged with the Office within 7 days of the notice being served.¹³² A period of time will be permitted, upon receipt of any objection, to submit medical evidence to support any objection.

The Nursing Homes Support Scheme

As discussed, consent is not a prerequisite. However, section 21(5) of the 2009 Act states that the expressed wishes (if known) of the relevant person shall be taken into consideration when appointing a person to be a care representative.

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

- a. a requirement of legal representation of the adult;**
- b. availability of legal aid;**
- c. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
- d. requirement of a specific medical expertise / statement;**
- e. hearing of the adult by the competent authority;**
- f. the possibility for the adult to appeal the order.**

Wardship

I refer to the discussion in the preceding section of this questionnaire as to the procedure and safeguards associated with wardship.

Section 12 of the 1871 Act allows for the procedure to be instigated by the President of the High Court themselves. This is usually executed where the proposed ward does not have a concerned relative to mount a petition. More frequently, an application to make an individual a ward of court is made under section 15 of the 1871 Act.

In making a petition, the petitioner must provide such information as to: the nature and amount of the respondent's property and debts, the respondent's medical condition and marital status.¹³³ Two medical affidavits are required to ground an application for wardship. Order 67 Rule 4(2) of the RSC provides that a petition shall also contain an undertaking by the petitioner that he/she will, in case the

¹³² RSC Ord 67, r 18.

¹³³ RSC Ord 67, r 4(1).

petition is dismissed or not proceeded with, pay the costs or expenses of any visitation of the respondent by a psychiatrist for the purpose of an inquiry.¹³⁴

The President of the High Court reviews the petition and if satisfied with the medical evidence, he/she will direct an inquiry into the capacity of the respondent before determination and direct whether notice of the petition or report and Order for inquiry shall be served on any person in addition to the respondent.¹³⁵ The inquiry usually involves visitation: a consultant psychiatrist examining the respondent and providing a report to the President of the High Court. The Registrar will list the petition for hearing before the court and notice of said application must be served personally on the respondent. A new [Statutory Instrument](#) provides that the person serving such notice to the respondent must read to the petitioner the contents of the petition and explain its nature and implications.¹³⁶

The respondent has the right to object and any objection must be in written form, made to the Registrar and be lodged with the Office within 7 days of the notice being served, as aforesaid.

The legal costs of a wardship application in most cases are paid out of the ward's own estate. Such costs include solicitor's fees, medical report fees and stamp duty. As discussed above, in the recent Supreme Court case of *AC v. Cork University Hospital*¹³⁷, Ms. Justice O' Malley held that the absence of legal aid available to the woman at the centre of the case, Ms. C, and many like her was: "*a matter of real concern, given the consequences of a wardship order.*"¹³⁸ The learned judge stopped short of identifying a right to legal aid in wardship proceedings, however. It is worth referring again to the guidelines espoused by the court in *AC* apropos fair procedures and set out in part in the last section of this questionnaire.

Where a respondent has been declared to be of unsound mind and incapable of managing his/her person or property, or where under the provisions of section 68 or section 70 of the 1871 Act, the Judge has made an Order for the purpose of rendering his/her property or income available for his/her maintenance or benefit or for carrying on his trade or business, said respondent shall be thereafter referred to as a ward of court. As a ward of court, decisions such as those related to the ward's personal welfare; their ability to enter legal relations and to contract; their

134 RSC Ord 67, r 4(2).

135 RSC Ord 67, r 6.

136 S.I. 600/2021.

137 [2019] IESC 73, [2020] 2 IR 38.

138 [2019] IESC 73, [2020] 2 IR 38 [396].

ability to marry; their financial affairs etc. are removed from their personal purview. In other words, as described by Whelan:

*“Once a person is declared a ward of court, they effectively lose the right to make most decisions about their person or property. So, they may not enter binding contracts or institute or defend legal proceedings and they may not sell or buy property or have a bank account. The ward may not travel outside the country...”*¹³⁹

Order 67 Rule 40 states that an Order declaring the ward to be of unsound mind shall contain directions that the petitioner lodge and file in the Office a statement of facts on oath and proposals for the management of the ward’s person and property setting out, in particular:

- a) The ward’s situation;
- b) The nature of his “*mental disease*”;
- c) Who should be appointed Committee of his person and of his estate;
- d) His property and the net amount or estimated value thereof;
- e) The amount of his gross income;
- f) The amount of his clear net income;
- g) Details as to past maintenance;
- h) Proposals as to future maintenance;
- i) Details of any costs to be payable out of the ward’s estate;
- j) Details of any debts owed by the ward;
- k) Whether a receiver should be appointed over the ward’s estate;
- l) Whether the ward has made a will and who has custody of thereof.¹⁴⁰

A Committee shall ultimately be appointed over the estate and/or person.

The Nursing Homes Support Scheme

According to the [Circuit Court Practice Direction, CC10](#), an application is initiated under section 21(4) by way of Originating Notice off Motion and grounded upon Affidavit.¹⁴¹ A date will then be set before the County Registrar of the Circuit Court. The Motion and Affidavit along with any exhibits shall be served personally on the respondent and also any person having greater or equal priority of right to apply to be a care representative.

¹³⁹ Darius Whelan, Mental Health Law and Practice (Round Hall 2009) 395.

¹⁴⁰ RSC Ord 67, r 40.

¹⁴¹ Circuit Court Practice Direction, CC10.

The respondent may reply to the application either personally or through his/her solicitor and this will be sent to the County Registrar, no later than 7 days prior to the return date.¹⁴² If the respondent does not consent to the application, the County Registrar shall send a copy of the reply to the applicant prior to the return date.

A person having an equal or greater priority of right to that of the applicant to apply to be a care representative, and who has not given a consent in writing under section 21(13) of the Act to the applicant's application, may file an affidavit replying to the application¹⁴³, in which event such person shall deliver a copy of that affidavit (and any exhibits) to the applicant and the respondent not later than 7 days prior to the return date.

Where at the hearing of the Originating Notice of Motion before the County Registrar objection is made by any notice party relating to the appointment of a care representative, the County Registrar shall transfer the Originating Notice of Motion, when in order for hearing, to the judge's list on the first opportunity.¹⁴⁴

The court shall be furnished with no less than two medical reports completed by registered medical practitioners who have examined the relevant person concerned and who confirm that the person in question does not have the capacity to make the decisions to which section 21 of the 2009 Act applies and that the reports set out the basis for that conclusion.¹⁴⁵

The court may hear such other evidence relating to the health or circumstances of the person concerned and the circumstances of their partner as it deems necessary to determine proceedings.¹⁴⁶

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

In the case of wardship applications, notice of said application must be served personally on the respondent. A judge may direct service of notice on other parties, as discussed.

¹⁴² Ibid, 4.

¹⁴³ Ibid, 5.

¹⁴⁴ Ibid, 6.

¹⁴⁵ The Nursing Homes Support Scheme Act 2009, s 21(18)(a).

¹⁴⁶ Ibid, s 21(19).

As discussed, notice of an application must be given to each person having greater or equal priority to make an application to be made a care representative.¹⁴⁷ Further, subsection (10) requires that:

*“Notice of every application under this section shall be given to the person to whom the application relates, unless the court determines that such notice need not be given”.*¹⁴⁸

Appointment of representatives/support persons

23. Who can be appointed as representative/support person (natural person, public institution, CSO’s, private organisation, etc.)? Please consider the following:

- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
- b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**
- c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
- d. what are the safeguards as to conflicts of interests at the time of appointment?**
- e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
- f. is a person obliged to accept appointment as representative/support person?**

Wardship

A Committee consists of the person(s) appointed by the court on foot of wardship proceedings to act in tandem with the Office to deal with the affairs of the ward (the ward’s person and/or estate). The person appointed is usually a relative. However, in the event of disagreement amongst a ward’s relatives as to how his/her affairs should be dealt with or where there exists no close relative to be appointed, the court may appoint the General Solicitor for Minors and Wards of Court to act as Committee. The General Solicitor for Minors and Wards of Court is a qualified solicitor in the service of the State who is involved only in cases in

¹⁴⁷ The Nursing Homes Support Scheme Act 2009, s 21(14).

¹⁴⁸ Ibid, s 21(10).

which he/she has been directed/appointed by the President of the High Court. Order 67 sets out the categories of individuals who may not act as Committee:

*“Neither the proprietor nor the keeper nor the medical superintendent of the hospital or institution in which the ward shall, for the time being reside nor any person residing with or in the employment of any such proprietor, keeper or medical superintendent shall be appointed committee of the ward’s person or estate either solely or jointly with any other person.”*¹⁴⁹

In its Consultation Paper on Law and the Elderly, the Law Reform Commission (“the **LRC**”) characterises the wardship regime in this jurisdiction as framing capacity in an “*all-or nothing*” manner.¹⁵⁰ It does not take into consideration any contextual variation in decision making ability. It is clear, for example, that in circumstances where a ward has the capacity to consent to medical treatment, he may nonetheless be overridden by virtue only of his status as a ward of court. This underscores the archaic nature of the current wardship system, which is centred on one’s status as a ward and fails to respond to the tenets of empowerment, support and subsidiarity. In her 2007 Article on the assessment of legal capacity, Donnelly argued for separate assessment of capacity to make healthcare decisions. In cases where the ward is found to be capable, their right to make their own decision should subsist.¹⁵¹

The Nursing Homes Support Scheme

Details as the requirements set out in section 21(20) and 21(12) of the 2009 Act, are set out above.

The same care representative may be appointed over both parties of a couple subject to, for example, the best interests of both parties.¹⁵²

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

Wardship

¹⁴⁹ RSC Ord 67, r 58.

¹⁵⁰ Law Reform Commission, (n 26), para. 4.52.

¹⁵¹ Mary Donnelly, ‘Assessing Legal Capacity: Process and the Operation of the Functional Test’ (2007) 2 JSIJ 141, 151.

¹⁵² The Nursing Homes Support Scheme Act 2009, s 21(23).

Once made a ward of court, the adult loses the right to make autonomous decisions about their person and/or property. As a ward of court, decisions such as those related to the ward's personal welfare; their ability to enter legal relations and to contract; their financial affairs etc. are removed from their personal purview.

The Nursing Homes Support Scheme

An Order appointing a care representative under the 2009 Act shall be subject to such conditions restricting his/her powers to act in relation to the matters to which section 21 of the Act applies as the court considers appropriate and will be explicitly set out in the Order.

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- b. property and financial matters;**
- c. personal and family matters;**
- d. care and medical matters;**
- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**
- g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- h. is there any right to receive remuneration (how and by whom is it provided)?**

Wardship

A Committee can only do what the court authorises him/her to do; a Committee has no inherent authority or power. For example, a Committee shall not change the ward's residence save by leave of the Judge or Registrar.¹⁵³ The Committee is accountable to the Office for all monies received and payments made on the ward's

¹⁵³ RSC Ord 67, r 60.

behalf.¹⁵⁴ Accounts are verified by Affidavit.¹⁵⁵ The Committee must also complete tax returns on behalf of the ward.¹⁵⁶ Any monies received by the Committee on account of the estate must be lodged into a separate account for the estate.¹⁵⁷

The High Court enjoys exclusive jurisdiction to grant or withhold consent to medical treatment in non-urgent matters.¹⁵⁸ In urgent matters, a medical professional is entitled to take necessary emergency action to preserve the life and health of the patient. The LRC notes that for “non-controversial” procedures, for example, the treatment of fractures, the Registrar of Wards of Court is authorised by the President of the High Court to issue consent to treatment.¹⁵⁹ Other non-routine or “controversial” matters will be dealt with personally by the President, with the assistance of his panel of Medical Visitors (usually consultant psychiatrists).

Order 67 RSC provides further assistance as to the rules of the court that govern dealing with the ward’s personal and property affairs. For example, they detail rules that pertain to the lease/sale/mortgage of the property of the ward; the appointment of receivers etc.

The Committee is monitored in the discharge of their duties through reports (accounting for expenses, assets, welfare of the ward etc.) and inspections by Case Officers, who in turn report to the Registrar and to the President. The Registrar also plays a watchdog role. Further, where an account of the Committee of the estate is unsatisfactory to the Registrar, or where the ward’s affairs require special investigation, he shall specifically report to the judge thereon.¹⁶⁰ The Registrar may also require the Committee of the person to return written particulars as to the ward’s residence, physical and mental condition, maintenance, comfort or any other such matter as he/she may advise.¹⁶¹

While a Committee is not paid a fee or salary, she/he is entitled to be reimbursed in respect of out of pocket expenses. Order 67 Rule 65 states: “*A Committee of the estate or person may be allowed remuneration on such terms and subject to such conditions (if any) as the Judge may from time to time determine*”.¹⁶²

A new Committee may be appointed upon death, resignation or replacement.

154 RSC Ord 67, r 63.

155 Ibid.

156 RSC Ord 67, r 68.

157 RSC Ord 67, r 66.

158 Law Reform Commission, (n 24), para. 4.50.

159 Ibid, para 4.50.

160 RSC Ord 67, r 64.

161 RSC Ord 67, r 59.

162 RSC Ord 67, r 65.

A ward may be discharged from wardship if they or a solicitor instructed by them apply to the Registrar of Wards of Court in writing for same. The application must be grounded on medical evidence to the effect that the ward is now of sound mind and capable of managing their own affairs. The President of the High Court will consider the application based on the medical evidence provided.

At any stage a Committee may apply in writing to be permitted to retire as Committee. A recommendation may also be sought by the Committee for their substitution. A new Committee may be appointed upon death, resignation or replacement.¹⁶³

The Courts Service of Ireland has provided an overview of the role of a Committee for the public: [Roles and Duties of a Committee](#).¹⁶⁴

The Nursing Homes Support Scheme

Any transaction between a care representative and another person shall, in favour of that other person, be as valid as if it had been entered into by the care recipient.¹⁶⁵

The care representative shall have a duty to act in the best interests of the person in respect of whom they have been appointed and to keep records relating to their actions.¹⁶⁶ They also have a duty to give all reasonable assistance to the Executive in relation to the registration of an Order under section 17 (2) of the 2009 Act.¹⁶⁷

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- a. if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place**

163 RSC Ord 67, r 57.

164 Courts Services, 'Role and Duties of a Committee' (Undated) <<https://www.courts.ie/view/document/43a3a489-14ec-4922-a3fa-54a13f5e1130/Role%20and%20Duties%20of%20Committee.pdf/pdf>> accessed 25 September 2022.

165 The Nursing Homes Support Scheme Act 2009, s 21(27).

166 Ibid, s 21(28).

167 Ibid.

(please consider cases of concurrent authority or joint authority and the position of third parties)?

In wardship, Order 67 Rule 57 RSC states as follows:

“Where the Judge considers it expedient he may appoint two or more persons to be committees of the estate or of the person; and may direct that on the death or discharge of any such person the custody and care of the estate or person, as the case may be shall continue to be exercised by the survivor or survivors.”¹⁶⁸

If more than one care representative was appointed under the 2009 Act, directions may be sought from the court in case of, for example, disagreement.¹⁶⁹

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

- a. what competent authority is responsible for the supervision?**
- b. what are the duties of the supervisory authority in this respect?**
- c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- d. describe the financial liability of the representative/support person for damages caused to the adult;**
- e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The Nursing Homes Support Scheme

Under section 21(25) of the 2009 Act, if an appointed care representative is, subsequent to appointment:

- a) Adjudicated as a bankrupt (unless said bankruptcy has been discharged or adjudication annulled); or
- b) Convicted of an offence involving fraud or dishonesty; or
- c) Convicted of an offence against the person or property of the care recipient

¹⁶⁸ RSC Ord 67, r 57.

¹⁶⁹ The Nursing Homes Support Scheme Act 2009, s 21 (29).

said person shall cease to be a care representative and that person shall notify the Executive and the court by which the appointment was made within 10 working days of such cesser.¹⁷⁰

Where an Order appointing a care representative ceases to have effect, for whatever reason, such cesser shall not affect the validity of any act previously done by said representative in accordance with their appointment.¹⁷¹

Wardship

The Registrar enjoys a watchdog or supervisory role in wardship cases. He/she enjoys a catch-all power under Order 67 Rule 49 to:

*“make any inquiry and receive and consider any proposal, as to any matter concerning the person, property, or affairs of any respondent or ward or his maintenance, or the maintenance of any member of his family, and report thereon to the Judge...ascertain whether there are any debts due by the ward which should not be disputed and consider whether any of them ought to be paid, and if so to whom and out of what property or fund; consider proposals for the adjustment and settlement of any such undisputed debt and for the compromise and settlement of any disputed debt, claim or demand against the ward’s estate; inquire and consider whether any dealings with the respondent’s or ward’s property, whether before or after the commencement of proceedings, should be examined; make a separate or special report or certificate, or state specially any circumstance relating to the subject matter of a report as he may think fit.”*¹⁷²

It should be noted that a wardship Order is not subject to an automatic periodic review and is therefore of indefinite duration. Review may be had on foot of limited invoking events. As aforesaid, however, the Registrar shall, in accordance with any general or special direction to be given by the Judge, visit every mental hospital and institution in which a ward is resident, and as occasion may require, every ward in private care.¹⁷³

Where the Committee of the estate defaults in furnishing proper accounts or lodging any sums of money directed to be lodged, the Registrar may disallow remuneration and/or may direct that the Committee pay interest at the statutory rate for the time that the monies have been improperly retained/uninvested.¹⁷⁴ Further,

¹⁷⁰ Ibid, s 21(25).

¹⁷¹ Ibid, s 21(26).

¹⁷² RSC Ord 67, r 49.

¹⁷³ RSC Ord 67, r 50.

¹⁷⁴ RSC Ord 67, r 67.

any failure or “*undue delay*”¹⁷⁵ by a Committee in complying with any requirement of Order 67 or of the Judge or Registrar, shall, unless satisfactorily explained, be grounds for their removal.

The Supreme Court has held that the paramount consideration must be the best interests of the ward and approved the finding that the proper approach was “*the standpoint of a prudent, good and loving parent*”.¹⁷⁶

In *A.C. v. Cork University Hospital*¹⁷⁷ the Supreme Court expressed concern about the lack of fundamental safeguards available to wards of court, stating that one of the most salient aspects of the process was the absence of the ward’s voice.

28. Describe any safeguards related to:

- a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**
- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**
- e. Please consider the position of the adult, contractual parties and third parties.**

The Nursing Homes Support Scheme

Section 21(31) of the 2009 Act provides that on application being made to it by any person appearing to have a good and sufficient interest in the welfare of the person to whom the order relates, the court may at any time direct the care representative to:

- a) prepare and file a report of his/her actions as care representative;
- b) attend before the court with such records and documents as may be specified by the court.¹⁷⁸

Section 21(35) provides for the setting aside of any decision or action taken by a care representative and/or an Order under section 21.¹⁷⁹ Where same are set aside

¹⁷⁵ RSC Ord 67, r 69.

¹⁷⁶ *Re a Ward of Court* [1996] 2 IR 79, p 128.

¹⁷⁷ [2019] IESC 73, [2020] 2 IR 38.

¹⁷⁸ The Nursing Homes Support Scheme Act 2009, s 21(31).

¹⁷⁹ *Ibid*, s 21(35).

or declared invalid, it will not affect the obligation or liability of the person on behalf of whom the Ancillary State Aid is/was to be paid, i.e. the care recipient.¹⁸⁰

Wardship

Types of decisions are discussed above. While no clear guidelines around conflict of interest exist, there are sanctions for the mismanagement of ward monies as discussed above.

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

The Nursing Homes Support Scheme

Under section 21(30) of the 2009 Act, on application to the Circuit Court by any person appearing to the court to have a “*good and sufficient interest in the welfare of the person to whom the application relates*”¹⁸¹, the court may appoint a person in the existing/previous care representative’s stead where:

- a) The care representative appointed previously has died; or
- b) The care representative appointed previously is no longer of full capacity; or
- c) The care representative has indicated to the court that he or she wishes to resign; or
- d) The appointment of the care representative has been revoked by the court.

Where the court has appointed more than one care representative and chooses to revoke the appointment of one such representative upon hearing a section 21(30) application, section 21(33) seems to state that the court cannot remove/replace the other care representative:

“Where more than one person stands appointed to act as a care representative of a person, the court in hearing the application...may revoke the appointment as respects one of the care representatives but not as respects the other or others and may appoint another person to be a care representative in place of the person whose appointment has been revoked”.¹⁸²

¹⁸⁰ Ibid, s 21(35).

¹⁸¹ Ibid, s 21(30).

¹⁸² The Nursing Homes Support Scheme Act 2009, s 21(33).

Revocation by the court shall be without prejudice to the validity of anything previously done by the representative under and in accordance with the appointment.¹⁸³

Wardship

A ward may be discharged from wardship if they or a solicitor instructed by them apply to the Registrar of Wards of Court in writing for same. The application must be grounded on medical evidence to the effect that the ward is now of sound mind and capable of managing their own affairs. The President of the High Court will consider the application based on the medical evidence provided.¹⁸⁴

Reflection

30. Provide statistical data if available.

Incoming Wards of Court

Incoming wards 2020	Incoming Wards 2021
382	430

[Source: Courts Service Annual Report 2021](#), page 77.

Wardship Caseload Breakdown

	2020	2021
Wardship cases	2,744	2,798
Applications Awaiting Hearing	127	183
Adults and minors taken into wardship (declaratory orders)	309	304
Dismissed/discharged	266	222
Orders signed	2,312	2,204

[Source: Courts Service Annual Report 2021](#), page 77.

Active Cases: Reason Admitted to Wardship

	2020	2021
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¹⁸³ Ibid, s 21(34).

¹⁸⁴ RSC Ord 67, r 93.

Brain injury	31	21
Dementia and age-related illness	173	201
Learning/intellectual disability	62	45
Minors (under age of 18 years)	19	15
Psychiatric illness	24	22
Total	309	304

[Source: Courts Service Annual Report 2021](#), page 77.

Circuit Court Care Representative Applications

Incoming Care Representative Applications 2020	Incoming Care Representative Applications 2021
564	591

[Source: Courts Service Annual Report 2021](#), page 79.

31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?

Some of the problems relating to wardship have been examined already in this report. The Irish Human Rights and Equality has emphasised the vital need for reform of the wardship system and has criticised the delay in the full commencement of the 2015 Act to respond to same:

“... for far too long we as a State have put up with a system of wardship, which is detached and divergent from any contemporary understanding of the concept of personal autonomy. A strength of this new legislation lies in its greater assimilation of human rights standards as to privacy, expression, fair trial, liberty, association, stemming from our Constitution, the ECHR, the UNCRPD and the EU Charter of Fundamental Rights... the Commission does hold concerns after years of delay, that such a significant piece of legislation is being moved at significant pace.”¹⁸⁵

SECTION IV – VOLUNTARY MEASURES

Overview

¹⁸⁵ Joint Committee on Children, Equality, Disability, Integration and Youth, Debate on General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021, 16 February 2022.

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.¹⁸⁶

Enduring Powers of Attorney

In this jurisdiction, a person (“the **Donor**”) may create an EPA when he/she is of sound mind as a pre-emptive decision-making act. An appointed attorney (“**Attorney**”) is thereafter charged with managing the affairs of the Donor, should the latter become unable to manage his/her affairs.¹⁸⁷ General power in relation to all the Donor’s property, affairs and/or personal care may be given to the Attorney. In the alternative, specific authority may be given for discrete purposes. The relevant legislation is the [Powers of Attorney Act 1996](#) and the [Enduring Powers of Attorney Regulations](#).¹⁸⁸ EPAs may be distinguished from general Powers of Attorney, as the latter is no longer valid once the Donor becomes mentally incapacitated.

Agency Agreements

An agency arrangement involves the appointment of a trusted other as an agent. This agent is charged with a discrete purpose, which usually involves dealing with a designated third party on a person’s behalf. A bank might permit an individual to carry out a third-party mandate if they are physically incapable of performing certain functions e.g. writing cheques. Said arrangements may only be entered into when the principal is mentally competent and the arrangement subsists for as long as the principal remains mentally competent.

As discussed in a previous section of this questionnaire, a special type of agency arrangement may be made under [Social Welfare Guidelines](#), which facilitates a trusted other to accept social welfare benefits on behalf of the recipient.¹⁸⁹ This type of agency arrangement can be made either by the recipient or the Department of Social Protection to facilitate payments of the recipient’s social welfare payments, either on a short-term (temporary agent) or enduring basis. The legal status of a social welfare agency relationship is unique when compared with other, more general agency relationships (e.g. third party mandate in a bank), in that it may be put in place or may subsist if the recipient becomes mentally incapable.

186 Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship – [opeka]).

187 Powers of Attorney Act 1996, s5.

188 S.I. 196/1996.

189 Department of Social Protection, (n59).

The Nursing Homes Support Scheme

As discussed in previous sections of this questionnaire, care representatives may be nominated by the recipient voluntarily or by way of substitute by the courts. This has been outlined elsewhere in the report and as such will not be outlined in full in this section.

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. Please consider, among others:

- a. the existence of specific provisions regulating voluntary measures;**
- b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

Enduring Powers of Attorney

Unlike a contract which crystallises upon execution, an EPA is a legal instrument which only comes into effect when it has been registered.¹⁹⁰ As stated, its provision as a voluntary measure is supported by the Powers of Attorney Act 1996 and the Enduring Powers of Attorney Regulations. A further difference between EPAs and contracts as ordinarily constituted, is the fact that an EPA can be revoked once made. Revocation is explored more fully below.

Agency Agreements

Agency arrangements take the form of written instructions, as opposed to a contract or trust. Social welfare agency arrangements are subject to guidelines published by the Department of Social Protection.¹⁹¹

34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.

An Advance Care Directive, as the concept is understood in this jurisdiction, does not require a named other to ‘stand-in-the-shoes’ of the Donor and administer their affairs on their behalf. Rather it is a record of a person’s specific wishes with regard to future medical treatment in the event that he/she becomes unable to communicate same. No appointment of another person is involved in this process. Advance Care Directives are recognised in this jurisdiction, but only in common law.

¹⁹⁰ Powers of Attorney Act, s 10.

¹⁹¹ Department of Social Protection, (n 59).

It should be noted that the 2015 Act provides for the latter in the area of healthcare decisions. Under the Act, if a person does not currently have capacity issues, they may record his/her wishes regarding healthcare and medical treatment in advance, in the event that he/she is unable to make these decisions in the future, when they are required. The person can appoint a trusted other as their designated healthcare representative to ensure their wishes are carried out.

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

Enduring Powers of Attorney

The EPA can give an Attorney general authority to do anything that the attorney might lawfully do or it may provide specific authority only to execute discrete acts on the Donor's behalf e.g. paying loans; paying expenses; managing investments; property sale/purchase.

Under section 6(2) of the 1996 Act, general authority is characterised as follows:

*“Where an instrument is expressed to confer a general authority on the attorney, it operates to confer, subject to the restriction imposed by subsection (5) and to any conditions or restrictions contained in the instrument, authority to do on behalf of the donor anything which the donor can lawfully do by attorney”.*¹⁹²

Section 6(6) provides for the possibility of making any specified personal care decisions on the Donor's behalf.¹⁹³ Under section 4 of the Act, a personal care decision is defined as including any one or more of the following:

- a) where the Donor should live;
- b) with whom he/she should live;
- c) whom the Donor should see and not see;
- d) what training or rehabilitation the Donor should get;
- e) the Donor's diet and dress;
- f) inspection of the Donor's personal papers;
- g) housing, social welfare and other benefits.¹⁹⁴

¹⁹² Power of Attorney Act 1996, s 6(2).

¹⁹³ Ibid, s 6(6).

¹⁹⁴ Ibid, s 4.

Agency Agreements

An agency arrangement is created for a specific, enumerated purpose e.g. the temporary or enduring collection of social welfare payments.

Start of the measure

Legal grounds and procedure

36. Who has the capacity to grant a voluntary measure?

Enduring Powers of Attorney

Section 5(1) of the Act states that:

“A power of attorney is an enduring power within the meaning of this Act if the instrument creating the power contains a statement by the donor to the effect that the donor intends the power to be effective during any subsequent mental incapacity of the donor and complies with the provisions of this section and regulations made thereunder.”¹⁹⁵

Section 4 of the 1996 Act describes “*mental capacity*” as follows: “...*in relation to an individual, means incapacity by reason of a mental condition to manage and administer his or her own property and affairs.*”¹⁹⁶

As such, it would seem from the text of the 1996 Act that a Donor, who is not suffering from incapacity by reason of a mental condition, may create this voluntary measure by confirming in writing a statement to the effect that he/she intends the power to be effective during any subsequent mental incapacity to manage and administer his/her own property and affairs.

Agency Agreements

A competent adult in receipt of one or more named social welfare benefits (as discussed above) can nominate an agent for the purpose of dealing with said payments on his/her behalf.

Recognition of an Agency Agreement is subject to the third party, i.e. the recipient of the instructions. For example, the Department of Social Protection.

¹⁹⁵ Powers of Attorney Act 1996, s 5(1).

¹⁹⁶ Ibid, s 4(1).

37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.

Enduring Powers of Attorney

A Donor may create an EPA on foot of a statement from a doctor confirming his/her mental capacity. An EPA must be created with the benefit of legal advice; a solicitor must explain the effect of the creation of the instrument and sign a statement confirming that the Donor understood the effect of the creation of said EPA.¹⁹⁷ The scope of the powers which are to vest in the Attorney should be addressed in the text of the EPA.¹⁹⁸ At least two notice parties must be made aware of the creation of the power.¹⁹⁹ At least one of the said notice parties must be the Donor's spouse or civil partner, if living with the Donor or; the child of the Donor; or a relative of the Donor, within the meaning of the Regulations.²⁰⁰

Agency Agreements

The social welfare payments to which an agent may be appointed include: Blind Pension; Disability Allowance; Invalidity Pension; State Pension (Contributory and Non-Contributory); Supplemental Welfare Allowance and others.²⁰¹

In the case of a temporary agent, he/she may be appointed by the recipient to collect a maximum of 5 payments per scheme (for which the recipient is eligible) over a 6-month period. A permanent arrangement may be applied for thereafter.²⁰²

Nominations made by a recipient appointing a permanent agent must be complete in writing and require the consent of the Department of Social Protection. The recipient may revoke the appointment by written notification to the Department. It is possible for an agent to be changed by applying in writing to the Department and acquiring its consent.²⁰³

In circumstances where a customer is unable to manage their own financial affairs, an agent may be appointed by the Department on his/her behalf. In its [2019 Operational Guidelines](#) on the topic, this may arise when a recipient suffers from:

197 Ibid, s 5(2)(d)(ii) and (iv).

198 Ibid, s 5.

199 S.I. No. 196/1996, 7(a).

200 Ibid, 7(c).

201 Department of Social Protection, (n 59).

202 Ibid

203 Ibid

- a) an inability to understand the basis of possible entitlements to benefit;
- b) an inability to understand and complete the claim form;
- c) an inability to understand and deal with correspondence and inquiries concerning the claim;
- d) an inability manage benefit payments received.²⁰⁴

The Guidelines state that in such cases, a formal application must be made on behalf of the recipient based on medical evidence and/or Social Welfare Inspector report on the circumstances of the case.

An agent must be over the age of 18 years and be one of the following:

- a) a spouse;
- b) a parent, step-parent or foster parent;
- c) a legal guardian;
- d) a child or step-child;
- e) a brother or sister; step-brother or step-sister; half-brother or half-sister;
- f) a son-in-law or daughter-in-law;
- g) a niece or nephew;
- h) a grandchild;
- i) a grandparent;
- j) an aunt or uncle;
- k) a person who has been appointed to be a care representative of the recipient;
- l) a person, other than the medical practitioner who signed the form, who appears to the Department to have a good and sufficient interest in the welfare of the customer.²⁰⁵

Where the recipient is resident in a care centre for a continuous period of four weeks or more, and where no other suitable person is capable and/or willing to be appointed, a representative of the care centre may be appointed to act as agent. In certain cases, the HSE may be appointed as an agent. Further limitations to the categories of individuals dictate that a person adjudicated as bankrupt may not be appointed as an agent unless the bankruptcy has been discharged or the adjudication annulled. Further, an individual who has been convicted of an offence against the person or property of the recipient, or of an offence involving fraud or dishonesty, may not act as an agent.²⁰⁶

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Department of Social Protection, (n 59).

38. Describe when and how voluntary measures enter into force. Please consider:

- a. the circumstances under which voluntary measures enter into force;**
- b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. who is entitled to initiate the measure entering into force?**
- d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?**

Enduring Powers of Attorney

The Enduring Power of Attorney only comes into effect when it has been registered.²⁰⁷ The Attorney(s) must apply for registration, once medical evidence has been obtained, confirming that the Donor is, or is becoming, mentally incapable of managing his/her affairs.²⁰⁸

Notification must be given to the Registrar of Wards of Court, the Donor and the Notice Parties, of intention to apply to have the power registered, after which, there is a five week period, in which any of the parties can object to the registration if they wish.²⁰⁹ The grounds on which an objection can be made, are as follows:

- a) that the enduring power purported to have been created was not valid;
- b) that the enduring power is no longer a valid and subsisting power;
- c) that the donor is not, or is not becoming, mentally incapable;
- d) that, having regard to all the circumstances, the attorney is unsuitable to be the donor's attorney;
- e) that fraud or undue pressure was used to induce the donor to create the enduring power.²¹⁰

Any objection should be sent in writing to the Registrar of Wards of Court.²¹¹

Where a court has reason to believe that the Donor may be or may be becoming mentally incapable and the court is of the opinion that it is necessary, before the instrument is registered, to exercise any power with respect to the power of attorney, the court may on application to it by an interested party exercise that power.

207 Powers of Attorney Act 1996, s 7.

208 Ibid, s 9.

209 Ibid, s 10(2).

210 S.I. No. 196/1996, Notice of Intention to apply for Registration.

211 Ibid.

Where an Attorney has made an application for registration of the instrument, then, until the application has been determined, the Attorney may take action under the instrument to maintain the Donor's estate or to prevent loss thereto; to maintain the Attorney or other persons insofar as is permitted under section 6(4); make personal care decisions which cannot reasonably be deferred until the application has been determined.²¹²

Agency Agreements

As discussed, in the case of a temporary agent, he/she may be appointed by the recipient to collect a maximum of 5 payments per scheme (for which the recipient is eligible) over a 6-month period. A permanent arrangement may be applied for thereafter.

Nominations made by a recipient appointing a permanent agent must be complete in writing and require the consent of the Department of Social Protection. The recipient may revoke the appointment by written notification to the Department. It is possible for an agent to be changed by applying in writing to the Department and acquiring its consent.

Forms are available for nomination purposes [online](#) and via An Post, the Irish post service.

Appointment of representatives/support persons

- 39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:**
- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
 - b. what are the safeguards as to conflicts of interests?**
 - c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

Enduring Powers of Attorney

²¹² Powers of Attorney Act 1996, s 7(2).

The Donor can appoint anyone to act and may appoint more than one Attorney if they wish.²¹³ However, if the Donor's spouse or civil partner and the marriage/partnership severs by way of for example, annulment, divorce or judicial separation, then the EPA will be invalidated.²¹⁴

The 1996 Act limits those who may be named as an Attorney. The following categories are exempt from being made an Attorney under an EPA:

- People under the age of 18
- Bankrupts
- People convicted of fraud
- People disqualified under the Companies Act
- An individual or trust corporation who own a Nursing Home in which the Donor is residing²¹⁵

Section 14 of the 1996 Act provides for the appointment of more than one Attorney and this is discussed more fully below.

Agency Agreements

See question 37.

During the measure

Legal effects of the measure

40. To what extent are the voluntary measure and the wishes expressed within it legally binding?

Enduring Powers of Attorney

Once registered the EPA is legal binding, subject to the intervention of the court.

Agency Agreements

See question 37, page 50.

41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

²¹³ Ibid, s 5.

²¹⁴ Ibid, s 5(7).

²¹⁵ Powers of Attorney Act 1996, s5(4).

In all matters, the legal capacity to make decisions in the case of the EPA or to deal with one's social welfare payments is transferred to the substituted other.

Powers and duties of the representative/support person

42. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:**
- b. property and financial matters;**
- c. personal and family matters;**
- d. care and medical matters?**
- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- f. is there a duty of the representative/support person to inform and consult the adult?**
- g. is there a right to receive remuneration (how and by whom is it provided)?**

Enduring Powers of Attorney

Section 6(7)(a) of the 1996 Act necessitates that decisions of the Attorney are informed by the “*best interests*” of the Donor in either a general or specific context.²¹⁶ According to section 6(7)(c), it may be said that sufficient compliance with paragraph (a) has been realised if the Attorney reasonably believes that what he/she decides is in the best interests of the donor. Paragraph (b) of the subsection provides further assistance as to what the “*best interests*” of the Donor entails. It states that regard should be had to:

“i) so far as ascertainable, the past and present wishes and feelings of the Donor and the factors which the Donor would consider if he or she were able to do so;

ii) the need to permit and encourage the Donor to participate, or to improve the Donor's ability to participate, as fully as possible in any decision affecting the Donor.

iii) so far as it is practicable and appropriate to consult any of the persons mentioned below, their views as to the Donor's wishes and feelings and as to what would be in the Donor's best interests:

²¹⁶ Powers of Attorney Act 1996. s 6(7)(a).

- I) *Any person named by the Donor as someone to be consulted on those matters;*
- II) *Anyone (whether the Donor's spouse, a relative, friend or other person) engaged in caring for the Donor or interested in the Donor's welfare;*

iv) whether the purpose for which any decision is required can be as effectively achieved in a manner less restrictive of the Donor's freedom of action."

Subsection (5) states that subject to any restrictions in the instrument, an Attorney operating under a general or a specific power may if provided for in the instrument, dispose of property of the Donor by way of gift to the following extent:

- a) By making gifts of a seasonal nature or at a time, or on an anniversary, of a birth or marriage, to persons (including the Attorney) who are related to or connected with the Donor; and
- b) Make gifts to any charity to which the Donor made or might be expected to make, provided that the value of the gift is not "*unreasonable*" having regard to all the circumstances and in particular, the extent of the Donor's assets.²¹⁷

Section 6(4) of the 1996 Act states that subject to any restrictions contained in the EPA instrument, an Attorney may act for the Attorney's benefit or that of other persons to the following extent:

- a) The Attorney may so act in relation to him/herself in relation to any other person if the Donor might be expected to provide for his/her/their needs; and
- b) The Attorney may do whatever the Donor might be expected to do to meet those needs.²¹⁸

This seems to be the case under the Act, whether the Attorney is operating under a general or specific power.

The right to remuneration and/or out-of-pocket expenses may also be specified in the instrument giving rise to the EPA.²¹⁹

Agency Agreements

²¹⁷ Ibid, s 6(5).

²¹⁸ Powers of Attorney Act 1996, s 6(4).

²¹⁹ Ibid, s 5(f) and S.I. 196/1996, Reg 6.

The agent is fixed with such legal obligations as:

- a) a duty to act in a personal capacity and not delegate responsibility to any other person;
- b) a duty to use the social welfare payments for the benefit of the recipient;
- c) a duty to ensure that payment is lodged to an interest-bearing account for the benefit of the recipient;
- d) a duty to report any changes in the recipient's circumstances are reported to the Department of Social Protection (e.g. change of means);
- e) a duty to ensure monies are not spent on items or services that the recipient has an entitlement to and are available and accessible;
- f) a duty to keep a record of all sums received and all transactions made in relation to the payment;
- g) a duty to make the records available if requested by the recipient, the recipient's nearest relative or the Department.²²⁰

43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?
- b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

Enduring Powers of Attorney

Section 14 of the 1996 provides for the appointment of more than one Attorney. It states that where multiple Attorneys are appointed, the EPA itself should specify whether the Attorneys should act jointly or jointly and severally. In default of same, the Attorneys shall be construed as having been appointed to act jointly.²²¹

Where two or more Attorneys have been appointed to act jointly, then in the case of the death, incapacity or disqualification of any one or more of them, the remaining Attorney(s) may continue to act, unless the EPA instrument expressly provides to the contrary.²²²

220 Department of Social Protection, (n 59).

221 Powers of Attorney Act 1996, s 14(1).

222 Powers of Attorney Act 1996, s 14(3).

Agency Agreements

It would seem from the Guidelines and also the appointment form that only one Agent may be appointed for the purpose of social welfare agency arrangements.

44. Describe the interaction with other measures. Please consider:

- a. if other measures (state-ordered measures; ex lege representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**
- b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

All the above voluntary measures will lapse upon the Donor/appointer being made a ward of court.

Safeguards and supervision

45. Describe the safeguards against:

- a. unauthorised acts of the adult and of the representative/support person;**
- b. ill-conceived acts of the adult and of the representative/support person;**
- c. conflicts of interests**

Please consider the position of the adult, contractual parties and third parties.

Enduring Powers of Attorney

Under section 12 of the 1996 Act, the court has a supervisory and determinative function in circumstances where:

- a) Any questions arise as to the meaning or effect of an instrument;
- b) If directions are required as to the management or disposal by the Attorney of property and affairs of the Donor;
- c) If directions are required as to the rendering of accounts by the Attorney and the production of records thereof;
- d) If directions are required as to the remuneration or expenses of the Attorney;

- e) If directions are required as to a personal care decision made or to be made by an Attorney;
- f) If directions are required to require the Attorney to furnish, information or documents in his/her person as Attorney;
- g) If directions are required as to consent or authorisation to act (either for the Attorney's own benefit, the benefit of other persons or to provide consent where the Attorney would need to have obtained consent from a mentally capable Donor in order to act);
- h) If directions are required as to relieve the Attorney wholly or partly from liability incurred or which may have been incurred on account of a breach of duty as Attorney.²²³

In the recent case of **CA v. BW and MA**,²²⁴ the Court of Appeal provided helpful guidelines as to the role of the courts in reviewing a personal care decision made by an Attorney:

“a) The role of the court is limited by the grant of authority under the Act to the attorney to make personal care decisions in the best interests of the donor.

b) The role of the court is to review the attorney's decision. In reviewing the decision, the court does not make a decision de novo. It is not a role akin to the court's supervisory decision in wardship.

c) Although the role of attorney is not one requiring specialist knowledge or skill, it is a decision concerning personal autonomy that the legislature has permitted a donor to place in the hands of a person chosen by him or her.

d) As a corollary of the primacy of the attorney's role, before the court can commence a review of a decision of an attorney, the court must have some evidence to suggest that prima facie, at least, the decision under challenge is not objectively reasonable.

e) The court's role is also limited by the provision in s. 6(7)(c) that it is sufficient compliance with the duty to act in the best interests of the donor if the attorney reasonably believes that what he or she decides is in the best interests of the donor.

f) There is a subjective and objective element to the reasonableness of the attorney's decision. An attorney must subjectively believe that they have acted

²²³ Powers of Attorney Act 1996, s 12.

²²⁴ [2020] IECA 250 (Unreported, Donnelly, 22nd September 2020).

reasonably in the best interests of the donor. That belief must also be objectively reasonable.

g) A decision made mala fides or for an improper purpose could neither be subjectively nor objectively reasonable. However, it should be stressed that before such a case could be entertained by the Court (a) the Court would require some evidence to suggest that prima facie, at least, the decision under challenge is not objectively reasonable and (b) a case based upon mala fides or improper purpose must be supported by evidence and not assertion.

h) The decision will be objectively unreasonable if it is one that is fundamentally at variance with reason or common sense. This means that the court will only review the decision where it is manifestly not in the donor's best interests and so irrational that no attorney, acting reasonably, could have arrived at it.

i) The personal care decision is one which affects rights and therefore it must be made within constitutional limitations. The donor has exercised autonomy in giving the power of attorney to another to make personal care decisions. Those personal care decisions relate to the exercise of commonplace and everyday decisions such as where to live and who to see; the giving effect to the grant to the attorney of those powers by the donor when he or she had capacity to do so reflects a respect for the donor's constitutional right to autonomy. A review based upon a breach of constitutional rights of the donor will only be sustainable where the result of the attorney's decision is that the donor's fundamental constitutional rights are not being respected. Such a situation might arise where the decision as to where the donor is to live has meant that the donor is living in inhuman and degrading conditions.”²²⁵

Agency Agreements

The Department of Social Protection may cancel an agency arrangement at any time where it has reason to believe that it is not working satisfactorily or that the payment is not being used for the benefit of the customer. Where this occurs, the agent must where appropriate, return the payments upon request.²²⁶

- 46. Describe the system of supervision, if any, of voluntary measures. Specify the legal sources. Please specify:**
- a. is supervision conducted:**
 - b. by competent authorities;**
 - c. by person(s) appointed by the voluntary measure.**

²²⁵ [2020] IECA 250, [85].

²²⁶ Department of Social Protection, (n 59).

- d. in each case, what is the nature of the supervision and how is it carried out?
- e. the existence of measures that fall outside the scope of official supervision.

Enduring Powers of Attorney

As discussed above, the High Court has a supervisory role in respect of an EPA, including the power to give directions about the management and disposal of the Donor's property. An EPA, once registered, may only be cancelled with approval from the High Court.

Agency Agreements

The Department of Social Protection may cancel an agency arrangement at any time where it has reason to believe that it is not working satisfactorily or that the payment is not being used for the benefit of the customer. Where this occurs, the agent must, where appropriate, return the payments upon request.²²⁷

End of the measure

47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.

Enduring Powers of Attorney

An EPA can be revoked by the Donor at any stage before an application for registration is made.²²⁸ Once the EPA has been registered, it may only be revoked by way of an application to the High Court.²²⁹ Further details of the termination or invalidation of an EPA may be found at section 5 of the 1996 Act.

Agency Agreements

The Department may cancel an agency arrangement at any time where it has reason to believe that it is not working satisfactorily or that the payment is not being used for the benefit of the customer. Where this occurs, the agent must, where appropriate, return the payments upon request.²³⁰

²²⁷ Ibid.

²²⁸ Powers of Attorney Act 1996, s 7.

²²⁹ Ibid, s 8.

²³⁰ Department of Social Protection, (n 59).

Reflection

48. Provide statistical data if available.

Enduring Powers of Attorney (Registered) Applications

Incoming 2020	Incoming 2021
1,338	1,234

[Source: Courts Service Annual Report 2021](#), page 79.

49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measure been evaluated, if so what are the outcomes?

The EPA system has been criticised for operating a status approach to capacity rather than a functional view of same.²³¹

The statutory definition of incapacity in the Powers of Attorney Act 1996, means: “*incapacity by reason of a mental condition to manage and administer his or her own property and affairs*”.²³²

This constitutes an all-or-nothing approach to capacity which does not leave room for nuances viz for example the type of decision to be made at the time.

The 2015 Act provides for a number of voluntary measures, which include an Enduring Power of Attorney and also an Advance Healthcare Directive (as afore-said). If a person does not currently have capacity issues, they can create an enduring power of attorney. The Attorney’s role is to act on the appointer’s behalf to make certain decisions if he/she are unable to in the future when required.

The 2022 Bill posits the establishment of a new system for EPAs whereby an EPA may be created by a Donor who enjoys capacity to do so, and registers same with the DSS, thereby facilitating the resolution of any issues with the EPA in advance of it coming into effect. Under the Bill, an EPA comes into effect via a notification process to the DSS by the Attorney.

231 Law Reform Commission, (n 26).

232 Powers of Attorney Act 1996, s 4.

SECTION V – EX LEGE REPRESENTATION

Overview

50. Does your system have specific provisions for ex lege representation of vulnerable adults? If so, please answer questions 51 - 64 if not proceed with question 65.

N/A

Start of the ex-lege representation

Legal grounds and procedure

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the ex lege representation?

N/A

52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?

N/A

53. Is it necessary to register, give publicity or to give any other kind of notice of the ex-lege representation?

N/A

Representatives/support persons

54. Who can act as ex lege representative and in what order? Think of a partner/spouse or other family member, or other persons.

N/A

During the ex-lege representation

Powers and duties of the representatives/support person

55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters.

Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.

N/A

56. What are the legal effects of the representative's acts?

N/A

Can an adult, while still mentally capable, exclude or opt out of such ex-lege representation (a) in general or (b) as to certain persons and/or acts?

**57. Describe how this *ex lege* representation interacts with other measures?
Think of subsidiarity**

N/A

Safeguards and supervision

58. Are there any safeguards or supervision regarding ex lege representation?

N/A

End of the ex-lege representation

59. Provide a general description of the end of each instance of ex-lege representation.

N/A

Reflection

60. Provide statistical data if available.

N/A

61. What are the problems which have arisen in practice in respect of ex lege representation (e.g. significant court cases, political debate, proposals for improvement)?

N/A

Specific cases of ex lege representation

ex lege representation resulting from marital law and/or matrimonial property law

- 62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then (also) legally bind the other spouse?**

N/A

- 63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.**

N/A

ex lege representation resulting from negotiorum gestio and other private law provisions

- 64. Does the private law instrument negotiorum gestio or a similar instrument exist in your jurisdiction? If yes, does this instrument have any practical significance in cases involving vulnerable adults?**

Although the principle of *negotiorum gestio* is a concept which may be found in the codified systems of Civilian Member States, it is not recognised in the Irish Common Law system.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

- 65. Do you have any other private law instruments allowing for representation besides negotiorum gestio?**

In Ireland, there persists an unsubstantiated concept that the 'next of kin' ("the NOK") enjoys legal status as an alternate or substitute decision maker for other adults in certain matters, particularly in the medical arena. The concept does not have legal force, but is of merely practical and customary significance; one's NOK

will be a point of contact in the event of an emergency. A NOK does not by virtue of that title alone, enjoy any decision-making rights over their relative.

66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?

N/A outside of state-ordered or voluntary measures.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. Provide an assessment of your system in terms of empowerment of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

a. the transition from substituted to supported decision-making;

At present, Ireland exists in limbo, as we wait for the full commencement of the 2015 Act. The current substituted decision-making scheme under wardship system, for example, subsists as the 2022 Bill makes its way through the legislative process. Although changes may be introduced via the Bill, the underlying ethos of the Act will remain: that of support, dignity and empowerment. As discussed in previous sections of this questionnaire, with reference to academic literature, amendment and commencement the 2015 Act will usher in a new era of supported decision-making, edging us closer towards compliance with the ECHR and CRPD.

b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;

The principle of subsidiarity is not promoted sufficiently under the state-ordered and voluntary measures currently available in this jurisdiction. Although the 2015 Act seeks to change this, it has been argued by some that the 2015 Act fails to achieve this. This is due to the fact that the 2015 Act operates a three-tier framework providing for:

- a) A Decision Making Assistant; or
- b) A Co-Decision Maker; or
- c) A Decision Making Representative,

depending on the needs of the relevant adult. The first two tiers provides for decision-support.²³³ The final of the three supports, the Decision-Making Representative, may be obtained upon application to the Circuit Court for a declaration, as discussed above. It is argued that by retaining as a last resort a form of substitute decision-making at the uppermost echelons of its framework (a Decision Making Representative) the 2015 Act has not fully embraced the principle of subsidiarity.²³⁴ Further, it might be argued that by applying a functional test of capacity to determine access to appropriate supports, subsidiarity is not being promoted by the Act.

c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;

Proportionality is noticeably absent from the current regime. Other than an EPA, the only way that adults that require assistance in making decisions can obtain said support is through a substituted decision-making measure e.g. wardship.

d. effect of the measures on the legal capacity of vulnerable adults;

Wardship affects the legal capacity of a ward of court in most areas of his/her lives. Until recently, the fact that an individual was a ward was determinative of whether he/she could marry. Section 7(1) of the 2015 Act was commenced in February 2021. This repealed the Marriage of Lunatics Act of 1811, which made it unlawful for wards of court to marry under any circumstances.

There is a distinction in Irish law as between testamentary capacity and capacity of a ward to make decisions as to his/her affairs. This has been discussed more fully above.

e. the possibility to provide tailor-made solutions;

The 2015 Act, once commenced will provide for non-substitutive decision support arrangements in the form of:

- a) A Decision Making Assistant; or
- b) A Co-Decision Maker.

The provision of same will be on a case-by-case basis and subject to the unique circumstances of the adult seeking them.

²³³ Áine Flynn, 'Ireland: Assisted Decision-Making (Capacity) Act 2015 and Article 12 of the United Nations Convention on the Rights of Persons with Disabilities' (2020) 41 *Jurimetrics* 231.

²³⁴ *Ibid.*

f. transition from the best interest principle to the will and preferences principle.

Even in the wake of the commencement of the 2015 Act, there exists an incremental migration towards the recognition of the wishes of those adults who lack capacity to make decisions. In the case of *A v. Hickey*²³⁵, for example, President Irvine took into consideration the wishes of the ward at the centre of the judgment to not be left on artificial life support.

This is also reflected in the recent Statutory Instruments which responded to the COVID-19 crisis and the vaccine rollout: *“if he or she [is] unable to give such consent, the will and preferences of the person [is] established and the administration [is] for the benefit of the person”*²³⁶.

Further, in *Governor of X Prison v. PMcD*,²³⁷ even absent the commencement of the 2015 Act in its totality, the court recognised that the refusal of medical treatment in an advance healthcare directive is legally enforceable in appropriate circumstances.

68. Provide an assessment of your system in terms of protection of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;

The kind of “*protection*” afforded to vulnerable adults under the current regime is paternalistic in nature. The wards of court system, for example, has its origins in the notion of the monarch as *parens patriae* or “*guardian of the people*”.²³⁸

The 2015 Act, in contrast, provides for a range of Interveners, who may be nominated to assist a relevant person in making their own decisions regarding personal welfare, property or affairs. As discussed, there are different types of Intervener with increasing levels of involvement and responsibility. At the lowest level of the tiered support structure is the Decision-Making Assistant. If a person needs

235 See for example, Re C [2021] IEHC 318.

236 SI No. 698 of 2020.

237 [2015] IEHC 259.

238 Patricia T. Rickard-Clarke, ‘Decision-Making Capacity: Standards Required by the Constitution’ in *The Assisted Decision making (Capacity) Act 2015: Personal and Professional Reflections* (Donovan Print 2021) 44.

a higher level of support, they can nominate a Co-Decision-Maker to make a decision with them. At the next level and only in circumstances where a person is considered to lack the requisite capacity to make a decision supported by Interveners as previously described, someone appointed under an EPA or an Advance Healthcare Directive can make the relevant decision. If the relevant adult has not planned ahead in this regard, the Circuit Court can appoint a Decision-Making Representative to make the decision on behalf of the person.

b. protection during a procedure resulting in the application, alteration or termination of adult support measures;

Under the Mental Health Act 2001, provision is made for Mental Health Tribunals which review admission orders and renewal orders.²³⁹ Legal representation is assigned to the patient unless he/she chooses to engage one for the purposes of the tribunal.²⁴⁰ There is no such corresponding provision of legal aid for wards of court.

Under the 2015 Act, legal aid will be available to those making applications to the courts for supports. The Act also transfers responsibility for the administration of the scheme of legal aid for cases before the Mental Health Tribunals to the Board. This provision has yet to be commenced.

c. protection during the operation of adult support measures:

- **protection of the vulnerable adult against his/her own acts;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
- **protection of the privacy of the vulnerable adult.**

The current regimes are paternalistic in that they focus on the protection of the relevant adult from harm caused by his/her own acts (e.g. Mental Health Act 2001 section 3) as opposed to safeguarding his/her rights to fair procedures (e.g. lack of legal aid in wardship proceedings), giving effect to his/her voice (e.g. in wardship proceedings).

²³⁹ Mental Health Act 2001, s 17 and s 18.

²⁴⁰ Mental Health Act 2001, s 17.

In relation to institutional abuse or neglect, HIQA's National Standards for Residential Care Settings for Older People in Ireland²⁴¹ and National Standards for Residential Services for Children and Adults with Disabilities²⁴² underscore the need for a care plan or personal plan to be drafted for each adult. The [Safe-guarding Vulnerable Persons at Risk of Abuse - National Policy and Procedures](#) which applies to all HSE and HSE funded services, espouses a number of principles aimed at promoting the welfare of vulnerable people and safeguarding them from abuse. These include a requirement that all services must have a publicly declared "*No Tolerance*" policy to any form of abuse and promote a culture which engenders this ethos.

However, there is currently no statutory provision for a care plan where adults at risk are in receipt of safeguarding services in the community.

241 HIQA, National Standards for Residential Care Settings for Older People in Ireland (HIQA 2016).

242 HIQA, National Standards for Residential Services for Children and Adults with Disabilities (HIQA 2013).