CAPACIDAD JURÍDICA Y DISCAPACIDAD

Proyecto a cargo de FUTUEX (Fundación Tutelar de Extremadura), Fundación Aequitas y Fundación Academia Europea de Yuste, en el marco del Congreso Permanente sobre Discapacidad y Derechos Humanos bajo la autoría de:
Rafael de Lorenzo García
Blanca Entrena Palomero
Almudena Castro-Girona Martínez
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Prólogo: Blanca Entrena Palomero
Artículo de: Gonzalo A. López Ebri

CUADERNO DE TRABAJO Nº13

REINO UNIDO

CAPACIDAD JURÍDICA Y DISCAPACIDAD

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(Un estudio de Derecho Privado Comparado a la luz de la Convención Internacional sobre los Derechos de las Personas con Discapacidad)

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LA CAPACIDAD A LA LUZ DE LA CONVENCIÓN

Blanca Entrena Palomero
Patrono de Aequitas y Presidenta de la Fundacion Mozambique Sur

La situación jurídica en que se encuentran las personas afectadas por algún tipo de discapacidad, ha cambiado radicalmente con la Convención de Derechos Humanos de la Personas con Discapacidad, dando un marco jurídico uniforme para todas las personas con capacidad diferente, cualquiera que sea el país donde residan, siempre que dicho país haya ratificado esta convención, convirtiéndola en normativa propia.

Las personas con discapacidad nunca han visto afectada su capacidad jurídica o capacidad para ser titulares de derechos y obligaciones. Pero sí la capacidad de obrar o de poder ejercer las facultades derivadas de esos derechos de que son titulares. En cada caso, dependían de la regulación civil de los ordenamientos jurídicos, de su estatuto personal, pues cada persona con discapacidad se regía según su normativa nacio-

nal propia. Dentro de cada ordenamiento jurídico nacional se producían modificaciones o supresiones de las facultades de ejercicio derivados de los derechos de que eran titulares las personas con discapacidad intelectual.

Dejamos fuera de este comentario a las personas afectadas por cualquier tipo de discapacidad física, pues sólo ven modificadas su capacidad de obrar cuando, excepcionalmente, le impidiera conocer o querer un resultado jurídico con pleno criterio.

En el ejercicio de la capacidad de obrar es necesaria la presencia de un profesional o profesionales que les permita conocer el alcance del negocio jurídico que se proponen realizar. El notario es este profesional-funcionario, pues prácticamente está presente en la mayoría de los países y su función de imparcialidad o asesoramiento es imprescindible para asegurar que la voluntad de la persona se ha formado adecuadamente. El Reglamento Notarial exige así (en los artículos 156, 156.8º y 167 del RD 45/2007, de 19 Enero) a este profesional que se asegure de que a su juicio, los otorgantes tienen la *capacidad civil suficiente* para otorgar el acto o celebrar el negocio concreto, pues dependerá de la naturaleza del acto o contrato y de las exigencias que el Derecho Sustantivo en orden a la capacidad de las personas.

Este es el meollo de la cuestión. Se ha superado la idea de que haya dos grupos de personas: capaces, que pueden ejercer por sí mismas

la capacidad de obrar; personas que, por no tener capacidad plena no podían comparecer para realizar negocio jurídico alguno.

El artículo 12 de la Convención de Derechos Humanos de las Personas con Discapacidad recoge, con el carácter integrador que presenta esta Convención, el criterio que hoy debe presidir todo negocio jurídico al exigir a los Estados partes que reafirmen el reconocimiento de la personalidad jurídica de las personas con discapacidad y en igualdad de condiciones y lo que es más importante, señala en los apartados 3º y 4º del mismo : *«3. Los Estados Partes adoptarán las medidas pertinentes para proporcionar acceso a las personas con discapacidad al apoyo que puedan necesitar en el ejercicio de su capacidad jurídica.*

4. Los Estados Partes asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvaguardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que, las medidas relativas al ejercicio de la capacidad jurídica, respeten los derechos, la voluntad y las preferencias de la persona, que no haya conflicto de intereses ni influencia indebida, que sean proporcionales y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y que estén sujetas a exámenes periódicos por par-

te de una autoridad o un órgano judicial competente, independiente e imparcial. Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas.»

Por tanto, junto a los notarios, deberá existir una batería de ayudas profesionales que permitan a las personas con discapacidad ejercer su diferente capacidad de obrar según su preferencia y según su voluntad. Ello implica que conozcan el efecto que tiene en su patrimonio el otorgamiento del acto o contrato, que conozcan las demás alternativas existentes,... para que su elección se realice sin influencias indebidas. Es verdad que nos lleva a un trabajo minucioso y personalizado de valoración de las distintas capacidades de que disfrutan las personas, todas.

Además, si bien pueden otorgar el negocio jurídico por sí, el inciso final del artículo 12.4º indica que, también podrían estar sujetos a un examen periódico (que se podría dejar regulado en el mismo documento) por parte de una autoridad, un órgano judicial aunque todo parece que indica que podría ser encomendado a las Fundaciones Tutelares, sujetos todos a la superior vigilancia del fiscal, que es, en el Derecho Español, a quien le corresponde esa fiscalización, como tienen encomendado por su Estatuto.

Todo ello teniendo en cuenta que las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de

las personas. No es lo mismo que se trate de una donación (sin que se derive de ella obligación alguna para la persona con discapacidad) de la que sólo se derivarían beneficios para la persona con discapacidad; a que se trate de un negocio bilateral del que se deriven obligaciones hacia su persona o su patrimonio, lo cual requiere un estudio pormenorizado de si hay equilibrio entre las prestaciones a las que se obligan ambas partes.

Una figura que merece un comentario aparte en el Patrimonio protegido constituido por una persona con discapacidad con «capacidad suficiente», pues en nuestro derecho fue la primera institución en la que se admitía capacidad para constituirlo por sí mismo(1). Pues fue el primer intento de, como dice Marín Calero, conocer y regular la realidad social de un grupo de nuestra sociedad que, aunque pudieran obtener una resolución judicial que modifique su capacidad de obrar, el hecho es que ni tienen esa resolución judicial ni la van a tener en el futuro en la mayoría de los supuestos.

Hasta la regulación en nuestra legislación de la figura del Patrimonio Protegido en atención de las personas con Discapacidad, ignorando lo que

(1) artículo 3 de la Ley 41/2003, de 18 de noviembre, de protección patrimonial de las personas con discapacidad y de modificación del Código Civil, de la Ley de Enjuiciamiento Civil y de la Normativa Tributaria con esta finalidad.

ocurría en la realidad, sólo se admitía la existencia de dos grupos de personas: con capacidad plena y personas incapacitadas personas que no podían gobernarse por sí mismas y que necesitaban de una persona que actuase por ellas, el tutor; o que actuase con ellos completando su capacidad, el curador.

No admitía la posibilidad de que, sin tener plena capacidad, se pudiera gozar de »capacidad suficiente» para entender un negocio concreto y por tanto actuar por sí mismo en ese acto.

Esta posibilidad se introdujo a petición de un asesor jurídico de la Asociación Down España, el Notario Carlos Marin, que conoce de cerca la realidad y, por tanto, podía dar un consejo valioso, que permitiese a las personas que no son plenamente capaces, pero sí tienen capacidad suficiente, actuar por sí mismos.

CONCLUSIÓN: Este cambio de sensibilidad en el ámbito jurídico implica que, las personas con capacidad diferente y que puedan entender el negocio que se está realizando, participen activamente en el mismo.

Esta idea, en el año 2003 se plasmó en la legislación española en la Ley de Protección patrimonial de las personas con discapacidad, como pequeño anticipo de las modificaciones que deben estar presente en las reformas de legislación civil de cada país en atención a las capacidades diferentes, y es la que hoy en día se recoge con

carácter universal en el artículo 12 de la Convención de Derechos Humanos de las Personas con Discapacidad, dando un nuevo enfoque toda la legislación que existe en cada normativa civil nacional.

De ahí que consideremos que es fundamental, en el mundo jurídico, el estudio de la situación de leyes modernas que proporcionen soluciones actuales que permitan la participación de las personas con discapacidad intelectual, en la medida de sus posibilidades, caso por caso, en situación de equidad con el resto de los miembros de la sociedad, y todo ello en un marco de seguridad jurídica como también ha supuesto la Reforma del Registro Civil Central, tras la Ley 1/2009.

Entre las modificaciones necesarias, debe ser prioritaria la superación de una terminología discriminatoria, que tanto agrede a las personas con capacidades diferentes y a sus familias, y que hoy empieza a estar superada gracias a la labor de fiscales como Gonzalo López Ebri, fiscal de Valencia, autor de un completo libro de fórmulas y dictámenes, y que por decisión de la Fiscalía General de Estado se distribuye por todas las fiscalías de España. Este es uno de los primeros resultados prácticos en el Derecho Español de la Convención de los Derechos Humanos de las Personas con Discapacidad, pasando a llamar a la fiscalía «sección civil y de protección de las personas con discapacidad» y a que el procedimiento sea llamado «procesos relativos a la capacidad de las per-

sonas», de ahí hasta desgranar cada una de las resoluciones en que en esta materia pueden intervenir la figura del fiscal.

Blanca Entrena Palomero

EL INTERNAMIENTO NO VOLUNTARIO

LA PROTECCIÓN PERSONAL Y PATRIMONIAL DE LAS PERSONAS CON DISCAPACIDAD PSÍQUICA EN LOS TÉRMINOS DEL ART. 763 LEC Y LA CONVENCIÓN SOBRE LOS DERECHOS DE LAS PERSONAS CON DISCAPACIDAD

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Partiendo de la obligada reducida extensión de este texto, exclusivamente vamos a plantear algunas consideraciones referidas a la interpretación, aplicación y posibles reformas del art. 763 LEC, a fin de conseguir su adecuación al contenido de la Convención sobre los derechos de las personas con discapacidad, y en particular a las prevenciones contenidas en el art. 12.

En este sentido, entendiendo que la redacción del actual art. 763 LEC dada por la Ley 1/2000, y

por lo que a su aplicación práctica respecta, ha sido objeto de múltiples y distintas consideraciones en lo referente a:

1. Legitimación pasiva: Sujetos destinatarios del art. 763; el problema del **«internamiento asistencial».**

2. Competencia para el control Periódico del internamiento.

3. Actividades que debe comportar el control periódico del internamiento.

Interpretaciones que, en la mayor parte de los casos, no se puede decir que hayan sido las más deseables, a nuestro entender, ni las que mejor protegían a las personas con discapacidad; ha llegado el momento de dar una nueva redacción al precepto que resuelva las anteriores disfunciones y lo adecue a la Convención; lo que forzosamente nos lleva a plantear la fundamentación, aunque aquí escueta, de los motivos en la que la basamos.

I EL INTERNAMIENTO ASISTENCIAL

Son sujetos pasivos del internamiento no voluntario aquellas personas que reúnan los requisitos del art. 763 LEC:

a) Que esté afectado por un trastorno psíquico.

b) Que para el ejercicio del derecho constitucional a su salud (art. 43 CE) sea necesario su internamiento en un centro adecuado.

c) Que no esté en condiciones de decidirlo por sí misma.

Con base en los requisitos arriba enumerados, es conocida la antigua polémica que se generó, y que todavía se trasluce en algunas resoluciones judiciales, con la publicación del anterior art. 211 CC, hoy art. 763 LEC, acerca de la cuestión relativa a si es o no necesaria autorización judicial para el ingreso no voluntario de personas de avanzada edad que por razón de un proceso degenerativo no pueden prestar su consentimiento y son ingresadas por sus familiares en algún Centro Asistencial, o Residencia, por no poder atenderlos personalmente.

Dos son las principales posturas mantenidas al efecto y totalmente contrapuestas:

A) La tesis negativa, integrada por aquellos que entienden que los internamientos de personas de edad avanzada y con una enfermedad degenerativa, no estarían dentro del ámbito del artículo 763 de la Ley de Enjuiciamiento Civil, precepto que solo sería de aplicación a supuestos muy concretos.

De este modo, llegan a la conclusión de que los internamientos no voluntarios de personas

de edad avanzada no precisan de autorización judicial, argumentando que el art. 763 LEC no contiene una definición precisa de lo que se entiende por internamiento, de donde, a su entender, se desprende del precepto que su justificación ha de venir dada por dos razones:

a) La existencia de una enfermedad psíquica.

b) El internamiento en un Centro destinado a su tratamiento, -psiquiátrico-.

Conclusión que a su vez justifican teniendo en cuenta la Exposición de Motivos de la Ley 1/1996 que reformó parcialmente el art. 211 del CC, así como tomando también en consideración el art. 17 de la CE , el Convenio Europeo para la protección de los Derechos Humanos y Libertades Fundamentales de 1950 y la interpretación que del mismo ha realizado en numerosas resoluciones el TEDH.

En este sentido, consideran el internamiento involuntario como una medida excepcional, necesaria, limitada en el tiempo y transitoria, y que no se da en aquellos supuestos en los que lo que se solicita es el internamiento de una persona de edad avanzada y con una enfermedad degenerativa, en el que lo que se pretende es una ayuda asistencial, indefinida en su duración, de dudosa necesidad, en tanto que el paciente podría percibir igual asistencia, atención y cuidados en su propio domicilio, obedeciendo más que a razones médicas, a la voluntad o conveniencia de la fa-

milia, que decide ingresarlo en una residencia o centro adecuado.

B) La tesis positiva, tesis seguida por la Fiscalía General del Estado, y plasmada en la Instrucción nº 3/90, relativa al*: «Régimen jurídico que debe regir para el ingreso de personas en residencias de la tercera edad»*, y que viene integrada por aquellos que entienden que tales internamientos no voluntarios requieren autorización judicial.

Así, los anteriores argumentos esgrimidos por los detractores de la necesidad de la autorización de estos internamientos, pueden ser empleados precisamente para justificar la tesis contraria, es decir, la necesidad de autorización judicial para el internamiento que nos ocupa.

No cabe duda que la exigencia de esa autorización viene dada por el hecho de que el internamiento no voluntario constituye una clara limitación al principio de libertad personal reconocido en el art. 17 de la CE.

Partiendo de tal premisa, vamos a examinar cada una de la exigencias y argumentos que sirven de soporte a la tesis negativa:

a) La existencia de una enfermedad psíquica

Si se requiere autorización judicial para ingresar a un paciente que tiene un trastorno psíquico, cómo es posible entender que enfermedades degenerativas como lo puedan ser la demencia senil o la enfermedad de alzheimer, que

no sólo limitan sino que incluso anulan la inteligencia y la voluntad, al fin la ***«psique»,*** no se consideren trastornos psíquicos por el simple hecho de que quienes las sufren tengan -*una avanzada edad*-.

¿Acaso la enfermedad psíquica deja de serlo a partir de determinada edad?.

La enfermedad psíquica sólo desaparece con la curación o con el fallecimiento de quienes la sufren. La incongruencia de tal argumento es evidente, y mucho más en la actualidad, cuando numéricamente tales enfermedades degenerativas superan con creces a las estrictamente denominadas por aquellos de manera -tan restrictiva-, *enfermedades psíquicas*.

En este sentido, la OMS define la demencia diciendo que incide en la identidad psíquica más profunda del individuo, describiéndola como: *«síndrome debido a una enfermedad del cerebro, generalmente de carácter crónica o progresiva, en la que hay déficits de múltiples funciones corticales superiores, entre ellas la memoria, el pensamiento, la orientación, la comprensión, el cálculo, la capacidad de aprendizaje, el lenguaje y el juicio».*

Fácilmente se ve que el argumento del trastorno psíquico no se sostiene. De esta forma se llegaría al absurdo de que si la causa que justifica la limitación de la libertad es la dolencia mental, la única diferencia para excluir la apli-

cación del art. 763 LEC a los ingresos no voluntarios de personas de avanzada edad, sería la edad. Argumento que por sí sólo no merece más comentario.

b) El internamiento en un Centro destinado a su tratamiento, -psiquiátrico-

Tampoco se sostiene el que se excluya la aplicación del art. 763 LEC a los denominados «internamientos asistenciales».

Dentro del art. 763 LEC también está comprendido el internamiento asistencial, toda vez que los trastornos psíquicos no han de provenir necesariamente de una enfermedad de carácter psiquiátrico, sino que pueden comprender una enfermedad degenerativa (la demencia senil o la enfermedad de Alzheimer), o incluso de un trastorno físico que produzca consecuencias psíquicas (un traumatismo por ejemplo, que prive al sujeto de sus facultades mentales). Máxime, cuando en el siglo que corre nadie estima que el internamiento de personas de edad avanzada lo es *meramente asistencial,* cuando tras todo internamiento lo que se pretende es la rehabilitación psico-social, en la medida de lo posible, y no el mero estaticismo de la persona internada.

La atención que necesitan las personas de edad avanzada que se encuentren en estos supuestos no va a ser únicamente la asistencial, sino también la médica, sanitaria y curativa, esto es, una atención integral que incluya todo lo necesario para el cuidado de la persona en

sus necesidades básicas vitales, así como su rehabilitación, y en la medida de lo posible, la ralentización de su proceso degenerativo.

En otro sentido y con mayor motivo, si es exigible la autorización judicial para el internamiento con finalidad curativa, temporal o provisional y necesaria en un centro de carácter psiquiátrico, con mucho mayor motivo resultará exigible, si ese internamiento se hace con visos de llegar a tener el carácter de indefinido, y como es más frecuente en el caso de Residencias de personas de avanzada edad, hasta el fallecimiento de la persona internada.

De no proceder así, se estaría favoreciendo el que personas de avanzada edad y sin capacidad para decidir su internamiento, fueran ingresadas por las personas de su entorno o por cualesquiera otros, en Centros y Residencias sin control alguno sobre su persona y sobre sus bienes; y entonces no sólo se estaría vulnerando el contenido del art. 763 LEC, sino los derechos reconocidos en los arts. 17 CE y 5 del Convenio Europeo de Derechos Humanos.

Lo contrario significaría dejarlos en la más absoluta desprotección, pudiendo sus hijos u otros parientes decidir por ellos, ingresándolos de por vida, aún contra su voluntad, en connivencia con los encargados de la Residencia o Centro, y al margen de cualquier control o noticia acerca de su existencia. Situación en nada permisible en un Estado Social y de Derecho.

Finalmente, ninguna duda cabe, que lo verdaderamente significativo del internamiento, no es ni su carácter psiquiátrico o asistencial, ni la denominación del Centro, ni la denominación de la enfermedad; lo verdaderamente relevante es la privación de libertad.

De donde se concluye, que los internamientos no voluntarios en Centros o Residencias de personas de avanzada edad que no estén en condiciones de decidir por sí mismas, precisan de la autorización Judicial prevista en el art. 763 LEC, pretendiendo de este modo garantizar y armonizar el derecho a la libertad (art. 17 CE) con el derecho a la salud (art. 43 CE), en aquellos casos en que la protección de ésta requiere una limitación del derecho a la libertad, mediante el ingreso y tratamiento en un Centro adecuado.

Ya que de otra forma se estaría incumpliendo el mandato, ya no particular, sino el general contenido en la Convención que no distingue ni soporta la anterior diferenciación, y sólo habla de **PERSONAS CON DISCAPACIDAD.**

II JUZGADO COMPETENTE PARA EL CONTROL PERIÓDICO DEL INTERNAMENTO

Mientras que la persona internada continúe en la misma Residencia o Centro para la que se dio la autorización de internamiento o en otra distinta, pero siempre dentro del partido judicial del Juez

que la autorizó, no se plantea problema alguno en cuanto a la competencia para el control semestral o periódico, será Juez competente el mismo que originariamente lo autorizó.

Cuestión distinta es, determinar cuál es el Juez competente para efectuar el control periódico de los internamientos previsto en el art. 763.4 LEC, para el supuesto de que la persona internada sea traslada a otra Residencia, Centro o Piso Tutelado que radique en partido judicial distinto al que autorizó originariamente el internamiento.

El tratamiento que la doctrina y la jurispruden cia realizan acerca de la determinación de la competencia territorial en los controles periódicos de los internamientos no voluntarios, para el caso de que la persona internada sea trasladada a otro Centro o Residencia que radique en partido judicial distinto al que originariamente autorizó el internamiento, no puede ser calificado como pacífico, lo que comporta, que para tomar postura acerca de la cuestión que nos ocupa, examinemos cada una de las motivaciones dadas al respecto.

A tal fin, podemos sintetizar las diferentes posturas doctrinales y jurisprudenciales, del siguiente modo:

1. LOS QUE ENTIENDEN QUE EL JUZGADO COMPETENTE ES EL QUE DICTÓ EL PRIMER AUTO DE INTERNAMIENTO.

En síntesis, fundamentan su postura en los siguientes argumentos:

1. Que de conformidad con el artículo 52.1.5º LEC, en los juicios en que se ejerciten acciones relativas a la asistencia o representación de incapaces, incapacitados o declarados pródigos, será competente el Tribunal del lugar en que éstos residan. En consonancia con dicho precepto, el artículo 763.1 LEC dispone que el internamiento, por razón de trastorno psíquico, de una persona que no esté en condiciones de decidirlo por sí, aunque esté sometida a la patria potestad o a tutela, requerirá autorización judicial, que será recabada del Tribunal del lugar donde resida la persona afectada por el internamiento. Con arreglo a los anteriores preceptos no ofrece duda que la competencia para acordar el internamiento correspondía al Juzgado del lugar de residencia al tiempo de solicitarse la autorización para su internamiento.

2. Que el número 4 del mismo art. 763 LEC establece que una vez autorizado el internamiento se expresará la obligación de los facultativos que atiendan ala persona internada de informar periódicamente al Tribunal sobre la necesidad de mantener la medida, sin perjuicio de los demás informes que el Tribunal pueda requerir cuando lo crea pertinente. Los informes periódicos serán remitidos cada seis meses, a no ser que el Tribunal, atendida la naturaleza del trastorno que motivó el internamiento, señale un plazo inferior. Recibidos los informes, el Tribu-

nal, previa la práctica, en su caso, de las actuaciones que estime imprescindibles, acordará lo procedente sobre la continuación del internamiento.

3. Que en su consecuencia la Ley atribuye el seguimiento de la situación o evolución del incapaz al mismo Tribunal que dispuso su internamiento, lo que guarda conexión lógica con la norma del artículo 61 LEC, reguladora de la competencia funcional por conexión para conocer de las incidencias, atribuyéndola al Juez o Tribunal que tenga competencia para conocer del pleito principal y con el principio de la *perpetuatio iurisdictionis* que consagra el artículo 411 LEC al disponer que las alteraciones que una vez iniciado el proceso se produzcan en cuanto al domicilio de las partes, la situación de la cosa litigiosa y el objeto no modificarán la jurisdicción y la competencia, que se determinarán según lo que se acredite en el momento inicial de la litispendencia.

4. A lo que añaden, la consideración de que todas las actuaciones del art. 763.4 LEC son propiamente de ejecución en la medida en que pertenecen también al juzgado que ha dictado la resolución en primera instancia tal y como dispone el art. 541.1 LEC

5. Y finalmente, consideran que les avala en su postura la doctrina establecida por el TS en al Auto dado por su Sala 1ª de 1 de Junio de

2004 al señalar en el conflicto negativo de competencia planteado en expediente de autorización de internamiento de un presunto incapaz, que la prórroga de la litispendencia dada la inicial competencia territorial asumida, obliga, conforme a los arts. 410 y 411 LEC, a continuar con ella, aunque se cambie el domicilio que provocó el fuero competencial durante los siguientes trámites del proceso.

2. LOS QUE ENTIENDEN QUE EL JUZGADO COMPETENTE ES EL DEL LUGAR EN EL QUE RESIDE LA PERSONA INTERNADA EN CADA MOMENTO

Tesis que según nuestro criterio es la correcta, con independencia de lo que más adelante digamos, ya que ni en pura técnica procesal, ni por aplicación integradora y teleológica del art. 763 LEC, es sostenible la contraria.

Si tenemos en cuenta el contenido de las actividades antes descritas, y que deben desarrollarse para un efectivo control periódico de los internamientos y para la protección de los derechos fundamentales que están en juego, fácilmente ya se observa la imposibilidad de que su cumplimiento se pueda realizar a través del auxilio judicial y por juez distinto del que deba resolver.

Pero no obstante ello, la decisión de esta cuestión exige partir de la fundamental premisa de que no nos hallamos ante un proceso en el que

un determinado órgano jurisdiccional, con exclusión de todos los demás, deba resolver una controversia entre partes con carácter definitivo, sino ante un procedimiento de naturaleza especial, como ya hemos visto, cuyo objeto está constituido, en un primer momento, por la autorización del internamiento psiquiátrico de determinada persona en un centro adecuado a sus circunstancias, pero que luego exige, si se acuerda dicha medida, seguir autorizando o no su permanencia en el centro en el que se halle internada, con la cadencia temporal que la ley establece, hasta que, en su caso, se produzca el alta médica.

Partiendo de esta premisa, es forzoso realizar un examen crítico de cada una de las argumentaciones dadas por los partidarios de la tesis de que la competencia siempre reside en el Juzgado que originariamente dictó el auto de internamiento, para de este modo poder concluir razonadamente a favor de la tesis que propugnamos.

1) Que de conformidad con el artículo 52.1.5º LEC, en los juicios en que se ejerciten acciones relativas a la asistencia o representación de incapaces, incapacitados o declarados pródigos, será competente el Tribunal del lugar en que éstos residan. Y que en consonancia con dicho precepto, el artículo 763.1 dispone que el in-

ternamiento, por razón de trastorno psíquico, de una persona que no esté en condiciones de decidirlo por sí, aunque esté sometida a la patria potestad o a tutela, requerirá autorización judicial, que será recabada del Tribunal del lugar donde resida la persona afectada por el internamiento.

Es evidente que las disposiciones relativas a la competencia territorial contenidas en los arts. 52.1.5ª y 763.1 LEC son indisponibles y por lo tanto de carácter obligatorio**.** Partiendo de esta premisa, es necesario calificar la naturaleza jurídico-procesal de esa posterior actuación jurisdiccional de autorización o no de la continuación del internamiento, para ver si le son de aplicación o no las reglas precitadas.

Los partidarios de mantener la competencia originaria califican, erróneamente, la actuación judicial de control periódico del internamiento, unas veces como incidente del pleito principal, y otras, como ejecución de la resolución dada.

Así, en primer lugar, no puede ser calificada como un mero incidente de un procedimiento principal, pues no se trata de resolver una cuestión distinta de la que constituye el objeto de dicho procedimiento pero que guarde relación de conexidad con el mismo, sino de pronunciarse en cada caso y momento acerca de la cuestión misma de la autorización del internamiento, que

puede mantenerse o dejarse sin efecto. Cada una de esas resoluciones produce, por tanto, efectos constitutivos.

En segundo lugar, por la misma razón no cabe equiparar esa posterior actuación jurisdiccional a la ejecución de una resolución firme. Adviértase, que la resolución de autorización del internamiento no produce efectos de cosa juzgada material y, sobre todo, que no se trata de cumplir o ejecutar de forma sucesiva una medida inicialmente adoptada, sino de pronunciarse periódicamente y de forma autónoma acerca de si, atendidas las circunstancias personales del sujeto afectado en el momento al que se contrae su examen periódico, existe o no razón jurídica para autorizar que el mismo deba permanecer o no internado.

De donde cabe concluir, que si cada autorización de continuación o no del internamiento produce efectos constitutivos, y debe estar integrada por las actuaciones a las que nos hemos referido al hablar del contenido del control periódico, por aplicación de los arts. 52.1.5ª y 763.1 LEC, será juez competente el de la residencia actual de la persona de cuyo internamiento se trate y no el que originariamente autorizó tal internamiento.

2) Que el número 4 del mismo art. 763 establece que una vez autorizado el internamiento se expresará la obligación de los facultativos que atiendan ala persona internada de informar periódicamente al

Tribunal sobre la necesidad de mantener la medida, sin perjuicio de los demás informes que el Tribunal pueda requerir cuando lo crea pertinente. Los informes periódicos serán remitidos cada seis meses, a no ser que el Tribunal, atendida la naturaleza del trastorno que motivó el internamiento, señale un plazo inferior. Recibidos los informes, el Tribunal, previa la práctica, en su caso, de las actuaciones que estime imprescindibles, acordará lo procedente sobre la continuación

Con base en esta argumentación, los partidarios de mantener la competencia originaria entienden que el art. 763.4 LEC atribuye al Tribunal que originariamente dictó el auto de internamiento la condición de ser el destinatario de los informes facultativos periódicos; cuando por el contrario, la LEC tan sólo habla de Tribunal y sin designación territorial alguna, de donde se desprende que en conexión lógica con el art. 763.1 LEC y con el carácter constitutivo de la resolución judicial por la que se autoriza o deniega la continuación de internamiento, el Tribunal al que se refiere el art. 763.4 LEC no puede ser otro que aquel que corresponda por el lugar en el que resida la persona a la que afecte la resolución judicial.

3) Que en su consecuencia la Ley atribuye el seguimiento de la situación o evolu-

ción del incapaz al mismo Tribunal que dispuso su internamiento, lo que guarda conexión lógica con la norma del artículo 61 reguladora de la competencia funcional por conexión para conocer de las incidencias, atribuyéndola al Juez o Tribunal que tenga competencia para conocer del pleito principal y con el principio de la perpetuatio iurisdictionis que consagra el artículo 411 LEC al disponer que las alteraciones que una vez iniciado el proceso se produzcan en cuanto al domicilio de las partes, la situación de la cosa litigiosa y el objeto no modificarán la jurisdicción y la competencia, que se determinarán según lo que se acredite en el momento inicial de la litispendencia.

En este apartado son dos las argumentaciones que se utilizan para mantener la competencia originaria: a) El de la conexidad derivada de su naturaleza de ser el control periódico un incidente del pleito principal; b) El del principio de la *perpetuatio iurisdictionis*.

Por lo que a su condición de incidente se refiere, nos remitimos a lo ya dicho anteriormente, por entender que su insostenibilidad está ya suficientemente razonada.

En cuanto a la *perpetuatio iurisdictionis*, hemos de decir, que es sabido que la presentación y posterior admisión de la demanda supone una

ruptura; se pasa de una relación jurídico material privada en conflicto, mantenida sólo entre particulares, al planteamiento de un litigio ante un órgano jurisdiccional, y esa ruptura se define hoy con el término -*litispendencia*-, que significa en la terminología de CHIOVENDA la «existencia de una litis en la plenitud de sus efectos», y en la terminología hoy usual en los tribunales se habla de la constitución válida de la relación jurídico- procesal.

Está relación jurídico-procesal válidamente constituida produce como uno de sus principales efectos la *perpetuatio iurisdictionis,* recogida en el art. 411 LEC *« Las alteraciones que una vez iniciado el proceso, se produzcan en cuanto al domicilio de las partes, la situación de la cosa litigiosa y el objeto del juicio no modificarán la jurisdicción y la competencia, que se determinarán según lo que se acredite en el momento inicial de la litispendencia».*

Por lo que ahora interesa señalar, los efectos que la litispendencia produce se concretan, básicamente, en que a partir del momento en que se origina, el órgano competente para el conocimiento del asunto debe continuar ese proceso, al margen de las alteraciones que puedan afectar al domicilio de las partes, hasta llegar a dictar sentencia que decida la controversia inicialmente planteada. La finalidad de la denominada *perpetuatio iurisdictionis* no es otra que la

de lograr que el mismo órgano jurisdiccional ante el que se conformó con plenitud de efectos la relación jurídico procesal y se fijó el objeto del proceso, lo decida con carácter definitivo.

Este efecto no puede llevarse a sus últimas consecuencias en contra de la misma realidad, y así no sólo se admiten cambios de parte derivados de hechos naturales (como la muerte de uno de los litigantes), sino también de actos jurídicos (la transmisión inter vivos de la cosa litigiosa), aunque en este segundo caso con requisitos distintos a los del primero; a los que habría que añadir, los cambios de residencia en aquellos tipos de procedimiento que por su naturaleza sea indelegable la actividad probatoria que la Ley le exige al órgano judicial, como son los exámenes personales a los que se refiere el art. 763 LEC.

Lo que, en resumen, viene a significar: que si bien la *perpetuatio iurisdictionis* es algo consustancial a todo proceso contencioso (valga el pleonasmo), no siempre ha de resultar aplicable a un procedimiento de tan especial naturaleza como el que nos ocupa, e incluso su aplicación -*sine limite*- al proceso contencioso, comportaría consecuencias indeseables, tal y como lo tiene declarado de forma reiterada y constante la Sala Civil-Penal del TSJ de la Comunidad Valenciana (Auto nº 8/2006, de fecha 31-1-2006, recurso nº 3/2006).

No está de más recordar de nuevo, que estamos ante un procedimiento de naturaleza especial, como ya hemos visto, cuyo objeto está constituido, en un primer momento, por la autorización del internamiento psiquiátrico de determinada persona en un Centro adecuado a sus circunstancias, pero que luego exige, si se acuerda dicha medida, seguir autorizando o no su permanencia en el Centro en el que se halle internada, con la cadencia temporal que la ley establece, hasta que, en su caso, se produzca el alta médica.

Todo lo anterior lo corrobora la Sala de lo Civil del Tribunal Supremo en el auto de 27 de marzo de 2007, recurso 13/2007, resolviendo un conflicto negativo de competencia, y lo que es más, referido incluso a un proceso principal de incapacidad, cuando llega a la conclusión de que, de la naturaleza de estos procedimientos se desprende que la *perpetuatio iurisdictionis* debe operar con sujeción a lo previsto en el art. 763.1 LEC, y así entiende que no obstante haberse entablado válidamente la relación jurídico-procesal con la presentación y admisión de la demanda de incapacidad ante el juzgado en el que radicaba la Residencia Geriátrica en la que estaba la demandada, y haberse procedido a los trámites de la audiencia de parientes y nombramiento de defensor judicial, al no haberse podido practicar la diligencia de reconocimiento

judicial prevista en el art. 759 LEC, por haber sido trasladada la demandada a otra Residencia Geriátrica sita en partido judicial distinto, procede atribuir la competencia el Juzgado de primera instancia del lugar en el que se encuentra internada.

Y finalmente, el auto del TS de 13 de junio de 2008 ha aclarado definitivamente la cuestión al resolver la determinación de la competencia territorial, diciendo:

«El lugar de la residencia del incapaz determina la competencia territorial, en base a o dispuesto en el art. 52-5º LEC, y el art. 63-1 LEC, vigente por aplicación de la Disposición derogatoria Ú 1-1ª de la actual Ley, preceptos que excluirían la aplicación a los procedimientos sobre la tutela y relativos a la capacidad de as personas, del principio de la –perpetuatio iurisdictionis- consagrado en el art. 411 LEC. Tal criterio competencial es más acode al principio de protección del incapaz, ya que el ejercicio de la tutela será más efectivo bajo el control del Juzgado de residencia del incapacitado, y además posibilita el acceso efectivo del incapaz a la justicia, de conformidad con el art. 13 de la Convención sobre derechos de las personas con discapacidad».

Es decir, no parece que el principio de la *perpetuatio iurisdictionis* sea de estricta aplicación a los controles periódicos de los internamientos.

4) A lo que añaden, la consideración de que todas las actuaciones del art. 763.4 LEC son propiamente de ejecución en la medida en que pertenecen también al juzgado que ha dictado la resolución en primera instancia tal y como dispone el art. 541.1 LEC.

Aquí, de nuevo nos remitimos a lo ya dicho acerca de la insostenibilidad de la consideración de que la actuación judicial del control periódico del internamiento sea un acto de ejecución de resolución judicial firme y principal.

Conclusión ésta, que es la más acorde con el contenido del art. 12.4 de la Convención cuando exige: ***«…que estén sujetas a los exámenes periódicos por parte de una autoridad o un Órgano Judicial****…*»

III ACTIVIDADES QUE DEBE COMPORTAR EL CONTROL PERIÓDICO DE LOS INTERNAMIENTOS NO VOLUNTARIOS

Determina la regla 4ª del art. 763 LEC que *«En la misma resolución que acuerde el internamiento se expresará la obligación de los facultativos que atiendan a la persona internada de informar periódicamente al tribunal sobre la necesidad de mantener la medida, sin perjuicio de los demás informes que el tribunal pueda requerir cuando lo crea pertinente.*

Los informes periódicos serán emitidos cada seis meses, a no ser que el tribunal, atendida la naturaleza del trastorno que motivó el internamiento, señale un plazo inferior.

Recibidos los referidos informes, el tribunal, previa la práctica, en su caso, de las actuaciones que estime imprescindibles, acordará lo procedente sobre la continuación o no del internamiento.

Sin perjuicio de lo dispuesto en los párrafos anteriores, cuando los facultativos que atiendan a la persona internada consideren que no es necesario mantener el internamiento, darán el alta al enfermo, y lo comunicarán inmediatamente al tribunal competente».

Ahora bien, la cuestión radica en determinar las actuaciones que deberá realizar el tribunal para dar cumplimiento al mandato contenido en el art. 763.4 LEC, y qué debe hacer una vez recibidos los informes que le envíe el facultativo encargado del cuidado y tratamiento de la persona internada.

Si la autorización o aprobación del internamiento no voluntario es la consecuencia de la ausencia de capacidad en la que se encuentra aquella persona que sufre una enfermedad psíquica que le impide decidirlo por sí misma, fácilmente se verá que la razón, función y finalidad del auto por el que se autoriza o aprueba el internamiento de una Persona Discapaz, no es

otra que, de un lado suplir la capacidad en la medida en que carece de ella, y de otro, el subvenir a la protección de su persona y, por ende, de su patrimonio. Finalidades éstas que sólo se pueden realizar, primordialmente, a través del control periódico de los internamientos.

Como primera conclusión de lo hasta ahora dicho, no podemos olvidar y permanecer ajenos a que instar un internamiento para obtener una resolución judicial que lo autorice o apruebe y luego no controlar el desarrollo del internamiento, es dejar vacío de contenido no sólo lo dispuesto en el art. 763.4 LEC, sino también su razón de ser; a lo que habría que añadir, que tal forma de proceder distaría mucho de lo que nuestra CE, nuestro Estatuto Orgánico y la legislación sustantiva nos exige y espera de nosotros.

Es decir, desde cualesquiera de las perspectivas posibles, se exige la intervención activa y eficaz de la Autoridad Judicial y del Ministerio Fiscal en el control de los internamientos, y no cabe la posibilidad de que el desarrollo de toda la actividad que constitucional, estatutaria y legislativa tiene encomendada nuestra Institución, por lo que a la protección de los Derechos de las Personas Discapaces se refiere, se vea truncada o deficientemente desarrollada por factores organizativos, medios o cualesquiera otras razones que, erróneamente, nos separen de esta realidad, realidad Social y legislativa que,

desde la perspectiva de un Ministerio Fiscal en el siglo XXI, resulta una exigencia para avanzar en la sociedad de bienestar y la construcción de una sociedad más justa y digna; potenciando el avance del modelo de Estado Social que consagra la Constitución Española.

Siendo el auto de internamiento una excepción al derecho fundamental consagrado en el art. 17.1 CE, no cabe más que:

a)Interpretar cualquier excepción de forma restrictiva.

b)Averiguar si los trastornos psíquicos persisten y consecuentemente debe continuar el internamiento.

c)Adoptar las medidas adecuadas para la protección personal y patrimonial de la persona internada.

d)No prolongar el internamiento cuando no subsista la enfermedad.

De donde se desprende, que no parece estar en consonancia con lo que exige la importancia e intensidad del derecho que se limita, reducir el control de la continuación o no del internamiento a la recepción de los informes emitidos por parte de los facultativos de la Residencia o Centro en la que la Persona Discapaz se encuentra internada.

Por lo que, entre las actividades que forzosamente deben integrar el control periódico de los internamientos deben incluirse las necesarias para que el juez tenga **de nuevo** el convencimien-

to de que persisten todos los elementos que fueron causa del auto de internamiento. Y es evidente, que auque la LEC no lo exija expresamente, difícilmente se podrá entender que si para la autorización originaria, no obstante los obligatorios informes facultativos, resulta ineludible que el tribunal oiga a la persona afectada por la decisión, para la prolongación de la medida ya no sea necesario el trámite de audiencia y quede subsumido por los informes facultativos -de parte- del Centro o Residencia. Esto sería obviar el art. 24 CE dejando «*inaudita parte*» a la persona internada y al margen de una resolución judicial que le afecta de tal suerte que le restringe su libertad.

Esa posterior actuación jurisdiccional de autorización o no del internamiento no puede ser calificada como un mero incidente de un procedimiento principal, sino la consecuencia de su propia naturaleza, pues no se trata de resolver una cuestión distinta de lo que constituye el objeto de dicho procedimiento pero que guarde relación de conexidad con el mismo, sino de pronunciarse en cada caso y momento acerca de la cuestión misma de la autorización del internamiento, que puede mantenerse o dejarse sin efecto. Cada una de esas resoluciones produce, por tanto, efectos constitutivos.

Por la misma razón, no cabe equiparar esa posterior actuación jurisdiccional a la ejecución de una resolución firme.

De lo que se concluye que el control periódico de la medida de internamiento comportará al menos:

a)La audiencia de la persona a quien le afecta la medida.

b)Los informes de los facultativos que atienden a la persona internada.

c)El informe del médico forense o de un facultativo designado por el Juez, distinto e independiente del Centro o Residencia.

Y finalmente, el Boletín Oficial del Estado del día 21 de abril de 2008, publicó el Instrumento de Ratificación por España de la Convención sobre los derechos de las personas con discapacidad, hecho en Nueva York el 13 de diciembre de 2006, con entrada en vigor en nuestro país, el día 3 de mayo de 2008, que con toda rotundidad exige un exhaustivo y periódico control judicial de los internamientos, cuando en el art. 12.4 de la regula los términos en que deben de establecerse *«las salvaguardias»*, diciendo:

« Los Estados Partes asegurarán que en todas las medidas relativas al ejercicio de la capacidad jurídica se proporcionen salvaguardias adecuadas y efectivas para impedir los abusos de conformidad con el derecho internacional en materia de derechos humanos. Esas salvaguardias asegurarán que las medidas relativas al ejercicio de la capacidad jurídica respeten los derechos, la voluntad y las preferencias de la

persona, que no haya conflicto de intereses ni influencia indebida, que sean proporciona- les y adaptadas a las circunstancias de la persona, que se apliquen en el plazo más corto posible y ***que estén sujetas a exámenes periódicos por parte de una autoridad o un órgano judicial competente, independiente e imparcial.*** *Las salvaguardias serán proporcionales al grado en que dichas medidas afecten a los derechos e intereses de las personas*».

IV PROPUESTA DE REDACCIÓN DEL ART. 763 LEC

«1. El internamiento, por razón de trastorno psíquico, sea o no de carácter asistencial al tratarse de una enfermedad psíquica degenerativa, de una persona que no esté en condiciones de decidirlo por sí, aunque esté sometida a la patria potestad o a tutela, requerirá autorización judicial, que será recabada del tribunal del lugar donde resida la persona afectada por el internamiento.

La autorización será previa a dicho internamiento, salvo que razones de urgencia hicieren necesaria la inmediata adopción de la medida. En este caso, el responsable del centro en que se hubiere producido el internamiento deberá dar cuenta de éste al tribunal competente lo antes posible y, en todo caso, dentro del plazo de veinticuatro horas, a los efectos de que se proceda a la preceptiva ratificación de dicha medida, que deberá efectuarse en el plazo máximo de setenta y dos horas desde

que el internamiento llegue a conocimiento del tribunal.

En los casos de internamientos urgentes, la competencia para la ratificación de la medida corresponderá al tribunal del lugar en que radique el centro donde se haya producido el internamiento. Dicho tribunal deberá actuar, en su caso, conforme a lo dispuesto en el apartado 3 del art. 757 de la presente Ley.

2. El internamiento de menores se realizará siempre en un establecimiento de salud mental adecuado a su edad, previo informe de los servicios de asistencia al menor.

3. Antes de conceder la autorización o de ratificar el internamiento que ya se ha efectuado, el tribunal oirá a la persona afectada por la decisión, al Ministerio Fiscal y a cualquier otra persona cuya comparecencia estime conveniente o le sea solicitada por el afectado por la medida. Además, y sin perjuicio de que pueda practicar cualquier otra prueba que estime relevante para el caso, el tribunal deberá examinar por sí mismo a la persona de cuyo internamiento se trate y oír el dictamen de un facultativo por él designado. En todas las actuaciones, la persona afectada por la medida de internamiento podrá disponer de representación y defensa en los términos señalados en el art. 758 de la presente Ley.

En todo caso, la decisión que el tribunal adopte en relación con el internamiento será susceptible de recurso de apelación.

4. En la misma resolución que acuerde el internamiento se expresará la obligación de los facultativos que atiendan a la persona internada de informar periódicamente al tribunal sobre la necesidad de mantener la medida, sin perjuicio de los demás informes que el tribunal pueda requerir cuando lo crea pertinente.

Los informes periódicos serán emitidos cada seis meses, a no ser que el tribunal, atendida la naturaleza del trastorno que motivó el internamiento, señale un plazo inferior.

Recibidos los referidos informes, el tribunal, previa la práctica, en su caso, de las actuaciones que estime imprescindibles, y en todo caso, las establecidas en el apartado 3 de este artículo, acordará lo procedente sobre la continuación o no del internamiento.

5. El control periódico de los internamientos le corresponderá al Tribunal del lugar donde resida en cada momento la persona afectada por el internamiento.

Sin perjuicio de lo dispuesto en los párrafos anteriores, cuando los facultativos que atiendan a la persona internada consideren que no es necesario mantener el internamiento, darán el alta al enfermo, y lo comunicarán inmediatamente al tribunal competente».

Gonzalo A. López Ebri

1)Breve descripción del sistema legal

El Reino Unido de Gran Bretaña e Irlanda del Norte consiste en cuatro países que se organizan en tres jurisdicciones cada una de las cuales posee su propio sistema judicial y jurídico. Estas son: Inglaterra y Gales, Escocia e Irlanda del Norte.

A)Sistema de Gobierno

El reino Unido se organiza a través de una monarquía constitucional, parlamentaria y democrática. La corona, actualmente a cargo de la Reina Elizabeth, ejerce el poder ejecutivo aunque delega primordialmente dicho función en su gabinete de ministros que es presidido por el Primer Ministro. El parlamente es bicameral conformado por la Cámara de los Lores (House of Lors) y la Cámara de los Comunes (House of Commons). El parlamente tiene el poder supre-

mo sobre el aspecto legislativo, siendo la Cámara de los Lores un órgano de revisión, quedando la principal función de aprobación legislativa a la Cámara de los Comunes.

B)Sistema jurídico

En el Reino Unido conviven tres sistemas jurídicos. El derecho inglés que se aplica en Inglaterra y Gales, el norirlandés que se aplica en Irlanda del Norte y el escocés que se aplica en Escocia. El derecho inglés y norirlandés se basan netamente en el sistema del derecho común (common law), mientras que el sistema escocés se trata de un sistema complejo y plural basado en los principios del sistema de derecho civil continental, pero con elementos del derecho común.

C)Sistema judicial

El máximo tribunal del Reino Unida está constituido por la Corte Suprema del Reino Unido (Supreme Court of the United Kingdom), establecido muy recientemente por la Ley de Reforma Constitucional de 2005, aunque comenzará a funcionar a partir de octubre de 2009. Hasta entonces el Comité de Apelaciones de la Cámara de los Lores es el más alto rango judicial en los aspectos civiles y penales para Inglaterra, Gales e Irlanda del Norte, y sólo para todos los aspectos civiles en relación con Escocia.

En Inglaterra y Gales el sistema judicial está encabezado por la Corte Suprema de Inglaterra (Supreme Court of England) y Gales que se conforma por una Corte de Apelaciones (Court of Appeal), una Corte Suprema de Justicia (High Court of Justice) (para cuestiones civiles) y una Corte de la Corona (Crown Court) (para casos penales). En Irlanda del Norte se sigue un esquema similar al anterior, mientras que en Escocia el máximo tribunal es la Corte de Sesiones (Court of Session) para casos civiles, y la Corte Suprema de Justicia (High Court of Justiciary) para casos penales

D)Sistema Constitucional

El Reino Unido se basa en un sistema constitucional no-escrito, que se conforma por una serie de principios y normas. No obstante actualmente la mayor cantidad de normas se encuentran codificadas en leyes, tratados y sentencias judiciales. La principal fuente normativa es la Carta de Derechos de 1689 (Bill of Rights). A ello habría que añadir una de las principales reformas del sistema constitucional británico de los últimos tiempos que ha consistido en la aprobación de la Carta de Derechos Humanos de 1998 (Human Rights Act) que básicamente incorpora en derecho interno el texto de la Convención Europea de Derechos Humanos de 1950.

2)Concepto de discapacidad y/o de persona con discapacidad

Ley sobre Discriminación por Discapacidad de 1995 (Disability Discrimination Act) 1995 c. 50

1. Siginificado de Discapacidad y de persona con discapacidad *(Meaning of «disability» and «disabled person»)*

(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

(2) In this Act «disabled person» means a person who has a disability.

2. Discapacidades anteriores *(Past disabilities)*

(1) The provisions of this Part and Parts II and III apply in relation to a person who has had a disability as they apply in relation to a person who has that disability.

(2) Those provisions are subject to the modifications made by Schedule 2.

(3) Any regulations or order made under this Act may include provision with respect to persons who have had a disability.

(4) In any proceedings under Part II or Part III of this Act, the question whether a person had a disability at a particular time («the relevant time») shall be determined, for the purposes of this section, as if the provisions of, or made under, this Act in force when the act complained of was done had been in force at the relevant time.

(5) The relevant time may be a time before the passing of this Act.

3. Directrices *(Guidance)*

(1) The Secretary of State may issue guidance about the matters to be taken into account in determining—

(a) whether an impairment has a substantial adverse effect on a person's ability to carry out normal day-to-day activities; or

(b) whether such an impairment has a long-term effect.

(2) The guidance may, among other things, give examples of—

(a) effects which it would be reasonable, in relation to particular activities, to regard for purposes of this Act as substantial adverse effects;

(b) effects which it would not be reasonable, in relation to particular activities, to regard for such purposes as substantial adverse effects;

(c) substantial adverse effects which it would be reasonable to regard, for such purposes, as long-term;

(d) substantial adverse effects which it would not be reasonable to regard, for such purposes, as long-term.

(3) A tribunal or court determining, for any purpose of this Act, whether an impairment has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities, shall take into account any guidance which appears to it to be relevant.

(4) In preparing a draft of any guidance, the Secretary of State shall consult such persons as he considers appropriate.

(5) Where the Secretary of State proposes to issue any guidance, he shall publish a draft of it, consider any representations that are made to him about the draft and, if he thinks it appropriate, modify his proposals in the light of any of those representations.

(6) If the Secretary of State decides to proceed with any proposed guidance, he shall lay a draft of it before each House of Parliament.

(7) If, within the 40-day period, either House resolves not to approve the draft, the Secretary of State shall take no further steps in relation to the proposed guidance.

(8) If no such resolution is made within the 40-day period, the Secretary of State shall issue the guidance in the form of his draft.

(9) The guidance shall come into force on such date as the Secretary of State may appoint by order.

(10) Subsection (7) does not prevent a new draft of the proposed guidance from being laid before Parliament.

(11) The Secretary of State may—

(a) from time to time revise the whole or part of any guidance and re-issue it;

(b) by order revoke any guidance.

(12) In this section—

«40-day period», in relation to the draft of any proposed guidance, means—

(a) if the draft is laid before one House on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days, and

(b) in any other case, the period of 40 days beginning with the day on which the draft is laid before each House,

no account being taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days; and

«guidance» means guidance issued by the Secretary of State under this section and includes guidance which has been revised and re-issued.

Anexo 1 Disposiciones suplementarias del artículo 1 ***(Schedule 1 Provisions Supplementing Section 1)***

1. Deficiencia ***(Impairment)***

(1) «Mental impairment» includes an impairment resulting from or consisting of a men-

tal illness only if the illness is a clinically well-recognised illness.

(2) Regulations may make provision, for the purposes of this Act—

(a) for conditions of a prescribed description to be treated as amounting to impairments;

(b) for conditions of a prescribed description to be treated as not amounting to impairments.

(3) Regulations made under sub-paragraph (2) may make provision as to the meaning of «condition» for the purposes of those regulations.

2. Efectos prolongados *(Long-term effects)*

(1) The effect of an impairment is a long-term effect if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring shall be disregarded in prescribed circumstances.

(4) Regulations may prescribe circumstances in which, for the purposes of this Act—

(a) an effect which would not otherwise be a long-term effect is to be treated as such an effect; or

(b) an effect which would otherwise be a long-term effect is to be treated as not being such an effect.

3.Desfiguración severa *(Severe disfigurement)*

(1) An impairment which consists of a severe disfigurement is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities.

(2) Regulations may provide that in prescribed circumstances a severe disfigurement is not to be treated as having that effect.

(3) Regulations under sub-paragraph (2) may, in particular, make provision with respect to deliberately acquired disfigurements.

4. Actividades regulares diarias *(Normal day-to-day activities)*

(1) An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following—

(a) mobility;

(b) manual dexterity;

(c) physical co-ordination;

(d) continence;

(e) ability to lift, carry or otherwise move everyday objects;

(f) speech, hearing or eyesight;

(g) memory or ability to concentrate, learn or understand; or

(h) perception of the risk of physical danger.

(2) Regulations may prescribe—

(a) circumstances in which an impairment which does not have an effect falling within sub-paragraph (1) is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities;

(b) circumstances in which an impairment which has an effect falling within sub-paragraph (1) is to be taken not to affect the ability of the person concerned to carry out normal day-to-day activities.

5. Efectos adversos sustantivos *(Substantial adverse effects)*

Regulations may make provision for the purposes of this Act—

(a) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as a substantial adverse effect;

(b) for an effect of a prescribed kind on the ability of a person to carry out normal day-to-day activities to be treated as not being a substantial adverse effect.

6. Efectos del tratamiento médico *(Effect of medical treatment)*

(1) An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.

(2) In sub-paragraph (1) «measures» includes, in particular, medical treatment and the use of a prosthesis or other aid.

(3) Sub-paragraph (1) does not apply—

(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in his case, correctable by spectacles or contact lenses or in such other ways as may be prescribed; or

(b) in relation to such other impairments as may be prescribed, in such circumstances as may be prescribed.

7. Persona considerada discapacitada *(Persons deemed to be disabled)*

(1) Sub-paragraph (2) applies to any person whose name is, both on 12th January 1995 and on the date when this paragraph comes into force, in the register of disabled persons maintained under section 6 of the [1944 c. 10.] Disabled Persons (Employment) Act 1944.

(2) That person is to be deemed—

(a) during the initial period, to have a disability, and hence to be a disabled person; and

(b) afterwards, to have had a disability and hence to have been a disabled person during that period.

(3) A certificate of registration shall be conclusive evidence, in relation to the person with respect to whom it was issued, of the matters certified.

(4) Unless the contrary is shown, any document purporting to be a certificate of registration shall be taken to be such a certificate and to have been validly issued.

(5) Regulations may provide for prescribed descriptions of person to be deemed to have disabilities, and hence to be disabled persons, for the purposes of this Act.

(6) Regulations may prescribe circumstances in which a person who has been deemed to be a disabled person by the provisions of sub-paragraph (1) or regulations made under sub-paragraph (5) is to be treated as no longer being deemed to be such a person.

(7) In this paragraph—

«certificate of registration» means a certificate issued under regulations made under section 6 of the Act of 1944; and

«initial period» means the period of three years beginning with the date on which this paragraph comes into force.

8. Afecciones progresivas *(Progressive conditions)*

(1) Where—

(a) a person has a progressive condition (such as cancer, multiple sclerosis or muscular dystrophy or infection by the human immunodeficiency virus),

(b) as a result of that condition, he has an impairment which has (or had) an effect on his ability to carry out normal day-to-day activities, but

(c) that effect is not (or was not) a substantial adverse effect,

he shall be taken to have an impairment which has such a substantial adverse effect if the condition is likely to result in his having such an impairment.

(2) Regulations may make provision, for the purposes of this paragraph—

(a) for conditions of a prescribed description to be treated as being progressive;

(b) for conditions of a prescribed description to be treated as not being progressive.

Anexo 2 Discapacidades anteriores *(Schedule 2)*

Discapacidades anteriores (Past Disabilities)

1 The modifications referred to in section 2 are as follows.

2 References in Parts II and III to a disabled person are to be read as references to a person who has had a disability.

3 In section 6(1), after «not disabled» insert «and who have not had a disability».

4 In section 6(6), for «has» substitute «has had».

5 For paragraph 2(1) to (3) of Schedule 1, substitute—

«(1) The effect of an impairment is a long-term effect if it has lasted for at least 12 months.

(2) Where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect recurs.

(3) For the purposes of sub-paragraph (2), the recurrence of an effect shall be disregarded in prescribed circumstances.»

Ley de Salud Mental de 1983 (Mental Health Act 1983 c. 20) Reformada por Ley de Salud Mental de 2007 (Mental Health Act 2007 c. 12)

1. Ámbito de aplicación: «Desorden mental» ***(Application of Act: «mental disorder»)***

(1) The provisions of this Act shall have effect with respect to the reception, care and treatment of mentally disordered patients, the management of their property and other related matters.

(2) In this Act—

«mental disorder» means any disorder or disability of the mind; and «mentally disordered» shall be construed accordingly;

and other expressions shall have the meanings assigned to them in section 145 below.

(2A) But a person with learning disability shall not be considered by reason of that disability to be –

(a) suffering from mental disorder for the purposes of the provisions mentioned in subsection (2B) below; or

(b) requiring treatment in hospital for mental disorder for the purposes of sections 17E and 50 to 53 below, unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part.

(2B) The provisions are –

(a) sections 3, 7, 17A, 20 and 20A below;

(b) sections 35 to 38, 45A, 47, 48 and 51 below; and

(c) section 72(1)(b) and (c) and (4) below.

(3) Dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of subsection (2) above.

(4) In subsection (2A) above, «learning disability» means a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning.

3)Régimen general de capacidad jurídica

A)De los principios sobre capacidad jurídica

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

1. Principios generales *(The principles)*

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Ley sobre Edad para la Capacidad Jurídica de 1991 (Escocia) (Age of Legal Capacity (Scotland) Act 1991 c.50)

1. Edad para la capcidad jurídica *(Age of legal capacity)*

(1) As from the commencement of this Act—

(a) a person under the age of 16 years shall, subject to section 2 below, have no legal capacity to enter into any transaction;

(b) a person of or over the age of 16 years shall have legal capacity to enter into any transaction.

(2) Subject to section 8 below, any reference in any enactment to a pupil (other than in the context of education or training) or to a person under legal disability or incapacity by reason of nonage shall, insofar as it relates to any time after the commencement of this Act, be construed as a reference to a person under the age of 16 years.

(3) Nothing in this Act shall—

(a) apply to any transaction entered into before the commencement of this Act;

(b) confer any legal capacity on any person who is under legal disability or incapacity other than by reason of nonage;

(c) affect the delictual or criminal responsibility of any person;

(d) affect any enactment which lays down an age limit expressed in years for any particular purpose;

(e) prevent any person under the age of 16 years from receiving or holding any right, title or interest;

(f) affect any existing rule of law or practice whereby—

(i) any civil proceedings may be brought or defended, or any step in civil proceedings may be

taken, in the name of a person under the age of 16 years who has no guardian or whose guardian is unable (whether by reason of conflict of interest or otherwise) or refuses to bring or defend such proceedings or take such step;

(ii) the court may, in any civil proceedings, appoint a curator ad litem to a person under the age of 16 years;

(iii) the court may, in relation to the approval of an arrangement under section 1 of the [1961 c. 57.] Trusts (Scotland) Act 1961, appoint a curator ad litem to a person of or over the age of 16 years but under the age of 18 years;

(iv) the court may appoint a curator bonis to any person;

(g) prevent any person under the age of 16 years from—

(i) being appointed as guardian to any child of his, or

(ii) exercising parental rights in relation to any child of his.

(4) Any existing rule of law relating to the legal capacity of minors and pupils which is inconsistent with the provisions of this Act shall cease to have effect.

(5) Any existing rule of law relating to reduction of a transaction on the ground of minority and lesion shall cease to have effect.

2. Excepciones a la regla general (*Exceptions to general rule)*

(1) A person under the age of 16 years shall have legal capacity to enter into a transaction—

(a) of a kind commonly entered into by persons of his age and circumstances, and

(b) on terms which are not unreasonable.

(2) A person of or over the age of 12 years shall have testamentary capacity, including legal capacity to exercise by testamentary writing any power of appointment.

(3) A person of or over the age of 12 years shall have legal capacity to consent to the making of an adoption order in relation to him; and accordingly—

(a) for section 12(8) (adoption orders) of the [1978 c. 28.] Adoption (Scotland) Act 1978 there shall be substituted the following subsection—

«(8) An adoption order shall not be made in relation to a child of or over the age of 12 years unless with the child's consent; except that, where the court is satisfied that the child is incapable of giving his consent to the making of the order, it may dispense with that consent.»; and

(b) for section 18(8) (freeing child for adoption) of that Act there shall be substituted the following subsection—

«(8) An order under this section shall not be made in relation to a child of or over the age of 12 years unless with the child's consent; except that where the court is satisfied that the child is

incapable of giving his consent to the making of the order, it may dispense with that consent.»

(4) A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment.

(5) Any transaction—

(a) which a person under the age of 16 years purports to enter into after the commencement of this Act, and

(b) in relation to which that person does not have legal capacity by virtue of this section, shall be void.

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

1. Principios rectores y definiciones *(General principles and fundamental definitions)*

(1) The principles set out in subsections (2) to (4) shall be given effect to in relation to any intervention in the affairs of an adult under or in pursuance of this Act, including any order made in or for the purpose of any proceedings under this Act for or in connection with an adult.

(2) There shall be no intervention in the affairs of an adult unless the person responsible for authorising or effecting the intervention is satisfied that the intervention will benefit the adult and that such benefit cannot reasonably be achieved without the intervention.

(3) Where it is determined that an intervention as mentioned in subsection (1) is to be made, such intervention shall be the least restrictive option in relation to the freedom of the adult, consistent with the purpose of the intervention.

(4) In determining if an intervention is to be made and, if so, what intervention is to be made, account shall be taken of—

(a) the present and past wishes and feelings of the adult so far as they can be ascertained by any means of communication, whether human or by mechanical aid (whether of an interpretative nature or otherwise) appropriate to the adult;

(b) the views of the nearest relative and the primary carer of the adult, in so far as it is reasonable and practicable to do so;

(c) the views of—

(i) any guardian, continuing attorney or welfare attorney of the adult who has powers relating to the proposed intervention; and

(ii) any person whom the sheriff has directed to be consulted,

in so far as it is reasonable and practicable to do so; and

(d) the views of any other person appearing to the person responsible for authorising or effecting the intervention to have an interest in the welfare of the adult or in the proposed intervention, where these views have been made known to the person responsible, in so far as it is reasonable and practicable to do so.

(5) Any guardian, continuing attorney, welfare attorney or manager of an establishment exercising functions under this Act or under any order of the sheriff in relation to an adult shall, in so far as it is reasonable and practicable to do so, encourage the adult to exercise whatever skills he has concerning his property, financial affairs or personal welfare, as the case may be, and to develop new such skills.

(6) For the purposes of this Act, and unless the context otherwise requires—

«adult» means a person who has attained the age of 16 years;

«incapable» means incapable of—

(a)acting; or

(b)making decisions; or

(c)communicating decisions; or

(d)understanding decisions; or

(e)retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of

communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and

«incapacity» shall be construed accordingly.

(7) In subsection (4)(c)(i) any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;

(c) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

B)De las personas que carecen de capacidad jurídica

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

2. Personas que carecen de capacidad ***(People who lack capacity)***

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person («D») may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

3. Incapacidad de tomar decisiones ***(Inability to make decisions)***

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.

4. Interés superior de la persona *(Best interests)*

(1) In determining for the purposes of this Act what is in a person's best interests, the person

making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he

reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) «Life-sustaining treatment» means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) «Relevant circumstances» are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

4A. Restricciones a la privación de la libertad *(Restriction on deprivation of liberty)*

(1) This Act does not authorise any person («D») to deprive any other person («P») of his liberty.

(2) But that is subject to—

(a) the following provisions of this section, and

(b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

4B. Privación de la libertad debido a la necesidad de aplicar un tratamiento para garantizar la vida etc. *(Deprivation of liberty necessary for life-sustaining treatment etc)*

(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.

(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.

(3) The second condition is that the deprivation of liberty—

(a) is wholly or partly for the purpose of—

(i) giving P life-sustaining treatment, or

(ii) doing any vital act, or

(b) consists wholly or partly of—

(i) giving P life-sustaining treatment, or

(ii) doing any vital act.

(4) The third condition is that the deprivation of liberty is necessary in order to—

(a) give the life-sustaining treatment, or

(b) do the vital act.

(5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.

(Texto de las artículos 4A y 4B incluidos por Ley de Salud Mental 2007, cfr. Artículo 50)

C)De las decisiones excluidas *(indelegables)(Excluded decisions)*

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

27. Relaciones familiars, etc. (Family relationships etc.)

(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person—

(a) consenting to marriage or a civil partnership,

(b) consenting to have sexual relations,

(c) consenting to a decree of divorce being granted on the basis of two years' separation,

(d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation,

(e) consenting to a child's being placed for adoption by an adoption agency,

(f) consenting to the making of an adoption order,

(g) discharging parental responsibilities in matters not relating to a child's property,

(h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37).

(2) «Adoption order» means—

(a) an adoption order within the meaning of

the Adoption and Children Act 2002 (c. 38) (including a future adoption order), and

(b) an order under section 84 of that Act (parental responsibility prior to adoption abroad).

28. Cuestiones relativas a la Ley de Salud Mental *(Mental Health Act matters)*

(1) Nothing in this Act authorises anyone—

(a) to give a patient medical treatment for mental disorder, or

(b) to consent to a patient's being given medical treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act.

(2) «Medical treatment», «mental disorder» and «patient» have the same meaning as in that Act.

29. Derechos de sufragio *(Voting rights)*

(1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.

(2) «Referendum» has the same meaning as in section 101 of the Political Parties, Elections and Referendums Act 2000 (c. 41).

D)Del régimen de consentimiento para autorizar investigaciones médicas *(Research)*

30. Investigaciones *(Research)*

(1) Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out—

(a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and

(b) in accordance with sections 32 and 33.

(2) Research is intrusive if it is of a kind that would be unlawful if it was carried out—

(a) on or in relation to a person who had capacity to consent to it, but

(b) without his consent.

(3) A clinical trial which is subject to the provisions of clinical trials regulations is not to be treated as research for the purposes of this section.

(4) «Appropriate body», in relation to a research project, means the person, committee or other body specified in regulations made by the appropriate authority as the appropriate body in relation to a project of the kind in question.

(5) «Clinical trials regulations» means—

(a) the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) and

any other regulations replacing those regulations or amending them, and

(b) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of this section.

(6) In this section, section 32 and section 34, «appropriate authority» means—

(a) in relation to the carrying out of research in England, the Secretary of State, and

(b) in relation to the carrying out of research in Wales, the National Assembly for Wales.

31. Requisitos para la aprobación *(Requirements for approval)*

(1) The appropriate body may not approve a research project for the purposes of this Act unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity to consent to taking part in the project («P»).

(2) The research must be connected with—

(a) an impairing condition affecting P, or

(b) its treatment.

(3) «Impairing condition» means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain.

(4) There must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it.

(5) The research must—

(a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or

(b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.

(6) If the research falls within paragraph (b) of subsection (5) but not within paragraph (a), there must be reasonable grounds for believing—

(a) that the risk to P from taking part in the project is likely to be negligible, and

(b) that anything done to, or in relation to, P will not—

(i) interfere with P's freedom of action or privacy in a significant way, or

(ii) be unduly invasive or restrictive.

(7) There must be reasonable arrangements in place for ensuring that the requirements of sections 32 and 33 will be met.

32. Consulta a cuidadores etc. ***(Consulting carers etc.)***

(1) This section applies if a person («R»)—

(a) is conducting an approved research project, and

(b) wishes to carry out research, as part of the project, on or in relation to a person («P») who lacks capacity to consent to taking part in the project.

(2) R must take reasonable steps to identify a person who—

(a) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P's welfare, and

(b) is prepared to be consulted by R under this section.

(3) If R is unable to identify such a person he must, in accordance with guidance issued by the appropriate authority, nominate a person who—

(a) is prepared to be consulted by R under this section, but

(b) has no connection with the project.

(4) R must provide the person identified under subsection (2), or nominated under subsection (3), with information about the project and ask him—

(a) for advice as to whether P should take part in the project, and

(b) what, in his opinion, P's wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter.

(5) If, at any time, the person consulted advises R that in his opinion P's wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure—

(a) if P is not already taking part in the project, that he does not take part in it;

(b) if P is taking part in the project, that he is withdrawn from it.

(6) But subsection (5)(b) does not require treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.

(7) The fact that a person is the donee of a lasting power of attorney given by P, or is P's deputy, does not prevent him from being the person consulted under this section.

(8) Subsection (9) applies if treatment is being, or is about to be, provided for P as a matter of urgency and R considers that, having regard to the nature of the research and of the particular circumstances of the case—

(a) it is also necessary to take action for the purposes of the research as a matter of urgency, but

(b) it is not reasonably practicable to consult under the previous provisions of this section.

(9) R may take the action if—

(a) he has the agreement of a registered medical practitioner who is not involved in the organisation or conduct of the research project, or

(b) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by

the appropriate body at the time when the research project was approved under section 31.

(10) But R may not continue to act in reliance on subsection (9) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency.

33. Garantías adicionales *(Additional safeguards)*

(1) This section applies in relation to a person who is taking part in an approved research project even though he lacks capacity to consent to taking part.

(2) Nothing may be done to, or in relation to, him in the course of the research—

(a) to which he appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect him from harm or to reduce or prevent pain or discomfort, or

(b) which would be contrary to—

(i) an advance decision of his which has effect, or

(ii) any other form of statement made by him and not subsequently withdrawn,

of which R is aware.

(3) The interests of the person must be assumed to outweigh those of science and society.

(4) If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay.

(5) P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements set out in section 31(2) to (7) is no longer met in relation to research being carried out on, or in relation to, P.

(6) But neither subsection (4) nor subsection (5) requires treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.

34. Pérdida de la capacidad durante un proyecto de investigación *(Loss of capacity during research project)*

(1) This section applies where a person («P»)—

(a) has consented to take part in a research project begun before the commencement of section 30, but

(b) before the conclusion of the project, loses capacity to consent to continue to take part in it.

(2) The appropriate authority may by regulations provide that, despite P's loss of capacity, research of a prescribed kind may be carried out on, or in relation to, P if—

(a) the project satisfies prescribed requirements,

(b) any information or material relating to P

which is used in the research is of a prescribed description and was obtained before P's loss of capacity, and

(c) the person conducting the project takes in relation to P such steps as may be prescribed for the purpose of protecting him.

(3) The regulations may, in particular,—

(a) make provision about when, for the purposes of the regulations, a project is to be treated as having begun;

(b) include provision similar to any made by section 31, 32 or 33.

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

47. Autoridad de la persona responsable del tratamiento médico *(Authority of persons responsible for medical treatment)*

(1) This section applies where the medical practitioner primarily responsible for the medical treatment of an adult—

(a) is of the opinion that the adult is incapable in relation to a decision about the medical treatment in question; and

(b) has certified in accordance with subsection (5) that he is of this opinion.

(2) Without prejudice to any authority conferred by any other enactment or rule of law, and subject to sections 49 and 50 and to the following provi-

sions of this section, the medical practitioner primarily responsible for the medical treatment of the adult shall have, during the period specified in the certificate, authority to do what is reasonable in the circumstances, in relation to the medical treatment, to safeguard or promote the physical or mental health of the adult.

(3) The authority conferred by subsection (2) shall be exercisable also by any other person who is authorised by the medical practitioner primarily responsible for the medical treatment of the adult to carry out medical treatment and who is acting—

(a) on his behalf under his instructions; or

(b) with his approval or agreement.

(4) In this Part»medical treatment» includes any procedure or treatment designed to safeguard or promote physical or mental health.

(5) A certificate for the purposes of subsection (1) shall be in the prescribed form and shall specify the period during which the authority conferred by subsection (2) shall subsist, being a period which—

(a) the medical practitioner primarily responsible for the medical treatment of the adult considers appropriate to the condition or circumstances of the adult; but

(b) does not exceed one year from the date of the examination on which the certificate is based.

(6) If after issuing a certificate, the medical practitioner primarily responsible for the medical treatment of the adult is of the opinion that the

condition or circumstances of the adult have changed he may—

(a) revoke the certificate;

(b) issue a new certificate specifying such period not exceeding one year from the date of revocation of the old certificate as he considers appropriate to the new condition or circumstances of the adult.

(7) The authority conferred by subsection (2) shall not authorise—

(a) the use of force or detention, unless it is immediately necessary and only for so long as is necessary in the circumstances;

(b) action which would be inconsistent with any decision by a competent court;

(c) placing an adult in a hospital for the treatment of mental disorder against his will.

(8) The authority conferred by subsection (2) shall not authorise medical treatment prescribed in regulations made under section 48.

(9) Subject to subsection (10), where any question as to the authority of any person to provide medical treatment in pursuance of subsection (2)—

(a) is the subject of proceedings in any court (other than for the purposes of any application to the court made under regulations made under section 48); and

(b) has not been determined, medical treatment authorised by subsection (2) shall not be given unless it is authorised by any other

enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.

(10) Nothing in subsection (9) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

48. Excepciones a la autoridad para el tratamiento *(Exceptions to authority to treat)*

(1) The authority conferred by section 47(2) does not extend to the giving of any of the forms of treatment to which Part X of the 1984 Act applies to a patient to whom that Part applies (which Part authorises certain treatments for mental disorder for certain patients detained under that Act).

(2) The Scottish Ministers may by regulations specify medical treatment, or a class or classes of medical treatment, in relation to which the authority conferred by section 47(2) shall not apply and make provision about the medical treatment, or a class or classes of medical treatment, in relation to which that authority does apply.

(3) Regulations made under subsection (2) may provide for the circumstances in which the specified medical treatment or specified class or classes of medical treatment may be carried out.

49. Tratamiento médico cuando existe una demanda de orden de intervención o de tutela *(Medical treatment where there is an application for intervention or guardianship order)*

(1) Section 47(2) shall not apply if, to the knowledge of the medical practitioner primarily responsible for the medical treatment of the adult, an application for an intervention order or a guardianship order with power in relation to any medical treatment referred to in that subsection has been made to the sheriff and has not been determined.

(2) Until the application has been finally determined, medical treatment authorised by section 47(2) shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.

(3) Nothing in subsection (2) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the provision of such medical treatment.

50. Tratamiento médico cuando un tutor ha sido designado *(Medical treatment where guardian etc. has been appointed)*

(1) This section applies where a guardian or a welfare attorney has been appointed or a

person has been authorised under an intervention order with power in relation to any medical treatment referred to in section 47.

(2) The authority conferred by section 47(2) shall not apply where—

(a) subsection (1) applies;

(b) the medical practitioner primarily responsible for the medical treatment of the adult is aware of the appointment or, as the case may be, authorisation; and

(c) it would be reasonable and practicable for that medical practitioner to obtain the consent of the guardian, welfare attorney or person authorised under the intervention order, as the case may be, to any proposed medical treatment but he has failed to do so.

(3) Where the medical practitioner primarily responsible for the medical treatment of the adult has consulted the guardian, welfare attorney or person authorised under the intervention order and there is no disagreement as to the medical treatment of the adult, any person having an interest in the personal welfare of the adult may appeal the decision as to the medical treatment to the Court of Session.

(4) Where the medical practitioner primarily responsible for the medical treatment of the adult has consulted the guardian, welfare attorney or person authorised under the intervention order and there is a disagreement as to the medi-

cal treatment of the adult, the medical practitioner shall request the Mental Welfare Commission to nominate a medical practitioner (the» nominated medical practitioner») from the list established and maintained by them under subsection (9) to give an opinion as to the medical treatment proposed.

(5) Where the nominated medical practitioner certifies that, in his opinion, having regard to all the circumstances and having consulted the guardian, welfare attorney or person authorised under the intervention order as the case may be and, if it is reasonable and practicable to do so, a person nominated by such guardian, welfare attorney or person authorised under the intervention order as the case may be, the proposed medical treatment should be given, the medical practitioner primarily responsible for the medical treatment of the adult may give the treatment or may authorise any other person to give the treatment notwithstanding the disagreement with the guardian, welfare attorney, or person authorised under the intervention order, as the case may be.

(6) Where the nominated medical practitioner certifies that, in his opinion, having regard to all the circumstances and having consulted the guardian, welfare attorney or person authorised under the intervention order as the case may be and, if it is reasonable and practicable to do so, a

person nominated by such guardian, welfare attorney or person authorised under the intervention order as the case may be, the proposed medical treatment should or, as the case may be, should not be given, the medical practitioner primarily responsible for the medical treatment of the adult, or any person having an interest in the personal welfare of the adult, may apply to the Court of Session for a determination as to whether the proposed treatment should be given or not.

(7) Subject to subsection (8), where an appeal has been made to the Court of Session under subsection (3) or an application has been made under subsection (6), and has not been determined, medical treatment authorised by section 47(2) shall not be given unless it is authorised by any other enactment or rule of law for the preservation of the life of the adult or the prevention of serious deterioration in his medical condition.

(8) Nothing in subsection (7) shall authorise the provision of any medical treatment where an interdict has been granted and continues to have effect prohibiting the giving of such medical treatment.

(9) The Mental Welfare Commission shall establish and maintain a list of medical practitioners from whom they shall nominate the medical practitioner who is to give the opinion under subsection (4).

(10) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

51. Autorización a la investigación *(Authority for research)*

(1) No surgical, medical, nursing, dental or psychological research shall be carried out on any adult who is incapable in relation to a decision about participation in the research unless—

(a) research of a similar nature cannot be carried out on an adult who is capable in relation to such a decision; and

(b) the circumstances mentioned in subsection (2) are satisfied.

(2) The circumstances referred to in subsection (1) are that—

(a) the purpose of the research is to obtain knowledge of—

(i) the causes, diagnosis, treatment or care of the adult's incapacity; or

(ii) the effect of any treatment or care given during his incapacity to the adult which relates to that incapacity; and

(b) the conditions mentioned in subsection (3) are fulfilled.

(3) The conditions are—

(a) the research is likely to produce real and direct benefit to the adult;

(b) the adult does not indicate unwillingness to participate in the research;

(c) the research has been approved by the Ethics Committee;

(d) the research entails no foreseeable risk, or only a minimal foreseeable risk, to the adult;

(e) the research imposes no discomfort, or only minimal discomfort, on the adult; and

(f) consent has been obtained from any guardian or welfare attorney who has power to consent to the adult's participation in research or, where there is no such guardian or welfare attorney, from the adult's nearest relative.

(4) Where the research is not likely to produce real and direct benefit to the adult, it may nevertheless be carried out if it will contribute through significant improvement in the scientific understanding of the adult's incapacity to the attainment of real and direct benefit to the adult or to other persons having the same inca-

pacity, provided the other circumstances or conditions mentioned in subsections (1) to (3) are fulfilled.

(5) In granting approval under subsection (3)(c), the Ethics Committee may impose such conditions as it sees fit.

(6) The Ethics Committee shall be constituted by regulations made by the Scottish Ministers and such regulations may make provision as to the composition of, appointments to and procedures of the Ethics Committee and may make such provision for the payment of such remuneration, expenses and superannuation as the Scottish Ministers may determine.

(7) Regulations made by the Scottish Ministers under subsection (6) may prescribe particular matters which the Ethics Committee shall take into account when deciding whether to approve any research under this Part.

(8) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to

the granter's personal welfare and having effect during the granter's incapacity.

52. Apelación ante decisión de tratamiento médico *(Appeal against decision as to medical treatment)*

Any decision taken for the purposes of this Part, other than a decision by a medical practitioner under section 50, as to the medical treatment of the adult may be appealed by any person having an interest in the personal welfare of the adult to the sheriff and thence, with the leave of the sheriff, to the Court of Session.

4)Régimen legal de incapacitación o limitación de la capacidad de obrar de las personas con discapacidad

A)Del procedimiento judicial de incapacitación

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

15. Poder para emitir resoluciones declarativas *(Power to make declarations)*

(1) The court may make declarations as to—

(a) whether a person has or lacks capacity to make a decision specified in the declaration;

(b) whethe3Courts (Scotland) Act 1971 (c. 58) may make provision as to the evidence which the sheriff shall take into account when deciding whether to give a direction under section 11(1).

3. Poder del Juez *(Powers of sheriff)*

(1) In an application or any other proceedings under this Act, the sheriff may make such consequential or ancillary order, provision or direction as he considers appropriate.

(2) Without prejudice to the generality of subsection (1) or to any other powers conferred by this Act, the sheriff may—

(a) make any order granted by him subject to such conditions and restrictions as appear to him to be appropriate;

(b) order that any reports relating to the person who is the subject of the application or proceedings be lodged with the court or that the person be assessed or interviewed and that a report of such assessment or interview be lodged;

(c) make such further inquiry or call for such further information as appears to him to be appropriate;

(d) make such interim order as appears to him to be appropriate pending the disposal of the application or proceedings.

(3) On an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of

an adult, the sheriff may give such directions to any person exercising—

(a) functions conferred by this Act; or

(b) functions of a like nature conferred by the law of any country,

as to the exercise of those functions and the taking of decisions or action in relation to the adult as appear to him to be appropriate.

(4) In an application or any other proceedings under this Act, the sheriff—

(a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the application or proceedings; and

(b) without prejudice to any existing power to appoint a person to represent the interests of the person who is the subject of the application or proceedings may, if he thinks fit, appoint a person to act for the purpose specified in paragraph (a).

(5) Safeguarding the interests of a person shall, for the purposes of subsection (4), include conveying his views so far as they are ascertainable to the sheriff; but if the sheriff considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to the sheriff, the sheriff may appoint another person for that latter purpose only.

(6) The sheriff may, on an application by—

(a) the person authorised under the order;

(b) the adult; or

(c) any person entitled to apply for the order,

make an order varying the terms of an order granted under subsection (2)(a).

4. Poder del Juez o del Tribunal de Apelación en relación con el familiar más cercano *(Power of Court of Session or sheriff with regard to nearest relative)*

(1) On an application by an adult, the court may, having regard to section 1 and being satisfied that to do so will benefit the adult, make an order that—

(a) certain information shall not be disclosed, or intimation of certain applications shall not be given, to the nearest relative of the adult;

(b) the functions of the nearest relative of the adult shall, during the continuance in force of the order, be exercised by a person, specified in the application, who is not the nearest relative of the adult but who—

(i) is a person who would otherwise be entitled to be the nearest relative in terms of this Act;

(ii) in the opinion of the court is a proper person to act as the nearest relative; and

(iii) is willing to so act; or

(c) no person shall, during the continuance in force of the order, exercise the functions of the nearest relative.

(2) An order made under subsection (1) shall apply only to the exercise of the functions under this Act of the nearest relative.

(3) The court may, on an application by an adult, make an order varying the terms of an order granted under subsection (1).

(4) No application shall be made under this section by an adult who is not incapable within the meaning of this Act at the time of making the application.

5. Garantía de los intereses en los procedimientos ante el Tribunal de Apelaciones *(Safeguarding of interests in Court of Session appeals or proceedings)*

(1) In determining any appeal or in any other proceedings under this Act the Court of Session—

(a) shall consider whether it is necessary to appoint a person for the purpose of safeguarding the interests of the person who is the subject of the appeal or other proceedings; and

(b) without prejudice to any existing power to appoint a person to represent the interests of the second mentioned person, may if it thinks fit appoint a person to act for the purpose specified in paragraph (a).

(2) Safeguarding the interests of a person shall, for the purposes of subsection (1), include conveying his views so far as they are ascertainable to the court; but if the court considers that it is inappropriate that a person appointed to safeguard the interests of another under this section should also convey that other's views to

the court, the court may appoint another person for that latter purpose only.

B)De la orden de intervención *(intervention order)*

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

53. Orden de intervención *(Intervention orders)*

(1) The sheriff may, on an application by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult, if he is satisfied that the adult is incapable of taking the action, or is incapable in relation to the decision about his property, financial affairs or personal welfare to which the application relates, make an order (in this Act referred to as an»intervention order»).

(2) In considering an application under subsection (1), the sheriff shall have regard to any intervention order or guardianship order which may have been previously made in relation to the adult, and to any order varying, or ancillary to, such an order.

(3) Where it appears to the local authority that—

(a) the adult is incapable as mentioned in subsection (1); and

(b) no application has been made or is likely to be made for an order under this section in relation to the decision to which the application under this subsection relates; and

(c) an intervention order is necessary for the protection of the property, financial affairs or personal welfare of the adult,

they shall apply under this section for an order.

(4) Section 57(3) and (4) shall apply to an application under this section and, for this purpose, for the reference to the individual or office holder nominated for appointment as guardian there shall be substituted a reference to a person nominated in such application.

(5) An intervention order may—

(a) direct the taking of any action specified in the order;

(b) authorise the person nominated in the application to take such action or make such decision in relation to the property, financial affairs or personal welfare of the adult as is specified in the order;

(6) Where an intervention order directs the acquisition of accommodation for, or the disposal of any accommodation used for the time being as a dwelling house by, the adult, the consent of the Public Guardian as respects the consideration shall be required before the accommodation is acquired or, as the case may be, disposed of.

(7) In making or varying an intervention

order the sheriff may, and in the case of an intervention order relating to property or financial affairs shall, except where—

(a) the person authorised under the intervention order is unable to find caution; but

(b) the sheriff is satisfied that nevertheless he is suitable to be authorised under the order,

require the person authorised under the order to find caution.

(8) The sheriff may, on an application by—

(a) the person authorised under the intervention order; or

(b) the adult; or

(c) any person claiming an interest in the property, financial affairs or personal welfare of the adult,

make an order varying the terms of, or recalling, the intervention order or any other order made for the purposes of the intervention order.

(9) Anything done under an intervention order shall have the same effect as if done by the adult if he had the capacity to do so.

(10) Where an intervention order is made, the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—

(a) enter in the register maintained by him under section 6(2)(b)(v) such particulars of the order as may be prescribed; and

(b) notify the adult, the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

(11) A transaction for value between a person authorised under an intervention order, purporting to act as such, and a third party acting in good faith shall not be invalid on the ground only that—

(a) the person acted outwith the scope of his authority;

(b) the person failed to observe any requirement, whether substantive or procedural, imposed by or under this Act or by the sheriff or by the Public Guardian; or

(c) there was any irregularity whether substantive or procedural in the authorisation of the person.

(12) A person authorised under an intervention order may recover from the estate of the adult the amount of such reasonable outlays as he incurs in doing anything directed or authorised under the order.

(13) Where a third party has acquired, in good faith and for value, title to any interest in heritable property from a person authorised under an intervention order that title shall not be challengeable on the ground only—

(a) of any irregularity of procedure in the making of the intervention order; or

(b) that the person authorised under the intervention order has acted outwith the scope of the authority.

(14) Sections 64(2) and 67(3) and (4) shall apply to an intervention order as they apply to a guardianship order and, for this purpose, for any reference to a guardian there shall be substituted a reference to the person authorised under the order.

54. Registro de la orden de intervención *(Records: intervention orders)*

A person authorised under an intervention order shall keep records of the exercise of his powers.

55. Notificación del cambio de domicilio *(Notification of change of address)*

After particulars relating to an intervention order are entered in the register under section 53 the person authorised under the intervention order shall notify the Public Guardian—

(a) of any change in his address; and

(b) of any change in the address of the adult,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(v) and notify the local authority and (in a case where the adult's incapa-

city is by reason of, or reasons which include, mental disorder and the intervention order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

56. Registro de la orden de intervención en relación con derechos sucesorios *(Registration of intervention order relating to heritable property)*

(1) This section applies where the sheriff makes an intervention order which vests in the person authorised under the order any right to deal with, convey or manage any interest in heritable property which is recorded or is capable of being recorded in the General Register of Sasines or is registered or is capable of being registered in the Land Register of Scotland.

(2) In making such an order the sheriff shall specify each property affected by the order, in such terms as enable it to be identified in the Register of Sasines or, as the case may be, the Land Register of Scotland.

(3) The person authorised under the order shall forthwith apply to the Keeper of the Registers of Scotland for recording of the interlocutor containing the order in the General Register of Sasines or, as the case may be, for registering of it in the Land Register of Scotland.

(4) An application under subsection (3) shall contain—

(a) the name and address of the person authorised under the order;

(b) a statement that the person authorised under the order has powers relating to each property specified in the order;

(c) a copy of the interlocutor.

(5) Where the interlocutor is to be recorded in the General Register of Sasines, the Keeper shall—

(a) record the interlocutor in the Register; and

(b) endorse the interlocutor to the effect that it has been so recorded.

(6) Where the interlocutor is to be registered in the Land Register of Scotland, the Keeper shall update the title sheet of the property to show it.

(7) The person authorised under the order shall send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an office copy thereof to the Public Guardian who shall enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(v).

C)De la orden de tutela *(guardianship order)*

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

57. Demanda de una orden de tutela ***(Application for guardianship order)***

(1) An application may be made under this section by any person (including the adult himself) claiming an interest in the property, financial affairs or personal welfare of an adult to the sheriff for an order appointing an individual or office holder as guardian in relation to the adult's property, financial affairs or personal welfare.

(2) Where it appears to the local authority that—

(a) the conditions mentioned in section 58(1)(a) and (b) apply to the adult; and

(b) no application has been made or is likely to be made for an order under this section; and

(c) a guardianship order is necessary for the protection of the property, financial affairs or personal welfare of the adult,

they shall apply under this section for an order.

(3) There shall be lodged in court along with an application under this section—

(a) reports, in prescribed form, of an examination and assessment of the adult carried out not more than 30 days before the lodging of the application by at least two medical practitioners one of whom, in a case where the incapacity is by reason of mental disorder, must be a medical practitioner approved for the purposes of section 20 of the 1984 Act as having special experience in the diagnosis or treatment of mental disorder;

(b) where the application relates to the personal welfare of the adult, a report, in prescribed form, from the mental health officer, (but where it is in jeopardy only because of the inability of the adult to communicate, from the chief social work officer), containing his opinion as to—

(i) the general appropriateness of the order sought, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application; and

(ii) the suitability of the individual nominated in the application to be appointed guardian; and

(c) where the application relates only to the property or financial affairs of the adult, a report, in prescribed form, based on an interview and assessment of the adult carried out not more than 30 days before the lodging of the application, by a person who has sufficient knowledge to make such a report as to the matters referred to in paragraph (b)(i) and (ii).

(4) Where an applicant claims an interest in the personal welfare of the adult and is not the local authority, he shall give notice to the chief social work officer of his intention to make an application under this section and the report referred to in subsection (3)(b) shall be prepared by the chief social work officer or, as the case may be, the mental health officer, within 21 days of the date of the notice.

(5) The sheriff may, on an application being

made to him, at any time before the disposal of the application made under this section, make an order for the appointment of an interim guardian.

(6) The appointment of an interim guardian in pursuance of this section shall, unless recalled earlier, cease to have effect—

(a) on the appointment of a guardian under section 58; or

(b) at the end of the period of 3 months from the date of appointment,

whichever is the earlier.

58 Inicio a trámite de la demanda *(Disposal of application)*

(1) Where the sheriff is satisfied in considering an application under section 57 that—

(a) the adult is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare, and is likely to continue to be so incapable; and

(b) no other means provided by or under this Act would be sufficient to enable the adult's interests in his property, financial affairs or personal welfare to be safeguarded or promoted,

he may grant the application.

(2) In considering an application under section 57, the sheriff shall have regard to any intervention order or guardianship order which

may have been previously made in relation to the adult, and to any order varying, or ancillary to, such an order.

(3) Where the sheriff is satisfied that an intervention order would be sufficient as mentioned in subsection (1), he may treat the application under this section as an application for an intervention order under section 53 and may make such order as appears to him to be appropriate.

(4) Where the sheriff grants the application under section 57 he shall make an order (in this Act referred to as a «guardianship order») appointing the individual or office holder nominated in the application to be the guardian of the adult for a period of 3 years or such other period (including an indefinite period) as, on cause shown, he may determine.

(5) Where more than one individual or office holder is nominated in the application, a guardianship order may, without prejudice to the power under section 62(1) to appoint joint guardians, appoint two or more guardians to exercise different powers in relation to the adult.

(6) In making a guardianship order relating to the property or financial affairs of the adult the sheriff shall, except where—

(a) the individual is unable to find caution; but

(b) the sheriff is satisfied that nevertheless he is suitable to be appointed guardian,

require an individual appointed as guardian to find caution.

(7) Where the sheriff makes a guardianship order the sheriff clerk shall forthwith send a copy of the interlocutor containing the order to the Public Guardian who shall—

(a) enter prescribed particulars of the appointment in the register maintained by him under section 6(2)(b)(iv);

(b) when satisfied that the guardian has found caution if so required, issue a certificate of appointment to the guardian;

(c) notify the adult of the appointment of the guardian; and

(d) notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission of the terms of the interlocutor.

59. Quién puede ser designado tutor ***(Who may be appointed as guardian)***

(1) The sheriff may appoint as guardian—

(a) any individual whom he considers to be suitable for appointment and who has consented to being appointed;

(b) where the guardianship order is to relate only to the personal welfare of the adult, the chief social work officer of the local authority.

(2) Where the guardianship order is to relate

to the property and financial affairs and to the personal welfare of the adult and joint guardians are to be appointed, the chief social work officer of the local authority may be appointed guardian in relation only to the personal welfare of the adult.

(3) The sheriff shall not appoint an individual as guardian to an adult unless he is satisfied that the individual is aware of—

(a) the adult's circumstances and condition and of the needs arising from such circumstances and condition; and

(b) the functions of a guardian.

(4) In determining if an individual is suitable for appointment as guardian, the sheriff shall have regard to—

(a) the accessibility of the individual to the adult and to his primary carer;

(b) the ability of the individual to carry out the functions of guardian;

(c) any likely conflict of interest between the adult and the individual;

(d) any undue concentration of power which is likely to arise in the individual over the adult;

(e) any adverse effects which the appointment of the individual would have on the interests of the adult;

(f) such other matters as appear to him to be appropriate.

(5) Paragraphs (c) and (d) of subsection (4) shall not be regarded as applying to an indivi-

dual by reason only of his being a close relative of, or person residing with, the adult.

60. Renovación de una orden de tutela por parte del Juez *(Renewal of guardianship order by sheriff)*

(1) At any time before the end of a period in respect of which a guardianship order has been made or renewed, an application may be made to the sheriff under this section by the guardian for the renewal of such order, and where such an application is so made, the order shall continue to have effect until the application is determined.

(2) Where it appears to the local authority that an application for renewal of a guardianship order under subsection (1) is necessary but that no such application has been made or is likely to be made, they shall apply under subsection (1) for the renewal of such an order and, where such an application is so made, the order shall continue to have effect until the application is determined.

(3) Section 57(3) shall apply for the purposes of an application made under this section as it applies for the purposes of an application made under that section; and for the purposes of so applying that subsection references to the appointment of a guardian (however expressed) shall be construed as references to the continuation of appointment.

(4) Section 58 shall apply to an application under this section as it applies to an application

under section 57; and for the purposes of so applying that section—

(a) references to the making of a guardianship order and the appointment of a guardian (however expressed) shall be construed as references to, respectively, the renewal of the order and the continuation of appointment;

(b) for subsection (4) there shall be substituted—

«(4) Where the sheriff grants an application under section 60, he may continue the guardianship order for a period of 5 years or for such other period (including an indefinite period) as, on cause shown, he may determine.».

(5) Where the sheriff refuses an application under this section, the sheriff clerk shall forthwith send a copy of the interlocutor containing the refusal to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv); and

(b) notify the adult and the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

61. Registro de una orden de tutela en relación con derechos sucesorios *(Registration of guardianship order relating to heritable property)*

(1) This section applies where the sheriff makes a guardianship order which vests in the guardian any right of the adult to deal with, convey or manage any interest in heritable property which is recorded or is capable of being recorded in the General Register of Sasines or is registered or is capable of being registered in the Land Register of Scotland.

(2) In making such an order the sheriff shall specify each property affected by the order, in such terms as enable it to be identified in the Register of Sasines or, as the case may be, the Land Register of Scotland.

(3) The guardian shall, after finding caution if so required, forthwith apply to the Keeper of the Registers of Scotland for recording of the interlocutor containing the order in the General Register of Sasines or, as the case may be, registering of it in the Land Register of Scotland.

(4) An application under subsection (3) shall contain—

(a) the name and address of the guardian;

(b) a statement that the guardian has powers relating to each property specified in the order;

(c) a copy of the interlocutor.

(5) Where the interlocutor is to be recorded in the General Register of Sasines, the Keeper shall—

(a) record the interlocutor in the Register; and

(b) endorse the interlocutor to the effect that it has been so recorded.

(6) Where the interlocutor is to be registered in the Land Register of Scotland, the Keeper shall update the title sheet of the property to show the interlocutor.

(7) The guardian shall send the endorsed interlocutor or, as the case may be, the updated Land Certificate or an office copy thereof to the Public Guardian who shall enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(iv).

62. Tutela compartida *(Joint guardians)*

(1) An application may be made to the sheriff—

(a) by two or more individuals seeking appointment, for their appointment as joint guardians to an adult; or

(b) by an individual seeking appointment, for his appointment as an additional guardian to an adult jointly with one or more existing guardians.

(2) Joint guardians shall not be appointed to an adult unless—

(a) the individuals so appointed are parents, siblings or children of the adult; or

(b) the sheriff is satisfied that, in the circumstances, it is appropriate to appoint as joint guardians individuals who are not related to the adult as mentioned in paragraph (a).

(3) Where an application is made under subsection (1)(a), sections 58 and 59 shall apply for the purposes of the disposal of that application

as they apply for the disposal of an application under section 57.

(4) In deciding if an individual is suitable for appointment as additional guardian under subsection (1)(b), the sheriff shall have regard to the matters set out in section 59(3) to (5).

(5) Where the sheriff appoints an additional guardian under this section, the sheriff clerk shall send a copy of the order appointing him to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2) (b)(iv) of this Act;

(b) when satisfied that the additional guardian has found caution if so required, issue a certificate of appointment to the additional guardian and a new certificate of appointment to the existing guardian;

(c) notify the adult and the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

(6) Joint guardians may, subject to subsection (7), exercise their functions individually, and each guardian shall be liable for any loss or injury caused to the adult arising out of—

(a) his own acts or omissions; or

(b) his failure to take reasonable steps to

ensure that a joint guardian does not breach any duty of care or fiduciary duty owed to the adult,

and where more than one such guardian is so liable they shall be liable jointly and severally.

(7) A joint guardian shall, before exercising any functions conferred on him, consult the other joint guardians, unless—

(a) consultation would be impracticable in the circumstances; or

(b) the joint guardians agree that consultation is not necessary.

(8) Where joint guardians disagree as to the exercise of their functions, either or both of them may apply to the sheriff for directions under section 3.

(9) Where there are joint guardians, a third party in good faith is entitled to rely on the authority to act of any one or more of them.

63. Tutela sustituta *(Substitute guardian)*

(1) In any case where an individual is appointed as guardian under section 58 the sheriff may, on an application, appoint to act as guardian in the event of the guardian so appointed becoming unable to act any individual or office holder who could competently be appointed by virtue of section 59.

(2) In this Act an individual appointed under section 58 and an individual or office holder appointed under this section are referred to

respectively as an «original guardian» and a «substitute guardian».

(3) The appointment of a substitute guardian shall be for the same period as the appointment of the original guardian under section 58(4).

(4) An application for appointment as a substitute guardian may be made at the time of the application for the appointment of the original guardian or at any time thereafter.

(5) In making an order appointing an individual as substitute guardian with powers relating to the property or financial affairs of the adult the sheriff shall, except where—

(a) the individual is unable to find caution; but

(b) the sheriff is satisfied that nevertheless he is suitable to be appointed substitute guardian,

require an individual appointed as substitute guardian to find caution.

(6) Subsection (1) shall apply to an individual who, having been appointed as a substitute guardian subsequently, by virtue of this section, becomes the guardian as it applies to an individual appointed under section 58 and, for this purpose, any reference in this section to the «original guardian» shall be construed accordingly.

(7) Where the sheriff appoints a substitute guardian (other than a substitute guardian appointed in the same order as an original guardian) under subsection (1), the sheriff clerk shall send a copy of the interlocutor containing

the order appointing the substitute guardian to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv); and

(b) notify the adult, the original guardian and the local authority and (in a case where the adult's incapacity is by reason of, or by reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission.

(8) On the death or incapacity of the original guardian, the substitute guardian shall, without undue delay, notify the Public Guardian—

(a) of the death or incapacity (and where the original guardian has died, provide the Public Guardian with documentary evidence of the death); and

(b) whether or not he is prepared to act as guardian.

(9) The Public Guardian on being notified under subsection (8) shall, if the substitute guardian is prepared to act—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv);

(b) when satisfied that the substitute guardian has found caution if so required, issue the substitute guardian with a certificate of appointment;

(c) notify the adult, the original guardian, the local authority and (in a case where the adult's

incapacity is by reason of, or by reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission that the substitute guardian is acting.

(10) Unless otherwise specified in the order appointing him, the substitute guardian shall have the same functions and powers as those exercisable by the original guardian immediately before the event mentioned in subsection (1).

64. Funciones y deberes del tutor *(Functions and duties of guardian)*

(1) Subject to the provisions of this section, an order appointing a guardian may confer on him—

(a) power to deal with such particular matters in relation to the property, financial affairs or personal welfare of the adult as may be specified in the order;

(b) power to deal with all aspects of the personal welfare of the adult, or with such aspects as may be specified in the order;

(c) power to pursue or defend an action of declaratory of nullity of marriage, or of divorce or separation in the name of the adult;

(d) power to manage the property or financial affairs of the adult, or such parts of them as may be specified in the order;

(e) power to authorise the adult to carry out

such transactions or categories of transactions as the guardian may specify.

(2) A guardian may not—

(a) place the adult in a hospital for the treatment of mental disorder against his will; or

(b) consent on behalf of the adult to any form of treatment mentioned in section 48(1) or (2).

(3) A guardian shall (unless prohibited by an order of the sheriff and subject to any conditions or restrictions specified in such an order) have power by virtue of his appointment to act as the adult's legal representative in relation to any matter within the scope of the power conferred by the guardianship order.

(4) The guardian shall not later than 7 days after any change of his own or the adult's address notify the Public Guardian who shall—

(a) notify the adult (in a case where it is the guardian's address which has changed), the local authority and (in a case where the adult's incapacity is by reason of, or reasons which include, mental disorder and the guardianship order relates to the adult's personal welfare or factors which include it) the Mental Welfare Commission of the change; and

(b) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iv).

(5) A guardian having powers relating to the property or financial affairs of the adult shall, subject to—

(a) such restrictions as may be imposed by the court;

(b) any management plan prepared under paragraph 1 of schedule 2; or

(c) paragraph 6 of that schedule,

be entitled to use the capital and income of the adult's estate for the purpose of purchasing assets, services or accommodation so as to enhance the adult's quality of life.

(6) The guardian may arrange for some or all of his functions to be exercised by one or more persons acting on his behalf but shall not be entitled to surrender or transfer any part of them to another person.

(7) The guardian shall comply with any order or demand made by the Public Guardian in relation to the property or financial affairs of the adult in so far as so complying would be within the scope of his authority; and where the guardian fails to do so the sheriff may, on the application of the Public Guardian, make an order to the like effect as the order or demand made by the Public Guardian, and the sheriff's decision shall be final.

(8) An interim guardian appointed under section 57(5) having powers relating to—

(a) the property or financial affairs of an adult shall report to the Public Guardian;

(b) the personal welfare of an adult shall report to the chief social work officer of the local authority, every month as to his exercise of those powers.

(9) Where the chief social work officer of the local authority has been appointed guardian he shall, not later than 7 working days after his appointment, notify any person who received notification under section 58(7) of the appointment of the name of the officer responsible at any time for carrying out the functions and duties of guardian.

(10) If, in relation to the appointment of the chief social work officer as guardian, the sheriff has directed that that intimation or notification of any application or other proceedings should not be given to the adult, the chief social work officer shall not notify the adult under subsection (9).

(11) The Scottish Ministers may by regulations define the scope of the powers which may be conferred on a guardian under subsection (1) and the conditions under which they shall be exercised.

(12) Schedule 2 (which makes provision as to the guardian's management of the estate of an adult) has effect.

65. Registro de tutores *(Records: guardians)*

A guardian shall keep records of the exercise of his powers.

66. Donaciones *(Gifts)*

(1) A guardian having powers relating to the property or financial affairs of an adult may make

a gift out of the adult's estate only if authorised to do so by the Public Guardian.

(2) Authorisation by the Public Guardian under subsection (1) may be given generally, or in respect of a particular gift.

(3) On receipt of an application in the prescribed form for an authorisation to make a gift, the Public Guardian shall, subject to subsection (4), intimate the application to the adult, his nearest relative, his primary carer and any other person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.

(4) Where the Public Guardian is of the opinion that the value of the gift is such that intimation is not necessary, he may dispense with intimation.

(5) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application.

(6) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the guardian and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the guardian, if he objects, an opportunity of being heard.

(7) The Public Guardian may at his own instance or at the instance of the guardian or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.

(8) A decision of the Public Guardian—

(a) to grant an application under subsection (5) or to refuse an application; or

(b) to refuse to remit an application to the sheriff under subsection (7),

may be appealed to the sheriff, whose decision shall be final.

5)Instituciones de guarda y protección de las personas con discapacidad

A)De la guarda de hecho (actos realizados en conexión con los cuidados o con el tratamiento)

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

5. Actos realizados en conexión con los cuidados o con el tratamiento *(Acts in connection with care or treatment)*

(1) If a person («D») does an act in connection with the care or treatment of another person («P»), the act is one to which this section applies if—

(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes—

(i) that P lacks capacity in relation to the matter, and

(ii) that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P—

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

(3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.

(4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment).

6. Limitación a los actos del artículo 5 ***(Section 5 acts: limitations)***

(1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.

(2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.

(3) The second is that the act is a proportionate response to—

(a) the likelihood of P's suffering harm, and

(b) the seriousness of that harm.

(4) For the purposes of this section D restrains P if he—

(a) uses, or threatens to use, force to secure the doing of an act which P resists, or

(b) restricts P's liberty of movement, whether or not P resists.

(5) But D does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention (whether or not D is a public authority).

(6) Section 5 does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by—

(a) a donee of a lasting power of attorney granted by P, or

(b) a deputy appointed for P by the court.

(7) But nothing in subsection (6) stops a person—

(a) providing life-sustaining treatment, or

(b) doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

7. Pago de los bienes y servicios necesarios *(Payment for necessary goods and services)*

(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.

(2) «Necessary» means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.

8. Gastos *(Expenditure)*

(1) If an act to which section 5 applies involves expenditure, it is lawful for D—

(a) to pledge P's credit for the purpose of the expenditure, and

(b) to apply money in P's possession for meeting the expenditure.

(2) If the expenditure is borne for P by D, it is lawful for D—

(a) to reimburse himself out of money in P's possession, or

(b) to be otherwise indemnified by P.

(3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person—

(a) has lawful control of P's money or other property, and

(b) has power to spend money for P's benefit.

B)De los poderes preventivos *(Lasting powers of attorney)*

9. Poderes Preventivos *(Lasting powers of attorney)*

(1) A lasting power of attorney is a power of attorney under which the donor («P») confers on the donee (or donees) authority to make decisions about all or any of the following—

(a) P's personal welfare or specified matters concerning P's personal welfare, and

(b) P's property and affairs or specified matters concerning P's property and affairs,

and which includes authority to make such decisions in circumstances where P no longer has capacity.

(2) A lasting power of attorney is not created unless—

(a) section 10 is complied with,

(b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and

(c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.

(3) An instrument which—

(a) purports to create a lasting power of attorney, but

(b) does not comply with this section, section 10 or Schedule 1,

confers no authority.

(4) The authority conferred by a lasting power of attorney is subject to—

(a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and

(b) any conditions or restrictions specified in the instrument.

10. Designación del apoderado *(Appointment of donees)*

(1) A donee of a lasting power of attorney must be—

(a) an individual who has reached 18, or

(b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.

(2) An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.

(3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.

(4) The instrument may appoint them to act—

(a) jointly,

(b) jointly and severally, or

(c) jointly in respect of some matters and jointly and severally in respect of others.

(5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.

(6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.

(7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—

(a) prevents the appointment taking effect in his case, but

(b) does not prevent a lasting power of attorney from being created in the case of the other or others.

(8) An instrument used to create a lasting power of attorney—

(a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but

(b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment.

11. Poderes preventivos: Restricciones ***(Lasting powers of attorney: restrictions)***

(1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain P, unless three conditions are satisfied.

(2) The first condition is that P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question.

(3) The second is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to P.

(4) The third is that the act is a proportionate response to—

(a) the likelihood of P's suffering harm, and

(b) the seriousness of that harm.

(5) For the purposes of this section, the donee restrains Pif he—

(a) uses, or threatens to use, force to secure the doing of an act which P resists, or

(b) restricts P's liberty of movement, whether or not P resists,

or if he authorises another person to do any of those things.

(6) But the donee does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention.

(7) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about P's personal welfare, the authority—

(a) does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity,

(b) is subject to sections 24 to 26 (advance decisions to refuse treatment), and

(c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.

(8) But subsection (7)(c)—

(a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and

(b) is subject to any conditions or restrictions in the instrument.

12. Alcance de los poderes preventivos: donaciones *(Scope of lasting powers of attorney: gifts)*

(1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

(2) The donee may make gifts—

(a) on customary occasions to persons (including himself) who are related to or connected with the donor, or

(b) to any charity to whom the donor made or might have been expected to make gifts,

if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

(3) «Customary occasion» means—

(a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or

(b) any other occasion on which presents are customarily given within families or among friends or associates.

(4) Subsection (2) is subject to any conditions or restrictions in the instrument.

13. Revocación de los poderes preventivos *(Revocation of lasting powers of attorney etc.)*

(1) This section applies if—

(a) P has executed an instrument with a view to creating a lasting power of attorney, or

(b) a lasting power of attorney is registered as having been conferred by P,

and in this section references to revoking the power include revoking the instrument.

(2) P may, at any time when he has capacity to do so, revoke the power.

(3) P's bankruptcy revokes the power so far as it relates to P's property and affairs.

(4) But where P is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended, so far as it relates to P's property and affairs, for so long as the order has effect.

(5) The occurrence in relation to a donee of an event mentioned in subsection (6)—

(a) terminates his appointment, and

(b) except in the cases given in subsection (7), revokes the power.

(6) The events are—

(a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor,

(b) subject to subsections (8) and (9), the death or bankruptcy of the donee or, if the donee is a trust corporation, its winding-up or dissolution,

(c) subject to subsection (11), the dissolution or annulment of a marriage or civil partnership between the donor and the donee,

(d) the lack of capacity of the donee.

(7) The cases are—

(a) the donee is replaced under the terms of the instrument,

(b) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.

(8) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.

(9) Where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the

power are suspended, so far as they relate to P's property and affairs, for so long as the order has effect.

(10) Where the donee is one of two or more appointed to act jointly and severally under the power in respect of any matter, the reference in subsection (9) to the suspension of the power is to its suspension in so far as it relates to that donee.

(11) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

14. Protección del apoderado y de terceros ante revocación o invalidación del poder *(Protection of donee and others if no power created or power revoked)*

(1) Subsections (2) and (3) apply if—

(a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but

(b) a lasting power of attorney was not created,

whether or not the registration has been cancelled at the time of the act or transaction in question.

(2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he—

(a) knows that a lasting power of attorney was not created, or

(b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.

(3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).

(4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—

(a) the transaction was completed within 12 months of the date on which the instrument was registered, or

(b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.

(5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power

is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs.

(6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

(…)

22. Poder del tribunal en relación con la validez de un poder preventive *(Powers of court in relation to validity of lasting powers of attorney)*

(1) This section and section 23 apply if —

(a) a person («P») has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or

(b) an instrument has been registered as a lasting power of attorney conferred by P.

(2) The court may determine any question relating to—

(a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;

(b) whether the power has been revoked or has otherwise come to an end.

(3) Subsection (4) applies if the court is satisfied—

(a) that fraud or undue pressure was used to induce P—

(i) to execute an instrument for the purpose of creating a lasting power of attorney, or

(ii) to create a lasting power of attorney, or

(b) that the donee (or, if more than one, any of them) of a lasting power of attorney—

(i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or

(ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.

(4) The court may—

(a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or

(b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.

(5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.

(6) «Donee» includes an intended donee.

23. Poder del tribunal en relación con la vigencia de los poderes preventivos *(Powers of court in relation to operation of lasting powers of attorney)*

(1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.

(2) The court may—

(a) give directions with respect to decisions—

(i) which the donee of a lasting power of attorney has authority to make, and

(ii) which P lacks capacity to make;

(b) give any consent or authorisation to act which the donee would have to obtain from P if P had capacity to give it.

(3) The court may, if P lacks capacity to do so—

(a) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;

(b) require the donee to supply information or produce documents or things in his possession as donee;

(c) give directions with respect to the remuneration or expenses of the donee;

(d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.

(4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).

(5) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

15. Creación de los poderes preventivos
(Creation of continuing power of attorney)

(1) Where an individual grants a power of attorney relating to his property or financial affairs in accordance with the following provisions of this section that power of attorney shall, notwithstanding any rule of law, continue to have effect in the event of the granter's becoming incapable in relation to decisions about the matter to which the power of attorney relates.

(2) In this Act a power of attorney granted under subsection (1) is referred to as a» continuing power of attorney» and a person on whom such power is conferred is referred to as a»continuing attorney».

(3) A continuing power of attorney shall be valid only if it is expressed in a written document which—

(a) is subscribed by the granter;

(b) incorporates a statement which clearly expresses the granter's intention that the power be a continuing power;

(c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—

(i) he has interviewed the granter immediately before the granter subscribed the document;

(ii) he is satisfied, either because of his own knowledge of the granter or because he has

consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the continuing power of attorney is granted the granter understands its nature and extent;

(iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

(4) A solicitor or member of another prescribed class may not grant a certificate under subsection (3)(c) if he is the person to whom the power of attorney has been granted.

16. Creación y ejercicio de los poderes preventivos en relación con el bienestar personal *(Creation and exercise of welfare power of attorney)*

(1) An individual may grant a power of attorney relating to his personal welfare in accordance with the following provisions of this section.

(2) In this Act a power of attorney granted under this section is referred to as a»welfare power of attorney» and an individual on whom such power is conferred is referred to as a»welfare attorney».

(3) A welfare power of attorney shall be valid only if it is expressed in a written document which—

(a) is subscribed by the granter;

(b) incorporates a statement which clearly expresses the granter's intention that the power be a welfare power to which this section applies;

(c) incorporates a certificate in the prescribed form by a solicitor or by a member of another prescribed class that—

(i) he has interviewed the granter immediately before the granter subscribed the document;

(ii) he is satisfied, either because of his own knowledge of the granter or because he has consulted other persons (whom he names in the certificate) who have knowledge of the granter, that at the time the welfare power of attorney is granted the granter understands its nature and extent;

(iii) he has no reason to believe that the granter is acting under undue influence or that any other factor vitiates the granting of the power.

(4) A solicitor or member of another prescribed class may not grant a certificate under subsection (3)(c) if he is the person to whom the power of attorney has been granted.

(5) A welfare power of attorney—

(a) may be granted only to an individual (which does not include a person acting in his capacity as an officer of a local authority or other body established by or under an enactment); and

(b) shall not be exercisable unless—

(i) the granter is incapable in relation to

decisions about the matter to which the welfare power of attorney relates; or

(ii) the welfare attorney reasonably believes that sub-paragraph (i) applies.

(6) A welfare attorney may not—

(a) place the granter in a hospital for the treatment of mental disorder against his will; or

(b) consent on behalf of the granter to any form of treatment mentioned in section 48(1) or (2).

(7) A welfare power of attorney shall not come to an end in the event of the bankruptcy of the granter or the welfare attorney.

(8) Any reference to a welfare attorney—

(a) in relation to subsection (5)(b) in a case where the granter is habitually resident in Scotland; and

(b) in subsection (6),

shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

17. Apoderado no obligado a actuar a actuar en ciertas circumstancias *(Attorney not obliged to act in certain circumstances)*

A continuing or welfare attorney shall not be obliged to do anything which would otherwise be within the powers of the attorney if doing it

would, in relation to its value or utility, be unduly burdensome or expensive.

18. Poder preventivo no otorgado en virtud de la presente ley *(Power of attorney not granted in accordance with this Act)*

A power of attorney granted after the commencement of this Act which is not granted in accordance with section 15 or 16 shall have no effect during any period when the granter is incapable in relation to decisions about the matter to which the power of attorney relates.

19. Registro de un poder preventivo *(Registration of continuing or welfare power of attorney)*

(1) A continuing or welfare attorney shall have no authority to act until the document conferring the power of attorney has been registered under this section.

(2) For the purposes of registration, the document conferring the power of attorney shall be sent to the Public Guardian who, if he is satisfied that a person appointed to act is prepared to act, shall—

(a) enter prescribed particulars of it in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be;

(b) send a copy of it with a certificate of registration to the sender;

(c) if it confers a welfare power of attorney, send a copy of it to the Mental Welfare Commission.

(3) The document conferring a continuing or welfare power of attorney may contain a condition that the Public Guardian shall not register it under this section until the occurrence of a specified event and in that case the Public Guardian shall not register it until he is satisfied that the specified event has occurred.

(4) A copy of a document conferring a continuing or welfare power of attorney authenticated by the Public Guardian shall be accepted for all purposes as sufficient evidence of the contents of the original and of any matter relating thereto appearing in the copy.

(5) The Public Guardian shall—

(a) on the registration of a document conferring a continuing or welfare power of attorney, send a copy of it to the granter; and

(b) where the document conferring the continuing or welfare power of attorney so requires, send a copy of it to not more than two specified individuals or holders of specified offices or positions.

(6) A decision of the Public Guardian under subsection (2) as to whether or not a person is prepared to act or under subsection (3) as to whether or not the specified event has occurred may be appealed to the sheriff, whose decision shall be final.

20. Poder del Juez *(Powers of sheriff)*

(1) An application for an order under subsection (2) may be made to the sheriff by any person claiming an interest in the property, financial affairs or personal welfare of the granter of a continuing or welfare power of attorney.

(2) Where, on an application being made under subsection (1), the sheriff is satisfied that the granter is incapable in relation to decisions about, or of acting to safeguard or promote his interests in, his property, financial affairs or personal welfare insofar as the power of attorney relates to them, and that it is necessary to safeguard or promote these interests, he may make an order—

(a) ordaining that the continuing attorney shall be subject to the supervision of the Public Guardian to such extent as may be specified in the order;

(b) ordaining the continuing attorney to submit accounts in respect of any period specified in the order for audit to the Public Guardian;

(c) ordaining that the welfare attorney shall be subject to the supervision of the local authority to such extent as may be specified in the order;

(d) ordaining the welfare attorney to give a report to him as to the manner in which the welfare attorney has exercised his powers during any period specified in the order;

(e) revoking—

(i) any of the powers granted by the continuing or welfare power of attorney; or

(ii) the appointment of an attorney.

(3) Where the sheriff makes an order under this section the sheriff clerk shall send a copy of the interlocutor containing the order to the Public Guardian who shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be;

(b) notify—

(i) the granter;

(ii) the continuing or welfare attorney;

(iii) where it is the welfare attorney who is notified, the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission;

(iv) where the sheriff makes an order under subsection (2)(c), the local authority.

(4) A decision of the sheriff under subsection (2)(a) to (d) shall be final.

(5) In this section any reference to—

(a) a continuing power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;

(b) a welfare power of attorney shall include a reference to a power (however expressed) under a contract, grant or appointment governed by the law of any country, relating to the granter's personal welfare and having effect during the granter's incapacity,

and»continuing attorney» and»welfare attorney» shall be construed accordingly.

21. Registro del poder ***(Records: attorneys)***

A continuing or welfare attorney shall keep records of the exercise of his powers.

22. Notificación al Defensor Público ***(Notification to Public Guardian)***

(1) After a document conferring a continuing or welfare power of attorney has been registered under section 19, the attorney shall notify the Public Guardian—

(a) of any change in his address;

(b) of any change in the address of the granter of the power of attorney;

(c) of the death of the granter of the power of attorney; or

(d) of any other event which results in the termination of the power of attorney,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be

and shall notify the granter (in the case of an event mentioned in paragraph (a) or (d)) and, where the power of attorney relates to the personal welfare of the adult, both the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.

(2) If, after a document conferring a continuing or welfare power of attorney has been registered under section 19, the attorney dies, his personal representatives shall, if aware of the existence of the power of attorney, notify the Public Guardian who shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be, and shall notify the granter and, where the power of attorney relates to the personal welfare of the adult, both the local authority and (in a case where the incapacity of the granter is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.

23. Revocación de un poder preventivo *(Resignation of continuing or welfare attorney)*

(1) A continuing or welfare attorney who wishes to resign after the document conferring the power of attorney has been registered under section 19 shall give notice in writing of his intention to do so to—

(a) the granter of the power of attorney;

(b) the Public Guardian;

(c) any guardian or, where there is no guardian, the granter's primary carer;

(d) the local authority, where they are supervising the welfare attorney.

(2) Subject to subsection (4), the resignation shall not have effect until the expiry of a period of 28 days commencing with the date of receipt by the Public Guardian of the notice given under subsection (1); and on its becoming effective the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(i) or (ii) as the case may be.

(3) Where the resignation is of a welfare attorney, the Public Guardian shall notify the local authority and (in a case where the incapacity of the adult is by reason of, or reasons which include, mental disorder) the Mental Welfare Commission.

(4) The resignation of a joint attorney, or an attorney in respect of whom the granter has appointed a substitute attorney, shall take effect on the receipt by the Public Guardian of notice under subsection (1)(b) if evidence that—

(a) the remaining joint attorney is willing to continue to act; or

(b) the substitute attorney is willing to act,

accompanies the notice.

24. Terminación de un poder preventivo ***(Termination of continuing or welfare power of attorney)***

(1) If the granter and the continuing or welfare attorney are married to each other the power of attorney shall, unless the document conferring it provides otherwise, come to an end upon the granting of—

(a) a decree of separation to either party;

(b) a decree of divorce to either party;

(c) declarator of nullity of the marriage.

(2) The authority of a continuing or welfare attorney in relation to any matter shall come to an end on the appointment of a guardian with powers relating to that matter.

(3) In subsection (2) any reference to—

(a) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity;

(b) a welfare attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed) relating to the granter's personal welfare and having effect during the granter's incapacity.

(4) No liability shall be incurred by any person who acts in good faith in ignorance of—

(a) the coming to an end of a power of attorney under subsection (1); or

(b) the appointment of a guardian as mentioned in subsection (2),

nor shall any title to heritable property acquired by such a person be challengeable on those grounds alone.

C)De la designación de asistentes *(appointment of deputies)*

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

16. Derecho a tomar decisiones y a designar asistentes: aspectos generales (Powers to make decisions and appoint deputies: general)

(1) This section applies if a person («P») lacks capacity in relation to a matter or matters concerning—

(a) P's personal welfare, or

(b) P's property and affairs.

(2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a «deputy») to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in

particular, to sections 1 (the principles) and 4 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7) An order of the court may be varied or discharged by a subsequent order.

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—

(a) has behaved, or is behaving, in a way that

contravenes the authority conferred on him by the court or is not in P's best interests, or

(b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

16A. Artículo 16: poderes: Pacientes comprendidos por la Ley de Salud Mental etc. ***(Section 16 powers: Mental Health Act patients etc)***

(1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.

(2) If—

(a) a welfare order includes provision which authorises a person to be deprived of his liberty, and

(b) that person becomes ineligible to be deprived of liberty by this Act,

the provision ceases to have effect for as long as the person remains ineligible.

(3) Nothing in subsection (2) affects the power of the court under section 16(7) to vary or discharge the welfare order.

(4) For the purposes of this section—

(a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;

(b) «welfare order» means an order under section 16(2)(a).»

(4) Omit the following provisions (which make specific provision about deprivation of liberty)—

(a) section 6(5);

(b) section 11(6);

(c) section 20(13).

(5) Schedule 7 (which inserts the new Schedule A1 into the Mental Capacity Act 2005 (c. 9)) has effect.

(6) Schedule 8 (which inserts the new Schedule 1A into the Mental Capacity Act 2005) has effect.

(7) Schedule 9 (which makes other amendments to the Mental Capacity Act 2005 and to other Acts) has effect.

(8) In subsection (9)—

«GOWA 1998» means the Government of Wales Act 1998 (c. 38);

«GOWA 2006» means the Government of Wales Act 2006 (c. 32);

«initial period» has the same meaning as in Schedule 11 to GOWA 2006.

(9) If this Act is passed after the end of the initial period, the functions conferred on the National Assembly for Wales by virtue of any provision of this Part of this Act are to be treated for the purposes of Schedule 11 to GOWA 2006 as if they—

(a) had been conferred on the Assembly constituted by GOWA 1998 by an Act passed before the end of the initial period, and

(b) were exercisable by that Assembly immediately before the end of the initial period.

(10) If any function of making subordinate legislation conferred by virtue of any provision of this Part of this Act is transferred to the Welsh Ministers (whether by virtue of subsection (9) or otherwise)—

(a) paragraphs 34 and 35 of Schedule 11 to the Government of Wales Act 2006 do not apply; and

(b) subsections (11) and (12) apply instead.

(11) If a relevant statutory instrument contains regulations under paragraph 42(2)(b), 129, 163 or 164 of Schedule A1 to the Mental Capacity Act 2005 (whether or not it also contains other regulations), the instrument may not be made unless a draft has been laid before and approved by resolution of the National Assembly for Wales.

(12) Subject to that, a relevant statutory instrument is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(13) In subsections (11) and (12) «relevant statutory instrument» means a statutory instrument containing subordinate legislation made in exercise of a function transferred as mentioned in subsection (10).

(Texto del artículo 16A incluido por Ley de Salud Mental 2007, cfr. Artículo 50)

17. Derechos incluidos en el artículo 16: bienestar personal *(Section 16 powers: personal welfare)*

(1) The powers under section 16 as respects P's personal welfare extend in particular to—

(a) deciding where P is to live;

(b) deciding what contact, if any, P is to have with any specified persons;

(c) making an order prohibiting a named person from having contact with P;

(d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;

(e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.

(2) Subsection (1) is subject to section 20 (restrictions on deputies).

18 Derechos incluidos en el artículo 16: propiedad y negocios *(Section 16 powers: property and affairs)*

(1) The powers under section 16 as respects P's property and affairs extend in particular to—

(a) the control and management of P's property;

(b) the sale, exchange, charging, gift or other disposition of P's property;

(c) the acquisition of property in P's name or on P's behalf;

(d) the carrying on, on P's behalf, of any profession, trade or business;

(e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;

(f) the carrying out of any contract entered into by P;

(g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;

(h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;

(i) the execution for P of a will;

(j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;

(k) the conduct of legal proceedings in P's name or on P's behalf.

(2) No will may be made under subsection (1)(i) at a time when P has not reached 18.

(3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.

(4) Schedule 2 supplements the provisions of this section.

(5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.

(6) Subsection (1) is subject to section 20 (restrictions on deputies).

(…)

Anexo 2 Propiedad y negocios (Especificaciones relativas al artículo 18 inciso 4) ***(Schedule 2 Property and affairs: supplementary provisions)***

1. Testamentos: aspectos generales ***(Wills: general)***

Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P.

2. Disposiciones que pueden establecerse en un testamento ***(Provision that may be made in will)***

The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

3. Testamentos: requisitos para su implementación ***(Wills: requirements relating to execution)***

(1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person («the authorised person») to execute a will on behalf of P.

(2) Any will executed in pursuance of the order or direction—

(a) must state that it is signed by P acting by the authorised person,

(b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time,

(c) must be attested and subscribed by those witnesses in the presence of the authorised person, and

(d) must be sealed with the official seal of the court.

4. Testamentos: efectos de su implementación *(Wills: effect of execution)*

(1) This paragraph applies where a will is executed in accordance with paragraph 3.

(2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that—

(a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and

(b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3.

(3) The will has the same effect for all purposes as if—

(a) P had had the capacity to make a valid will, and

(b) the will had been executed by him in the manner required by the 1837 Act.

(4) But sub-paragraph (3) does not have effect in relation to the will—

(a) in so far as it disposes of immovable property outside England and Wales, or

(b) in so far as it relates to any other property or matter if, when the will is executed—

(i) P is domiciled outside England and Wales, and

(ii) the condition in sub-paragraph (5) is met.

(5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

5. Ordenes de transferencia complementaria al acuerdo *(Vesting orders ancillary to settlement etc.)*

(1) If provision is made by virtue of section 18 for—

(a) the settlement of any property of P, or

(b) the exercise of a power vested in him of appointing trustees or retiring from a trust,

the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require.

(2) The power under sub-paragraph (1) includes,

in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19).

6. Variación del acuerdo *(Variation of settlements)*

(1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if—

(a) the settlement makes provision for its variation or revocation,

(b) the court is satisfied that a material fact was not disclosed when the settlement was made, or

(c) the court is satisfied that there has been a substantial change of circumstances.

(2) Any such order may give such consequential directions as the court thinks fit.

7. Transferencia de acciones a curador designado fuera de Inglaterra o Gales *(Vesting of stock in curator appointed outside England and Wales)*

(1) Sub-paragraph (2) applies if the court is satisfied—

(a) that under the law prevailing in a place outside England and Wales a person («M») has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions

with respect to the management and administration of his property and affairs, and

(b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph.

(2) The court may direct—

(a) any stocks standing in the name of P, or

(b) the right to receive dividends from the stocks,

to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.

(3) «Stocks» includes—

(a) shares, and

(b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,

and «dividends» is to be construed accordingly.

8. Preservación de los intereses de los bienes dispuestos en representación de una persona que carece de capacidad *(Preservation of interests in property disposed of on behalf of person lacking capacity)*

(1) Sub-paragraphs (2) and (3) apply if—

(a) P's property has been disposed of by virtue of section 18,

(b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and

(c) on P's death, any property belonging to P's estate represents the property disposed of.

(2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.

(3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.

(4) The court may direct that, on a disposal of P's property—

(a) which is made by virtue of section 18, and

(b) which would apart from this paragraph result in the conversion of personal property into real property,

property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.

(5) References in sub-paragraphs (1) to (4) to the disposal of property are to—

(a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;

(b) the removal of property from one place to another;

(c) the application of money in acquiring property;

(d) the transfer of money from one account to another;

and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.

(6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.

9 falta texto?

(1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money—

(a) for carrying out permanent improvements on any of P's property, or

(b) otherwise for the permanent benefit of any of P's property.

(2) The court may order that—

(a) the whole of the money expended or to be expended, or

(b) any part of it,

is to be a charge on the property either without interest or with interest at a specified rate.

(3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).

(4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.

(5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

10. Poderes como patrones de beneficencia (Patronato de Beneficencia) ***(Powers as patron of benefice)***

(1) Any functions which P has as patron of a benefice may be discharged only by a person («R») appointed by the court.

(2) R must be an individual capable of appointment under section 8(1) (b) of the 1986 Measure (which provides for an individual able to make a declaration of communicant status, a clerk in Holy Orders, etc. to be appointed to discharge a registered patron's functions).

(3) The 1986 Measure applies to R as it applies to an individual appointed by the registered patron of the benefice under section 8(1)(b) or (3) of that Measure to discharge his functions as patron.

(4) «The 1986 Measure» means the Patronage (Benefices) Measure 1986 (No. 3).

(…)

19. Designación de asistentes *(Appointment of deputies)*

(1) A deputy appointed by the court must be—

(a) an individual who has reached 18, or

(b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.

(2) The court may appoint an individual by appointing the holder for the time being of a specified office or position.

3) A person may not be appointed as a deputy without his consent.

(4) The court may appoint two or more deputies to act—

(a) jointly,

(b) jointly and severally, or

(c) jointly in respect of some matters and jointly and severally in respect of others.

(5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies—

(a) in such circumstances, or on the happening of such events, as may be specified by the court;

(b) for such period as may be so specified.

(6) A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.

(7) The deputy is entitled—

(a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and

(b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.

(8) The court may confer on a deputy powers to—

(a) take possession or control of all or any specified part of P's property;

(b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.

(9) The court may require a deputy—

(a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and

(b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

20. Restricciones a los asistentes *(Restrictions on deputies)*

(1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter.

(2) Nothing in section 16(5) or 17 permits a deputy to be given power—

(a) to prohibit a named person from having contact with P;
(b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.
(3) A deputy may not be given powers with respect to—
(a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,
(b) the execution for P of a will, or
(c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
(4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).
(5) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P.
(6) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests).
(7) A deputy may not do an act that is intended to restrain P unless four conditions are satisfied.
(8) The first condition is that, in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court.

(9) The second is that P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question.
(10) The third is that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.
(11) The fourth is that the act is a proportionate response *and*—
(a) the likelihood of P's suffering harm, or
(b) the seriousness of that harm.
(12) For the purposes of this section, a deputy restrains P if he—
(a) uses, or threatens to use, force to secure the doing of an act which P resists, or
(b) restricts P's liberty of movement, whether or not P resists,
or if he authorises another person to do any of those things.
(13) But a deputy does more than merely restrain P if he deprives P of his liberty within the meaning of Article 5(1) of the Human Rights Convention (whether or not the deputy is a public authority).
(Texto del inciso 11 reformado por Ley de Salud Mental 2007, cfr. Artículo 51)

21. Transferencia de procedimientos relativos a personas menores de 18 años *(Transfer of proceedings relating to people under 18)*

The Lord Chancellor may by order make provi-

sion as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order—

(a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or

(b) from a court having jurisdiction under that Act to the Court of Protection.

D)De las decisiones anticipadas para rechazar un tratamiento *(Advance decisions to refuse treatment)*

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

24 De las decisiones anticipadas para rechazar un tratamiento: Aspectos generales *(Advance decisions to refuse treatment: general)*

(1) «Advance decision» means a decision made by a person («P»), after he has reached 18 and when he has capacity to do so, that if—

(a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and

(b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,

the specified treatment is not to be carried out or continued.

(2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.

(3) P may withdraw or alter an advance decision at any time when he has capacity to do so.

(4) A withdrawal (including a partial withdrawal) need not be in writing.

(5) An alteration of an advance decision need not be in writing (unless section 25(5) applies in relation to the decision resulting from the alteration).

25. Validez y aplicabilidad de las decisiones anticipadas *(Validity and applicability of advance decisions)*

(1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to P unless the decision is at the material time—

(a) valid, and

(b) applicable to the treatment.

(2) An advance decision is not valid if P—

(a) has withdrawn the decision at a time when he had capacity to do so,

(b) has, under a lasting power of attorney created after the advance decision was made,

conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or

(c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.

(3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.

(4) An advance decision is not applicable to the treatment in question if—

(a) that treatment is not the treatment specified in the advance decision,

(b) any circumstances specified in the advance decision are absent, or

(c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.

(5) An advance decision is not applicable to life-sustaining treatment unless—

(a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and

(b) the decision and statement comply with subsection (6).

(6) A decision or statement complies with this subsection only if—

(a) it is in writing,

(b) it is signed by P or by another person in P's presence and by P's direction,

(c) the signature is made or acknowledged by P in the presence of a witness, and

(d) the witness signs it, or acknowledges his signature, in P's presence.

(7) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

26. Efectos de las decisiones anticipadas *(Effect of advance decisions)*

(1) If P has made an advance decision which is—

(a) valid, and

(b) applicable to a treatment,

the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.

(2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment.

(3) A person does not incur liability for the consequences of withholding or withdrawing a

treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment.

(4) The court may make a declaration as to whether an advance decision—

(a) exists;

(b) is valid;

(c) is applicable to a treatment.

(5) Nothing in an apparent advance decision stops a person—

(a) providing life-sustaining treatment, or

(b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

E)Servicio independiente de defensa para la capacidad mental *(Independent mental capacity advocate service)*

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

35. Designación de defensores independientes para la capacidad mental *(Appointment of independent mental capacity advocates)*

(1) The appropriate authority must make such

arrangements as it considers reasonable to enable persons («independent mental capacity advocates») to be available to represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate.

(2) The appropriate authority may make regulations as to the appointment of independent mental capacity advocates.

(3) The regulations may, in particular, provide—

(a) that a person may act as an independent mental capacity advocate only in such circumstances, or only subject to such conditions, as may be prescribed;

(b) for the appointment of a person as an independent mental capacity advocate to be subject to approval in accordance with the regulations.

(4) In making arrangements under subsection (1), the appropriate authority must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision.

(5) The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.

(6) For the purpose of enabling him to carry out his functions, an independent mental capacity advocate—

(a) may interview in private the person whom he has been instructed to represent, and

(b) may, at all reasonable times, examine and take copies of—

(i) any health record,

(ii) any record of, or held by, a local authority and compiled in connection with a social services function, and

(iii) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),

which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.

(7) In this section, section 36 and section 37, «the appropriate authority» means—

(a) in relation to the provision of the services of independent mental capacity advocates in England, the Secretary of State, and

(b) in relation to the provision of the services of independent mental capacity advocates in Wales, the National Assembly for Wales.

36. Funciones de los defensores independientes para la capacidad mental *(Functions of independent mental capacity advocates)*

(1) The appropriate authority may make regulations as to the functions of independent mental capacity advocates.

(2) The regulations may, in particular, make provision requiring an advocate to take such steps as may be prescribed for the purpose of—

(a) providing support to the person whom he has been instructed to represent («P») so that P may participate as fully as possible in any relevant decision;

(b) obtaining and evaluating relevant information;

(c) ascertaining what P's wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if he had capacity;

(d) ascertaining what alternative courses of action are available in relation to P;

(e) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained.

(3) The regulations may also make provision as to circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging, any relevant decision.

37. Aplicación de un tratamiento médico complejo por parte de un órgano del Servicio Nacional de Salud SNS *(Provision of serious medical treatment by NHS body)*

(1) This section applies if an NHS body—

(a) is proposing to provide, or secure the

provision of, serious medical treatment for a person («P») who lacks capacity to consent to the treatment, and

(b) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.

(2) But this section does not apply if P's treatment is regulated by Part 4 of the Mental Health Act.

(3) Before the treatment is provided, the NHS body must instruct an independent mental capacity advocate to represent P.

(4) If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with subsection (3).

(5) The NHS body must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the independent mental capacity advocate.

(6) «Serious medical treatment» means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority.

(7) «NHS body» has such meaning as may be prescribed by regulations made for the purposes of this section by—

(a) the Secretary of State, in relation to bodies in England, or

(b) the National Assembly for Wales, in relation to bodies in Wales.

38. Ingreso en instalaciones de un órgano del Servicio Nacional de Salud SNS (Provision of accommodation by NHS body)

(1) This section applies if an NHS body proposes to make arrangements—

(a) for the provision of accommodation in a hospital or care home for a person («P») who lacks capacity to agree to the arrangements, or

(b) for a change in P's accommodation to another hospital or care home,

and is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for it to consult in determining what would be in P's best interests.

(2) But this section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.

(3) Before making the arrangements, the NHS body must instruct an independent mental capacity advocate to represent P unless it is satisfied that—

(a) the accommodation is likely to be provided for a continuous period which is less than the applicable period, or

(b) the arrangements need to be made as a matter of urgency.

(4) If the NHS body—

(a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because it was satisfied that subsection (3)(a) or (b) applied, but

(b) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period—

(i) beginning with the day on which accommodation was first provided in accordance with the arrangements, and

(ii) ending on or after the expiry of the applicable period,

it must instruct an independent mental capacity advocate to represent P.

(5) The NHS body must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.

(6) «Care home» has the meaning given in section 3 of the Care Standards Act 2000 (c. 14).

(7) «Hospital» means—

(a) a health service hospital as defined by section 128 of the National Health Service Act 1977 (c. 49), or

(b) an independent hospital as defined by section 2 of the Care Standards Act 2000.

(8) «NHS body» has such meaning as may be

prescribed by regulations made for the purposes of this section by—

(a) the Secretary of State, in relation to bodies in England, or

(b) the National Assembly for Wales, in relation to bodies in Wales.

(9) «Applicable period» means—

(a) in relation to accommodation in a hospital, 28 days, and

(b) in relation to accommodation in a care home, 8 weeks.

39 Ingreso en instalaciones de una autoridad local *(Provision of accommodation by local authority)*

(1) This section applies if a local authority propose to make arrangements—

(a) for the provision of residential accommodation for a person («P») who lacks capacity to agree to the arrangements, or

(b) for a change in P's residential accommodation,

and are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for them to consult in determining what would be in P's best interests.

(2) But this section applies only if the accommodation is to be provided in accordance with—

(a) section 21 or 29 of the National Assistance Act 1948 (c. 29), or

(b) section 117 of the Mental Health Act,

as the result of a decision taken by the local authority under section 47 of the National Health Service and Community Care Act 1990 (c. 19).

(3) This section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.

(4) Before making the arrangements, the local authority must instruct an independent mental capacity advocate to represent P unless they are satisfied that—

(a) the accommodation is likely to be provided for a continuous period of less than 8 weeks, or

(b) the arrangements need to be made as a matter of urgency.

(5) If the local authority—

(a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because they were satisfied that subsection (4)(a) or (b) applied, but

(b) subsequently have reason to believe that the accommodation is likely to be provided for a continuous period that will end 8 weeks or more after the day on which accommodation was first provided in accordance with the arrangements,

they must instruct an independent mental capacity advocate to represent P.

(6) The local authority must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.

40. Exenciones *(Exceptions)*

The duty imposed by section 37(3), 38(3) or (4) or 39(4) or (5) does not apply where there is—

(a) a person nominated by P (in whatever manner) as a person to be consulted on matters to which that duty relates,

(b) a donee of a lasting power of attorney created by P who is authorised to make decisions in relation to those matters, or

(c) a deputy appointed by the court for P with power to make decisions in relation to those matters.»

(Texto reformado por Ley de Salud Mental 2007, cfr. Artículo 49)

41. Poder para ajustar la competencia del defensor independiente para la capacidad mental *(Power to adjust role of independent mental capacity advocate)*

(1) The appropriate authority may make regulations—

(a) expanding the role of independent mental capacity advocates in relation to persons who lack capacity, and

(b) adjusting the obligation to make arrangements imposed by section 35.

(2) The regulations may, in particular—

(a) prescribe circumstances (different to those set out in sections 37, 38 and 39) in which an independent mental capacity advocate must, or

circumstances in which one may, be instructed by a person of a prescribed description to represent a person who lacks capacity, and

(b) include provision similar to any made by section 37, 38, 39 or 40.

(3) «Appropriate authority» has the same meaning as in section 35.

F)Del Defensor Público *(The Public Guardian)*

Ley sobre Capacidad Mental de 2005 (Inglaterra y Gales) (Mental Capacity Act 2005) (England and Wales) (c. 9)

57. El Defensor Público *(The Public Guardian)*

(1) For the purposes of this Act, there is to be an officer, to be known as the Public Guardian.

(2) The Public Guardian is to be appointed by the Lord Chancellor.

(3) There is to be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine.

(4) The Lord Chancellor may, after consulting the Public Guardian—

(a) provide him with such officers and staff, or

(b) enter into such contracts with other persons for the provision (by them or their sub-contractors) of officers, staff or services,

as the Lord Chancellor thinks necessary for the proper discharge of the Public Guardian's functions.

(5) Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers.

58. Funciones del Defensor Público ***(Functions of the Public Guardian)***

(1) The Public Guardian has the following functions—

(a) establishing and maintaining a register of lasting powers of attorney,

(b) establishing and maintaining a register of orders appointing deputies,

(c) supervising deputies appointed by the court,

(d) directing a Court of Protection Visitor to visit—

(i) a donee of a lasting power of attorney,

(ii) a deputy appointed by the court, or

(iii) the person granting the power of attorney or for whom the deputy is appointed («P»),

and to make a report to the Public Guardian on such matters as he may direct,

(e) receiving security which the court requires a person to give for the discharge of his functions,

(f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court,

(g) reporting to the court on such matters relating to proceedings under this Act as the court requires,

(h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,

(i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.

(2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.

(3) The Lord Chancellor may by regulations make provision—

(a) conferring on the Public Guardian other functions in connection with this Act;

(b) in connection with the discharge by the Public Guardian of his functions.

(4) Regulations made under subsection (3)(b) may in particular make provision as to—

(a) the giving of security by deputies appointed by the court and the enforcement and discharge of security so given;

(b) the fees which may be charged by the Public Guardian;

(c) the way in which, and funds from which, such fees are to be paid;

(d) exemptions from and reductions in such fees;

(e) remission of such fees in whole or in part;

(f) the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity.

(5) For the purpose of enabling him to carry out his functions, the Public Guardian may, at all reasonable times, examine and take copies of—

(a) any health record,

(b) any record of, or held by, a local authority and compiled in connection with a social services function, and

(c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),

so far as the record relates to P.

(6) The Public Guardian may also for that purpose interview P in private.

59. Consejo del Defensor Público *(Public Guardian Board)*

(1) There is to be a body, to be known as the Public Guardian Board.

(2) The Board's duty is to scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate.

(3) The Lord Chancellor must, in discharging

his functions under sections 57 and 58, give due consideration to recommendations made by the Board.

(4) The members of the Board are to be appointed by the Lord Chancellor.

(5) The Board must have—

(a) at least one member who is a judge of the court, and

(b) at least four members who are persons appearing to the Lord Chancellor to have appropriate knowledge or experience of the work of the Public Guardian.

(6) The Lord Chancellor may by regulations make provision as to—

(a) the appointment of members of the Board (and, in particular, the procedures to be followed in connection with appointments);

(b) the selection of one of the members to be the chairman;

(c) the term of office of the chairman and members;

(d) their resignation, suspension or removal;

(e) the procedure of the Board (including quorum);

(f) the validation of proceedings in the event of a vacancy among the members or a defect in the appointment of a member.

(7) Subject to any provision made in reliance on subsection (6)(c) or (d), a person is to hold and vacate office as a member of the Board in accor-

dance with the terms of the instrument appointing him.

(8) The Lord Chancellor may make such payments to or in respect of members of the Board by way of reimbursement of expenses, allowances and remuneration as he may determine.

(9) The Board must make an annual report to the Lord Chancellor about the discharge of its functions.

60. Informe Anual *(Annual report)*

(1) The Public Guardian must make an annual report to the Lord Chancellor about the discharge of his functions.

(2) The Lord Chancellor must, within one month of receiving the report, lay a copy of it before Parliament.

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

6. El Defensor Público y sus funciones *(The Public Guardian and his functions)*

(1) The Accountant of Court shall be the Public Guardian.

(2) The Public Guardian shall have the following general functions under this Act—

(a) to supervise any guardian or any person who is authorised under an intervention order y circumstances made known to him in which the

property or financial affairs of an adult seem to him to be at risk;

(e) to provide, when requested to do so, a guardian, a continuing attorney, a withdrawer or a person authorised under an intervention order with information and advice about the performance of functions relating to property or financial affairs under this Act;

(f) to consult the Mental Welfare Commission and any local authority on cases or matters relating to the exercise of functions under this Act in which there is, or appears to be, a common interest.

(3) In subsection (2)(c) any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

7. El Defensor Público: otras disposiciones *(The Public Guardian: further provision)*

(1) The Scottish Ministers may prescribe—

(a) the form and content of the registers to be established and maintained under section 6(2)(b) and the manner and medium in which they are to be established and maintained;

(b) the form and content of any certificate which the Public Guardian is empowered to issue under this Act;

(c) the forms and procedure for the purposes of any application required or permitted to be made under this Act to the Public Guardian in relation to any matter;

(d) the evidence which the Public Guardian shall take into account when deciding under section 11(2) whether to dispense with intimation or notification to the adult.

(2) The Public Guardian may charge the prescribed fee for anything done by him in connection with any of his functions under this Act and he shall not be obliged to act until such fee is paid.

(3) Any certificate which the Public Guardian issues under this Act shall, for the purposes of any proceedings, be conclusive evidence of the matters contained in it.

G)De la acción de intervención en fondos dinerarios

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

25. Acción de intervención sobre fondos dinerarios *(Authority to intromit with funds)*

(1) Subject to section 34, an individual (which does not include a person acting in his capacity as an officer of a local authority or other body established by or under an enactment) may apply to the Public Guardian for authority under this Part to intromit with funds held by a person or organisation (the»fundholder») on behalf of an adult who is incapable in relation to decisions about the funds or of safeguarding his interests in the funds, and is the sole holder of an account in his name.

(2) An application for authority under this section shall be made in respect of a specified account with the fundholder and shall not be made if there is an existing authority to intromit under this Part.

26. Demanda de acción de intervención *(Application for authority to intromit)*

(1) An application form for authority to intromit with funds shall—

(a) state the purposes of the proposed intromission, setting out the specific sums relating to each purpose;

(b) be signed by the applicant;

(c) be countersigned by a member of such class of persons as is prescribed, who shall declare in the form that—

(i) he knows the applicant and has known him for at least 2 years prior to the date of the application;

(ii) he knows the adult;

(iii) he is not—

(A) a relative of or person residing with the applicant or the adult; or

(B) a director or employee of the fundholder; or

(C) a solicitor acting on behalf of the adult or any other person mentioned in this sub-paragraph in relation to any matter under this Act; or

(D) the medical practitioner who has issued the certificate under sub-paragraph (f);

(iv) he believes the information contained in the document to be true; and

(v) he believes the applicant to be a fit and proper person to intromit with the funds;

(d) contain the names and addresses of the nearest relative and primary carer of the adult, if known;

(e) identify the account with the fundholder in relation to which the authority is sought;

(f) be accompanied by a certificate in prescribed form from a medical practitioner that the adult is—

(i) incapable in relation to decisions about; or

(ii) incapable of acting to safeguard or promote his interests in,

the funds;

(g) contain an undertaking that he will open an account (the»designated account») solely for the purposes of—

(i) receiving funds transferred under section 29(1); and

(ii) intromitting with those funds.

(2) The applicant shall, not later than 14 days after the form has been countersigned as mentioned in subsection (1)(c), send the completed form to the Public Guardian.

(3) On receipt of a properly completed form sent timeously to him under subsection (2), the Public Guardian shall intimate the application to the adult, his nearest relative, his primary carer and any person who the Public Guardian considers has an interest in the application and advise them of the prescribed period within which they may object to the granting of the application; and he shall not grant the application without affording to any objector an opportunity of being heard.

(4) Having heard any objections as mentioned in subsection (3), the Public Guardian may grant the application and where he does so he shall—

(a) enter prescribed particulars in the register maintained by him under section 6(2)(b)(iii); and

(b) issue a certificate of authority to the withdrawer.

(5) A certificate of authority issued under subsection (4) shall instruct—

(a) the fundholder that the account held in the name of the adult; and

(b) the withdrawer that the designated account, must not be overdrawn; and if either account is overdrawn, the fundholder of that account shall have a right of relief against the withdrawer.

(6) A certificate of authority issued under subsection (4) shall instruct the fundholder of the account held in the name of the adult that no operations shall be carried out on the account other than those carried out in accordance with the certificate by the person authorised under this section.

(7) Where the Public Guardian proposes to refuse the application he shall intimate his decision to the applicant and advise him of the prescribed period within which he may object to the refusal; and he shall not refuse the application without affording to the applicant, if he objects, an opportunity of being heard.

(8) The Public Guardian may at his own instance or at the instance of the applicant or of any person who objects to the granting of the application remit the application for determination by the sheriff, whose decision shall be final.

(9) A decision of the Public Guardian—

(a) to grant an application under subsection (4) or to refuse an application; or

(b) to refuse to remit an application to the sheriff under subsection (8) above,

may be appealed to the sheriff, whose decision shall be final.

(10) In this Act an individual in respect of whom a form is registered under subsection (4) is referred to as a»withdrawer».

27. Notificación de cambio de domicilio *(Notification of change of address)*

After the name of a withdrawer has been registered under section 26 the withdrawer shall notify the Public Guardian—

(a) of any change in his address; and

(b) of any change in the address of the adult,

and the Public Guardian shall enter prescribed particulars in the register maintained by him under section 6(2)(b)(iii).

28. Objeto de la intervención sobre fondos dinerarios *(Purposes of intromissions with funds)*

(1) The purposes of intromissions with funds may include any or all of the following—

(a) the payment of central and local government taxes for which the adult is responsible;

(b) the provisions of sustenance, accommodation, fuel, clothing and related goods and services for the adult;

(c) the provision of other services provided for the purposes of looking after or caring for the adult;

(d) the settlement of debts owed by or incurred

in respect of the adult, including any prescribed fees charged by the Public Guardian in connection with the application to intromit.

(2) The Public Guardian may, in any case, authorise payment for the provision of items other than those mentioned in subsection (1).

(3) Subject to subsection (4), any funds used by the withdrawer shall be applied only for the benefit of the adult.

(4) Where the withdrawer lives with the adult, he may, to the extent authorised by the certificate, apply any funds withdrawn towards household expenses.

29. Extracción y uso de fondos dinerarios *(Withdrawal and use of funds)*

(1) On presentation to it of the certificate issued under section 26(4)(b), the fundholder of the account held in the name of the adult specified in the form may make arrangements to transfer to the designated account such sums as the Public Guardian shall authorise.

(2) The fundholder of an account held by an adult shall be liable to the adult for any funds removed from the account under this section at any time when it was aware that the withdrawer's authority had been terminated or suspended by the Public Guardian under section 31(3), but, on meeting such liability, the fundholder of the account shall have a right of relief against the withdrawer.

(3) The Public Guardian may authorise a method of payment other than a method mentioned in subsection (1).

(4) A decision of the Public Guardian not to authorise—

(a) a method of payment other than a method mentioned in subsection (1); or

(b) a payment under subsection (3),

may be appealed to the sheriff, whose decision shall be final.

30. Registro y pedido de informes *(Records and inquiries)*

(1) The Scottish Ministers may by regulations provide that a withdrawer shall keep a record of his intromissions with the funds and that the Public Guardian may at any time require a withdrawer to produce such record for the Public Guardian's inspection.

(2) The Public Guardian may—

(a) make inquiries from time to time as to the manner in which a withdrawer has exercised his functions under this Part; and

(b) ask the withdrawer to produce any records which he has relating to his intromissions.

(3) The Public Guardian may require a fundholder of an account in the name of an adult or of a designated account to make its records of the account available for inspection by the Public Guardian.

(4) A fundholder complying with a requirement under subsection (3) may charge a reasonable fee for doing so and may recover that fee from the account concerned.

31. Duración y fin del registro (Duration and termination of registration)

(1) Subject to the following provisions of this section, the authority of a withdrawer to intromit with funds under section 26 shall be valid for a period of 3 years commencing with the date of issue of the certificate by the Public Guardian under subsection (4)(b) of that section.

(2) The Public Guardian may reduce or extend the period of validity mentioned in subsection (1); and an extension may be without limit of time.

(3) The Public Guardian may suspend or terminate the authority of a withdrawer and shall forthwith intimate such suspension or termination to—

(a) the withdrawer;

(b) the fundholder of the designated account,

and such suspension or termination shall have the effect of suspending or, as the case may be, terminating all operations on that account.

(4) The Public Guardian may on terminating the authority of the withdrawer grant the withdrawer interim authority to continue to intromit with the funds of the adult for a period not exceeding 4 weeks from the date of the termination;

and paragraphs (a) and (b) of section 26(4) shall apply in the case of a grant of interim authority under this subsection as they apply to the grant of an application under that section.

(5) Subsections (1) and (2) are without prejudice to the right of the withdrawer to make subsequent applications under the said section 26 after the end of a valid period of authority to withdraw or, as the case may be, a suspension or termination of the authority.

(6) A decision of the Public Guardian to reduce or extend a period of validity mentioned in subsection (1) or to suspend or terminate the authority of a withdrawer under subsection (3) may be appealed to the sheriff, whose decision shall be final; and the suspension or termination shall remain in force until the appeal is determined.

(7) The authority of a withdrawer to withdraw funds under section 26 shall come to an end—

(a) on the appointment of a guardian with powers relating to the funds or account in question;

(b) on the granting of an intervention order relating to the funds or account in question; or

(c) on a continuing attorney's acquiring authority to act in relation to the funds or account in question,

but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of the coming to an end of a withdrawer's authority under this subsection.

(8) In subsection (7) any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

32. Cuentas bancarias conjuntas *(Joint accounts)*

Where an individual who along with one or more others is the holder of a joint account with a fundholder becomes incapable in relation to decisions about, or of safeguarding his interests in, the funds in the account, any other joint account holder may continue to operate the account unless—

(a) the terms of the account provide otherwise; or

(b) he is barred by an order of any court from so doing.

33. Transferencia de fondos *(Transfer of funds)*

(1) The Public Guardian may, on an application made at the same time as, or at any time after, an application for authority to intromit with funds held in a specified account by a fundholder, authorise the transfer of funds from that account to another specified account.

(2) In subsection (1), «specified» means specified in the application to transfer funds and in the authorisation of that transfer; and the account to which funds are transferred may be specified as to kind of account.

(3) A decision of the Public Guardian under subsection (1) may be appealed to the sheriff, whose decision shall be final.

34. Inaplicabilidad de la Parte 3 ***(artículos 25-33) (Disapplication of Part 3)***

(1) This Part shall not apply in the case of an adult in relation to whom—

(a) there is a guardian or continuing attorney with powers relating to the funds or account in question; or

(b) an intervention order has been granted relating to the funds or account in question,

but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of any such appointment or grant.

(2) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of

any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

6)Capacidad jurídica de las personas con discapacidad en centros de salud

A)Del ingreso compulsivo a hospitales

Ley de Salud Mental de 1983 (Mental Health Act 1983 c. 20) Reformada por Ley de Salud Mental de 2007 (Mental Health Act 2007 c. 12)

2. Ingreso para evaluación *(Admission for assessment)*

(1) A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below in pursuance of an application (in this Act referred to as «an application for admission for assessment») made in accordance with subsections (2) and (3) below.

(2) An application for admission for assessment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment) for at least a limited period; and

(b) he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons.

(3) An application for admission for assessment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with.

(4) Subject to the provisions of section 29(4) below, a patient admitted to hospital in pursuance of an application for admission for assessment may be detained for a period not exceeding 28 days beginning with the day on which he is admitted, but shall not be detained after the expiration of that period unless before it has expired he has become liable to be detained by virtue of a subsequent application, order or direction under the following provisions of this Act.

3. Ingreso para tratamiento *(Admission for treatment)*

(1) A patient may be admitted to a hospital and detained there for the period allowed by the

following provisions of this Act in pursuance of an application (in this Act referred to as «an application for admission for treatment») made in accordance with this section.

(2) An application for admission for treatment may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital; and

(…)

(c) it is necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment and it cannot be provided unless he is detained under this section; and

(d) appropriate medical treatment is available for him.

(3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraphs (a) and (d) of that subsection; and

(b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (c) of that subsection, specifying whether other methods of dealing with the patient are available and, if so, why they are not appropriate.

(4) In this Act, references to appropriate medical treatment, in relation to a person suffering from mental disorder, are references to medical treatment which is appropriate in his case, taking into account the nature and degree of the mental disorder and all other circumstances of his case.

4. Ingreso para evaluación en casos de emergencia *(Admission for assessment in cases of emergency)*

(1) In any case of urgent necessity, an application for admission for assessment may be made in respect of a patient in accordance with the following provisions of this section, and any application so made is in this Act referred to as «an emergency application».

(2) An emergency application may be made either by an approved mental health professional or by the nearest relative of the patient; and every such application shall include a statement that it is of urgent necessity for the patient to be admitted and detained under section 2 above, and that compliance with the provisions of this Part of this Act relating to applications under that section would involve undesirable delay.

(3) An emergency application shall be sufficient in the first instance if founded on one of the medical recommendations required by section 2 above, given, if practicable, by a practitioner who has previous acquaintance with the patient and otherwise complying with the requirements of section 12 below so far as applicable to a single recommendation, and verifying the statement referred to in subsection (2) above.

(4) An emergency application shall cease to have effect on the expiration of a period of 72 hours from the time when the patient is admitted to the hospital unless—

(a) the second medical recommendation required by section 2 above is given and received by the managers within that period; and

(b) that recommendation and the recommendation referred to in subsection (3) above together comply with all the requirements of section 12 below (other than the requirement as to the time of signature of the second recommendation).

(5) In relation to an emergency application, section 11 below shall have effect as if in subsection (5) of that section for the words «the period of 14 days ending with the date of the application» there were substituted the words «the previous 24 hours».

5. Demanda respecto de pacientes ya ingesado en hospital *(Application in respect of patient already in hospital)*

(1) An application for the admission of a patient to a hospital may be made under this Part of this Act notwithstanding that the patient is already an in-patient in that hospital or, in the case of an application for admission for treatment, that the patient is for the time being liable to be detained in the hospital in pursuance of an application for admission for assessment; and where an application is so made the patient shall be treated for the purposes of this Part of this Act as if he had been admitted to the hospital at the time when that application was received by the managers.

(2) If, in the case of a patient who is an in-patient in a hospital, it appears to the registered medical practitioner or approved clinician in charge of the treatment of the patient that an application ought to be made under this Part of this Act for the admission of the patient to hospital, he may furnish to the managers a report in writing to that effect; and in any such case the patient may be detained in the hospital for a period of 72 hours from the time when the report is so furnished.

(3) The registered medical practitioner or approved clinician in charge of the treatment of a patient in a hospital may nominate one (but not more than one) person to act for him under subsection (2) above in his absence.

(3A) For the purposes of subsection (3) above –

(a) the registered medical practitioner may

nominate another registered medical practitioner, or an approved clinician, on the staff of the hospital; and

(b) the approved clinician may nominate another approved clinician, or a registered medical practitioner, on the staff of the hospital.

(4) If, in the case of a patient who is receiving treatment for mental disorder as an in-patient in a hospital, it appears to a nurse of the prescribed class—

(a) that the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital; and

(b) that it is not practicable to secure the immediate attendance of a practitioner or clinician for the purpose of furnishing a report under subsection (2) above, the nurse may record that fact in writing; and in that event the patient may be detained in the hospital for a period of six hours from the time when that fact is so recorded or until the earlier arrival at the place where the patient is detained of a practitioner or clinician having power to furnish a report under that subsection.

(5) A record made under subsection (4) above shall be delivered by the nurse (or by a person authorised by the nurse in that behalf) to the managers of the hospital as soon as possible after it is made; and where a record is made

under that subsection the period mentioned in subsection (2) above shall begin at the time when it is made.

(6) The reference in subsection (1) above to an in-patient does not include an in-patient who is liable to be detained in pursuance of an application under this Part of this Act or a community patient and the references in subsections (2) and (4) above do not include an in-patient who is liable to be detained in a hospital under this Part of this Act or a community patient.

(7) In subsection (4) above «prescribed» means prescribed by an order made by the Secretary of State.

6. Efectos de la demanda de admisión ***(Effect of application for admission)***

(1) An application for the admission of a patient to a hospital under this Part of this Act, duly completed in accordance with the provisions of this Part of this Act, shall be sufficient authority for the applicant, or any person authorised by the applicant, to take the patient and convey him to the hospital at any time within the following period, that is to say—

(a) in the case of an application other than an emergency application, the period of 14 days beginning with the date on which the patient was last examined by a registered medical practitioner before giving a medical recommendation for the purposes of the application;

(b) in the case of an emergency application, the period of 24 hours beginning at the time when the patient was examined by the practitioner giving the medical recommendation which is referred to in section 4(3) above, or at the time when the application is made, whichever is the earlier.

(2) Where a patient is admitted within the said period to the hospital specified in such an application as is mentioned in subsection (1) above, or, being within that hospital, is treated by virtue of section 5 above as if he had been so admitted, the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act.

(3) Any application for the admission of a patient under this Part of this Act which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the application or any such medical recommendation is made or given or of any matter of fact or opinion stated in it.

(4) Where a patient is admitted to a hospital in pursuance of an application for admission for treatment, any previous application under this Part of this Act by virtue of which he was liable to be detained in a hospital or subject to guardianship shall cease to have effect.

B)Del régimen de tutela de los pacientes

Ley de Salud Mental de 1983 (Mental Health Act 1983 c. 20) Reformada por Ley de Salud Mental de 2007 (Mental Health Act 2007 c. 12)

7. Demanda de tutela *(Application for guardianship)*

(1) A patient who has attained the age of 16 years may be received into guardianship, for the period allowed by the following provisions of this Act, in pursuance of an application (in this Act referred to as «a guardianship application») made in accordance with this section.

(2) A guardianship application may be made in respect of a patient on the grounds that—

(a) he is suffering from mental disorder of a nature or degree which warrants his reception into guardianship under this section;

(b) it is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.

(3) A guardianship application shall be founded on the written recommendations in the prescribed form of two registered medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in subsection (2) above are complied with; and each such recommendation shall include—

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in paragraph (a) of that subsection; and

(b) a statement of the reasons for that opinion so far as it relates to the conditions set out in paragraph (b) of that subsection.

(4) A guardianship application shall state the age of the patient or, if his exact age is not known to the applicant, shall state (if it be the fact) that the patient is believed to have attained the age of 16 years.

(5) The person named as guardian in a guardianship application may be either a local social services authority or any other person (including the applicant himself); but a guardianship application in which a person other than a local social services authority is named as guardian shall be of no effect unless it is accepted on behalf of that person by the local social services authority for the area in which he resides, and shall be accompanied by a statement in writing by that person that he is willing to act as guardian.

8. Efectos de la demanda de tutela *(Effect of guardianship application, etc)*

(1) Where a guardianship application, duly made under the provisions of this Part of this Act and forwarded to the local social services authority within the period allowed by subsection (2) below

is accepted by that authority, the application shall, subject to regulations made by the Secretary of State, confer on the authority or person named in the application as guardian, to the exclusion of any other person—

(a) the power to require the patient to reside at a place specified by the authority or person named as guardian;

(b) the power to require the patient to attend at places and times so specified for the purpose of medical treatment, occupation, education or training;

(c) the power to require access to the patient to be given, at any place where the patient is residing, to any registered medical practitioner, approved mental health professional or other person so specified.

(2) The period within which a guardianship application is required for the purposes of this section to be forwarded to the local social services authority is the period of 14 days beginning with the date on which the patient was last examined by a registered medical practitioner before giving a medical recommendation for the purposes of the application.

(3) A guardianship application which appears to be duly made and to be founded on the necessary medical recommendations may be acted upon without further proof of the signature or qualification of the person by whom the appli-

cation or any such medical recommendation is made or given, or of any matter of fact or opinion stated in the application.

(4) If within the period of 14 days beginning with the day on which a guardianship application has been accepted by the local social services authority the application, or any medical recommendation given for the purposes of the application, is found to be in any respect incorrect or defective, the application or recommendation may, within that period and with the consent of that authority, be amended by the person by whom it was signed; and upon such amendment being made the application or recommendation shall have effect and shall be deemed to have had effect as if it had been originally made as so amended.

(5) Where a patient is received into guardianship in pursuance of a guardianship application, any previous application under this Part of this Act by virtue of which he was subject to guardianship or liable to be detained in a hospital shall cease to have effect.

(…)

10. Transferencia de la tutela en caso de muerte o incapacidad del tutor ***(Transfer of guardianship in case of death, incapacity, etc of guardian)***

(1) If any person (other than a local social

services authority) who is the guardian of a patient received into guardianship under this Part of this Act—

(a) dies; or

(b) gives notice in writing to the local social services authority that he desires to relinquish the functions of guardian, the guardianship of the patient shall thereupon vest in the local social services authority, but without prejudice to any power to transfer the patient into the guardianship of another person in pursuance of regulations under section 19 below.

(2) If any such person, not having given notice under subsection (1)(b) above, is incapacitated by illness or any other cause from performing the functions of guardian of the patient, those functions may, during his incapacity, be performed on his behalf by the local social services authority or by any other person approved for the purposes by that authority.

(3) If it appears to the county court, upon application made by an approved mental health professional acting on behalf of the local social services authority, that any person other than a local social services authority having the guardianship of a patient received into guardianship under this Part of this Act has performed his functions negligently or in a manner contrary to the interests of the welfare of the patient, the court may order that the guardianship of the

patient be transferred to the local social services authority or to any other person approved for the purpose by that authority.

(4) Where the guardianship of a patient is transferred to a local social services authority or other person by or under this section, subsection (2)(c) of section 19 below shall apply as if the patient had been transferred into the guardianship of that authority or person in pursuance of regulations under that section.

(5) In this section «the local social services authority», in relation to a person (other than a local social services authority) who is the guardian of a patient, means the local social services authority for the area in which that person resides (or resided immediately before his death).

C)Del consentimiento para un tratamiento médico

Ley de Salud Mental de 1983 (Mental Health Act 1983 c. 20) Reformada por Ley de Salud Mental de 2007 (Mental Health Act 2007 c. 12)

57. Tratamiento que requiere consentimiento y una segunda opinión *(Treatment requiring consent and a second opinión)*

(1) This section applies to the following forms of medical treatment for mental disorder—

(a) any surgical operation for destroying

brain tissue or for destroying the functioning of brain tissue; and

(b) such other forms of treatment as may be specified for the purposes of this section by regulations made by the Secretary of State.

(2) Subject to section 62 below, a patient shall not be given any form of treatment to which this section applies unless he has consented to it and—

(a) a registered medical practitioner appointed for the purposes of this Part of this Act by the Secretary of State (not being the responsible clinician (if there is one) or the person in charge of the treatment in question) and two other persons appointed for the purposes of this paragraph by the Secretary of State (not being registered medical practitioners) have certified in writing that the patient is capable of understanding the nature, purpose and likely effects of the treatment in question and has consented to it; and

(b) the registered medical practitioner referred to in paragraph (a) above has certified in writing that it is appropriate for the treatment to be given.

(3) Before giving a certificate under subsection (2)(b) above the registered medical practitioner concerned shall consult two other persons who have been professionally concerned with the patient's medical treatment but of those persons—

(a) one shall be a nurse and the other shall be

neither a nurse nor a registered medical practitioner; and

(b) neither shall be the responsible clinician (if there is one) or the person in charge of the treatment in question.

(4) Before making any regulations for the purpose of this section the Secretary of State shall consult such bodies as appear to him to be concerned.

58 Tratamiento que requiere consentimiento y una segunda opinión *(Treatment requiring consent or a second opinión)*

(1) This section applies to the following forms of medical treatment for mental disorder—

(a) such forms of treatment as may be specified for the purposes of this section by regulations made by the Secretary of State;

(b) the administration of medicine to a patient by any means (not being a form of treatment specified under paragraph (a) above or section 57 above or section 58A(1)(b) below) at any time during a period for which he is liable to be detained as a patient to whom this Part of this Act applies if three months or more have elapsed since the first occasion in that period when medicine was administered to him by any means for his mental disorder.

(2) The Secretary of State may by order vary the length of the period mentioned in subsection (1)(b) above.

(3) Subject to section 62 below, a patient shall not be given any form of treatment to which this section applies unless—

(a) he has consented to that treatment and either the approved clinician in charge of it or a registered medical practitioner appointed for the purposes of this Part of this Act by the Secretary of State has certified in writing that the patient is capable of understanding its nature, purpose and likely effects and has consented to it;

(b) a registered medical practitioner appointed as aforesaid (not being the responsible clinician or the approved clinician in charge of the treatment in question) has certified in writing that the patient is not capable of understanding the nature, purpose and likely effects of that treatment or being so capable has not consented to it but that it is appropriate for the treatment to be given.

(4) Before giving a certificate under subsection (3)(b) above the registered medical practitioner concerned shall consult two other persons who have been professionally concerned with the patient's medical treatment, but of those persons—

(a) one shall be a nurse and the other shall be neither a nurse nor a registered medical practitioner; and

(b) neither shall be the responsible clinician or the person in charge of the treatment in question.

(5) Before making any regulations for the purposes of this section the Secretary of State shall

consult such bodies as appear to him to be concerned.

58. Terapia de Electroshock etc. ***(A Electro-convulsive therapy, etc.)***

(1) This section applies to the following forms of medical treatment for mental disorder—

(a) electro-convulsive therapy; and

(b) such other forms of treatment as may be specified for the purposes of this section by regulations made by the appropriate national authority.

(2) Subject to section 62 below, a patient shall be not be given any form of treatment to which this section applies unless he falls within subsection (3), (4) or (5) below.

(3) A patient falls within this subsection if—

(a) he has attained the age of 18 years;

(b) he has consented to the treatment in question; and

(c) either the approved clinician in charge of it or a registered medical practitioner appointed as mentioned in section 58(3) above has certified in writing that the patient is capable of understanding the nature, purpose and likely effects of the treatment and has consented to it.

(4) A patient falls within this subsection if—

(a) he has not attained the age of 18 years; but

(b) he has consented to the treatment in question; and

(c) a registered medical practitioner appointed as aforesaid (not being the approved clinician in charge of the treatment) has certified in writing—

(i) that the patient is capable of understanding the nature, purpose and likely effects of the treatment and has consented to it; and

(ii) that it is appropriate for the treatment to be given.

(5) A patient falls within this subsection if a registered medical practitioner appointed as aforesaid (not being the responsible clinician (if there is one) or the approved clinician in charge of the treatment in question) has certified in writing—

(a) that the patient is not capable of understanding the nature, purpose and likely effects of the treatment; but

(b) that it is appropriate for the treatment to be given; and

(c) that giving him the treatment would not conflict with—

(i) an advance decision which the registered medical practitioner concerned is satisfied is valid and applicable;

(ii) a decision made by a donee or deputy or by the Court of Protection.

(6) Before giving a certificate under subsection (5) above the registered medical practitioner concerned shall consult two other persons who

have been professionally concerned with the patient's medical treatment, but of those persons—

(a) one shall be a nurse and the other shall be neither a nurse nor a registered medical practitioner; and

(b) neither shall be the responsible clinician (if there is one) or the approved clinician in charge of the treatment in question.

(7) This section shall not by itself confer sufficient authority for a patient who falls within section 56(5) above to be given a form of treatment to which this section applies if he is not capable of understanding the nature, purpose and likely effects of the treatment (and cannot therefore consent to it).

(8) Before making any regulations for the purposes of this section, the appropriate national authority shall consult such bodies as appear to it to be concerned.

(9) In this section—

(a) a reference to an advance decision is to an advance decision (within the meaning of the Mental Capacity Act 2005) made by the patient;

(b) «valid and applicable», in relation to such a decision, means valid and applicable to the treatment in question in accordance with section 25 of that Act;

(c) a reference to a donee is to a donee of a lasting power of attorney (within the meaning of section 9 of that Act) created by the patient,

where the donee is acting within the scope of his authority and in accordance with that Act; and

(d) a reference to a deputy is to a deputy appointed for the patient by the Court of Protection under section 16 of that Act, where the deputy is acting within the scope of his authority and in accordance with that Act.

(10) In this section, «the appropriate national authority» means—

(a) in a case where the treatment in question would, if given, be given in England, the Secretary of State;

(b) in a case where the treatment in question would, if given, be given in Wales, the Welsh Ministers.

59. Plan de tratamiento *(Plans of treatment)*

Any consent or certificate under section 57, 58 or 58A above may relate to a plan of treatment under which the patient is to be given (whether within a specified period or otherwise) one or more of the forms of treatment to which that section applies.

60. Retirada del consentimiento *(Withdrawal of consent)*

(1) Where the consent of a patient to any treatment has been given for the purposes of section 57, 58 or 58A above, the patient may, subject

to section 62 below, at any time before the completion of the treatment withdraw his consent, and those sections shall then apply as if the remainder of the treatment were a separate form of treatment.

(1A) Subsection (1B) below applies where—

(a) the consent of a patient to any treatment has been given for the purposes of section 57, 58 or 58A above; but

(b) before the completion of the treatment, the patient ceases to be capable of understanding its nature, purpose and likely effects.

(1B) The patient shall, subject to section 62 below, be treated as having withdrawn his consent, and those sections shall then apply as if the remainder of the treatment were a separate form of treatment.

(1C) Subsection (1D) below applies where—

(a) a certificate has been given under section 58 or 58A above that a patient is not capable of understanding the nature, purpose and likely effects of the treatment to which the certificate applies; but

(b) before the completion of the treatment, the patient becomes capable of understanding its nature, purpose and likely effects.

(1D) The certificate shall, subject to section 62 below, cease to apply to the treatment and those sections shall then apply as if the remainder of the treatment were a separate form of treatment.

(2) Without prejudice to the application of

subsections (1) to (1D) above to any treatment given under the plan of treatment to which a patient has consented, a patient who has consented to such a plan may, subject to section 62 below, at any time withdraw his consent to further treatment, or to further treatment of any description, under the plan.

61. Revisión del tratamiento *(Review of treatment)*

(1) Where a patient is given treatment in accordance with section 57(2), 58(3)(b) or 58A(4) or (5) above, or by virtue of section 62A below in accordance with a Part 4A certificate (within the meaning of that section), a report on the treatment and the patient's condition shall be given by the approved clinician in charge of the treatment to the Secretary of State—

(a) on the next occasion on which the responsible clinician furnishes a report under section 20(3), 20A(4) or 21B(2) above in respect of the patient; and

(b) at any other time if so required by the Secretary of State.

(2) In relation to a patient who is subject to a restriction order, limitation direction or restriction direction subsection (1) above shall have effect as if paragraph (a) required the report to be made—

(a) in the case of treatment in the period of six

months beginning with the date of the order or direction, at the end of that period;

(b) in the case of treatment at any subsequent time, on the next occasion on which the responsible clinician makes a report in respect of the patient under section 41(6), 45B(3) or 49(3) above.

(3) The Secretary of State may at any time give notice directing that, subject to section 62 below, a certificate given in respect of a patient under section 57(2), or 58(3(b) or 58A(4) or (5) above shall not apply to treatment given to him after a date specified in the notice and sections 57, 58 and 58A above shall then apply to any such treatment as if that certificate had not been given.

(3A) The notice under subsection (3) above shall be given to the approved clinician in charge of the treatment.

62. Tratamiento de urgencia *(Urgent treatment)*

(1) Sections 57 and 58 above shall not apply to any treatment—

(a) which is immediately necessary to save the patient's life; or

(b) which (not being irreversible) is immediately necessary to prevent a serious deterioration of his condition; or

(c) which (not being irreversible or hazardous) is immediately necessary to alleviate serious suffering by the patient; or

(d) which (not being irreversible or hazardous) is immediately necessary and represents the minimum interference necessary to prevent the patient from behaving violently or being a danger to himself or to others.

(1A) Section 58A above, in so far as it relates to electro-convulsive therapy by virtue of subsection (1)(a) of that section, shall not apply to any treatment which falls within paragraph (a) or (b) of subsection (1) above.

(1B) Section 58A above, in so far as it relates to a form of treatment specified by virtue of subsection (1)(b) of that section, shall not apply to any treatment which falls within such of paragraphs (a) to (d) of subsection (1) above as may be specified in regulations under that section.

(1C) For the purposes of subsection (1B) above, the regulations—

(a) may make different provision for different cases (and may, in particular, make different provision for different forms of treatment);

(b) may make provision which applies subject to specified exceptions; and

(c) may include transitional, consequential, incidental or supplemental provision.

(2) Sections 60 and 61(3) above shall not preclude the continuation of any treatment or of treatment under any plan pending compliance with section 57, 58 or 58A above if the approved

clinician in charge of the treatment considers that the discontinuance of the treatment or of treatment under the plan would cause serious suffering to the patient.

(3) For the purposes of this section treatment is irreversible if it has unfavourable irreversible physical or psychological consequences and hazardous if it entails significant physical hazard.

63. Tratamientos que no requieren de consentimiento *(Treatment not requiring consent)*

The consent of a patient shall not be required for any medical treatment given to him for the mental disorder from which he is suffering not being a form of treatment to which section 57, 58 or 58A above applies, if the treatment is given by or under the direction of the approved clinician in charge of the treatment.

D)De la administración de las finanzas de residentes *(Management of residents' finances)*

Ley sobre Adultos con Incapacidad de 2000 (Escocia) (Adults with Incapacity) (Scotland) Act 2000 (asp 4)

35. Aplicación de la Parte 4 (artículos 35-46) *(Application of Part 4)*

(1) Subject to subsection (3), this Part applies to the management of the matters set out in section 39 relating to any resident of any of the following establishments—

(a) a hospital or other premises mentioned in section 10(3)(a) of the Nursing Homes Registration (Scotland) Act 1938 (c. 73) («the 1938 Act»);

(b) a nursing home registered under the 1938 Act;

(c) a hospital or similar institution which, but for section 6 of that Act, would require to be registered under the 1938 Act;

(d) an establishment in respect of which there is registration under section 61B, 62 or 63 of the Social Work (Scotland) Act 1968 (c. 49) («the 1968 Act»);

(e) an establishment in relation to which, but for the exception provided by section 61(1A)(a) of the 1968 Act, there would require to be registration under section 62 or 63 of the 1968 Act;

(f) a private hospital registered under Part IV of the Mental Health (Scotland) Act 1984 (c. 36) («the 1984 Act»);

(g) a State hospital.

(2) In this Part establishments mentioned in paragraph (b), (ca), (cb), (d) or (f) of subsection (1) are referred to as»registered establishments», all other establishments mentioned in subsection (1) are referred to as»unregistered establishments», and registered and unregistered establishments

together are referred to as»authorised establishments».

(3) This Part shall not apply to a registered establishment where notice in writing is given to the supervisory body by—

(a) the managers of the registered establishment; or

(b) an applicant for registration of an establishment,

that it shall not apply.

(4) The Scottish Ministers may by regulations amend the list of authorised establishments set out in subsection (1).

(5) In this Part,»the managers» has the meaning set out in schedule 1; and»resident» in relation to an authorised establishment means an adult whose main residence for the time being is the authorised establishment or who is liable to be detained there under the 1984 Act.

36. Registro a los efectos de administrar las finanzas de residentes *(Registration for purposes of managing residents' finances)*

After section 61A of the Social Work (Scotland) Act 1968 (c. 49) there shall be inserted—

«61B Registration for purpose of managing residents' finances (1) Any residential or other establishment in respect of which there is no requirement to register under section 61 of this

Act may apply for registration under this Part of this Act for the purposes only of Part 4 (Management of Residents' Finances) of the Adults with Incapacity (Scotland) Act 2000 (asp 4).

(2) Where an application for registration to which subsection (1) applies is granted, the establishment shall be entered in the register kept for the purposes of section 61(2) above by the local authority or, as the case may be, the Scottish Ministers.

(3) The provisions of this Part of this Act shall apply to establishments to which this section applies subject to the following—

(a) section 61(2) and (3) shall not apply;

(b) section 62(8) and (8A) shall not apply;

(c) section 65 shall not apply;

(d) the provisions of section 67(1) shall apply only where the person carrying on the establishment is registered.».

37. Residentes cuyos asuntos pueden ser administrados *(Residents whose affairs may be managed)*

(1) The managers of an authorised establishment shall be entitled to manage on behalf of any resident in the establishment in relation to whom a certificate has been issued under subsection (2) any of the matters set out in section 39.

(2) Where the managers of an authorised establishment, having considered all other appro-

priate courses of action, have decided that management on behalf of the resident of the matters set out in section 39 by them is the most appropriate course of action, they shall cause to be examined by a medical practitioner any resident in the establishment who they believe may be incapable in relation to decisions as to, or of safeguarding his interest in, any of the resident's affairs referred to in section 39; and if the medical practitioner finds that the resident is so incapable he shall issue a certificate in prescribed form to that effect.

(3) Subject to subsection (8), the managers of the authorised establishment shall intimate their intention of requiring an examination under subsection (2) to the resident and to the resident's nearest relative.

(4) Subject to subsection (8), the managers of the authorised establishment shall—

(a) send a copy of the certificate to the resident and to the supervisory body, who shall notify the resident's nearest relative;

(b) notify the resident and the supervisory body that they intend to manage the resident's affairs.

(5) Notification under subsection (4)(b) shall include a statement as to what other courses of action had been considered and why they were not considered appropriate.

(6) The medical practitioner who certifies under this section shall not—

(a) be related to the resident or to any of the managers of the authorised establishment;

(b) have any direct or indirect financial interest in the authorised establishment.

(7) A certificate—

(a) shall be reviewed where it appears to the managers of the authorised establishment, the medical practitioner who certifies under this section or any person having an interest in any of the resident's affairs mentioned in section 39 that there has been any change in the condition or circumstances of the resident bearing on the resident's incapacity; and

(b) shall expire 3 years after it was issued.

(8) If the managers of the authorised establishment consider that intimation to the resident under subsection (3) or any action under subsection (4) would be likely to pose a serious risk to the health of the resident they may apply to the supervisory body for a direction that they need not make the intimation or take the action.

(9) The Scottish Ministers may prescribe the evidence which the supervisory body shall take into account in reaching a decision under subsection (8).

38. Procedimiento financiero y controles en establecimientos registrados *(Financial procedures and controls in registered establishments)*

(1) In section 1(3) of the Nursing Homes Registration (Scotland) Act 1938 (c. 73) («the 1938 Act»), after paragraph (d) there shall be inserted—

«(e) that the applicant does not maintain financial procedures and controls adequate to ensure the safeguarding of any property of a resident of the home which the applicant will be required to manage.».

(2) In section 4(1)(a) of the 1938 Act, after subparagraph (ii) there shall be inserted «; and

(iii) the financial procedures and controls relating to residents' property.».

(3) In section 62(3) of the Social Work (Scotland) Act 1968 (c. 49), after paragraph (c) there shall be inserted—

«(d) that the applicant does not maintain financial procedures and controls adequate to ensure the safeguarding of any property of a resident of the establishment which the applicant will be required to manage.».

(4) In section 13(1) of the 1984 Act, after paragraph (a) there shall be inserted—

«(aa) that the person proposing to carry on the establishment maintains financial procedures and controls adequate to ensure the safeguarding of any property of a resident of the hospital which that person will be required to manage.».

39. Asuntos que pueden ser administrados *(Matters which may be managed)*

(1) The matters which may be managed under this Part by the managers of an authorised establishment are—

(a) claiming, receiving, holding and spending any pension, benefit, allowance or other payment other than under the Social Security Contributions and Benefits Act 1992 (c. 4);

(b) claiming, receiving, holding and spending any money to which a resident is entitled;

(c) holding any other moveable property to which the resident is entitled;

(d) disposing of such moveable property,

and in this Part these matters, or any of them, are referred to as residents' affairs; and cognate expressions shall be construed accordingly.

(2) In managing these matters, the managers of an authorised establishment shall—

(a) act only for the benefit of the resident; and

(b) have regard to the sentimental value that any item might have for the resident, or would have but for the resident's incapacity.

(3) The managers of an authorised establishment shall not, without the consent of the supervisory body, manage any matter if that matter has a value greater than that which is prescribed for the purposes of this subsection.

(4) The supervisory body may in relation to an individual resident permit the managers of the authorised establishment to manage any matter which has a value greater than that which is prescribed in relation to it under subsection (3).

(5) For the purpose of this section,»manage» denotes no greater responsibility than complying with the duties set out in this section.

40. Órganos de control *(Supervisory bodies)*

(1) A supervisory body for the purposes of this Part is—

(a) in relation to a registered establishment (other than an establishment mentioned in paragraph (f) of section 35(1)), the person or body with whom the establishment is required to register;

(b) in relation to an authorised establishment mentioned in paragraphs (a), (c), (f) or (g) of section 35(1), the Health Board for the area in which the authorised establishment is situated;

(c) in relation to an authorised establishment mentioned in paragraph (e) of that section, the local authority of the area in which the authorised establishment is situated, and any reference in this Part to an authorised establishment in relation to a supervisory body is a reference to an authorised establishment for which the supervisory body is responsible.

(2) A supervisory body shall from time to time make inquiry as to the manner in which the managers of an authorised establishment are carrying out the management of residents' affairs and in particular the manner in which they are carrying out their functions under section 41.

(3) A supervisory body shall investigate any complaint received as to the manner in which the managers of an authorised establishment are managing residents' affairs.

(4) The Scottish Ministers may by regulations amend the list of supervisory bodies set out in subsection (1).

41. Deberes y obligaciones de los administradores de establecimientos autorizados *(Duties and functions of managers of authorised establishment)*

The managers of an authorised establishment shall, in relation to residents whose affairs they are managing under section 39—

(a) claim, receive and hold any pension, benefit, allowance or other payment to which the resident is entitled other than under the Social Security Contributions and Benefits Act 1992 (c. 4);

(b) keep the funds of residents separate from the funds of the establishment;

(c) comply with any requirements of the supervisory body as respects keeping the funds of residents separate or distinguishable from each other;

(d) ensure that where, at any time, the total amount of funds held on behalf of any resident exceeds such sum as may from time to time be prescribed they shall be placed so as to earn interest;

(e) keep records of all transactions made in relation to the funds held by them in respect of each resident for whose benefit the funds are held and managed and, in particular, ensure that details of the balance and any interest due to each resident can be ascertained at any time;

(f) produce such records when requested to do so by the resident, his nearest relative or the supervisory body;

(g) spend money only on items or services which are of benefit to the resident on whose behalf the funds are held;

(h) not spend money on items or services which are provided by the establishment to or for such resident as part of its normal service;

(i) make proper provision for indemnifying residents against any loss attributable to—

(i) any act or omission on the part of the managers of the establishment in exercising the powers conferred by this Part or of others for whom the managers are responsible or attributable to any expenditure in breach of paragraph (g);

(ii) any breach of duty, misuse of funds or failure to act reasonably and in good faith on the part of the managers.

42. Autorización de administrador designado para extraer fondos de la cuenta de un residente ***(Authorisation of named manager to withdraw from resident's account)***

(1) On an application in writing by the managers of an authorised establishment the supervisory body may issue a certificate of authority under this section in relation to any resident named in the application.

(2) An application under subsection (1) shall specify one or more persons (being managers, officers or members of staff of the establishment) who shall exercise the authority conferred by this section.

(3) A certificate of authority shall be signed by the officer of the supervisory body authorised by the body to do so and shall—

(a) specify accounts or other funds of the resident;

(b) name the persons specified in the application (the»authorised persons»);

(c) specify the period of validity of the certificate of authority, being a period not exceeding the period of validity of the certificate issued under section 37(2).

(4) The authorised persons may make withdrawals from such account or source of funds of the named resident as is specified in the certificate of authority and the fundholder may make payments accordingly.

(5) The supervisory body may at any time after it has issued a certificate of authority, revoke it and if it does so it shall notify the fundholder of the revocation.

43. Declaración de los asuntos del residente *(Statement of resident's affairs)*

(1) In this section,»resident» means a resident of an authorised establishment whose affairs are being managed in accordance with the provisions of this Part and»statement» means a statement of the affairs of the resident.

(2) Where a resident ceases to be incapable of managing his affairs, the managers of the establishment shall prepare a statement as at the date on which he ceases to be incapable and shall give a copy to him.

(3) Where a resident moves from an authorised establishment to another authorised establishment, the managers of the establishment from which he moves shall, except where he has ceased to be incapable, prepare a statement as at the date on which he moves and shall send a copy of the statement to the managers of the other establishment.

(4) Where a resident leaves an authorised establishment, other than to move to another authorised establishment and except where he has ceased to be incapable, the managers of the establishment shall prepare a statement as at the date on which he leaves and shall give a copy of the statement to any person who appears to them to be the person who will manage his affairs.

44. Residente que cesan su condición del tal en establecimientos autorizados *(Resident ceasing to be resident of authorised establishment)*

(1) Where a resident ceases to be a resident of an authorised establishment, or ceases to be incapable, the managers of the establishment shall continue, for a period not exceeding 3 months from the date on which he ceases to be a resident or, as the case may be, to be incapable, to manage his affairs while such other arrangements as are necessary for managing his affairs are being made.

(2) At the end of the period referred to in subsection (1) during which the managers of the establishment have continued to manage the resident's affairs, they shall prepare a statement and shall give a copy of it to—

(a) the resident, if he has ceased to be incapable; or

(b) any person who appears to them to be the person who will manage his affairs.

(3) Where a resident ceases to be a resident of an authorised establishment and his affairs are to be managed by another establishment, authority or person (including himself) the managers of the establishment shall take such steps as are necessary to transfer his affairs to that establishment, authority or person, as the case may be.

(4) Where a resident ceases to be a resident of an authorised establishment the managers of the establishment shall within 14 days of that event inform—

(a) the supervisory body; and

(b) where the resident has not ceased to be incapable and has moved neither—

(i) to another authorised establishment; nor

(ii) into the care of a local authority,

the local authority of the area in which they expect him to reside.

45. Apelaciones, revocaciones etc. ***(Appeal, revocation etc)***

(1) Where it appears to a supervisory body that the managers of an authorised establishment are no longer operating as such or have failed to comply with any requirement of this Part or that, for any other reason, it is no longer appropriate that they should continue to manage residents' affairs it may revoke—

(a) in the case of a registered establishment to which section 61B of the Social Work (Scotland) Act 1968 (c. 49) applies, the registration;

(b) in any other case, the power to manage.

(2) Where the managers of a registered establishment have given notice to the supervisory body under section 35(3) the supervisory body shall revoke the registration.

(3) Where a registration or a power to manage has been revoked under this section, the supervisory body shall within a period of 14 days from such revocation take over management of the residents' affairs and, where they do so, comply with the requirements imposed by and under this Part upon the managers of an authorised establishment.

(4) The supervisory body shall, within the period of 3 months after taking over management of residents' affairs under subsection (3), cause that management to be transferred to such other establishment, authority or person (who may be the resident) as they consider appropriate.

(5) Where the supervisory body is satisfied that the circumstances mentioned in subsection (1) no longer apply in relation to an establishment whose power to manage it has revoked, it may annul the revocation of the power and, where necessary, of the registration.

(6) Any decision of a supervisory body may be appealed to the sheriff, whose decision shall be final.

46. Inaplicabilidad de la Parte 4 (artículos 35-45) ***(Disapplication of Part 4)***

(1) This Part shall not apply to any of the matters which may be managed under section 39 if—

(a) there is a guardian, continuing attorney, or other person with powers relating to that matter; or

(b) an intervention order has been granted relating to that matter,

but no liability shall be incurred by any person who acts in good faith under this Part in ignorance of any guardian, continuing attorney, other person or intervention order.

(2) In this section any reference to—

(a) a guardian shall include a reference to a guardian (however called) appointed under the law of any country to, or entitled under the law of any country to act for, an adult during his incapacity, if the guardianship is recognised by the law of Scotland;

(b) a continuing attorney shall include a reference to a person granted, under a contract, grant or appointment governed by the law of any country, powers (however expressed), relating to the granter's property or financial affairs and having continuing effect notwithstanding the granter's incapacity.

7)Capacidad jurídica de las personas con discapacidad para la realización de actos jurídicos

A)De la capacidad en materia de matrimonio

Ley de Matrimonio de 1949 (Marriage Act 1949 c. 76)

3: Matrimonio de personas menores a 21 años (Marriages of persons under twenty-one)

(1) Where the marriage of a child, not being a widower or widow, is intended to be solemnized on the authority issued by a superintendent registrar under Part III of this Act, the consent of the person or persons specified in subsection (1A) of this section shall be required:

Provided that—

(a) if the superintendent registrar is satisfied that the consent of any person whose consent is so required cannot be obtained by reason of absence or inaccessibility or by reason of his being under any disability, the necessity for the consent of that person shall be dispensed with, if there is any other person whose consent is also required; and if the consent of no other person is required, the Registrar General may dispense with the necessity of obtaining any consent, or the court may, on application being made, consent to the marriage, and the consent of the court so given shall have the same effect as if it had been given by the person whose consent cannot be so obtained;

(b) if any person whose consent is required refuses his consent, the court may, on application being made, consent to the marriage, and the consent of the court so given shall have the same

effect as if it had been given by the person whose consent is refused.

(1A)The consents are—

(a) subject to paragraphs (b) to (d) of this subsection, the consent of—

(i) each parent (if any) of the child who has parental responsibility for him; and

(ii) each guardian (if any) of the child;

(b) where a residence order is in force with respect to the child, the consent of the person or persons with whom he lives, or is to live, as a result of the order (in substitution for the consents mentioned in paragraph (a) of this subsection);

(c) where a care order is in force with respect to the child, the consent of the local authority designated in the order (in addition to the consents mentioned in paragraph (a) of this subsection);
(…)

(d) where neither paragraph (b) nor (c) of this subsection applies but a residence order was in force with respect to the child immediately before he reached the age of sixteen, the consent of the person or persons with whom he lived, or was to live, as a result of the order (in substitution for the consents mentioned in paragraph (a) of this subsection).

(1B)In this section «guardian of a child», «parental responsibility», «residence order» and «care order» have the same meaning as in the Children Act 1989.]

(Texto reformado por Ley de Reforma del Derecho de Familia de 1987-Family Law Reform Act 1987-)

B)De la capacidad en materia contractual

Ley de Compraventa de Bienes de 1979 (Sale of Goods Act 1979 c.54)

Contrato de Compra-venta:

2. Contrato de compra-venta *(Contract of sale)*

(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

(2) There may a contract of sale between one part owner and another.

(3) A contract of sale may be absolute or conditional.

(4) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contact is called a sale.

(5) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

(6) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

3. Capacidad para comprar y vender *(Capacity to buy and sell)*

(1) Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property.

(2) Where necessaries are sold and delivered to a minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.

(3) In subsection (2) above 'necessaries' means goods suitable to the condition in life of the minor or other person concerned and to his actual requirements at the time of the sale and delivery.

Ley sobre Derechos de Terceros en los Contraltos de 1999 (Contracts (Rights of Third Parties) Act 1999 c. 31)

1. Derecho de tercero de ejecutar los términos del contrato (Right of third party to enforce contractual term)

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a «third party») may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him. (…)

2. Variación y rescisión del contrato *(Variation and rescission of contract)*

(…)

(4) Where the consent of a third party is required under subsection (1) or (3), the court or arbitral tribunal may, on the application of the parties to the contract, dispense with his consent if satisfied—

(a) that his consent cannot be obtained because his whereabouts cannot reasonably be ascertained, or

(b) that he is mentally incapable of giving his consent. (…)

8)Legislación notarial

A)Organización de los notarios

Ley de Servicios jurídicos y judiciales de 1990 (Courts and Legal Services Act 1990 c.41)

Designación y reglamentación de los Notarios *(Notaries)*

(1) Public notaries shall no longer be appointed to practise only within particular districts in England, or particular districts in Wales.

(2) It shall no longer be necessary to serve a period of apprenticeship before being admitted as a public notary.

(…)

(4) The Master may by rules make provision—

(a) as to the educational and training qualifications which must be satisfied before a person may be granted a faculty to practise as a public notary;

(b) as to further training which public notaries are to be required to undergo;

(c) for regulating the practice, conduct and discipline of public notaries;

(d) supplementing the provision made by subsections (8) and (9);

(e) as to the keeping by public notaries of records and accounts;

(f) as to the handling by public notaries of clients' money;

(g) as to the indemnification of public notaries against losses arising from claims in respect of civil liability incurred by them;

(h) as to compensation payable for losses suffered by persons in respect of dishonesty on the part of public notaries or their employees; and

(i) requiring the payment, in such circumstances as may be prescribed, of such reasonable fees as may be prescribed, including in particular fees for—

(i) the grant of a faculty;

(ii) the issue of a practising certificate by the Court of Faculties of the Archbishop of Canterbury; or

(iii) the entering in that court of a practising certificate issued under the [1974 c. 47.] Solicitors Act 1974.

(5) The repeal of section 2 of the Act of 1833 and section 37 of the Act of 1914 by this Act shall not affect any appointment made under either of those sections; but the Master may by rules make such provision as he considers necessary or expedient in consequence of either, or both, of those repeals.

(6) Rules made under subsection (5) may, in particular, provide for the grant by the Master of a new faculty for any person to whom the Notary Public (Welsh Districts) Rules 1924 applied immediately before the commencement of this section, in place of the faculty granted to him by the Clerk of the Crown in Chancery.

(7) Subsections (4) to (6) shall not be taken to prejudice—

(a) any other power of the Master to make rules; or

(b) any rules made by him under any such power.

(8) With effect from the operative date, any restriction placed on a qualifying district notary, in terms of the district within which he may practise as a public notary, shall cease to apply.

(9) In this section—

«Master» means the Master of the Faculties;

«the operative date» means the date on which subsection (1) comes into force or, if on that date the notary concerned is not a qualifying district notary (having held his faculty for less than five years)—

(a)the date on which he becomes a qualifying district notary; or

(b)such earlier date, after the commencement of subsection (1), as the Master may by rules prescribe for the purpose of this subsection;

«prescribed» means prescribed by rules made under this section; and

«qualifying district notary» means a person who—

(a)holds a faculty as a notary appointed under section 2 of the Act of 1833 or section 37 of the Act of 1914; and

(b)has held it for a continuous period of at least five years.

(10) Section 5 of the [1533 c. 21.] Ecclesiastical Licences Act 1533 (which amongst other things now has the effect of requiring faculties to be registered by the Clerk of the Crown in Chancery) shall not apply in relation to any faculty granted to a public notary.

(11) Nothing in this section shall be taken—

(a) to authorise any public notary to practise as a notary or to perform or certify any notarial act within the jurisdiction of the Incorporated

Company of Scriveners of London or to affect the jurisdiction or powers of the Company; or

(b) to restrict the power of the Company to require a person seeking to become a public notary within its jurisdiction to serve a period of apprenticeship.

B)Reglamentos de actuación notarial

Reglamento de la Práctica Notarial de 2001 (Notaries Practice Rules 2001)

19. Deber de registro (protocolización) ***(Duty to Keep Records)***

19.1. A notary shall keep proper records of his notarial acts in accordance with this rule.

19.2. The records so kept shall be sufficient to identify:

19.2.1. the date of the act;

19.2.2. the person at whose request the act was performed;

19.2.3. the person or persons, if any, intervening in the act and, in the case of a person who intervened in a representative capacity, the name of his principal;

19.2.4. the method of identification of the party or parties intervening in the notarial act, and in the case of a party intervening in a representative capacity, any evidence produced to the notary of that party's entitlement so to intervene;

19.2.5. the nature of the act;

19.2.6. the fee charged.

19.3. In the case of a notarial act in the public form, the notary shall place an original of the act or a complete photographic copy of the same in a protocol which shall be preserved permanently by the notary.

19.4. Records of acts not in public form kept in accordance with rule 19.2 shall be preserved for a minimum period of twelve years and, for the avoidance of doubt, such preservation may be by means of a suitable digital or other electronic system providing for the storage of documents in an indelible and unalterable format.

19.5. A copy of a notarial act or of the record of a notarial act preserved in accordance with rules 19.3 and 19.4 shall, upon payment of a reasonable fee, be issued upon the application of any person or authority having a proper interest in the act unless prevented by order of a competent court.

19.6. Any question as to whether a person has a proper interest in an act for the purposes of rule 19.5 shall be determined by the Master.

9)Normativa general sobre discapacidad

·Disability (Grants) Act 1993
·Disability Living Allowance and

Disability Working Allowance Act 1991
·Disability Discrimination Act 1995
·Disability Rights Commission Act 1999
·Special Educational Needs and Disability Act 2001
Disability Discrimination Act 2005

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FUNDACIÓN FAEX
ALBEAR DE EXTREMADURA
Fundación Carlos III
Fundación Æquitas