Court of Protection Protocol
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Court of Protection Protocol

This protocol has been produced to offer guidance to staff about good practice in case management prior to accessing the Court of Protection in relation to welfare disputes and the procedure to follow when an application may be needed[1]. The text boxes are an aide memoire and refer staff to relevant legislation and/or steps to follow at certain stages in the process. Where the term 'the person' is used this refers to the person subject to an application under the Court of Protection.

Introduction

The Court of Protection is a specialist court, set up as part of the Mental Capacity Act (MCA), to deal with decision-making for persons (those 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 the persons best interests
- whether a person is being deprived of their liberty
- the validity of lasting and enduring powers of attorney
- the appointment of deputies.

The MCA Code of Practice gives further advice about the Court of Protection in Chapter 8.

Five Guiding Principles of the Mental Capacity Act	
Principle 1: **A presumption of capacity**	Every adult has the right to make their own decision and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume someone cannot make a decision for themselves just because they have a particular medical condition or disability.
Principle 2: **Individuals being supported to make their own decisions**	You must take all practicable steps to support the person to make the decision before deciding that they lack capacity. If a lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.
Principle 3: **Unwise decisions**	People might make what others regard as an unwise or eccentric decision based on their own values, beliefs and preferences. You cannot treat them as lacking capacity for that reason.
Principle 4: **Best interests**	If a person has been assessed as lacking capacity then any action taken, or any decision made for, or on behalf of that person, must be made in his or her best interests.
Principle 5: **Less restrictive option**	When you are making a decision on behalf of a person who lacks capacity you must consider whether it is possible to decide or act in a way that would least interfere with the person's rights and freedoms of action.

[1]Please note that this Protocol does not apply to applications to the CoP for community DoLS

Decisions about whether an application should be made to the Court of Protection must be informed by the MCA Code of Practice and case law, staff must always apply the guiding principles of the MCA

Good practice in case management before considering an application to court

In all cases a thorough Care Act assessment is crucial to determine the person's care and support needs. This step comes before any consideration of best interests. As the first principle referred to above indicates, the MCA directs that you must presume someone to have capacity but if you have doubts you should undertake a mental capacity assessment. This assessment will determine whether the person has mental capacity in relation to care and support needs.

This level of decision will need a formal assessment of the person's capacity if their capacity is in doubt. This will be formally recorded on the Shropshire Council Assessment tool and will be followed, if capacity is lacking, by a best interests decision regarding the decisions required. Each decision that needs to be taken in relation to the individual has to be considered separately as the person may have capacity to make some decisions but not others. A timeline may help identify what the changes in capacity are and how that challenges the person's continued independence.

The best interests' decision-making process (explained in more detail below) will then be able to consider available options. You will need to have obtained confirmation of which option/s will be funded before proceeding any further, including what current funding is in place. Best interests' decisions should include an analysis of the benefits and burdens of all available options and alternatives that have been considered. In order to establish as much as possible about the person's wishes and feelings a pen picture will be needed of the person to include; historical biographical information, previous occupation, family circumstances, and community engagement. This is vital to understand who they are and what their views might have been had they still retained capacity. Though not determinative, the wishes and feelings of the person are to be given particular weight. Indeed, the Court of Protection has regularly emphasized the particular importance of establishing and taking into account what they are. Ensure an assessment of the carer (if appropriate) is carried out and needs addressed. Would an increase in support enable the person to remain independent? All decisions must be evidenced based and recorded

Remember that capacity is time and decision specific

Practice tips

- Consider use of assistive technology to establish patterns of behaviour and to identify risks.
- Consider fluctuating needs that may impact on capacity. Making an accurate appraisal of fluctuating needs requires time to establish the full extent of the fluctuation. An expert opinion may be needed to support any assessment.
- Consider whether other agencies should be playing a more prominent role. For instance, is this more a health matter than social care.
- Decisions should avoid the tendency towards protection of the individual who lacks capacity and not be risk averse.

Steps in case management before an application to court is considered

The following steps are essential in all situations when working with a person with care and support needs. If you are considering an application to the Court of Protection this means that you consider there to be a significant welfare dispute or unresolved conflict. The following steps will already have been taken but it is the social workers responsibility to ensure they are robust.

1. Complete the Personal Profile (Care Act assessment) which will include an analysis of risk and a risk management plan.
2. Complete the Support Plan (following approval of the options if necessary by Support Planning Forum)
3. Ensure reasonable adjustments have been made to support the individual to participate in the process.
4. If the person has "significant difficulty" in participating in the assessment, identify an "appropriate individual" to represent them (for further detail see the blue box below).
5. Complete a decision- specific capacity assessment
6. If there is no "appropriate individual" refer to CAAN for an independent advocate or consider an IMCA referral if the mandatory requirements are met.
7. Begin a chronology of events, ensure all observations are up to date and all communications are recorded.

8. 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.
9. Ask to see a copy of the LPA or Deputyship. If no copy is made available you can complete form 'OPG 100' to search the register. This is a free service. https://www.gov.uk/find-someones-attorney-or-deputy Determine which decisions are needed, who can make them and where necessary hold a best interests meeting.
10. Make sure that the advocate or "appropriate individual" is included at each step.

Care Act Reminder

"Substantial difficulty" means difficulty in one of these areas	Appropriate individual must not be
• Understanding relevant information • Retaining information • Using or weighing up information (as part of being involved in the key process) • Communicating their views, wishes and feelings	• already providing care or treatment to the person in a professional capacity or on a paid basis • someone the person does not want to support them • Someone who is unlikely to be able to, or available to, adequately support the person's involvement • Someone implicated in an enquiry into abuse or neglect or who has been judged by a safeguarding adult review to have failed to event abuse or neglect.

Best interests decision making

Before any application to Court is considered there must be a clear record of the best interest decision/s under consideration. The social worker must follow the statutory checklist and must use the Shropshire Council template for recording on Liquid Logic.

Best interests meeting tips

- Use the statutory checklist as a process of acquiring evidence
- Maintain focus on the best outcome for the person taking into account what is known about their wishes and feelings and what is important to their wellbeing, bearing in mind the less restrictive option.
- The persons wishes and feelings are of particular importance
- Gather the views of all the professionals involved and other interested parties including family members, informal carers and provider services. It is an opportunity to clarify individual opinions and the reasoning for their view.
- All available options should be considered but please ensure funding is in place or has been agreed
- Provide a record of decision making and actions why a particular course of action was identified.
- If the persons wishes cannot be adhered to please give reasons why
- Consideration should be given to what further assessments or expert opinion may be needed
- Record all opinions, including any dissent and the reasoning for each view
- Conclude with a summary of decisions reached, actions to be taken, by whom and when

MCA 2005 statutory checklist for making best interest decisions

- **It is important not to make assumptions on the basis of the person's age or appearance, condition or any aspect of their behaviour.**
- **The decision-maker must consider all the relevant circumstances relating to the decision in question.**
- **The decision-maker must consider whether the person is likely to regain capacity. If so, can the decision or act wait until then?**
- **The decision-maker must involve the person as fully as possible in the decision that is being made. The decision maker must consider:**
- **The person's past and present wishes and feelings (particularly if they have been written down)**
- **Any beliefs and values (e.g. religious, cultural or moral) likely to influence the decision in question.**
- **As far as possible the decision-maker must consult other people and take into account their views as to what would be in the best interests of the person lacking capacity, especially:**
- **What they think is in their best interests and**
- **What they know about their wishes and feelings**

Other factors the person would have considered if they could

Disputes

Usually the best interest's decision-making process will help everyone to share their views and generally agreement will be reached on the way forward. Occasionally there will a dispute for example, a family member, advocate or the person themselves may have a strong view about what is in the persons best interests, which may differ considerably from that of the local authority. Where there is a dispute it is important to try to diffuse the situation using principles of conflict resolution (see table below) or to consider alternatives to legal action. These include:

- Informal resolution processes, face to face meetings and mediation.
- Following a complaints or disputes resolution procedure.
- Suggesting that the family or person refer their concerns to the Local Government Ombudsman
- Conflict Resolution

Conflict Resolution

Conflict can be perceived as a threat	
Ignoring disagreements can lead to conflict developing	Try to understand the other person's perspective
Conflict triggers an emotional reaction	
Try to de-personalise the situation	Listen to the emotion not just the words
Good communication skills can prevent disagreements developing into conflicts	
Acknowledge differences of opinion	Acknowledge good intentions even if views differ

The social worker, Senior and Team Manager will need to be certain that all informal dispute resolution methods have been tried, without success before proceeding to consider an application to the Court of Protection.

Next Steps

If you are considering an application to Court this suggests that there is still a conflict or an unresolved welfare issue at the conclusion of the best interests' decision-making process.

Remember that you do not necessarily need a consensus in order to proceed with the decision - this will depend on the kind of intervention necessary.

Remember:

If the person has capacity for the decision in question then an application to the Court of Protection is not possible. In such circumstances, the only options available are

- **the Mental Health Act 1983 if the person meets the criteria for detention or**
- **to consider the intervention of the Police (Police and Criminal Evidence Act) if it is deemed necessary to enter without warrant to save life or limb if there is a serious risk of harm.**
- **In certain cases if the person is a vulnerable and is experiencing undue pressure or duress an application can be made to the High Court for a decision under the inherent jurisdiction. Legal advice must be sought in these circumstances**
- **If the person is in danger due to criminal activity then the police should be contacted.**

If the person lacks capacity the following will need to be evidenced before a decision can be made on how to proceed.

- All less restrictive interventions must have been explored before a decision is taken to seek the intervention of the Court. This does not mean any less restrictive interventions need to have been tried first but the practitioner needs to evidence why they are not appropriate given the likelihood and risk of harm.
- A comprehensive risk assessment and plan in relation to the intervention required from the Court. This will identify the risks, the likelihood of the risk occurring and the proposed intervention in response to the risk.
- If restraint will be necessary then each measure proposed should be identified from the least restrictive to the most restrictive including how each measure is proportionate to the likelihood and risk of harm.
- Any support required from outside agencies such as police, ambulance service should be identified.

The social worker has been the decision maker to this point but from here on in full discussion must take place with Senior and Team Manager before instigating a legal planning meeting

Are you able to say yes to the following questions?

1. **Is there is still a substantive dispute relating to the welfare of a vulnerable person who lacks capacity to make a decision on the issue?**
2. **Have attempts to resolve the dispute been unsuccessful?**
3. **Does the LA believe it is necessary to commence proceedings in the Court of Protection so as to protect the person from abuse or neglect or otherwise to promote their best interests?**

Considerations from this point on

Section 5 of the MCA allows acts in relation to care and treatment to be carried out where the person lacks capacity to consent and the action is in their best interests. Section 6 of the Act places limits on the use of force or restraint in relation to such action by specifying that it must be necessary to protect the person from harm and a proportionate response to the likelihood and seriousness of harm.

There are therefore many acts which can be carried out under the MCA, where the principles of the MCA have been fully adhered to and the use of force or restraint is demonstrably proportionate to the likelihood and seriousness of harm.

1. At this point the practitioner needs to consider whether the proposed intervention may exceed what is allowed under the MCA. In particular the question of whether the restrictions in themselves amount to a deprivation of liberty (which cannot be authorised by Section 5) and would therefore be, without taking further steps, a breach of Article 5 of the Human Rights Act (HRA). **If the intervention includes restrictions which exceed what is allowed under the MCA an application to the Court of Protection may be needed before any steps are taken. Legal advice will be needed.**
2. The practitioner needs to consider whether any family member or person concerned in the welfare of the person who lacks capacity or indeed the person themselves, objects to the interventions proposed. If there is no family to support the person then an IMCA should be appointed as a matter of urgency. If the person themselves or their family objects then the practitioner must consider the implications of Article 8 HRA. If there is an interference with the person's family life (which includes decisions around sexual relationships) an application will need to be considered. **Legal advice will be need to be sought at this point**
3. The practitioner should also consider whether the intervention is as a result of a significant welfare issue which cannot be resolved. Examples of such situations are moving a person who lacks capacity into residential accommodation in order to meet their care and support needs but where either they or their family object or where there is concern that contact of some kind between the person who lacks capacity and another individual is detrimental to their welfare **At this**

point you need to make reference to the questions in the blue box above and this will give you some guidance as to whether an application may be needed to the Court of Protection. Legal advice will be needed at this point and a Legal Planning Meeting should be convened. (For further situations that may require a Court application see Appendix 1)

Acting in an emergency

Sometimes people lacking mental capacity to decide for themselves require action to be taken immediately and in response to an emergency situation. The person's safety is paramount and any necessary action should be taken. A full written record should be made as soon as possible and where appropriate (for example where the intervention involves a deprivation of liberty) an application to the Court of Protection should follow immediately.

Legal advice will be needed in this situation

Legal planning meetings

If having followed all the procedures identified above the issue remains unresolved, consider whether the triggers for an application to the Court of Protection have been met.

If the triggers appear to be met then the team manager in consultation with the service manager /legal services will set up a legal planning meeting. Consider whether or not this should be a joint planning meeting with health (if jointly commissioned package) Legal Planning meetings will be Chaired by the Area Service Manager.

Please note that a legal planning meeting should not be used for crisis resolution or in response to an emergency, but should be part of a planning process.

It is important to identify at the outset, who should be involved in the legal planning meeting and to avoid (where possible) duplicate or multiple meetings. Minutes and emails of relevance should be shared with all those who are considered to be necessary participants in the process.

Prior to the legal planning meeting the **social worker** should prepare a report which contains:

1. A description in summary of the presenting situation
2. The outcomes being sought from the court.
3. A summary of all the steps taken thus far to resolve the dispute (remember applying to the Court of Protection is very much a last resort).
4. A clear analysis of how you have reached your professional judgement in respect of the desired outcomes (and confirmation you have funding approval)
5. A summary of your own professional credentials (qualifications, length of experience in this role and any specific training or expertise in particular conditions). This is to go into any witness statement prepared for the Court application

Be prepared to present your summary verbally and to be challenged (in a supportive way) on your decisions. You will need to begin collating all assessments and related documents.

A standard agenda will be used for Legal Planning meetings which can be found at APPENDIX Four

Legal Planning Meeting

The meeting will:

1. **Consider the case put by the social worker**
2. **Explore with them any care options not previously explored**
3. **Explore any dispute resolution options not already attempted**
4. **Consider which legal options are available**
5. **Determine the next steps including input from other professionals**
6. **Consider the finances of the individual**
7. **Consider who will act as litigation friend to the person**

The outcome of the legal planning meeting is to decide whether there is sufficient evidence to support a request for authorisation from the Assistant Director proceed to the Court of Protection. It will also indicate how soon it is considered necessary to make the application i.e. either "extremely urgent" (24-48 hours), "urgent" (within 7 days) or "standard" (up to 28 days).The Chair will complete the Record of Decision for submission to Assistant Director for approval. (APPENDIX 3)

Change of circumstances after a decision to proceed to court

It is possible that circumstances may change, even at this stage. For example, the issue causing concern may resolve or conversely the situation may worsen. It is important to keep this under constant review. If approval to proceed to Court has been given but is no longer necessary as the risks are removed, or if the approved timescales for the making of the application, are not met the Record of Decision (Appendix 3) must be reviewed by the Area Service Manager and the Assistant Director must be informed. If authorisation to proceed to Court was not given, but the situation worsens the Record of Decision must be reviewed in order for the Assistant Director to review their decision.

Once approval is given for an application to Court, the Team Manager will add the case details to the Court of Protection spreadsheet, which will be monitored monthly though the Court of Protection update meeting.

Preparation for a hearing

Social workers will be expected to attend Court in the event of a Court application being made.

The social worker will now prepare the witness statement for proceedings. A template will be provided by Legal Services.

Your legal advisor should let you know

- the date and time of the hearing, where the court is and how to get there
- what needs to be done in preparation for the hearing
- any further actions or reports needed as a result of any interim decisions or directions by the Court

Following the hearing

Ensure you follow the court decisions taking responsibility for any further actions. Be aware of key dates and what is expected of you by the court

Summary of Steps in a Court of Protection Application	
1.	Where, having considered the principles set out above, an application to the Court of Protection may be necessary, make contact with Legal Services to request a Legal Planning Meeting to include senior managers. This can be done via a conference call if the matter is sufficiently urgent that a physical meeting cannot be arranged in time.
2.	If the Legal Planning meeting agrees that an application is appropriate, formal authorisation needs to be sought to commence proceedings from the Assistant Director. This will be done by the Chair of the meeting, using the Decision Tool.
3.	If proceedings are authorised then the social workers will need to complete the following: 1. Witness statement – a template is provided at Appendix 3. 2. CoP 1 and 1B (please speak to Legal Services) 3. CoP3 – this is the assessment of capacity. Unless the assessment is complex the Court is likely to be satisfied with an assessment from the social worker but if a medical practitioner is willing and able to complete the form that may be preferable, especially if there is any controversy over whether P lacks capacity.
4.	If authorisation is not given to commence proceedings the situation must be kept under review and the Decision Tool should be reviewed and updated for the Assistant Director if circumstances change.
5.	Legal Services will finalise and submit the documentation and include a statement/submission dealing with the urgency of the situation.
6.	In cases of extreme urgency, it may be appropriate to seek a telephone hearing with a Judge.

Appendix 1 –

Specific situations which require a legal planning meeting

1. Admission to residential care with objection

Sometimes the issue facing the practitioner involves consideration of moving the person from their home into residential care in order to meet their care and support needs but where either they or their family objects.

It is important to be aware that the Council has no right to require anyone to move from their home against their wishes without either applying the safeguards described below or applying to the CoP for prior approval. This is difficult area as sometimes it is necessary for a person to move in order that their care and support needs can be met. Each situation will be different, and it will be necessary to assess the urgency to decide which approach is appropriate.

Practitioners will need to have explored all options for supporting the person at home, perhaps with an increased package of care, before any decision about admission to residential care is considered.

Practitioners will also need to be familiar with the remit (and limits) of Sections 5 and 6 of the Mental Capacity Act ("MCA"). Section 5 provides a practitioner with protection from liability for their actions where they reasonably believe that an individual lacks capacity to consent to their admission to residential care and that such an admission is in their best interests (provided the practitioner does not act negligently).

Section 6 then goes on to provide that if restraint is necessary in the course of moving the person, then the practitioner will be protected by Section 5 but only if they reasonably believe that it is necessary to restrain the person to prevent harm to them and the act is a proportionate response to both the likelihood of the individual suffering harm, and the seriousness of that harm. This will require a clear risk assessment.

Additionally, case-law has established that it is good practice to seek court approval in any situation where the LA is in doubt as to whether it is lawful for them to require the person to move into residential care from their own home. Some people will need to move into care because of a breakdown in arrangements at home (caused for example by a fire, flooding, provider failure or an increase in their care needs) and where there is no objection (either from the person themselves or their family) then a move can take place.

PRIOR to any move there must be an assessment of capacity, best interests decision and, if the relevant a Deprivation of Liberty Safeguards standard authorisation will be required.

This is particularly true if either the person who lacks capacity or someone concerned with their welfare, objects to their proposed deprivation of liberty in residential care, (even if only respite is proposed - see below).

If the circumstances are too urgent to wait for the granting of a Standard Authorisation, then the local authority must seek the approval of the Court of Protection prior to the deprivation of liberty arising. In these situations, it is also possible to rely on Section 4B of the MCA which allows a person to be deprived of liberty pending an application to Court in order to either provide life sustaining treatment or to do a vital act.

Summary of Possible Situations

Circumstances	Legal Framework
P and family/others concerned with P's welfare all agree residential care is necessary and in P's best interests.	Section 5 MCA (and possibly s 6 if P resists at any point and restraint is necessary and proportionate to prevent harm to P). If P is to be deprived of their liberty within the care home a Standard Authorisation needs to be in place prior to the move.
P does not object to the move to residential care but someone legitimately concerned with P's welfare does.	As a minimum a Standard Authorisation needs to be in place prior to the move, though CoP approval (bearing in mind Neary) should be considered.
Where P is to be deprived of their liberty at a care home and there is not time to ensure a Standard Authorisation is in place first.	Court approval will be needed prior to the move (though see s 4B MCA)
Where P objects (whether expressly or impliedly) to the move.	Court approval is likely to be needed prior to the move as there will be a serious interference with P's Article 8 right to respect for their private and family life and their home.

What if the Person Will Not Allow Access to the Practitioner?

- For the most extreme situations, emergency police intervention is available under section 17(1)(e) of the Police and Criminal Evidence Act 1984 to save life or limb or to prevent serious damage to property. Risk of serious harm would suffice[2] ; mere concern for the person's welfare would not[3]. Whilst this power would not authorise the person's compulsory removal, it would permit compulsory entry.
- Section 115 of the Mental Health Act 1983 ("MHA") authorises an approved mental health professional ("AMHP") to enter and inspect private premises (although not by force) if they have reasonable cause to believe that a mentally disordered person is not under proper care.
- Section 135 of the MHA provides that the AMHP can obtain a warrant from the Magistrates' Court to enter premises, if need be by force, if certain welfare criteria are met. The person can be removed to a place of safety and held there for up to 72 hours with a view to the making of either (a) an application under the MHA or (b) "other arrangements for his treatment and care."

[2] Baker v CPS [2009] EWHC 229

[3]Syed v DPP [2010] EWHC 81

What If the person has capacity?

If the person is assumed to have capacity or if the assessment concludes they have capacity, they cannot be admitted to residential care using the MCA. In such circumstances, the only options available are:

1. the Mental Health Act 1983 if the person meets the criteria for detention or to consider the intervention of the Police (Police and Criminal Evidence Act) to enter without warrant to save life or limb if there is a serious risk of harm (though this does not authorise removal).
2. In certain cases, if the person is vulnerable and is experiencing undue pressure or duress an application can be made to the High Court for a decision under their inherent jurisdiction. Legal advice must be sought if this is a possibility.
3. If the person is in danger due to criminal activity, then the police should be contacted.

How Should Respite be Treated?

Respite needs to be considered in exactly the same way as when considering a permanent placement. The same questions need to be asked regarding deprivation of liberty. Respite for a period of anything more than a few (2-3) days will be a deprivation of liberty if the acid test is met and this period could be even less in settings where particularly intense measures of control are imposed. In addition, the following further points may be relevant:

- The impact of being in an unfamiliar setting on the person and how his or her care plan provides for a response to unsettled behaviour.
- The impact of reduced contact with a primary carer.
- The underlying intention of the placement: is there any prospect that it will be extended or made permanent? 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 person the true purpose of their move, but these are very likely to be circumstances in which the sanction of the Court is required.

Acid Test to determine a deprivation of liberty

For a person to be deprived of their liberty, they must lack mental capacity to make the decision about where to be accommodated to receive care and treatment AND be subject both to complete or continuous supervision and complete or continuous control and not be free to leave.

How do I Transport the Person to the Care Home/Hospital?

Transporting a person who lacks capacity from their home, or another location to a hospital or care home by ambulance in an emergency will not usually amount to a deprivation of liberty and can be achieved under the wider provision of the MCA (see Sections 5 and 6 above), as long as being in hospital or a care home will be in their best interests. There may be exceptional circumstances where transporting the person will amount to a deprivation of liberty and therefore you will need to seek authorisation from the Court of Protection either before the move takes place or (in the emergency situations contemplated by Section 4B MCA) at the same time as the move takes place.

Transport situations which may need court approval

These include where:

- it is necessary to arrange for the assistance of the police to gain entry to the person's home to assist in their removal.
- it is or may be necessary to do more than persuade or use transient physical restraint of the person during the move so that, for example, force or threats have to be used to overcome the person's resistance to being transported.
- the person may have to be sedated.

  the journey is exceptionally long or otherwise very onerous for the person.
- Subterfuge has to be used so that, for example, the person is falsely informed that they will be returning home shortly.

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.

Please note that it is generally understood[4] that a standard authorisation does not provide authority for depriving a person of their liberty when they are being conveyed from their home to a care home specified in the authorisation. However, if the individual is subject to guardianship under the MHA, s18(7) provides an AMHP with the power to take and convey the person to a specified place of residence.

[4]GJ v Foundation Trust [2009] EWHC 2972 (Fam)

What if the deprivation of liberty is not anticipated?

Where it was not anticipated that an authorisation would be needed but once the person is moved it is clearly needed then the care home is able to issue an Urgent Authorisation which must be accompanied by a request for a Standard. Caselaw suggests this will rarely happen as the Courts view is that it should be clear in advance when a situation will amount to a deprivation of liberty.

Further advice on deprivation of liberty can be obtained from the DoLS Team on 01743 255850 or dols@shropshire.gov.uk

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

In any case where a person 16 or over[5] is receiving care in a setting other than a hospital or care home, in a way that meets the acid test for a deprivation of liberty, these arrangements must be authorised by the Court. This applies even if the care is entirely privately funded, such as where a court-appointed Deputy is administering personal injury awards and has informed the local authority of the situation.

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 1.2 representative. The local authority should consider whether a family member or friend is willing to be the litigation friend (further detail can be found at https://www.gov.uk/litigation-friend/suitability) or Rule 1.2 representative. If there is no one who can or will do this the local authority will be able to ask for someone to be appointed.

Once the application has been made, the local authority may, if applicable, be authorised to deprive the person of their liberty under s 4B MCA.

[5]Deprivation of liberty must be authorised for those under 16 also. Legal advice will be needed.

3. 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 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 practitioner considers restrictions need to be imposed on contact visits. These must be considered before an application to the CoP is made to restrict contact.

1. **Keep the 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; in yet 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 the 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.

4. Tenancy Agreements

If a person lacks the mental capacity to make his or her own informed decision about whether or not to accept a tenancy offer, then an appropriate person can make the decision through the best interest process outlined in the MCA.

Alternatively, if there is a registered enduring or lasting power of attorney in place; or a Deputy for property and affairs has already been appointed, then the attorney or deputy would usually make that decision (see below).

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 sole purpose of the application is to sign or terminate the tenancy, and the application should be for an order that specifically deals with the tenancy matter. If, however, the adult lacks capacity to manage other aspects of their property and affairs and they have assets and income other than social security benefits then it will usually be necessary to appoint a deputy to deal with all these decisions.

The court is prepared to deal with all of the adults required to sign the tenancy agreement(s) in a single application. This is on the understanding that the only order required from the court relates to the tenancy agreement and no further directions, for example the appointment of a deputy, are necessary.

The court will require:

- A single COP1 Application form setting out the order or declaration required with a list of all the adults required to sign the agreement annexed;
- A COP3 Assessment of capacity for each adult. The assessment should deal specifically with the adult's capacity to sign or terminate the agreement;
- A COP24 Witness statement for each person setting out the circumstances behind the moves and confirming that a best interests assessment has been carried out, including consultation with close family members, or people in close contact with the person, where applicable.
- An application fee.
- A covering letter clearly stating that the applications relates to tenancy agreements in respect of more than one person

The application form should request the court to make a single order or declaration that it is in all the person's best interests for the tenancy arrangement to be signed or terminated on their behalf. The procedure above can also be adapted for applications relating to individuals.

5. Section 21a deprivation of liberty appeals

Where a DoLS authorisation is in place the route to challenge is an appeal to the Court. This is known as a section 21 A 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 IMCA. Caselaw has also made it clear that the Council as the Supervisory Body must also act robustly to ensure cases are taken to Court where an appeal is required.

The case of RD & Ors (Duties and Powers of Relevant Person's Representatives and Section 39D IMCAs) [2016] EWCOP 49 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.

6. 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 administering them.

Appendix 2 –

Benefits and burdens, best interests balance sheet

This case involved an 80-year-old female with a diagnosis of dementia, physically well, very active and mobile but without mental capacity to make care, treatment, risk or financial decisions or to litigate. She was constantly asking to go home and had tried to leave respite care. The balance sheet approach was used in this complex case with the following outcomes:

Benefits of own home (a)	Benefits of care home (b)
1. Continues to remain in a familiar place. 2. She does not feel unsafe. 3. She wants to be independent. 4. She wonders why she is in a hotel and not at home. 5. **More family contact and maintaining community contacts.** 6. Increased care package. 7. **This is where she is happiest.**	1. **Regular meals/hydration.** 2. Prompting with medication. 3. Prompting with personal care/hygiene. 4. Pressure/skin area support/treatment. 5. Physical safety improved. 6. Staff available 24/7 to deal with crisis. 7. Ongoing reassurance for her anxieties. 8. **Improved dignity.** 9. Release strain on family members. 10. Anti-depressants and anti-psychotics can be administered. 11. **She enjoys the company of others.** 12. TLC and treatment may slow her decline. 13. Less need for her to contact emergency services. 14. Reduced possibility of exploitation/ cold callers.
Plus burdens of own home (a)	**Plus burdens of care home (b)**
8. Not eating or drinking enough. 9. Insufficient/irregular medication. 10. Deteriorating personal hygiene. 11.Deteriorating pressures areas. 12. Risks of wandering/falls. 13. Increased psychological distress. 14. Community/family support has failed	15. Likely to be affected by not being in own home. 16. **Loss of independence.** 17. Inevitable short term anger/distress. 18. Stronger possibility of depression. 19. She may just give up. 20. Problems with contact and community activities.

*With acknowledgement to Neil Allen

Appendix 3 –

Record of decision – court of protection application Assistant Director

Name of person		Date of Record of Decision	
Summary of concerns			
Summary of all measures to date to manage the risk			
Date of legal planning meeting		Outcome of legal planning meeting (copy of minutes)	
Urgency of Proceedings (Please indicate how soon it is intended the application should be made. Please note that if, following approval, these timescales are not met the relevant Service Manager MUST contact the Assistant Director)	Extremely Urgent (24-48 Hours)	Urgent (up to 7 days)	Standard (up to 28 days)
Date submitted for Assistant Director Approval		Decision of Assistant Director – Should proceedings commence?	
		YES	NO
Date and sign			
Date proceeding issued			
If proceedings are not issued, please review all the above information and update to inform the Assistant Director			
Date resubmitted to Assistant Director		Decision of Assistant Director – should proceedings commence?	
		YES	NO
Date and sign			
Change of circumstances requiring a review of the above information			
Date of resubmission to Assistant Director		Decision of Assistant Director – should proceedings commence?	
		YES	NO

Appendix 4 –

Legal Planning Meeting

Standard agenda

- Welcome and introductions
- Confidentiality and sharing agreement
- Identification of necessary attendees (and any apologies)
- Summary of social workers report to include
  - A description in summary of the presenting situation
  - A summary of all the steps taken so far to resolve the issue.
  - The outcomes being sought from the court
  - A clear analysis of how the outcome required, was arrived at
- Update on any of the information, by any attendees
- Update on mental Capacity issues
- Discussion by all attendees
- Agreement on plan
- Legal advice (has the threshold for proceedings in the Court of Protection been met)
- Recommendations and proposed actions, with specific reference to timescales

(NB Following the conclusion of the Legal Planning Meeting approval for the commencement of proceedings in the Court of Protection must be sought by the Service Manager from the Assistant Director)