

Ireland

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In Ireland, there is a growing consensus around the importance of the right to self-determination in our legal system. Legislative reform has focused on how autonomy is respected in the context of incapacity. The balance between autonomy and protection of the elderly is both delicate and pivotal.

In Ireland, the latest census reports show that the largest increase in population since 2011 is in the citizens over 65 years of age. It increased from 535,393 in 2011 to 637,567 in 2016. It is anticipated that by 2041 there will be 1.4 million people over 65 years of age. That is more than double the current older population now.

There has been a considerable shift in thinking in Ireland over the past two decades but a slow development in meaningful legal protection being afforded to the elderly. At present in Ireland, legislation is somewhat sparse. The Powers of Attorney Act 1996 (the “1996 Act”) and the Enduring Powers of Attorney Regulations 1996 provide a skeletal framework and represent the core legislative provisions in this area. There are essentially two types of powers of attorney provided for in the 1996 Act and subsequent Regulations:

1. Power of Attorney which can give either a specific or general power. This Power of Attorney ceases to have effect when the Donor becomes incapacitated.
2. Enduring Power of Attorney which takes effect upon the incapacity of the Donor.

An Enduring Power of Attorney comes into force once registered and application is made to the Irish High Court on foot of a medical certificate of mental incapacity. The High Court has an extensive supervisory role and can make numerous directions about the management of property and financial affairs. It also can in some cases permit the Attorney to make personal care decisions. The Enduring Power of Attorney ceases on death or revocation.

If a person is unable to manage his/her affairs due to mental incapacity and does not have an Enduring Power of Attorney previously referred to, an application can be made to have him/her made a Ward of Court. The origins of the application can be found in the Lunacy Regulation (Ireland) Act 1871 and such an application and its effect have traditionally been considered somewhat draconian. It necessitates an application to the Irish High Court grounded upon two medical practitioners’ affidavits certifying mental incapacity. If the Court is of the view that protection is required, a Committee will be appointed to oversee the Ward’s affairs. The office of the Wards of Court will also make arrangements for maintenance of dependants of the Ward and management of the Ward’s affairs.

Internationally, we have seen the introduction of the Hague Convention on the International Protection of Adults (“the 2000 Convention”). It represents the first modern attempt by States to create a coherent cross-border mechanism to enable protection of adults and their property when they are not in a position to protect their interests. Ireland signed up to the Convention on 18 September 2008. Given Ireland’s limited legislation and the far-reaching implications of the Wardship jurisdiction, considerable reform of Ireland’s antiquated mental capacity legislation was required to bring it into line with the 2000 Convention. This reform was proposed in the Assisted Decision Making (Capacity) Act 2015 (the “2015 Act”). The 2015 Act formally

adopted the 2000 Convention under section 110. The 2015 Act materially changes the landscape of protection of the elderly.

The 2015 Act proposes a shift away from a status based approach to assessment of capacity whereby a person of ‘unsound mind’ who is ‘incapable of governing his/her person or property’ is deprived of all legal rights in respect of decision making (as provided for in the Lunacy Regulation (Ireland) Act, 1871) to an assessment of capacity that will be time-specific and issue-specific. In summary, the legislation will provide for a functional approach to the assessment of capacity.

It proposes three types of decision-making support options across several areas such as personal welfare, finances and property. The three options are: -

1. Assisted decision making whereby a person may appoint a decision-making assistant by formal agreement to support him/her to understand, make and express decisions. The decision making remains with the person and his/her assistant will be supervised by the Director of the Decision Support Service.
2. Co-decision making which facilitates making decisions jointly under a co-decisionmaking agreement. As above, there is supervision by the Director of the Decision Support Service.
3. A decision making representative (appointed by the Circuit Court) to make a decision on behalf of the person. This is limited in scope and application and again is supervised as above.

The 2015 Act also envisages an expansion of the Enduring Power of Attorney to provide for decisions on health care matters. The Act also provides for greater external supervision of the Attorney. Unfortunately, this Act has not commenced other than to provide for the setting up of the administration and supervision element of the Act.

In addition to the foregoing, the Mental Health Act 2018 distils the thinking on assisted decisionmaking. Decisions may only to be made in a manner that minimises the restriction of the person’s rights and the person’s freedom of action. Due regard must be had for the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy.

Ireland ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol (UNCPRD) on 7 March 2018, some 10 years following its introduction. In addition to the foregoing, the Mental Health (Amendment) Act 2018 introduces the guiding principles which were developed in section 8 of the 2015 Act as the replacement for the best interests provision contained at section 4 of the Mental Health Act 2001 which was paternalistic and contrary to the obligations of the State under the UNCPRD. Elderly in certain circumstances may need the protection of the Mental Health Acts, particularly in situations of behavioural disturbances in the context of dementia. Decisions may only to be made in a manner that minimises the restriction of the person’s rights and the person’s freedom of action.

It is indeed a damning indictment on Irish society to find that basic rights are not adequately protected and vulnerable and valuable members of society struggle to preserve autonomy. Irish law remains limited in protection of the elderly under the provisions of the 1996 Act and the

Wardship jurisdiction. Significant change is mooted but will not be realised without the commencement of the substantive provisions of the 2015 Act.