

GLOUCESTERSHIRE MULTI AGENCY MENTAL CAPACITY ACT POLICY

APPENDIX 10



Applications to the Court of Protection: a Guide for Council Staff

This note has been produced to offer guidance to Councils about when the intervention of the Court of Protection may be needed in relation to welfare decisions where a person lacks mental capacity for the decision. Any decision in relation to an application to Court¹ must be informed by the Mental Capacity Act (MCA), the MCA Code of Practice and case law. This is a short summary and overview and not legal advice, which should always be sought in individual situations.

1 Court means Court of Protection throughout this document

INTRODUCTION

The Court of Protection is a specialist court, which deals with decisions affecting people aged 16 or over, who may lack capacity to make specific decisions. Generally, the court has a range of powers, including decisions about:

- whether a person has capacity to make a particular decision
- whether an action is in a person's best interests
- whether a person is being deprived of their liberty
- the validity of lasting and enduring powers of attorney
- the appointment of deputies.

BEFORE CONSIDERING AN APPLICATION TO COURT

The following steps are likely to be needed in most social care cases before an application to Court is considered.

1. A Care Act assessment for the person concerned, including, where applicable, an analysis of risk and a risk management plan
2. If the person has “significant difficulty” in participating in the Care Act assessment, an “appropriate individual” should be identified to represent them;
3. A decision specific capacity assessment.
4. Consideration of relevant advocacy (including Care Act advocacy if no appropriate person can be found to assist the individual in a Care Act assessment).
5. Determine whether anyone holds a Lasting Power of Attorney for Health and Welfare decisions or whether there is a Deputy appointed for Health and Welfare.
6. Clarify which decisions are needed, who can make them, which options are available and will be funded and where necessary ensure there is a best interests decision.
7. Explore informal resolution processes, such as face to face meetings and mediation.
8. Where appropriate, explore formal dispute resolution such as a formal complaint or referral to the Local Government Ombudsman but this should not delay a necessary Court application.

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TO ASSIST IN DETERMINING WHETHER COURT INTERVENTION IS NEEDED

Many acts of care can be delivered and many actions taken by reliance on Section 5 of the MCA where the person lacks capacity to consent and the action is in their best interests. Section 6 of the Act limits the use of force or restraint in relation to these actions by specifying that it must be necessary to protect the person from harm and a proportionate response to the likelihood and seriousness of harm.

Therefore where the principles of the MCA have been followed and the use of force or restraint is proportionate to likelihood and seriousness of the harm, the intervention of the Court is unlikely to be needed.

TO HELP IN DETERMINING PROPORTIONALITY

Asking the following questions may help to determine whether the proposed act or action is proportionate.

1. Does the proposed intervention exceed what is allowed under the MCA?

2. Do any necessary restrictions in themselves amount to a deprivation of liberty (which cannot be authorised by Section 5) and therefore a breach of Article 5 of the European Convention on Human Rights (ECHR)?
3. Does the person, any family members or someone concerned with the welfare of the person who lacks capacity, object to the interventions proposed?
4. Is there an interference with the person's family life (which includes decisions around sexual relationships) which may breach Article 8 ECHR?
5. Is the intervention because of a significant welfare issue which cannot be resolved such as moving a person who lacks capacity into residential accommodation where either they or their family object?
6. Is the intervention needed due to concern that contact of some kind between the person who lacks capacity and another individual is detrimental to their health or welfare?
7. Is there a need to agree a tenancy agreement for a person who lacks capacity to do so and has no one legally appointed to act for them?
8. Is there a need to authorise a deprivation of liberty in a setting other than a care home or hospital or for a young person aged 16 to 18?
9. Is the person expressing an objection to the care arrangements which suggest they would wish to appeal a decision that they are deprived of liberty and no one has issued proceedings?

Any of the above situations are likely to need further discussion and legal advice in relation to an application to the Court of Protection.

WHAT OPTIONS ARE THERE IF THE PERSON HAS CAPACITY TO MAKE THE RELEVANT DECISIONS?

In certain cases if the person has capacity to make the relevant decisions but is vulnerable and is experiencing undue pressure or duress, an application can be made to the High Court for orders to be made under its inherent jurisdiction directed against those who are exerting the pressure/duress. Legal advice must be sought if this is a possibility.

Additionally it is a criminal offence in England and Wales for someone to subject a person to coercive control. In these situations there is recourse by reporting to the police. There may also be protection through the Family Court. Further information can be found here <http://rightsofwomen.org.uk/get-information/violence-against-women-and-international-law/coercive-control-and-the-law/> 3

SPECIFIC SITUATIONS IN MORE DETAIL

When it is necessary for someone who lacks capacity to consent, to move in order that their care and support needs can be met

It is important to be aware that the Council has no right to require anyone to move from their home without applying the safeguards described below or applying to Court for prior approval. This is a difficult area as sometimes it is necessary that they move in order that their care and support needs can be met.

It is now fair to say that Court approval is not necessary in every case and not every situation requiring a move from home will be an emergency (legal advice should always be sought).

Some people will need to move into care or from one care setting to another because of a breakdown in arrangements at home; fire, flood, provider failure or an increase in their care needs, for example, and where there is no objection (either from the person themselves or their family members) then a move should be able to take place. **Prior** to any move there must be an assessment of capacity, a best interests decision and a Deprivation of Liberty Safeguards (DoLS) standard authorisation in place (if the person will be deprived of their liberty at a care home or hospital once they move).

Sometimes a move into residential care will relate to more urgent situations which will require careful consideration of the need to seek Court approval prior to the move.

Such circumstances would include the following, a move which will:

- Result in a sufficiently serious interference with the person's Article 8 European Convention right to respect for their private and family life, e.g. when the person objects either by word or actions to the move.
- Result in a deprivation of liberty and there is not time to ensure that a standard authorisation is in place prior to the move.
- Result in a deprivation of liberty in a setting other than a care home or hospital.

In all cases involving a move to a care home or hospital at the very least a Standard Authorisation ought to be in place prior to the move (even if only respite is proposed - see below) but this may not always be adequate. In cases involving a move to a different setting prior approval of the Court may be needed.

In an emergency a person may be deprived of their liberty by relying on Section 4B MCA this is where a deprivation of liberty is necessary in order to give the person life-sustaining treatment or carry out 'vital acts' – i.e. acts reasonably believed to be necessary to prevent a serious deterioration in the person's condition. **This can only be done after or at the same time as an application is made to the Court of Protection.** 4

1. Transporting a Person to a Care Home/Hospital

Usually transporting someone who lacks capacity for the decision, from their home, to a hospital or care home by ambulance **in an emergency** will not amount to a deprivation of liberty and can be achieved under the wider provisions of the MCA.

Exceptions to this needing further consideration would be:

- When it is necessary to involve the police to gain entry to the person's home to assist with the move
- When it is necessary to do more than persuade or use transient physical restraint of the person during the move so that, for example, force or the threat of force have to be used to overcome the individual's resistance to be transported
- When the person may have to be sedated
- When subterfuge has to be used.
- When the journey is exceptionally long or otherwise very onerous for the individual

In these circumstances authority will be needed from the Court of Protection, either prior to the removal or (in emergency situations contemplated by Section 4B of the MCA) at the same time as the removal is taking place.

The Court will expect a detailed conveyance plan to be prepared and submitted which will usually include planning for restraint and consideration of the less restrictive options in relation to the move.

2. Respite situations

Respite for a period of anything beyond a few days (2-3) possibly less if particularly intense measures of control are imposed, will need to be considered in exactly the same way as described above, if the acid test is met.

It is important that a move is not described as 'respite' when, in reality, it is intended to be permanent. There may be some limited circumstances under which it may be lawful to conceal from the individual the true purpose of their move, but these are very likely to be circumstances in which the sanction of the Court is required.

3. Deprivation of liberty in a setting other than a hospital or care home

In any case where a person 16 and over² is receiving care in a setting other than a hospital or care home, in a way that meets the acid test of a deprivation of liberty, these arrangements must be authorised by the Court. This is generally referred to as a deprivation of liberty Order.

2 Deprivation of liberty must be authorised for those under 16 also. Further advice will be needed.

Where care is entirely privately funded, such as a court-appointed Deputy administering personal injury damages awards, if the care arrangements meets the "acid test," and the person cannot consent, this must also be authorised by the Court. The Deputy should inform the relevant Local Authority of the situation. There is a streamlined process to enable the court to authorise deprivation of liberty in these settings, as they cannot be authorised by using the Deprivation of Liberty Safeguards (DoLS) 5

It is expected that, except in an emergency, the deprivation of liberty order must be in place before the deprivation of liberty starts.

During the application to Court the person will need support to make sure they are involved as much as they are able, in the process. This support can come from either a litigation friend or what is called a Rule 3A representative.

The Council should consider whether a family member or friend is willing to be the litigation friend (further detail can be found here <https://www.gov.uk/litigation-friend/suitability>) or Rule 3A representative (this is to make sure the person's voice is heard). An explanatory note for families in relation to this role can be found here: <http://www.bailii.org/ew/cases/EWCOP/2016/16.html>

If there is no one who can or will do this then the Council need to consider whether anyone else, such as an IMCA, for example, could do this. In situations where there is no one able to do this the case may be stayed by the Court but Councils are strongly advised not to delay making applications in such cases.

NB: Once the application has been put in, the Council may, if applicable, be authorised to deprive the person of their liberty under s.4B MCA (see above), if the deprivation of liberty is necessary to give the person life-sustaining treatment or to carry out 'vital acts'

<http://www.39essex.com/content/wp-content/uploads/2016/11/Judicial-Deprivation-of-Liberty-authorisations-Nov-2016.pdf>

4. Limiting contact

Limiting contact between a person and their family or friends is likely to involve or to raise serious issues under Article 8 ECHR and as such is likely to require Court approval. The Court has previously issued useful guidance regarding the restriction of contact arrangements with a person in a care home in their best interests (WCC v GS (2011) EWHC 2244 (COP)) this decision offers a framework where a Council considers restrictions need to be imposed on contact visits. These must be evidenced before an application to the Court is made to restrict contact.

- 1. Keep any contact arrangements under review** - nothing should be set in stone.
- 2. Detail every step of a contact session** - In some cases there will be a need to manage every step from the arranging of the visit to the arrival of the family member at the home until their departure. In other cases, a more general approach can be appropriate.
- 3. Create a contact schedule** - The dates and times of visits will need to be set out clearly in a contact schedule.
- 4. Have a contingency plan** – this is sometimes needed to address problems, for example, if the family member cannot get to the home on a particular day due to an emergency.
- 5. Consider additional resources** - Is it appropriate for financial assistance to be made available by the local authority or other relevant third party to the relative for travelling to and from a care home.
- 6. Consider supervision** - If the visit is to be supervised, who is to supervise and what level of supervision is required. In some cases the supervision may take the form of detailed note taking by an independent person; in other cases it may be a cursory check-up by a member of the care home staff; however, in other cases, the allocated social worker may attend to just keep a watching brief.
- 7. Build in flexibility for the care home** – The home or contact supervisor may need to cancel, shorten or lengthen a visit if circumstances deem it appropriate, either before the visit or during the visit.

8. Are conditions necessary - Contact arrangements may include provision that the family member not be rude to or harass staff or other residents, the point of entry and exit to and from the care home, the fact that other residents need to be left alone, that their care should not be interfered with, restrictions as to what food and drink can be brought into the home and the venue in the home for contact.

9. A record of the visit - The level of formality will depend on the situation. In more serious cases every word may need to be recorded and in other cases a note will simply be taken that the visit passed without incident and everything went well.

5. Tenancy agreements

Although the MCA allows for decisions to be made in a person's best interests this does not extend to **signing** legal documents, such as tenancy agreements.

Someone can only sign a tenancy agreement on the person's behalf if they are:

- An attorney under a registered lasting power of attorney (LPA) or enduring power of attorney (EPA);
- A deputy appointed by the Court of Protection; or
- Someone else authorised to sign by the Court of Protection.

In some circumstances, landlords may be willing to accept unsigned tenancies. Even if the landlord will accept an unsigned agreement, it would also be appropriate to make an application where there is a dispute or if it is not clear whether the tenancy offer is in the person's best interests.

If the person has a registered attorney under an EPA or LPA, or has a deputy appointed to make decisions on their behalf, then the deputy or attorney can terminate or enter into a tenancy agreement without further authorisation from the court.

A Deputy does not need to be appointed if the only issue is the tenancy agreement.

Tenancy issues can also be raised during applications to authorise deprivation of liberty and there will be a benefit to the person and to the process by ensuring such requests are co-ordinated.

6. Deprivation of Liberty 21A appeals

Where a DoLS authorisation is in place the route to challenge is an appeal to the Court. This is known as a section 21A appeal. The appeal is a key Article 5 protection for the person and attracts non-means tested legal aid.

There are protections in place to ensure the person is supported with an appeal through the appointment of a Relevant Persons Representative (RPR) or in some circumstances the involvement of an Independent Mental Capacity Advocate (IMCA). However case law has made it clear that the Council as supervisory body must also act robustly to ensure cases are taken to Court where an appeal is required.

The recent case of RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAS) (Rev 1) [2016] EWCOP 49 (04 August 2016) gave detailed guidance to help in determining whether an appeal should be brought. This involves considering first the persons capacity to bring an appeal and then whether their wishes can be evidenced from their preferences or from their behaviour. More detailed guidance is identified at the end of this guide. 7

i This assumes the Mental Health Act 1983 is not being used and as such describes situations where the Mental Capacity Act will be relied on.

7. Other scenarios

Consideration of a court application may also be needed in the following situations if the Council believes that a person with care and support needs lacks the capacity to take the relevant decision and:

- There is reason to believe that they are engaging in sexual relations or may be about to enter into a marriage,
- Someone has funds other than state benefits, but has no-one to administer them, or the Council has concerns about the person who is administering them.

This Guide was prepared by Lorraine Currie with thanks to

Shropshire Council for use of their Protocol for Applications to the Court of Protection.

39 Essex Chambers for reference to “when to apply to the Court of Protection” factsheet.

Neil Allen, 39 Essex Chambers

Alex Ruck Keene, 39 Essex Chambers

Heather Blow, Lincolnshire County Council

Wendy Black, Lincolnshire County Council

Sheila Williams for administrative support and proof reading.