Mental Capacity: Law and Practice

Third Edition

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PREFACE TO THE FIRST EDITION

It is 17 years since the Law Society’s Mental Health Sub-Committee (as it then was) first drew public attention to the legal vacuum in which people who lacked mental capacity were obliged to exist. This provoked the Law Commission to take this topic on board and, after several years of consultation, recommendations were made for a statutory mental incapacity jurisdiction. Different governments then pursued further consultation whilst lacking the will to introduce legislation, but pressures to do so became overwhelming with the introduction of community care policies, disability discrimination laws and ultimately human rights legislation. The Mental Capacity Act 2005 is the result, but a consequence of the changed climate is that it must meet higher standards than were expected when the need was first identified.

This Act builds upon enduring powers of attorney and the existing jurisdiction of the Court of Protection, and follows most of the Law Commission’s recommendations in creating a broad and viable framework. The devil will be in the detail that has yet to emerge through forms, Codes of Practice, regulations and Court rules. There is an inevitable tension between protection and empowerment, and inadequate support may lead to a denial of both. Those who complain that the jurisdiction is too controlling may be the first to express outrage when abuse is not prevented. But we do not live in a ‘nanny state’ and there are issues as to who should fund the new jurisdiction. The existing Court of Protection can seek to be self-funding because it only opens its doors to those who have money. The new jurisdiction may find itself addressing the needs of some of the most financially disempowered people in the community. Is it in reality an extension of our health and social services notwithstanding that it functions through a Court? The legal rights of individuals who lack the capacity to pursue them must be addressed, but this can only be done in the context of support and care provision, which become the ultimate responsibility of the state.

No one should allow themselves to be fooled by the familiar terms ‘Public Guardian’ and ‘Court of Protection’. The former is a new incarnation with a statutory role rather than a mere administrative body, and only time will tell how far this role will develop. The latter is a new regional court working within the mainstream courts and enjoying a wider jurisdiction exercised under
different principles. Those already working within the existing system do not know how the new regime will develop, so for practitioners and others there must be an element of speculation.

This book is an attempt by four concerned authors who have throughout been committed to the reforms to explain what is going on and provide some insight into the issues that must be faced. Although the detailed law must be set out, however tedious this may be, we have endeavoured to breathe life into the provisions and procedures. We have also tried to face up to some of the potential pitfalls and difficulties that will inevitably arise in implementing new legislation in this complex area.

I wish to thank my co-authors for their dedicated contributions, each being highly experienced in the topics that they have covered. As to the rest I must accept responsibility. We do not claim to be experts – who is in this field? – but for my part I have drawn on 28 years of general legal practice, 13 years as a generic judge and five years involvement within the existing Court of Protection. Above all, I have been influenced by my family experience of a child with severe learning disabilities and the insight this gave me into a different philosophy which should influence the legal system more in the future than it has in the past. I have campaigned for this jurisdiction from the inception and wish to see it improve the quality of life of those who lack capacity, their families and carers. Whether it does so will depend upon all those who play a part in the process, but by picking up this book you have indicated that you are one of those people. Thank you for your support.

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Grange-over-Sands
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