

**Wardship  
Applications - A  
Guide for Health  
Care Workers**

**HSE**

**February 2022**

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## **Disclaimer**

This Guidance has been developed to guide and support health care workers. It is not a complete or authoritative statement of the law and is not a legal interpretation.

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## **Foreword**

The HSE is committed to protecting the rights of those using the health and social care services we provide and fund. We recognise we need to improve our practice in this regard. A right's based approach to care means that recourse to wardship must only be taken when the many other avenues to place individual's rights at the centre of care planning and provision have been exhausted. This guidance is intended as a resource against which to assess any potential decision to apply for Wardship.

A decision to apply for Wardship is of such significance to the person who is subject to the application that applications themselves should be rare and exceptional. Where a decision is made to apply for wardship a senior accountable officer of the HSE (in the context of a wardship application) for example a CHO Chief Officer or Hospital Group Chief Executive must personally approve the application, and this responsibility must not be delegated or handed over to legal professionals. The Senior Accountable Officer may appoint a senior staff member e.g. a Head of Service as Case Manager, who must remain personally involved at all stages including attendance at all hearings and retention of decision making responsibility for the HSE with regards the application, and if relevant on-going wardship. Further information can be found within the guidance itself on the role of Case Manager.

As legislation, policy and systems modernise it is essential that more person centred approaches to practice are put in place to protect the rights of patients, services users and vulnerable adults. Until the current wardship regime is repealed this guidance on Wardship will apply. Please review it carefully. I expect this guidance to be operationalised across all services and assurances will be sought in this regard through the established governance structures for all services.

**Ms. Yvonne O'Neill**  
**Acting National Director- Community Operations**  
**2022**

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## **Purpose of these guidelines**

These guidelines have been developed to provide for a clear and consistent approach on steps required before an application for wardship of an adult is considered by the HSE. It is also to ensure that any application for wardship is given due consideration and undertaken in a way which respects the person's constitutional, European and international human rights throughout the process.

The guidelines are outlined in five parts. Part one sets out the steps to be explored and considered before an application for wardship is determined. Part two outlines the process for emergency applications and matters which may fall under the doctrine of necessity. Part three details the steps required in seeking legal advice before a decision is made about a wardship application. Part four outlines what is entailed in proceeding with an application for wardship so as to assist the Healthcare Worker in understanding the wardship process. Part five details the implications of wardship and examines the role of the HSE after the application for wardship has been made.

These guidelines are not prescriptive and their application will depend on individual circumstances and contexts. They are primarily, but not exclusively, of relevance to all Health Care Workers within HSE services and HSE funded services who are considering or are in the process of making an application to the Court to have the person taken into wardship.

These guidelines will be reviewed once the Lunacy Regulations (Ireland) Act 1871 are repealed and Part 5 of the Assisted Decision Making (Capacity) Act 2015 is commenced. These guidelines will remain valid until such time as all existing wards have transitioned into the new scheme under Part 5 of the 2015 Act. This will be for a period of three years as per the 2015 Act from the date of commencement.

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Please note that until the 1871 Act is repealed and Part 5 of the 2015 Act is commenced wardship applications will remain an option to be considered.<sup>1</sup>

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<sup>1</sup> The General Solicitor for Minors and Wards of Court has stated that *“This legislation is not commenced so the current system must be upheld and complied with. This does not mean however that the ethos of the legislation cannot be applied as long as any action is lawful and in compliance with existing legislation and Rules of the Court”* (June 2021).

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## Part One: Considerations in advance of wardship

### 1. Introduction

A decision to apply to have a person taken into wardship has significant consequences for the person's life thereafter as acknowledged in the Supreme Court decisions of *AC v HSE*<sup>2</sup> and *AM v HSE*<sup>3</sup>. While the Courts have emphasised that a lack of capacity does not diminish the rights of a citizen<sup>4</sup> successive governments have stated that the wardship regime is out of step with Ireland's national and international commitments to protect a person's fundamental rights and the regime will be repealed when Section 5 of the Assisted Decision Making (Capacity) Act 2015 is commenced<sup>5</sup>. Notwithstanding the significant developments that have been adopted by the Courts to ensure the human rights of the person are respected in wardship applications<sup>6</sup> it is critical that a decision by the HSE or HSE funded agency to apply to have a person taken into wardship is arrived at having exhausted alternative options for the person in the first instance.

Whilst there may be particular situations which may warrant urgent consideration for an application for wardship owing to a serious and imminent risk to the person's health or life, such applications must ensure a person's human rights are respected and that their right to fair procedures at every stage of the process are protected.

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<sup>2</sup> *AC v Hickey & Ors* [2019] IR 73

<sup>3</sup> "An order making a person a ward of court has real consequences. It can deprive a person of the power to make many of the choices which are fundamental and integral to day-to-day life. Orders can be over-broad in their effect and disproportionate in their scope", *AM v HSE* [2019] IESC 3 2019: para. 8.

<sup>4</sup>In the case of *Re A Ward of Court (No. 2)* [1996] 2 IR 79, at page 126, Hamilton C.J. confirmed that a lack of capacity does not diminish the rights of a citizen:

*"The loss by an individual of his or her mental capacity does not result in any diminution of his or her personal rights recognised by the Constitution, including the right to life, the right to bodily integrity, the right to privacy, including self-determination, and the right to refuse medical care or treatment. The ward is entitled to have all these rights respected, defended, vindicated and protected from unjust attack and they are in no way lessened or diminished by reason of her incapacity"*

<sup>5</sup> Government of Ireland (2020) *Programme for Government: Our Shared Future*

(<https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>)

<sup>6</sup> *AC v Hickey & Ors* [2019] IR 73, *AM v HSE* [2019] IESC 3 2019, *In the matter of C, A ward of Court* [2021] IEHC 318, *In the Matter of CL* [2021] IEHC 465.



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This section sets out steps which must be considered before any application for wardship is considered.

## **2. Presumption of decision-making capacity**

All persons have equal legal rights before the law. People have the right to control their own lives and the right to make informed decisions on matters that relate to them. This includes people with an intellectual or physical disability, cognitive difficulties due, for example, to acquired brain injury or dementia, and people with mental health problems.

The HSE National Consent Policy sets out the presumption that a person has capacity to make a decision, regardless of the presence of intellectual or cognitive disabilities. People may differ in the amount of assistance they require to make particular decisions, but this does not necessarily mean that they lack decision-making capacity. This is an important consideration in any discussion on wardship.

## **3. Support for the person who may be considered for wardship**

There are legal and ethical responsibilities on a Health Care Worker to ensure that the person who is at the centre of considerations for wardship is at all times supported to express their will and preference. Every reasonable effort should be made to support the person and to elicit their will and preferences. The voice of the person must be ascertained and listened to. This can be done by applying the following principles in any discussion with a person pertaining to an application for wardship:

- i. Consideration should be given at all times to the urgency of the decision that is triggering the consideration for wardship - must the decision be made now? Can it wait until the person's condition has improved or their decision-making capacity is at its best?

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- ii. The presumption of capacity of the person should prevail unless otherwise demonstrated.
  - iii. The person has the right to participate when any decision is being made that involves them and they should be involved as far as practicable in the formation of any decision pertaining to their care.
  - iv. The person should have access to an independent advocate <sup>7</sup>(see appendix 6) and/or a self-nominated support person e.g. trusted friend or relative.<sup>8</sup>
  - v. The person should be given information in a manner and language that they understand in relation to decisions that are being considered and made concerning them pertaining to their decision-making capacity and consideration of wardship.
  - vi. All medical reports/opinions/letters/expressions of concern from clinicians and anyone relevant to the decision-making capacity of the person must be made available to him or her, unless the Health Care Worker / clinician involved has sufficient grounds to believe that there will be a potential negative impact on the person, or if permission of the Court is required to release the reports. These reports should be conveyed in a way that is comprehensible to the person.
  - vii. The person should be asked for their consent with respect to any decisions which are being made in relation to their care and all other decisions affecting them. If consent is not forthcoming it should be documented that the consent of the person was sought and the reasons stated why it was not possible to obtain.
  - viii. Where the person has communication difficulties, every practicable effort should be made to support them through the use of communication aides or to support them through those who have an insight into how the person communicates.

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<sup>7</sup> It is the person's choice whether or not they wish an advocate to be involved. Independent advocacy is entirely led by the person and provided with the person's authority to act.

<sup>8</sup> If there are urgent orders to be sought in advance the Court will appoint a Guardian ad Litem who's role is to report the views of the person to the court. This role should not be conflated with the GAL appointed under the Child Care Act 1991. A GAL does not replace the need for independent advocacy while wardship is being considered if the person wishes to have an advocate.

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- ix. Due regard must be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy including any control over property and affairs.

#### 4. What is a ward of court?

A ward of court is an individual who the court has determined that there is adequate evidence that he or she is *'of unsound mind and incapable of managing his or her own person and property'*<sup>9</sup> and that *wardship is both necessary and appropriate*<sup>10</sup>. Wardship applications are sought in instances where it is determined that a person lacks capacity to make decisions on their own behalf.

Historically, wardship was used where the proposed ward had property or assets to protect. However, wardship has evolved to include people who require the protection of the Court but who do not have any property requiring protection and management.

Usually, a person is made a ward of court following an application made by a family member, the person's own solicitor or the Health Service Executive (HSE).

#### 5. What are the implications of wardship?

When a person is made a ward of court, the Court has legal authority **over all matters** relating to that person and his or her estate. The person is legally referred to as a 'Ward of Court'. The Court appoints a 'Committee' whose role is to manage the person's property, personal care decisions and day-to-day affairs by reference to the orders of the Court.

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<sup>9</sup> A ward is defined by Order 67, Rule 1 of the Rules of the Superior Court as "*a person who has been declared to be of unsound mind and incapable of managing his person or property*" and includes, where the context so admits, a person in respect of whom or whose property an order has been made under section 68 or section 70 of the Lunacy Regulation (Ireland) Act, 1871

<sup>10</sup> Stated in *AC v Hickey & Ors* [2019] IR 73

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When a person is made a ward of court there are a number of things that they explicitly may no longer do without the consent of the Court. For example, a ward is not allowed to travel abroad without the consent of the office of the wards of court or consent to medical treatment<sup>11</sup> and can only commence legal proceedings if permission is granted by the Court to do so (see Part 5 for further details).

While a person who is a ward of court may no longer make a wide range of decisions including financial, personal care and day to day decisions which may impact on the person's decision making autonomy, the President of the High Court may make orders in the person's best interests which takes the person's will and preference and beliefs and values into account including whether the person can make certain autonomous decisions such as the decision to take the COVID-19 vaccination, their wishes and preferences pertaining to their committee and other any such issues which are raised directly with the President.

## **6. Why consider wardship?**

Wardship applications may be considered where it has been determined that a person lacks decision making capacity, cannot manage their affairs, all alternative options to wardship have been exhausted and, owing to their specific set of circumstances, the person requires the intervention of the court to protect their estate or their person.

Circumstances which may require consideration of a wardship application are varied and subjective to the facts and circumstances of each case. Such circumstances may pertain to medical interventions such as the refusal of life sustaining treatment, safeguarding including financial abuse and safety and welfare reasons where there may be a risk to the person or others.

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<sup>11</sup>The President of the High Court issued guidance in April 2021 in relation to the COVID-19 vaccine. This guidance note states that if the ward / intended ward has capacity to object to the administration of the vaccination, then the vaccine should not be administered. Further information at <https://www.lawsociety.ie/News/News/Stories/vaccination-of-wards-of-court—intended-wards-of-court-for-the-covid-19-virus/>.

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It is important to note that these circumstances cited here **may not always require a wardship application and other interventions may be more appropriate depending on the circumstances of each individual case.**

It is also important to note that factors such as imminent risk to the person's health or life are of paramount importance in considering wardship. In such circumstances an emergency application for wardship can be considered- see Part Two 2.2 for further detail.

## **7. The decision to make a person a ward of court**

The decision as to whether or not to take a person into Wardship is one made at its discretion of the President of the High Court. In *Re D Finlay C.J.* stated:

“It is, I think, important to emphasise that the jurisdiction of the High Court to take persons of unsound mind into Wardship is and must always remain a discretionary jurisdiction. Where a person has property it is, in my view, open to the President of the High Court, or to any judge exercising the jurisdiction on his designation, to conclude that Wardship is not necessary in any given circumstances either for the protection of that property or of the person of the respondent”.<sup>12</sup>

The test is whether or not Wardship is necessary to protect the person or property of the individual.<sup>13</sup>

## **8. Inherent Jurisdiction**

The High Court in Ireland holds what is termed as “inherent jurisdiction” to vindicate or defend the personal rights of any citizen. This jurisdiction is derived from the Constitution and is not dependent on any statutory provision. This inherent jurisdiction may only be utilised in the event that a statutory remedy (e.g. the

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<sup>12</sup> *Re D* 1987 I.R.449

<sup>13</sup> Office of the wards of Court, June 2021

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Wardship regime or Mental Health Act regime) is not available and fundamental constitutional rights of an individual are at stake. It can only be invoked in rare and extreme cases and where a “lacuna” or omission in the statutory law.

## 9. Safeguarding against a third party who is allegedly causing concern

In instances where the alleged risk emanates from the person’s place of residence, and/or from those closest to the person, every effort must be made to ensure appropriate legal measures are directed at the person creating that risk<sup>14</sup>. This may include utilising the provisions of the Domestic Violence Act 2018 (the 2018 Act). This is detailed further in section 9 below.

## 10. Considering the most appropriate intervention

In considering whether a wardship application needs to be made, a Health Care Worker must first understand the consequences it has for a person’s decision-making autonomy.

It is important to carefully consider if the proposed intervention is the and an appropriate course of action, taking account of all of the known circumstances. Due consideration must be given to reviewing all available supports for the person as an alternative to wardship and, if necessary, seek legal advice on the options available (interim / pre-wardship orders may be obtained in certain instances – see Section 12 for more information).

In considering other possible options available the need for **any action or decision at all should also be considered**. This will on occasions take more time as it is

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<sup>14</sup> In *AC v Hickey & Ors* [2019] IR 73 the Supreme Court held ‘*where the risk to a patient comes from a third party, it seems to me to be preferable that appropriate legal measures should be directed at the persons creating that risk...rather than unnecessarily depriving the person of her liberty, notional as that liberty may be in practice.*’ At para 381

necessary to ensure that the person obtains the relevant support to enable them to make the decision in question.

Whilst it is imperative that all possible alternatives to wardship are explored and considered, **wardship applications may be unavoidable in certain situations, and must be expedited in a timely manner so as to mitigate risk or harm to the person.** This must at all times be done in a manner which respects the person's human rights and in accordance with fair procedures.

## 11. Alternative options to wardship

When examining whether there are alternatives to wardship consideration should be given to the options detailed below. In the first instance it is important to investigate if the person has planned ahead for a time when they may lack capacity to make their own decisions. The Health Care Worker should check whether the person has already prepared an Enduring Power of Attorney (EPA)<sup>15</sup> or has a valid and applicable Advance Healthcare Directive<sup>16</sup> in place in respect of the particular decision that needs to be made. If the person has validly advance planned then there may not be a need to apply for wardship for the person. The Health Care Worker should actively encourage discussions with the person about planning ahead for the future in order to help preserve the person's wishes and preferences when they are no longer able to do so<sup>17</sup>.

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<sup>15</sup> Enduring Powers of Attorney Act 1996 does not permit the inclusion of healthcare treatment decisions. It does however permit the inclusion of care decisions such as personal care, place of care and other day to day decisions.

<sup>16</sup> The legislation for Advance Healthcare Directives has not yet commenced. However the Courts have recognised the validity and applicability of Advance Healthcare Directives in *Governor of X Prison –v P Mc.D* [2015] IEHC 259 and a person's advance views on healthcare decisions in *In the matter of C, A ward of Court* [2021] IEHC 318

<sup>17</sup> The Irish Hospice Foundation have produced the 'Think Ahead' form for planning ahead which is available on [www.thinkahead.ie](http://www.thinkahead.ie). See also Section 11.4 Patient Private Property Account for details on financial planning.

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## **11.1. Enduring Powers of Attorney**

If the person's decision-making capacity to manage their affairs is in question, steps should be taken to establish whether the person has made an Enduring Power of Attorney (EPA) so that steps can be taken towards registration when appropriate. The obligation to register an EPA is that of the Attorney appointed under the document and the HSE is not involved in the registration process.

Personal care decisions made under an EPA are limited to matters such as place of residence, dress, diet, training and rehabilitation, housing, welfare and other benefits for the person. Under the existing law, the Enduring Powers of Attorney Act 1996, decisions pertaining to healthcare are excluded therefore an Attorney may not make healthcare decisions or consent to medical treatment on behalf of the person.

Where there is an EPA, enquiries may need to be made so as to ascertain what authority the Attorney has under the EPA, if the Attorney has the authority for the decisions to be made and whether the EPA has been registered. For example some Attorney's may have only have authority for financial decisions.<sup>18</sup>

## **11.2 Advance Healthcare Directive**

An Advance Healthcare Directive is an advance expression in writing (this includes voice and video recording) made by a person with decision-making capacity which sets out their preferences concerning healthcare treatment decisions that may arise if he or she subsequently lacks decision-making capacity. An Advance Healthcare Directive only comes into effect when the person who made it (the Directive-Maker) lacks capacity to consent to or refuse healthcare treatment at the time the healthcare treatment decision has to be made.

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<sup>18</sup> Under current Irish law: An Attorney who has been expressly given this power may make certain "personal care" decisions on behalf of the person under an Enduring Power of Attorney made under the Power of Attorney Act 1996 (i.e. the current legislation governing Powers of Attorney). These do not include healthcare decisions.



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Advance Healthcare Directives are provided for in Part 8 of the Assisted Decision Making (Capacity) Act 2015 which is due to be commenced in 2022. The Assisted Decision-Making (Capacity) Act 2015, when fully commenced, will contain a clear set of minimum criteria for an advanced healthcare directive to be valid under that Act and a valid and applicable refusal of treatment in an Advance Healthcare Directive will be legally binding on healthcare professionals.

Apart from the Assisted Decision Making (Capacity) Act 2015 however there is a general constitutional principle that an adult who has decision-making capacity has the right to consent to and the right to refuse healthcare treatment. In appropriate circumstances, this legal principle may be relied upon to give effect to a person's previously recorded freely stated wishes about a future treatment decision.

Thus, although each Advance Healthcare Directive must be considered on its own facts and circumstances the Irish Courts have indicated a general view that an opinion of "freely stated wishes" about future care ought to be respected "in appropriate cases".

This means that, in general, Advance Healthcare Directives should be respected as evidence of an expression of the person's will and preferences provided that the directive clearly sets out the treatment decisions and the circumstances in which the Advance Healthcare Directive is to apply.

If, however, there are ambiguities in relation to the validity and applicability of the Advance Healthcare Directive (AHD), legal advice should be sought and ultimately the matter may have to be referred to court. Such ambiguities may include:

- Concerns as to whether the AHD was made voluntarily;
- Concerns that the Directive-Maker, while he or she had capacity to do so, has done anything clearly inconsistent with directions set out in the AHD;
- Concerns that the Directive Maker may subsequently have revoked or attempted to revoke the AHD;

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- Doubt as to whether a treatment refusal was intended to apply in the circumstances which have arisen;
  - Concerns that a treatment refusal is based upon false assumptions;
  - Concerns that the AHD is too broad in its application and so it is not clear that it applies to the situation in question.

Even if there are ambiguities, the Advance Healthcare Directive may still have relevance because it conveys significant important information in relation to the person's will and preferences in relation to their healthcare treatment.

### **11.3 Domestic Violence Act 2018 (the 2018 Act)**

If the reasons why admission to wardship is being considered is due to a risk of domestic violence and in certain circumstances where physical or sexual abuse of a vulnerable person (called an "aggrieved person" in the 2018 Act) is suspected and that person is not a Ward of the Court, it may be feasible for the HSE<sup>19</sup>, to bring an application in the District Court under section 11c of the 2018 Act for a safety order, barring order or emergency barring order to protect the aggrieved person.<sup>20</sup>

It is advisable that legal advice is sought in these instances.

For more information on the Domestic Violence Act 2018, please go to

<https://www.garda.ie/en/about-us/organised-serious-crime/garda-national-protective-services-bureau-gnpsb-/domestic-abuse/faqs-in-respect-of-the-domestic-violence-act-2018-.pdf>.

For information on the Courts Service please go to:

<https://www.courts.ie/domestic-abuse>

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<sup>19</sup> There is a memorandum of understanding between the Child and Family Agency (CFA) and the HSE in relation to the HSE bringing applications under the 2018 Act.

<sup>20</sup> Section 11 (C) Domestic Violence Act 2018-

<https://www.irishstatutebook.ie/eli/2018/act/6/section/11/enacted/en/html#sec11>

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## 11.4 Private Patient Property Account

The HSE and HSE funded services may hold a person's money in a Patient Private Property (PPP) account under the Health (Repayment Scheme) Act 2006 for the benefit of the person. With a Patient Private Property Account, the HSE will administer the person's day-to-day funds on the person's behalf. The person will have access to the funds as required, and the money remains the person's property. These accounts are generally held on behalf of people who are in long term residential care arrangements including supported community maintenance and accommodation arrangements, being cared for by or on behalf of the HSE due to a physical or mental disability or ill health. The funds must be used for the benefit of the person, particularly where a person may not have decision-making capacity to manage, or to make decisions around the best use of their funds.

The HSE document [Patients Private Property Guidelines](#) provides guidance to healthcare workers on managing a person's funds, particularly in cases where the person's capacity to manage their own financial affairs is in question.

The PPP service is, in effect, a free personal banking service for people in receipt of HSE services who chose to use it. It facilitates the centralised cashing of allowances such as disability and old age pension with seamless payment of contributions to care and payment for all personal necessities such as clothes, confectionary, hairdressing etc.

The operation of a PPP account for people in receipt of HSE services will often obviate the necessity of an application for wardship where there is only an income stream or cash balance to be managed and no complex assets to be safeguarded. It also reduces the risk to a potentially vulnerable adult's income where otherwise a third party opts to step in and manage the finances with no oversight attaching to this arrangement.

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## 11.5 Agency Arrangement with the Department of Social Protection

An agency arrangement applies in circumstances where a customer of the Department of Social Protection (DSP) who is not a ward of court, or who has no EPA arrangement in place and may lack decision making capacity to manage their own financial affairs.

On application to the DSP, under the provisions and obligations set out in social welfare legislation, an agent may be appointed (who may or may not be a family member), with authorisation to collect the person's social welfare payment and to undertake certain transactions on their behalf. In all such cases, a medical practitioner must certify, on the agent nomination form, that the person is unable for the time being to manage their own financial affairs, for reasons which may include:

- An inability to understand the basis of possible entitlement to benefit/pension
- An inability to understand and complete formal correspondence/forms
- An inability to understand and deal with correspondence and enquiries concerning their claim
- An inability to manage benefit/pension payments received

Where a registered care provider is appointed as an agent, in either a HSE-funded or private nursing home setting, the DSP can facilitate electronic payments directly to the central residents' account of the institution. All monies transferred must be individually and correctly managed on behalf of the resident.

An agent's powers are limited to matters relating to the social welfare payment. They have a legal obligation to ensure that collected payments are used only for the benefit of the recipient and must also deal with certain other (standard) aspects of a social welfare payment, including the timely notification to the DSP of any known change in the recipient's circumstances.

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## 11.6 Supported banking arrangements

There are a number of banking products now available where a person lacks capacity to manage their financial affairs.

Further details are available directly from financial institutions and are updated regularly.

### **Part One: Summary of key points**

Prior to an application for wardship, the HCW should:

- Ensure the person's decision-making capacity has been maximised
- Ensure the person has been supported to make the decision
- Ensure all necessary support has been given to ascertain the person's will and preference
- Understand the implications of wardship for the person's autonomy and human rights
- Ensure all alternatives and options have been considered and pursued
- Utilise the doctrine of necessity for medical emergencies only
- Utilise the doctrine of necessity in relation to temporary detention only in exceptional circumstances and within strict time limitations
- Ensure that the person's human rights and right to fair procedures are protected through all stages of the process
- Ensure the person has access to all relevant documentation in a format that they can understand, and is supported to understand these

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## Part 2- Emergency applications and Doctrine of Necessity

### 1. Doctrine of Necessity and Medical Emergencies

In an emergency life-threatening situation where a person lacks capacity to consent or where the urgency of the relevant intervention imposes time limitations on the ability of the person to appreciate what treatment is required, the necessary treatment may be administered in the absence of the expressed consent of the person.

**This exception is limited to situations where the treatment is immediately necessary to save the life or to prevent a serious deterioration of their condition, and there is no valid advance refusal of treatment<sup>21</sup>.**

The Health Care Worker should refer to the HSE National Consent Policy for further information- <https://www.hse.ie/eng/about/who/qid/other-quality-improvement-programmes/consent/>

### 2. Doctrine of Necessity - Temporary Justification for Detention

In *AC v Hickey & Ors* [2019] IR 73, the Supreme Court held that while a hospital had no overriding power to detain someone, it did have some limited powers under the doctrine of necessity and that this doctrine provides legal justification for the short-term detention of a person in their own interest.

The doctrine of necessity applies where there is a need to take action for someone who lacks capacity to make a decision and the action is one that a reasonable person would take in the best interests of the person. This permits, in a situation of urgency, actions taken in the interests of a person who lacks capacity. It provides legal justification for the short-term detention of a person in their own interest.

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<sup>21</sup> HSE National Consent Policy 6.1 "Emergency Situations" p. 35

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The Supreme Court has emphasized that this is a **temporary justification for a detention that can only be relied on to deal with urgent situations as it lacks formal safeguards and procedures**. If a hospital, nursing home or residential unit concludes by way of clinical opinion that a patient lacks capacity to make the decision about where they should live, it must, if it has serious concerns for the person's welfare, arrange for the necessary assessments and seek the assistance of the court within a "reasonably short time". While no clear time frame is provided in AC, it was noted that a delay of two weeks in seeking such assistance would in most cases be too long. Thus immediate action will be required.

Arising from the judgment the following steps should be taken to temporarily detain a person:

1. Assess whether the person wishes to leave?
2. If so, is the person being pressured to leave or being directed to leave by a third party?
3. If the person has capacity to make this decision then he/she must be allowed to leave irrespective of whether the Health Care Worker thinks that the person is making a wise decision or otherwise. The presumption of capacity applies in this context in the same way as in all other contexts
4. If it is believed, based on evidence, that the person may lack the capacity to make this specific decision then a functional assessment of capacity to make this decision should be organised as quickly as possible, and the Health Care Worker must decide what if anything should be done within as short a time as is reasonably practicable.
5. If the Health Care Worker concludes that the person lacks capacity to make a decision they must, if they have serious welfare concerns such as risk to the health or life of the person, seek the assistance of the court within a reasonably short time. This will ordinarily require a wardship application and legal advice must be taken.
6. It is imperative that the human rights of the person are safeguarded at all stages in this context. Fair procedures must be followed, the person's will and preference must be ascertained and recorded, independent advocacy should

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be sourced (with the person's consent) or a social worker accessed. The Health Care Worker should liaise with trusted friends or family who are independent to the issue, notwithstanding the need to be alert to vested interests and undue influence. The voice of the person should be heard and listened to in the process. It is important that this process is documented and ideally co-signed by at least two professionals e.g. Registrar, Social worker, Nurse, Occupational therapist or Speech and language therapist.

7. If the doctrine of necessity is being relied upon as the basis to treat or detain the person, this must be very carefully documented on the person's clinical files (or residential files as appropriate).

In particular, the following must be noted on the person's file:

- the circumstances that led to the decision being made,
- how it was communicated to the person, who communicated it to him/her,
- what was their reaction,
- were family members or other trusted people present (and, if so, what was their reaction),
- did the person have the decision-making capacity to comprehend what was being said

It is important to remember that any detention can only be in exceptional circumstances and must be limited in time.

### **3. Emergency applications**

Applications in emergency situations should be made in situations where there is a critical and/or immediate risk to the health, welfare and safety of the person, for example, refusal of urgent medical treatment or the imminent risk of harm to the person. Legal advice should be sought as soon as possible in these cases to ensure that any necessary documentation such as medical reports, affidavits are prepared and the High Court is notified.



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An emergency application and an order can be granted on a same or next day basis in exceptional cases.

In some cases, preliminary urgent orders can be obtained to address the immediate crises that has arisen, for example the need for someone to undergo emergency brain surgery, but if the person's decision-making capacity has improved by the time the Declaration hearing (that is the hearing where the High Court ultimately decides on whether the person should be made a ward of court) is scheduled, the application may not proceed.

An emergency application may only be brought where there is a written report to the effect that the person lacks capacity and evidence is available to the court. The evidence may be written (e.g. medical report) or oral (e.g. the clinician may physically attend the hearing). Once the application has commenced it is a matter for the President of the High Court to decide whether or not it will continue to a Wardship declaration.

## Part Two: Summary of key points

- **Doctrine of Necessity and Medical Emergencies:** In an emergency life-threatening situation the necessary treatment may be administered in the absence of the expressed consent of the person\*.
- \*This exception is limited to situations where the treatment is immediately necessary to save the life or to prevent a serious deterioration of their condition, and there is no valid advance refusal of treatment
- **The Supreme Court has ruled that the doctrine of necessity** may be used in an urgent hospital situation to provide legal justification for the **short term detention** of a person in their own interest
- This temporary justification for a detention can only be relied on to deal with **urgent situations in hospital settings** as it lacks formal safeguards and procedures
- **Applications in emergency situations** should be made in situations where there is a critical and/or immediate risk to the health, welfare and safety of the person, for example, refusal of urgent medical treatment or the imminent risk of harm to the person.
- The **presumption of capacity** applies in this context in the same way as in all other contexts.

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## Part Three: Seeking legal advice on whether an application for wardship is necessary

### 1. The role of the HSE case manager

Where all alternatives have been exhausted and a decision is made to apply for wardship, a senior accountable officer of the HSE, for example someone nominated by the CHO Chief Officer / Hospital Group Chief Executive must personally govern the application. S/he may appoint a senior staff member e.g. a head of service or senior clinician as case manager, who must remain involved at all stages of the process including attendance at required hearings and retention of decision-making responsibility for the HSE with regards the application, and if relevant on-going Wardship.

The appointed HSE case manager should be someone with sufficient knowledge of the circumstances of the person and have the necessary authority of the organisation. S/he will co-ordinate the process at each stage on behalf of the HSE. In the first instance the case manager must ensure the following:

1. The will and preference of the person is sought and if appropriate there should be consultation with the person's relatives, primary carer, the person with whom he or she resides, and any other person with an interest in the welfare of the person as regards to the person's will and preference including an independent advocate. It is important that the HSE case manager is alerted to any possible undue influence or duress which should be included in relevant documentation.
2. The decision to apply for wardship should be in proportion to the risk or issue faced by the person and the urgency of the decision that has to be made.
3. The **final decision** to seek legal advice with respect to wardship should only be determined through a multi-disciplinary team process<sup>22</sup>.

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<sup>22</sup> In emergency situations some cases may need resolution before a court within hours of an incident occurring – if there is a Multi-Disciplinary process it needs to occur immediately

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4. In emergency cases obtaining legal advice should not be delayed. However due process and ensuring the rights of the person are respected also apply in these urgent circumstances.
  5. A social assessment should be undertaken which considers the person's circumstances and demonstrates evidence regarding supports and the need for legal intervention that are recommended. This should have regard to medical and clinical matters. NB This will not happen in emergency applications due to the time constraints.

## **2. Matters to be considered before seeking legal advice for an application for wardship**

The HSE case manager and the multi-disciplinary team should consider the following points before seeking legal advice on the matter:

- Be clear why the legal advice is needed and what is the decision that needs to be made
- Be clear why the HSE and not a family member /relative is considering bringing a possible application for wardship (in circumstances whereby a family member cannot or will not make the application).
- Set out in writing what advice is being requested and/or what best outcome is being sought.
- Advice should be sought on whether grounds for an application for wardship exist, noting that the court determines that the person is "*of unsound mind and incapable of managing his or her own person and property*" and that wardship is both necessary and appropriate".
- Advice should be sought as to the least restrictive legal options based on the facts of the case.
- Advice should be sought as to how the law applies to the specific circumstances, the legal options open to the HSE/HSE funded agency, the implications for the person, the likely outcome of each possibility, and how

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that can be accomplished. This should be sought as a prerequisite for seeking further instructions as to the next steps.

### **3. Seeking initial legal advice and engaging a contracted HSE Legal Firm**

HSE contracted legal firms may only be engaged by a HSE Authorised Legal Service User (LSU). (See “Authorised Legal Service User” in the Glossary). If the HSE case manager is not a LSU and needs legal advice then he/she should identify who is the LSU in their area and seek authority via the LSU to contact a HSE contracted legal firm<sup>23</sup>.

### **4. Documentation to support the legal advice being sought**

The HSE case manager must oversee the submission of documentation to the legal advisers in order to ensure the best advice and guidance on the matter in question can be provided. Providing information and/or documentation without specifying the advice required may result in legal work being carried out which is not wanted or needed.

The HSE Case Manager must undertake the following:

- Provide the legal advisers with all of the assessments, reports and significant correspondence including care plans, opinions, letters and evidence of supports which were put in place for the person with respect to the decision in question that exist concerning the person in a timely manner.
- Ensure that the required documentation is determined from the outset and the provision of accurate legal advice based on all of the facts available.
- Ensure that this documentation is also made available in a format accessible to the person being considered for wardship.

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<sup>23</sup> Any queries concerning Authorised Legal Service Users may be directed to the HSE Office of Legal Services, 64/64 Adelaide Road, Dublin 2 (01- 6626966)

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- All of this must be done in a timely way to avoid unnecessary delays and avoidable legal costs.

## **5. On receipt of legal advice**

Once the HSE case manager receives legal advice setting out possible options, the HSE/HSE funded agency can then decide on the next steps to take. Sometimes, it will be clear what the appropriate/necessary next steps are. Other times, the HSE case manager may need to seek additional advice, convene a multi-disciplinary case conference and consider the options further. These options could include alternative less restrictive avenues to wardship such as those outlined in Part 1 of this document.

It is ultimately the HSE case manager's decision, in conjunction with the Chief Officer / Hospital Group CEOs, to commence a wardship application. The contracted legal firm will not commence the preparation and progression of a wardship application unless expressly instructed to do so by the HSE case manager.

Once an instruction has been made to proceed with an application, the HSE case manager retains responsibility for the case and a duty to ensure that the rights of person being considered for wardship are respected and that due process is adhered to throughout the process. It remains their responsibility to ensure that the legal advice given has been made on all of the available facts.

It is imperative that HSE Hospital Groups and local CHO areas communicate with each other in advance of an application which may involve the movement of a person who is the subject of a wardship application to a community setting (e.g. a care home or a nursing home).

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### **Part Three: Summary of key points**

A HSE case manager must be assigned to coordinate the application for wardship. This role entails:

- Establishing if all alternatives have been considered and exhausted
- Establishing whether the person has in place, for example, a valid advance healthcare directive or enduring power of attorney, covering the decision to be made
- Ensuring the will and preference of the person is considered
- Ensuring that the person has access to advocacy and support to maximise their decision-making capacity
- Ensuring that the necessity and the grounds for the application have been fully explored
- Ensuring that the relevant information, material and assessments are gathered and considered by a multi-disciplinary case conference
- Considering the recommendations from the multi-disciplinary case conference and the proposed intervention
- Engaging with the legal firm for initial advice and guidance
- Supplying the legal firm with all relevant information and material
- Considering the advice from the legal firm

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## Part Four: Proceeding with a wardship application

### 1. Responsibilities of the HSE case manager

Once a decision has been made to give instructions to the contracted legal firm to proceed with an application for wardship the HSE case manager now becomes “**the petitioner**”, that is the person who is making the application for wardship. The application is known as **the petition**<sup>24</sup>. It is the responsibility of the HSE case manager to ensure that fair procedures are followed throughout this process. This responsibility is not delegated to the contracted legal firm. A number of steps that the HSE case manager is responsible for are outlined below to ensure fair procedures are followed.<sup>25</sup>

- **Step one: Support the person being considered for wardship to access an independent advocate.**

The role of the independent advocate is to work with and for the person being considered for wardship, so as to ensure their will and preferences, and beliefs and values, are independently represented throughout the process. An Independent Advocate is employed or engaged by an advocacy organisation, is free from conflict of interest and is independent of family and service providers. The independent advocate will support the person to have a stronger voice and to have as much control as possible over their own lives. It is important to remember that it is the person’s choice as to whether or not they wish an advocate to be involved.

- **Step two: Ensure that the person being considered for wardship is made aware of their rights in the process**<sup>26</sup>. The person needs to be made aware that they have the right to object to the application and present their own medical evidence, they have the right to be present for the hearing and the

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<sup>24</sup>If an emergency application is made, a petition is not required. See Part 2.

<sup>25</sup> Also see Appendix 1-3 for further details

<sup>26</sup> Where a person does not have capacity to instruct, the Court may appoint a Guardian Ad Litem (GAL) for the person. The role of a GAL is to report the views of the person to the court. This role should not be conflated with the GAL appointed under the Child Care Act 1991.



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right to request an enquiry before a jury at the hearing<sup>27</sup>. This should be explained in an accessible format and with the support of an independent advocate if requested by the person or through a GAL if appointed by the Court. This should be documented. See appendix four and appendix 6 for further information.

- **Step Three: Ensure the person being considered for wardship is informed what will happen throughout process of applying for wardship.**

The person should be informed that the following steps will be followed:

- A HSE case manager will oversee the case in the HSE/HSE funded agency.
- There will be two functional assessments of the person's decision making capacity to determine if they fit the criteria for wardship.
- If the person fits the criteria, an application (the petition) will be made to the court which states that the person "is of unsound mind and is unable to manage their affairs".
- The person will be sent the notice that a petition (the application for wardship) has been sent to the High Court.
- The person has a specified time limit of one week to object to this application in writing to the Office of the Wards of Court.
- The Office of the Wards of Court will, on behalf of the President of the High Court, send a Medical Visitor to further assess the decision-making capacity of the person being proposed for wardship.
- A Hearing will be scheduled and the person has a right to attend.
- Where there is no objection, the Court will determine whether a declaration admitting a person to wardship will be made.
- If there is an objection, the person is entitled to be legally represented and to a hearing in Court.<sup>28</sup>
- The Court will determine whether a declaration admitting a person to wardship will be made.

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<sup>27</sup> Note that whilst a person has the right to ask for an inquiry before a jury under the legislation it is a matter for the President of the High Court to refuse an inquiry before a jury if 'satisfied by personal examination of him that he is not mentally competent to form and express a wish in that behalf'.

<sup>28</sup> There is not an automatic right to legal aid in these circumstances.

- The outcome of the hearing will be communicated to the person in a manner that they can understand.
  - The person has a right to appeal.
  - A committee will be appointed. This may be a family member or trusted friend or it may be the Solicitor General in the Office of the Wards of Court.
  - A case worker from the Office of the Wards of Court will be appointed.
  - A review of the person's case may be undertaken by the Court or the person themselves may request a review.
  - If the person no longer lacks decision making capacity and is now able to manage their affairs they can apply to office of the wards of court for a declaration by the court to be discharged from wardship. The Court will decide if the person can be discharged from wardship.
- **Step Four: Ensure that notice of the petition (called service of papers) and documentation relating to the application are made available in a timely manner and in an accessible manner to the person being considered for wardship**

The notice of the Petition must be given personally to the person who is the subject of the wardship application. It is important that this process is undertaken with sensitivity and with regard to the most appropriate method of communication. The HSE case manager will ensure that this has been undertaken by the contracted legal firm and that there is available documentation of how this was undertaken.<sup>29</sup> An independent advocate or nominated person should be present to support the person where possible.

- **Step Five: If the case of an urgent application, ensure that the least restrictive option is pursued and a review of the urgency is undertaken in the context of the facts of the case.**

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<sup>29</sup> The Court now seeks evidence that this was undertaken and evidence of the response of person who is the subject of the wardship application.

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- **Step Six: Enquire as to the provision of legal assistance for the person being considered for wardship.**

It is important where the HSE is seeking orders that may interfere with the person's constitutional right to bodily integrity (such as an order to administer medical treatment) or right to liberty (such as an order to detain a person in a particular health / care institution) efforts should be made to ensure the person has the benefit of independent legal advice. Where a person objects to the wardship application, independent legal advice should be provided. A person may be appointed a GAL by the Court depending on the measures required (e.g. when pre-Wardship orders are sought or detention orders are sought).

- **Step Seven: Liaise with the contracted legal firm on matters relating to the application for wardship.**

It is essential that the HSE case manager liaises with the contracted legal firm on all matters relating to the application for wardship throughout the process. The HSE case manager has a duty to ensure that the steps outlined above and fair procedures are adhered to at all times and must seek documentary evidence to that effect. The HSE case manager cannot delegate this duty to the contracted legal firm however he/she will be advised by the contracted legal firm in respect of HSE's duty and responsibilities to ensure fair procedures are adhered to and must seek documentary evidence to that effect.

- **Step Eight: Ensure that all relevant documentation is provided in a timely manner to the contracted legal firm as detailed in Part 2.**

As previously outlined in part 2 it is critical that relevant documentation is provided to the contracted legal firm to ensure the matter is dealt with promptly and without any unnecessary delay which may result in lengthy delays and unnecessary legal costs.

- **Step Nine: Represent the HSE in person at all hearings relating to the application.**

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The HSE case manager is required to attend all court hearings relating to the application.

- **Step Ten: Ensure the person being considered for wardship is informed of the outcome of the hearing if they do not attend in person**

The person who is the subject of the wardship application should be given information on the outcome of any application or hearing, and be notified that they have a right of appeal. They should also be informed if an interim order was made or if a further review or information was sought by the court and of dates for return to the court. This information should be delivered sensitively, in a format that the person can understand and the person should have access to an independent advocate or nominated person. In the event that a GAL has been appointed by the Court the GAL will ensure the person is informed of the outcome of the hearing. The role of the HSE case manager is to ensure that this has been undertaken and that the process was documented.

In some cases, particularly where the Court's decision is contrary to the expressed will and preference of the person or the views of interested others, it would be appropriate for the key Health Care Worker's to meet with the person to explain what has happened and right of appeal. It is recommended practice that an independent advocate or nominated person should be present. The role of the HSE case manager is to ensure that this has been undertaken and documented.

- **Step Eleven: If the person seeks to appeal the decision, the HSE case manager should ensure that relevant supports are in place to enable this including legal representation and independent advocacy.**
- **Step Twelve: In cases where an application is submitted by the HSE for a review ensure that an application for a review of the case is submitted in accordance with the rules of the court**

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On the review date, evidence will have to be offered, by affidavit or otherwise, to the effect that the person continues to lack capacity or not (if applicable), and continues to require the treatment / deprivation or not (if applicable) necessary. There is an on-going role for the HSE case manager.

## **2. Application of fair procedures throughout the process**

Throughout the process the HSE case manager has a duty to ensure that the person is supported throughout the process and that fair procedures are applied. The HSE case manager should ensure the following in as far as is reasonable:

- That the process is explained to the person in a way that s/he can understand;
- That no bias or perception of bias arises;
- That the person who is the subject of the wardship application is furnished with details of the reason for wardship to include where appropriate the medical and social care reports (where appropriate and in accordance with legal constraints) which ground the application;
- That all parties to the application act in a fair and reasonable manner;
- That only relevant facts are taken into account when making a decision;
- That unnecessary delays are avoided;
- That, where possible, the person is afforded representation, including legal representation.

## **3. Timelines for a wardship application to be considered**

With the exception of emergency applications which can be processed within a matter of days or hours, where relevant it takes approximately between 1- 3 months from the date of filing the initial papers with the Wards of Court office for the application to be fully processed and a hearing date reached. This is an approximate timeframe only and the timeline in any given case will depend on the

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capacity of the Wards of Court Office at that particular time. It will also be influenced by the provision of accurate and timely information by the HSE case manager (the petitioner) to the contracted legal firm. The contracted legal firm will advise the HSE case manager of the required documentation and failure to provide accurate and timely information in response to this request may result in significant delays in the wardship process.

## **Part Four: Summary of key points**

Once a decision has been made to give instructions to the contracted legal firm to proceed with an application for wardship a number of steps must be overseen by the HSE Case Manager to ensure fair procedures are followed:

- Step one: Ensure that the person being considered for wardship has access to an independent advocate.
- Step two: Ensure that the person being considered for wardship is made aware of their rights throughout the process
- Step Three: Ensure the person being considered for wardship is informed what will happen throughout process of applying for wardship.
- Step Four: Ensure that notice of the petition (called service of papers) and documentation relating to the application are made available in a timely manner and in an accessible format to the person being considered for wardship
- Step Five: In the case of an urgent application, ensure that the least restrictive option is pursued and a review of the urgency is undertaken in the context of the facts of the case
- Step Six: Enquire as to the provision of legal assistance for the person being considered for wardship.
- Step Seven: Liaise with the contracted legal firm on matters relating to the application for wardship.
- Step Eight: Ensure that all relevant documentation is provided in a timely manner to the contracted legal firm as detailed in Part 2.
- Step Nine: Represent the HSE in person at required hearings relating to the application.
- Step Ten: Ensure the person being considered for wardship is informed of the outcome of the hearing if they do not attend in person
- Step Eleven: If the person is seeking an appeal ensure that relevant supports are in place to enable this.
- Step Twelve: Ensure that an application for a review of the case is submitted in accordance with the rules of the court, where applicable

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## **Part 5: Implications of wardship<sup>30</sup>**

### **1. Decision making once a person becomes a ward of court**

When a person is made a ward of court, the Court has legal authority **over all matters** relating to that person and his or her estate. The person is now legally referred to as a 'ward of court' and the Court appoints a 'Committee' whose role is to manage the person's property, personal care decisions and day-to-day affairs by reference to the orders of the Court. The committee may be a number of family members or may be the Solicitor General in Office of the Wards of Court.

### **2. Case Worker- Office of the Wards of Court**

A case worker in the office of the wards of court is assigned to each person who is a ward of court. The case worker (Office of the Wards of Court) will be able to clarify what decisions can be made by the committee and what decisions must be referred to the High Court. Each order is specific to the circumstances of the person in question and cannot be generalised. It is important for Health Care Worker's to establish the scope of the committee with respect to decisions pertaining to health and social care.

### **3. Medical treatment**

Where someone is a Ward of Court, it is the Court which has authority to give or withhold consent to the interventions or administration of treatment on behalf of the Ward. As a matter of law, such decisions are made having regard to what is in the best interests of the Ward, having regard to all relevant considerations, including the past and present will and preference of the Ward.

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<sup>30</sup> For more details on the implications of wardship see Appendix 5 and 6



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If a Ward needs a healthcare intervention consisting of a relatively minor elective or non-emergency procedure<sup>31</sup>, the Registrar of the Wards of Court office should be informed of this. Information to be provided should include whether (a) the ward has the decision making capacity to decide for him or herself and b) the will and preferences of the ward regarding the intervention.

For significant treatment decisions, including major procedures such as surgery, a request for consent to the carrying out of treatment in respect of a Ward is usually made by the clinician concerned to the Office of Wards of Court, addressed to the Registrar of Wards of Court or the Case Officer dealing with the Ward<sup>32</sup>.

In some emergencies, it may not be possible to obtain timely consent. This may be because it is outside normal office hours (although the Office of Wards of Court make every effort to provide out-of-office support) or because treatment is immediately necessary to save the life or prevent a serious detriment to the health of the Ward. In such circumstances, the necessary treatment may be administered without obtaining the consent of the Court, although the circumstances surrounding the administration of treatment should be recorded and the Registrar of the Wards of Court Office should be informed.

### **Where a Ward of Court has capacity to make the relevant decision**

Some Wards will have capacity to make particular decisions, even if they may require support to do so. Their capacity to provide or refuse consent for the proposed health and social care intervention should be assessed and documented. If the Ward has capacity to make a decision, their decision should in general be respected.

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<sup>31</sup> Examples include general eye examinations, dental checks, fillings and cleaning teeth, vaccine administration, x-rays and scans, cervical check, breast check, bowel screening, diabetic retina screening, suturing and administration of standard medication and antibiotics.

<sup>32</sup> The Consent to Request for Medical Treatment form is available electronically and can be submitted to the office of the Wards of Court using the email address [wards@courts.ie](mailto:wards@courts.ie) which is monitored throughout the day.

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However, in the following circumstances, the Office of Wards of Court should be notified and its agreement obtained before the proposed intervention proceeds or is withheld in accordance with the will and preference of the Ward, as a Court application may be required:

- if refusal of an intervention does not seem to be in the best interests of a Ward, such as when it may have a significant impact on the health or wellbeing of the Ward or may threaten his or her placement;
- in cases where treatment is high risk or possibly controversial (e.g. amputation, non-therapeutic sterilisation insertion of PEG tube or nasogastric tube or experimental treatment)
- if the Ward's family members or Committee do not agree with the Ward's decision

### **Where a Ward of Court lacks capacity to make the relevant decision**

Even if a Ward is determined to lack capacity to provide or refuse consent to a proposed intervention, his or her past and present will and preferences remain important and should be ascertained. Healthcare Workers should, in general, act to give effect to those will and preferences when it comes to deciding whether it is in the best interests of the Ward to proceed or not with a proposed intervention.

Where, having considered all relevant factors including the will and preferences of the Ward, a Healthcare Worker considers it is in the best interests of the Ward that that the intervention should proceed, and this is consistent with the will and preference of the Ward, the intervention should proceed. However, if the intervention represents a significant treatment decision, the Office of Wards of Court should be notified before the intervention proceed.

If the will and preference of the Ward is that the intervention should NOT proceed and the Healthcare Worker considers it is in the best interests of the Ward that that the intervention should not proceed, the Office of Wards of Court should be notified and its agreement obtained before the intervention is withheld, as a Court application may be required if:

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- The refusal of an intervention may have a significant impact on the health or wellbeing of the Ward or may threaten his or her placement;
  - The Ward's family members or Committee do not agree with the Ward's will and preference; or
  - There is any dispute over what course of action is in the best interests of the Ward.

In such situations the Court and the Office of the Wards of Court will in general be guided by the views of the treating clinicians though the decision ultimately falls to be made by the Office / Court.

**For examples on healthcare treatment see appendix 6**

#### **4. Bank Accounts and Investments of the Ward**

These accounts are usually closed and the proceeds lodged in Court and invested for the Ward's benefit. However, they may not always be closed immediately. Certain products, such as An Post investments will be allowed to mature in order to get the optimal return. Investments such as shares and endowment policies are usually not lodged in Court.

#### **5. Pension**

Where possible, approval is given for a Ward's pension or Disability Allowance to be paid to the Committee or (where relevant) proprietor of a nursing home for the maintenance of the Ward. In some cases, the pension may be paid directly to the Ward.

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## **6. Expenditure**

All payments on behalf of the Ward must be approved by the Court. In practice, most payments can be approved by the Registrar or Case Officer. Where the Ward is living at home, regular payments can be made to the Committee or other person looking after the Ward to meet the Ward's living expenses. The level and frequency of payments depend on the Ward's needs and income and this is a matter which the Committee needs to discuss in detail with the Case Officer.

## **7. Sale or Letting of the Ward's House or Lands**

Where it is necessary to meet nursing home expenses or other debts of the Ward, or where the property is vacant and cannot be secured, the Court may permit the Committee either to sell or to let the property.

Lettings are generally authorised by the Court where a sale of the property is not required to fund the Ward's maintenance. The main consideration when letting the Ward's property is that the proposed rent represents the market value.

## **8. Purchasing Property on Behalf of a Ward**

If a Ward has sufficient means, is able to reside in the community and does not have adequate or suitable accommodation, his/her funds can be used to purchase a house, subject to the approval of the Court.

## **9. Travel Abroad**

A Ward may not travel abroad without the Court's permission. The Ward must produce a Medical Certificate confirming he/she is fit to travel. In practice, permission is usually granted. However, medical or safety considerations may have to be taken into account.

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## **10. Legal Proceedings**

A Ward may only commence legal proceedings if the Court permits the Committee to bring those proceedings on behalf of the Ward. The fact that a person has been taken into Wardship does not mean that he or she cannot be sued, defend an action or be prosecuted for committing a crime. The Court must approve any settlement of proceedings involving a Ward. It is not always necessary to take someone into Wardship in order to institute or defend proceedings. In certain cases, the Court may allow a “next friend” or “guardian ad litem” to represent the person in the proceedings.

## **11. Advance notification to the Registrar of the Wards of Court Office**

When an Order has been granted by the President of the High Court directing where a ward should reside, the advance permission of the Registrar of the Wards of Court office must be obtained by the Committee in the event it is proposed to move the ward to another residential or care setting.

## **12. Discharge from wardship**

Any Application by a ward of court to be discharged from wardship must be made to the Registrar of Wards of Court in writing by the ward or by a Solicitor instructed by the ward and followed by a formal application for discharge.

The application should be based “*on medical evidence to the effect that the ward has now regained decision making capacity and is capable of managing his affairs*”. The court will consider the application on the basis of the medical evidence available to it.

Discharges from wardship are becoming more common now in circumstances where the person was taken into wardship as a result of an acute event resulting in a

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temporary loss of capacity to manage one's person or affairs. It is a matter for the President of the High Court whether to grant or refuse an application for discharge.

### **13. Role of a healthcare worker in enabling a review for the discharge of a person from wardship**

If a Health Care Worker believes that a person who is a ward of court has now regained decision making capacity, they should contact the Office of the wards Court and the person's case worker to ensure that their case is reviewed and considered for discharge.

### **14. Review of wardship and the Assisted Decision Making (Capacity) Act 2015**

Upon commencement of Part 6 of the Assisted Decision Making (Capacity) 2015 Act, it will no longer be legally possible to admit an adult into wardship. Instead the provisions under the 2015 Act will apply.

For people who are already Wards of Court, the 2015 Act provides for the person who is a ward, a relative or friend or any other person with sufficient interest or expertise to make an application to 'the wardship court' (generally the High Court and in some instances the Circuit Court) for a review of the person's capacity<sup>33</sup>. Even if such an application is not made, the 2015 Act requires that within three years of the commencement of Part 6 of the 2015 Act, all Wards of Court will be discharged from wardship and the decision-making capacity of each person who is a Ward of Court must be reviewed by the wardship court.

Depending on the outcome of this review by the court, one of the arrangements under the 2015 Act may be put into operation. Further detail on the transition of

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<sup>33</sup> The wardship court is the court that made the original order to have the person taken into wardship.

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persons from wardship to the new support arrangements will be provided through forthcoming Rules of Court from the Courts Service. These will set out the detail of the review process and the procedure to be followed for the implementation of the order of the court following such review.

Preparations are underway to commence the Assisted Decision Making (Capacity) Act in mid-2022.

For information on the wardship transition please go to:

<https://www.courts.ie/wards-court-decision-support-service>

## Part Five: Summary of key points

- 1 When a person is made a ward of court, the Court has legal authority over all **matters** relating to that person and his or her estate
- 2 The person is now legally referred to as a 'Ward of Court' and the Court appoints a 'Committee' whose role is to manage the person's property, personal care decisions and day-to-day affairs by reference to the orders of the Court.
- 3 It is important for HCW's to establish the scope of the committee with respect to decisions pertaining to health and social care
- 4 A case worker in the office of the wards of court is assigned to each person who is a ward of court.
- 5 If the person who is a ward of court needs a healthcare intervention consisting of a relatively minor procedure, the approval of the Registrar of the Wards of Court office should be obtained.
- 6 More serious interventions require approval of the President of the High Court.
- 7 In emergency situations where it is not possible to obtain timely approval the necessary treatment may be administered.
- 8 Advance permission of the Registrar of the Wards of Court office must be obtained by the Committee in the event it is proposed to move the person who is a ward to another residential or care setting.
- 9 Any Application by a person who is a Ward of court to be discharged from Wardship must be made to the Register of Wards of Court in writing by the Ward or by a Solicitor instructed by the person who is a ward and followed by a formal application for discharge.
- 10 A Health Care Worker has a role in enabling a review through the office of the wards of court for the discharge of a person from Wardship if they become aware that the person has now regained decision making capacity.
- 11 Once Part 6 of the Assisted Decision Making (Capacity) 2015 Act is commenced, it will no longer be legally possible to admit an adult into wardship. Instead the arrangements under the 2015 Act will apply.



## Appendix One: Summary of guidance on wardship process

Guidance on Wardship Process for Healthcare Workers		
<p><b>Stage 1</b> <b>Advance Considerations</b></p> <p>The healthcare worker should:</p> <ul style="list-style-type: none"><li>• Presume decision-making capacity</li><li>• Ensure all alternatives / options are considered and pursued</li><li>• Be aware of relevant knowledge and information</li><li>• Ensure all necessary support is given to hear and support the voice of the person to maximise their decision-making capacity</li><li>• Ensure necessity and grounds for intervention considered</li></ul>	<p><b>Stage 2</b> <b>Considering an Application</b></p> <p>A case manager must be assigned to co-ordinate the case. This role entails:</p> <ul style="list-style-type: none"><li>• Establishing if all alternatives have been considered and exhausted</li><li>• Ensuring the will and preference of the person is considered</li><li>• Ensuring access to advocacy and support to maximise the persons decision-making capacity</li><li>• Ensuring the necessity and the grounds have been fully explored</li><li>• Ensuring the relevant information, material and assessments are gathered and considered by a multidisciplinary case conference</li><li>• Considering the recommendations of a multidisciplinary case conference and the appropriate intervention</li><li>• Engaging with the legal advisers for initial advice and guidance</li><li>• Supplying all relevant information and material to the legal firm in a timely manner</li><li>• Considering the advice from the legal advisers</li></ul>	<p><b>Stage 3</b> <b>Proceeding with an Application*</b></p> <ul style="list-style-type: none"><li>• Case manager considers advice and makes decision whether to instruct legal advisers to proceed with an application</li><li>• The case manager becomes the petitioner</li><li>• The case manager must ensure that fair procedures are followed and fundamental rights of the person are protected</li><li>• Legal assistance and advocacy should be sourced</li></ul> <p>* If risk is urgent and immediate move to Stage 3</p>

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## **Appendix Two: The medical assessment and medical affidavit**

The person subject to the application for wardship must have their capacity functionally assessed by two Registered Medical Practitioners<sup>34</sup>. Each Medical Practitioner must swear a Medical Affidavit on foot of their own assessment of the person's decision-making capacity. The terminology as set out in the Rules of Court requires that the Medical Affidavit confirms that the person is of "unsound mind and incapable of managing his/her affairs." Following the Supreme Court decision in *AM v HSE* it is also necessary to state that the application is both necessary and appropriate. When the assessment is carried out it is then necessary to send the detailed report to the legal firm who will draft the affidavit and return to the Registered Medical Practitioner for sign off and swearing. All of this must be achieved within 30 days of the assessment. It is essential that these timeframes are met otherwise another assessment report will be required.

While particular terminology is required in the Medical Affidavit a more thorough and detailed overview should be clearly and comprehensively set out in the report attached to the affidavit. Additional Affidavits should be provided by other Health Care Workers alongside the two medical practitioners to give necessary contextual information about the person and their circumstances to the Court.

The following are a series of indicative questions which should guide the preparation of an assessment report:

- What is the date of assessment and purpose of assessment (i.e. assessing decision making capacity to make a particular decision or decisions)?
- What is the person's history?
- What is your knowledge and professional relationship with the person?

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<sup>34</sup>Please see latest practice direction from the President of the High Court at <https://www.courts.ie/content/affidavits-medical-practitioners-supporting-petition>

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- Has the Health Care Worker used the functional approach to the assessment of capacity as per common law test as set out in the Medical Council's guide and the HSE National Consent Policy<sup>35</sup>?
  - What is the specific decision to be made? Does the person lack decision making capacity with respect to that decision? Does the person have decision making capacity with respect to other decisions?
  - Is there any medical or psychiatric diagnosis relevant to the assessment of capacity?
  - What are the recommended treatment options and long-term medical needs for the patient or service user?

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<sup>35</sup> Note that the High Court will only accept capacity assessments from medical practitioners.

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## Appendix Three: The petition

The application made by way of Petition to the court must include:

- a The name, religion, age, PPS number and description of the respondent (the person whom the application is being made) and whether she or he is married or not;
- b The names, religion and residences of his or her next-of-kin and of the person or persons in whose house or under whose care she or he is for the time being, or has been residing for the preceding twelve months (as far as can be ascertained by the petitioner)
- c The amount and nature of his/her income, outgoings, property and his/her debts;
- d The names and ages of the members of his family who are dependent upon him or her.
- e A summary of the medical diagnosis and medical history.

If all of the above information is not available, the HSE case manager should liaise with the contracted legal firm to proceed without it if appropriate.

The petitioner (person making the application) must have produced two medical reports stating that the person is of “unsound mind and is incapable of managing himself and his or her own affairs”

As the Petitioner has already sworn to the information on oath in completing the Petition in most cases the Petitioner will not be required to give any oral evidence to the Court. However, in some cases s/he will be required by the HSE to be present in Court.

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## **Appendix Four: Steps to be undertaken once an application for wardship is made**

Once a prima facie case has been established and an inquiry ordered, Order 67, Rule 18 of the Rules of the Superior Courts, the following steps must be followed:

### **Service of papers on the person who is the subject of the wardship application**

Notice of the Petition must be served personally on the person who is the subject of the wardship application and the Affidavit of Service must be filed with the Offices of the Wards of Court. The Court requires evidence of the response of the respondent. It is important that this process is undertaken with sensitivity and with regard to the most appropriate method of communication.

The role of the HSE case manager is to ensure that this has been undertaken by the contracted legal firm and that there is available documentation of how this was undertaken in every case.

An independent advocate or nominated person should be present where possible.

### **Objection to the Petition by the person who is subject to the application for wardship**

The person who is the subject of the wardship application has a right to object to the application. The documentation served on the person who is the subject of the wardship application must clearly set out details notifying him/her of entitlement to object by notifying the Register of Wards of Court in writing within 7 days. Whilst the statutory period allowed for a person to object to the wardship application is only 7 days it is the practice of the President of the High Court to accept late objections up to several months. The person should be supported in making the decision about whether s/he wishes to object and should be facilitated in accessing a nominated person or an independent advocate.

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While there are no regulations in place in relation to what protocol the Office of the Wards of Court should follow if a person who is subject to the wardship application objects, every objection is brought to the attention of the Court. It is the practice of the Office of the Wards of Court to respond to all objections, including objections submitted outside of the seven-day rule and in any format. In other words, the Office of the Wards of Court will accept a written note from the person as an objection. The person will then be requested to provide medical evidence and the matter will be listed before the President. In cases where a person indicates that he/she wishes to object it is the practice of contracted legal firms to ensure that the person is afforded representation by way of legal advisor or advocate to assist the person with their objection if they wish to do so.

The role of the HSE case manager is to ensure that this has been undertaken and that there is available documentation of how this was undertaken in every case.

### **Medical Visitor**

The Office of the Wards of Court may, on behalf of the President of the High Court, send a Medical Visitor to further assess capacity of the person being proposed for wardship. The Medical Visitor has an independent role in the process. The Medical Visitor's fees must be discharged by the Petitioner once directed to do so by the Wards of Court office.

The HSE Case Manager should enquire through the legal firm when the Medical Visitor will be appointed and ensure that supports are in place for the person meeting the medical visitor such as an independent advocate or their nominated person where possible. This should be documented.

### **Request for an Inquiry by Jury**

The person subject to the wardship application may request for the Inquiry to be held before a jury. When the person subject to the wardship application requests an Inquiry before a jury/he/she is required within 7 days of service upon him/her of the

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Wardship papers, to notify the Registrar of this.<sup>36</sup> The matter is then listed before the court for directions and the President of the High Court may direct that the person subject to the wardship application attend before the President for personal examination. If this is not directed by the President then the matter is referred to a judge and jury and directions as to the issues, time, venue and mode of the Inquiry are given. An example of a situation where an Inquiry by jury might be used is when there is opposing medical evidence.

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<sup>36</sup> Order 67, rule 10 and Form No. 6, Appendix K to the Superior Court Rules.

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## Appendix Five: The committee

A "Committee" in the Wardship context is the Court-appointed representative of the person who is a ward of court. The role of the committee is to act on his or her behalf. More than one person can be appointed to be the Committee of a Ward of Court i.e. Joint Committee.

The Committee will often be a close relative of the person who is a ward of court. Where there is no suitable relative who is prepared to act or where there is disagreement among a person's relatives and/or HSE about how his/her affairs should be managed, the court may appoint the General Solicitor for Minors and Wards of Court as the Committee.

When the HSE is acting as the Petitioner it is generally precluded from acting as the Committee.

The Committee may only do what the court authorises him or her to do and has no inherent authority or power and can only be replaced or substituted by the court. The Committee acts under the directions of the Court either personally or through his/her solicitor. Typically, a Committee may be permitted by the Court to carry out certain functions for the person who is a ward's behalf such as collecting their pension and lodging the proceeds into an approved bank account to the credit of the Ward.

There may be many 'day to day' affairs that the Committee will be required to attend to on a regular basis:

- Making sure that the property of person is insured;
- Keeping the person informed of any matters which require Court Approval e.g. change of residence/nursing home, consent to medical procedure etc;
- Making sure that the person has adequate clothing and that his/her personal needs are met;



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- Dealing with the person's tax affairs. This may require the retention of an accountant to file annual income tax returns for the person who is a ward. Accountant's fee would be paid through the Wards of Court office. Note medical expenses provide some income tax relief;
  - Making applications for the person's benefit e.g. pension, Nursing Home Support Scheme (Fair Deal), medical card entitlements etc.

### **Office of the Wards of Court Case Officer**

Once a person is taken into Wardship, a case officer in the Wards of Court Office will be assigned to look after their affairs. The Committee or solicitor will correspond with the case officer in relation to the management of the Ward's affairs and the case officer in turn follows the direction of the President of the High Court.

### **Advance notification to the Registrar of the Wards of Court Office if a person is moving to another residential or care setting**

When an Order has been granted by the President of the High Court directing where a Ward should reside, the advance permission of the Registrar of the Wards of Court office must be obtained by the Committee in the event it is proposed to move the person who is a ward to another residential or care setting.

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## **Appendix Six: The role of an independent advocate or self-nominated person**

There is currently no statutory provision for non-legal advocacy in relation to wards. However, an independent advocate or self-nominated person can play a key role in ensuring that the voice of the person, who is subject to a wardship application, is heard, and ensuring that all alternative courses of action are taken into consideration.

The role of the independent advocate is to work with and for the person being considered for wardship, so as to ensure their will and preferences, and beliefs and values, are represented throughout the process. An Independent Advocate is employed or engaged by an advocacy organisation, is free from conflict of interest and is independent of family and service providers. The independent advocate will support the person to have a stronger voice and to have as much control as possible over their own lives.

The independent advocate may explain to the person what the impact of wardship would be for the person in their particular circumstances, and may support the person to ascertain from their point of view if there is an alternative to wardship.

National organisations who provide advocacy in this area can work with people who are subject to wardship applications to support their voice and will and preferences to be heard.

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## **Appendix 7 Guidance on healthcare treatment for a person who is ward of court- Covid 19 Vaccination**

**To: Mr Liam Woods, Ms Yvonne O'Neill**

**For further distribution to Hospital and Mental Health Clinical Directors, Heads of Service, Directors of Nursing, Chief Operating Officers and other relevant members of staff**

**Re: Guidance regarding Consent for COVID 19 Vaccination of Hospital Inpatient Wards of Court**

**Date: 15 March 2021**

Dear Colleagues

The implementation of the COVID 19 Vaccination programme in acute hospitals is underway. A small proportion of patients suitable for vaccination in acute hospitals (which in some cases will include acute mental health units) will be Wards of Court.

Ultimate responsibility for healthcare decisions in Wards rests with the President of the High Court. She has recently issued specific directions regarding how the consent process and vaccination should operate for Wards and these are the subject of this memo. This process, as set out in the flow chart below, is for Wards of Court only and does not apply to the general inpatient population.

The direction from the President of the High Court is underpinned by the principle that it is in the best interests of most people who are wards to receive the COVID-19 vaccine as soon as possible.

Wards of court should be supported through the consent process by being provided with information on vaccination in a format they can understand if possible. If it is in their best interests to receive the vaccine every appropriate and practical effort should be made to persuade them to consent to vaccination and to support them if they are anxious or concerned.

The Ward, and the Committee of the Ward or their Guardian ad Litem (court appointed representative/ GAL), should be given as much advance notice of vaccination as possible.

If, after they have been provided with information on the vaccine, the Ward consents or agrees to vaccination, it should proceed. There is no need in these circumstances to notify the Court or seek

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Court approval. However, a Committee/GAL may make an application to the Court to seek to prevent vaccination, which application must be made within 7 days of the notification of the decision to vaccinate.

If, after efforts to inform and persuade them, a Ward refuses vaccination a capacity assessment should be carried out by the treating physician to evaluate if they understand the consequences of their decision.

- If the treating clinician is satisfied that the person has capacity to object to the administration of the vaccine, then the vaccine should not be administered. The office of the Wards of Court need be notified only in any case in which the refusal of a Ward to accept the vaccine could adversely impact on their placement.
- If the treating physician is satisfied that the person does not have capacity to object to the administration of the vaccine, written notification of the capacity assessment should be sent to the Ward and their Committee/GAL and should include a decision whether vaccination will or will not proceed based on the person's best interests.
- If the best interests decision is to vaccinate the Ward, a Committee/GAL may make an application to the Court to seek to prevent vaccination, which application must be made within 7 days of the notification of the decision to vaccinate.
- If a person who is a ward refuses the vaccine, has undergone a capacity assessment which determines they do not have capacity and the physician decides that the vaccination is not to proceed in their best interests, the Office of the Wards of Court is to be notified of the decision and the rationale for not receiving the vaccine.

The following should be included in the person's healthcare record:

- Record of advance notice of vaccination to the Ward, GAL or Committee
- Details of efforts to help the person who is a ward to make an informed decision
- Details of the decision to consent or refuse and the rationale for the decision, including capacity assessment (if it was required) and consideration of best interests of the person
- Efforts taken to support the person during the injection process, whether it proceeded to conclusion or not
- All written notifications to Ward, GAL, Committee or Courts

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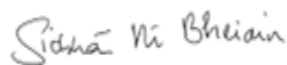
Guidance documentation and webinar content is available to support staff in the process of Consent for Vaccination and this information is being updated intermittently:

<https://www.hse.ie/eng/health/immunisation/hcpinfo/covid19vaccineinfo4hps/>.

A webinar directed at acute hospital staff involved in the vaccination programme has been organised for Tuesday 16 March @ 1pm- 2.15pm: ***Supporting the consent process for the vaccination programme against Sars-CoV-2 (Covid 19) in Acute Hospitals***. [Click here to register for the webinar](#). The recording will be available via the weblink above after the event.

Please share this memo immediately with all relevant members of staff.

Yours sincerely



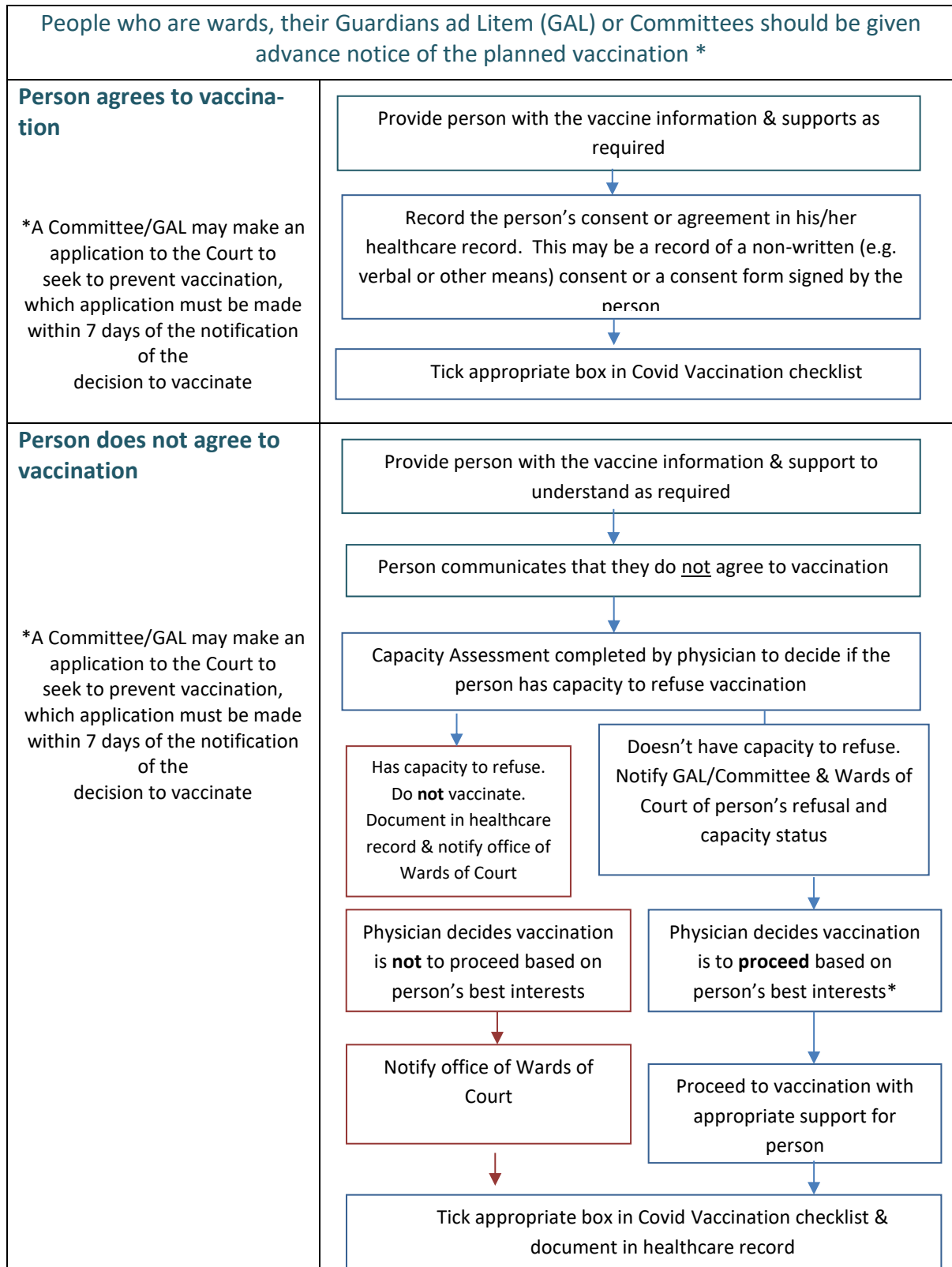
**Dr. Siobhán Ní Bheirne, MCRN: 15579**

**National Lead for Integrated Care**

Cc: Dr Colm Henry, Chief Clinical Officer  
Prof Martin Cormican, National Clinical Lead, Antimicrobial Resistance and Infection Control

## Consent Flow Chart to guide COVID 19 Vaccination of Acute Hospital Inpatient Wards of Court 15 March 2021

Information on supporting the consent process is available here including the COVID Vaccination Checklist: <https://www.hse.ie/eng/health/immunisation/hcpinfo/covid19vaccineinfo4hps/>



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## **Appendix Eight: Membership of the guidance working group**

Ms. Yvonne O'Neill, Interim National Director, Community Operations

Mr. JP Nolan, Head of Quality and Patient Safety, National Community Healthcare

Ms. Patricia Rickard-Clarke, Chairperson, Safeguarding Ireland and Solicitor

Ms. Caoimhe Gleeson, Programme Manager, National Office for Human Rights and Equality Policy

Ms. Marie Tighe, Project Manager, National Office for Human Rights and Equality Policy

Mr. Tim Hanly, General Manager, National Safeguarding Office

Ms. Máire Lennon, A/Head of Legal Services, Office of Legal Services

Ms. Anne Marie Cullen, Solicitor, Office of Legal Services

Ms. Ellen McCarthy, Solicitor, Office of Legal Services

Ms. Jacqueline Grogan, Project Manager, National Office for Human Rights and Equality Policy

Ms. Marguerite Clancy, Senior Researcher, National Safeguarding Office

Ms. Helen Byrne, Acute Operations

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## **Glossary**

### **Authorised Legal Service User**

An Authorised Legal Service User is a designated person in the HSE who is authorised to engage directly and instruct the HSE's contracted legal firms. The HSE Office of Legal Services has responsibility for holding and maintaining the list of Authorised Legal Service Users on an on-going basis. The list may be added to from time to time, or users may be removed from time to time, as they enter or exit a role, and a person is an Authorised Legal Service user by virtue of being on this list. An external legal firm may only accept instructions from an Authorised Legal Service User.

### **Advance Healthcare Directive**

An Advance Healthcare Directive is an advance expression made by a person with decision-making capacity which sets out their preferences concerning healthcare treatment decisions that may arise if he or she subsequently lacks decision-making capacity. An Advance Healthcare Directive must include a number of formalities so as to be valid and applicable.

Advance Healthcare Directives are provided for in Part 8 of the Assisted Decision Making (Capacity) Act 2015 which will be commenced in 2022. In the absence of commencement however there is a general legal principle that an adult who has decision-making capacity has the right to consent to and the right to refuse healthcare treatment. A person may rely on this legal principle even if he or she lacks capacity.

### **Committee**

A "Committee" in the Wardship context is the Court-appointed representative of the Ward whose role is to act on his or her behalf in line with directions given by the court. There are two kinds of Committee: (a) The Committee of the Person who has the responsibility for decisions in relation to the personal care of the Ward (b) The Committee of the Estate who has responsibility in managing the financial affairs of the Ward. Both responsibilities can reside in the same person.



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## **European Convention on Human Rights (ECHR)**

The European Convention on Human Rights (ECHR) 2003 is an international convention to protect human rights and political freedoms in Europe.

## **Enduring Power of Attorney**

This is a legal agreement made in accordance with the requirements of the Powers of Attorney 1996 Act (until commencement of the Assisted Decision-Making (Capacity) Act 2015) whereby a Donor (the person who has decision-making capacity) gives authority to an Attorney (the person to whom authority is given) to act on their behalf in the event that the donor lacks decision-making capacity at any time in the future.

Personal care decisions made under an EPA are limited to matters such as place of residence, dress, diet, training and rehabilitation, and housing, welfare and other benefits for the person. Under the existing law, the Enduring Powers of Attorney Act 1996, decisions pertaining to healthcare are excluded.

## **Ex parte**

An ex parte application means an application made to the Court without notice to the other party (i.e. the Respondent).

## **General Solicitor**

The General Solicitor for Minors and Wards of Court is a qualified solicitor in the service of the State. In some cases, where there is a disagreement among the proposed Ward's relatives, or there is no suitable relative prepared to act as Committee, the Court may appoint the General Solicitor to act as the Ward's Committee. In cases where the HSE initiates the Wardship application (i.e. the HSE is the petitioner) it is frequently the practice of the President of the High Court to appoint the General Solicitor as Committee. Although the office of the General Solicitor is located in the same building as the Office of the Wards of Court it is a completely separate entity. The General Solicitor's role is limited to those powers

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specifically given by the Court and is required to account to the Court annually for monies received and disbursed.

### **Guardian Ad Litem**

A Guardian Ad Litem (GAL) may be appointed by the court for the duration of a legal process. Their role is to report the views of the person to the court. This role should not be conflated with the GAL appointed under the Child Care Act 1991.

### **HSE Acute Hospital**

Acute Hospitals under the functional control of the HSE. The services delivered include inpatient scheduled care, unscheduled/emergency care, maternity services, outpatient and diagnostic services.

### **HSE Case Manager:**

A HSE case manager is the person who must personally govern the application for wardship. The Chief Officer or Hospital Group CEO will delegate this role to a senior staff member e.g. a Head of Service or Senior Clinician to act as Case Manager. This person must remain involved at all stages of the process including attendance at all hearings and retention of decision-making responsibility for the HSE with regards the application, and if relevant on-going Wardship.

The appointed HSE case manager should be someone with sufficient knowledge of the circumstances of the person and have the necessary delegated authority of the organisation. S/he will co-ordinate the process at each stage on behalf of the HSE

### **HSE Community Health Organisation (CHO)**

A Community Health Organisation is the organisational framework for the delivery of the broad range of Community Services in the HSE that are provided outside the acute hospital setting and include Primary Care, Social Care, Mental Health and Health and Wellbeing.

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## **In Chambers**

In chambers means in private and is similar to “in camera”. When a Judge hears a matter in chambers it is out of public view and not heard in open court.

**Inherent Jurisdiction:** The High Court in Ireland holds what is termed as “inherent jurisdiction” to vindicate or defend the personal rights of any citizen. This jurisdiction is derived from the Constitution and is not dependent on any statutory provision. This inherent jurisdiction may only be utilised in the event that a statutory remedy (e.g. the Wardship regime or Mental Health Act regime) is not available and fundamental constitutional rights of an individual are at stake. It can only be invoked in rare and extreme cases and where a “lacuna” or omission in the statutory law.

## **Medical visitor**

The Court has a panel of Medical Practitioners known as “Medical Visitors”. Medical Visitors are engaged by the Wards of Court office at the direction of the President to provide medical evidence in respect of the proposed Ward to assist the President in assessing an application for Wardship.

## **Office of the Wards of Court**

The office of the Wards of court which is based in the courts service manages the day to day administration of Wardship matters including the maintenance of court files. The office is supervised by the Registrar<sup>37</sup>.

## **Office of the Wards of Court Case Officer**

When a person is taken into Wardship a member of staff of the Wards of Court office known as a “case officer” is assigned to liaise with the Committee of the Ward to ensure the Ward’s affairs are being managed. The case officer follows any directions which the President of the High Court may give. The case officer also deals with all correspondence in the case and, where necessary, will refer a given aspect of the case to the President of the High Court for directions.

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<sup>37</sup> <https://www.courts.ie/content/office-wards-court>

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### **Petitioner**

A person who makes the application to the court to admit a person to Wardship is known as a petitioner. This is usually a family member but can also be an unrelated third party such as a solicitor, doctor or the HSE.

### **President of the High Court**

The President of the High Court is responsible for wardship matters. In general, the President, upon consideration of the medical and other relevant evidence, determines the capacity of a person for purposes of bringing that person into Wardship (and discharge from Wardship) and makes the major healthcare decisions (e.g. major surgery) and estate management (e.g. sale or purchase of house or lands) on advice of the Registrar and/or Medical Visitors.

### **Prima facie**

This is a Latin term which means “at first impression”.

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

The Registrar of Wards of Court supervises the day to day administration of the Office of the Wards of Court. Under the practice established by the President of the High Court the Registrar with the authority from the President provides consent to the carrying out of “non-controversial” procedures (e.g. routine investigate procedures or treatment of fractures or lesions following an accident).

### **Respondent**

The person who is the subject of an application in wardship proceedings i.e. the proposed Ward.

### **United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)**

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is an international treaty which identifies the rights of persons with disabilities as well as the obligations on Government to promote and protect those rights. It aims to ensure that persons with disabilities enjoy the same human rights as

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everyone else and to enable them participate fully in society without discrimination on any grounds.

### **Ward of Court**

A Ward of Court is an individual who has been deemed by the court to be of “unsound mind and is incapable of managing his or her own person and affairs”<sup>38</sup>.

### **Wardship**

Wardship is the process whereby an application is made to the court to hold a formal inquiry into the question of a person’s decision-making capacity. The person who is the subject of such application is known as the Respondent. If, following such an inquiry, a person was declared by the court to be of “unsound mind and incapable of managing their person and property” then they are described as a Ward of Court and the court assumes overall control of the person’s affairs and must make decisions on the person’s behalf in their best interests. The wardship process operates under the following legislative provision: Courts (Supplemental Provisions) Act 1961, section 9; Rules of the Superior Courts, Order 67; Circuit Court Rules, Order 47; and the Lunacy Regulations (Ireland) Act 1871. Section 6(2) of the Assisted Decision-Making (Capacity) Act 2015 (when commenced) will repeal the Lunacy Regulation (Ireland) Act 1871, subject to the terms and saver provided for in Part 6 of the 2015 Act.

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<sup>38</sup> As defined in the Lunacy Regulation (Ireland) Act 1871