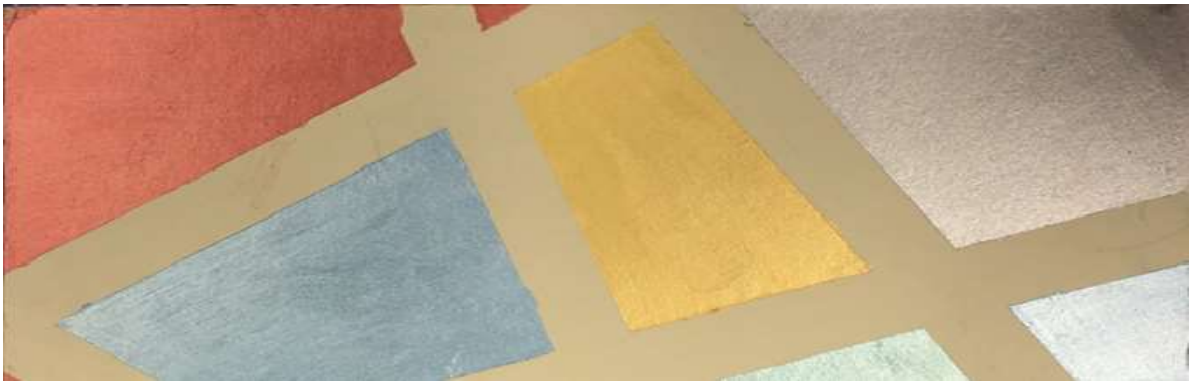
JUDICIAL AUTHORISATION OF DEPRIVATION OF LIBERTY

July 2020



A: Introduction

1. With the delay to the introduction of the Liberty Protection Safeguards until April 2022, and unless the Mental Health Act 1983 is applicable, there is no administrative mechanism available to authorise the deprivation of liberty for a person with impaired decision-making capacity who is either (1) outside a hospital or care home; or (2) is in a hospital or care home or is aged 16 or 17. This means that, unless a court authorises the position, those people caring for the person have no legal 'cover' for their actions, and (where relevant) the public body commissioning care or aware of the person's circumstances will also be acting unlawfully.

2. This guidance note sets out how to make use of the procedure established by the Court of Protection to enable a judge to consider the position and – in many cases – to authorise the position without a hearing. This procedure is often called the *Re X* procedure after the decision of *Re X and others (Deprivation of Liberty)* [2014] EWCOP 25 (and *No 2* [2014] EWCOP 37). It is set out in Practice Direction 11A, and a form, COPDOL11. This Guide amplifies the Practice Direction and the form and sets out when and how to make an application for judicial authorisation of deprivation of liberty.

B: When to make an application

3. Local authorities, Local Health Boards and CCGs who are responsible for care arrangements that give rise to deprivations of liberty outside hospitals and care homes (or

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

Trusts in relation to those who are under 18 in inpatient settings) should make an application at the earliest possible opportunity. As noted at Section D below, there will be situations in which the court may not be able to progress the application at pace. However, as soon as the application has been made, those providing care to the person will have authority to deprive the person of their MCA, so long as at all times it can properly be said that the deprivation of liberty is (in essence) 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. Applicants should consider making it explicit in their application that MCA s.4B is being relied upon pending the decision of the court. If they do, the evidence should make it clear what is likely to happen to P's health if the necessary care and support is not provided.

4. The *Re X* procedure is often thought of as designed to address the position of those over 18 who are deprived of their liberty under arrangements made by public bodies in placements outside hospitals or care homes. However, case-law has also made clear that applications to the Court of Protection[3] will need to be brought in two further categories of case:

    a. Wherever a 16 or 17 year old is confined (applying the 'acid test') and cannot consent to that confinement. As the Supreme Court made clear in *Re D* [2019] UKSC 42, it is irrelevant at that point whether a person with parental responsibility is seeking to consent to or otherwise authorise the position. It is also irrelevant whether the arrangements giving rise to the confinement are taking place in a private setting (including the family home) if the state is aware, or ought to be aware, of the position. More detailed practice guidance about 16/17 year olds and deprivation of liberty can be found here.

    b. Where a court-appointed deputy is administering personal injury damages awards and is making care arrangements for a person which satisfy the 'acid test,' to which the person cannot consent. In such a case, the deputy must alert the local authority with safeguarding responsibilities for the person to investigate. If the deprivation cannot be avoided, an application to the Court of Protection will be necessary: *SSJ v Staffordshire County Council* [2016] EWCA Civ 1317. The Court of Appeal did not address who must make the application, but Charles J suggested at first instance that the primary obligation lay with the deputy (who should seek to ensure that the costs of so doing are provided for in any personal injury damages award). Senior Judge Hilder has subsequently made clear that, unless damages have been awarded to include the cost of making the application, she considers that the relevant local authority should be the applicant.[4] This flows – we suggest

[3] The Court of Protection lacks the jurisdiction to authorise the deprivation of liberty of those under 16. So an application to the High Court under the inherent jurisdiction will be required: the procedure and draft orders are set out in the judgment of Sir James Munby P in *Re A-F (Children) (No. 2)* [2018] EWHC 2129 (Fam).
[4] See the December 2019 39 Essex Chambers Mental Capacity Report.

– from the fact that safeguarding (for which statute makes local authorities responsible) includes a requirement to ensure that individuals are not arbitrarily deprived of their liberty.

5. It is well-established that, except in emergencies, the authority to detain must be sought before the deprivation of liberty starts: see by analogy *Re AJ* [2015] EWCOP 5. Failure to do so will result, at least, in a procedural breach of Article 5(1).

C: How to make an application

6. The COPDOL11 form should be used, available here. The form and guidance require the applicant to consider certain triggers which may indicate that the application is not suitable for the streamlined process. The triggers remain: (1) any contest by P or by anyone else to certain of the key requirements of the form (age, evidence of unsoundness of mind, lack of capacity, the care or support plan and best interests); (2) any failure to comply with the requirement to consult with P and all other relevant people in P's life and to canvas their wishes, feelings and views; (3) any concerns arising out of information supplied in relation to P's wishes and feelings/any relevant person, concerns about P's litigation friend/Rule 1.2 representative, any matters suggesting that the matter needs particular judicial scrutiny; (4) any objection by P; (5) any potential conflict with a relevant advance decision by P or any decisions under an LPA or by P's deputy; or (6) any other reason that the court thinks that an oral hearing is appropriate.

7. The COPDOL11 form requires the applicant to answer a substantial number of matters, either in the body of the form or in attached documents. We set out the key requirements below, but re-ordered from the various locations so as to place them in a logical order, and also amplified where necessary by reference to other relevant case-law.

The order

8. A draft of the precise order sought should be provided, including in particular the duration of the authorisation sought and appropriate directions for automatic review and liberty to apply and/or seek a redetermination in accordance with Rule 89. A model order is provided here.

That the court can in principle make an order

9. Proof that P is 16 years old or more and is not ineligible to be deprived of liberty under the MCA (the same eligibility requirements applying in respect of DOLS authorisations). We suggest that this evidence will be of the same nature as that required to allow the supervisory body to be satisfied that the (higher) age requirement under Schedule A1 is met. Stating P's date of birth will ordinarily suffice. If in doubt, of course check their birth certificate. If there is doubt and no papers – for example in the case of a paperless asylum seeker – a *Merton*-compliant age assessment may be required (see *B v London Borough of Merton* [2003] EWHC 1689 (Admin)).

10. The basis upon which it is said that P is of unsound mind (together with the relevant medical evidence). Professional medical opinion is necessary to establish unsoundness of mind but where the facts are clear this need not involve expert psychiatric opinion and evidence from a general practitioner will suffice. We note that there therefore may well be a difference between (1) 'standard' applications to the CoP where a COP3 setting out the basis upon which it is said that the person lacks capacity to take the relevant decision(s) can be completed by (inter alia) a social worker, and (2) a deprivation of liberty application, where the social worker can complete the evidence as to the lack of capacity to consent, but cannot complete the evidence of P's unsoundness of mind.

11. The nature of P's care arrangements (together with a copy of P's care and/or support plan) and why it is said that they do or may amount to a deprivation of liberty. The form asks the applicant to provide: (i) the arrangements for review of the care or support plan, (ii) the level of supervision (1:1 etc) periods of the day when supervision is provided, (iii) use or possible use of restraint and/or sedation, (iv) use of assistive technology, and (v) what would happen if P tried to leave. The applicant is also required to set out what options have been considered and explain why the care package has been chosen as appropriate as well as any recent changes to the care/support plan or any planned changes, with reasons. We suggest that where any sedation or restraint is being used or may be used, the details are given (eg drug name, dose, method of administration especially if covert[5]) and an explanation should be given as to why these are the least restrictive measures to deal with the relevant issues. In *Re NRA*, Charles J held that the actual care notes can be very informative and their production may obviate the need for a summary or a lengthy summary.

12. The importance of the care plan accurately recording the use of restraint, especially physical restraint, was emphasised by Baker J in *Re AJ* [2015] EWCOP 5. Linked to this, because the judge's main concern is as to what is actually happening on the ground, the care plan that will usually need to be supplied with the application will be the care provider's care plan, because that will (or should) be detailing what is taking place on a day to day basis. Whereas the main function of the care and support plan drawn up by the local authority (or NHS body) is to set out how the person's assessed needs will be met, and it will often not include the necessary level of detail. The public body making the application will therefore have to make sure that it has obtained (and where necessary worked with the care provider to improve) the care provider's care plan before making the application so as to ensure that it addresses the matters set out above. Given that a more restrictive care regime will need to be sanctioned by the court, applicants may want to consider incorporating contingency arrangements into the care plan so as to minimise the need for judicial micro-management.

Why the court can consent to the arrangements on P's behalf as being in P's best interests

13. The basis upon which it is said that the care arrangements are necessary in P's best interests and why the care package advanced is the appropriate one. This will include explanation of why there

[5] See also the guidance on covert medication in *Re AG* [2016] EWCOP 37.

is no less restrictive option (including details of any investigation into less restrictive options and confirmation that a best interests assessment, which should be attached, has been carried out). It will almost invariably be helpful to include a balance sheet to identify how the best interests decision has been reached. Charles J emphasised in *Re NRA* that the supporting material here is particularly important because it highlights the core of the decision-making process and so the reasons why the court can be satisfied that it can properly consent to the arrangements on P's behalf in their best interests.

14. Any evidence of conflicting interests within the same placement. This is particularly important in supported living placements because, as Charles J noted in *Re NRA*, in any one supported living placement there can be a number of service users and the demands of the care package for one service user can impact on the others.

15. If the proposed placement is planned and has not yet taken place, an explanation of whether or not a transition plan has been produced, a copy of the transition plan and an explanation as to how the placement will be reviewed, particularly in the context of responding to P's reaction to his or her new placement.

16. If P is already living at the placement, information about the date P moved there, where he or she lived before, why the move took place, and how the move is working.

17. Any relevant wishes and feelings expressed by P and any views expressed by any relevant person. There is a section in Annex B which is intended to capture information about those people consulted in relation to P and their views. The section includes: (i) what their approach has been to issues relating to P's accommodation and care in the past, (ii) why they think that they have and will provide support which is in P's best interests, (iii) what reasons each person gives for supporting the care package being provided under the care or support plan, and (iv) over what period and how frequently they have visited or otherwise communicated with P.

18. Details of any relevant advance decision by P and any relevant decisions under a lasting power of attorney or by P's deputy (who should be identified).

Ancillary matters about the arrangements

19. If there is a tenancy agreement, clarification of who has the authority or needs to apply for the authority to sign it on P's behalf.

Procedural matters relating to the application

20. P's eligibility for public funding. This means, essentially, providing any details that are available as to P's savings and income, and details of any person (for instance a property and affairs deputy) who may be able to assist providing details of P's means.

21. Whether or not it is thought the case is controversial and can be dealt with without an oral hearing and, if so, the reasons why.

22. The steps that have been taken to notify P and all other relevant people in P's life (who should be identified) of the application and to canvass their wishes, feelings and views. The form has a section expressly designed to explore the extent to which the applicant has consulted with P (Annex C).

23. Information about the participation of family and friends over the years including (1) the nature of the care and support they have provided, (2) their approach to issues relating to the provision of care and support in the past and (3) whether and why it is thought that family or friends have provided and will provide balanced support for P in his or her best interests.

24. Whether P's family and friends support P's care package and the reasons why or why not.

25. Whether a family member or friend is willing to be a litigation friend or a Rule 1.2 representative[6] and whether they are able to keep the care package under review. This is explored in detail in Annex B.

26. Whether a family member or friend is suitable to be a litigation friend or a Rule 1.2 representative, with particular reference to the history of P's care. It should be not assumed that the person needs to be someone who supports the deprivation of liberty. Indeed, sometimes the most vocal are the best advocates for P.

27. If no family member or friend is able to act as P's litigation friend or Rule 1.2 representative, whether or not there is any other person (for instance a statutory advocate such as an IMCA) who would be able to do so.

28. Where possible, a statement from one or more of the actual carers should be provided as to P's wishes and feelings and any deficiencies or possible changes to the care package.

29. Any reasons for particular urgency in determining the application.

[6] This was Rule 3A until the Court of Protection Rules came into force on 1 December 2017. Rule 1.2 requires the court to consider in every case whether it should make one, or more, of a number of possible directions relating to P's participation. One such direction is the appointment of a Rule 3A representative, whose function is to give a "voice" to P by providing the court with information as to the matters set out in section 4(6) of the MCA and to discharge other functions as the court may direct. A Rule 1.2 representative may be a friend or family member, an IMCA, an advocate appointed under the Care Act 2014 or anyone with relevant knowledge. A person may be suitable to act as a Rule 1.2 representative (or litigation friend) notwithstanding that they may be or have been in conflict with the relevant public body, "fighting P's corner".

30. Any factors that ought to be brought specifically to the court's attention (the applicant being under a specific duty to make full and frank disclosure to the court of all facts and matters that might impact upon the court's decision), being factors:

    c. needing particular judicial scrutiny; or

    d. suggesting that the arrangements may not in fact be in P's best interests or be the least restrictive option; or

    e. otherwise indicating that the order sought should not be made.

31. The importance of complying with these provisions was emphasised by Senior Judge Hilder in *Re JDO (authorisation of deprivation of liberty)* [2019] EWCOP 47, in which she made clear that the requirement for consultation is a wide one, and that to comply with the duty of full and frank disclosure, "[i]*f a person sensibly within the categories of person who ought to be consulted holds a view which is contrary to the Applicant's, the Applicant must make that clear in the application, irrespective of its own view of the merits of that other view. In the context of a procedure designed for non-contentious applications, such factors clearly include indications that the proposal is in fact disputed, irrespective of the applicant's view of the merits of that dispute*." Senior Judge Hilder also rejected the argument that the duty of consultation was not limited to people who offered an alternative to the proposal being put before the court. As she made clear, "[i]*f the duty of disclosure extended only to concerns where alternative options were already identified, inactivity on the part of person under the duty would be rewarded and opportunity for proper enquiry denied. There is no threshold for bringing a challenge to a deprivation of liberty and any applicant for authorisation under the streamlined procedure must proactively inform the court of contrary views*."

D: What the court will do

The participation of P

32. In *Re NRA* Charles J held that it was not necessary to join P as a party where a family member or friend was properly able to act as their Rule 1.2 representative. In *Re VE* [2016] EWCOP 16, Charles J approved a guidance note for such Rule 1.2 representatives, highlighting that their key responsibilities included: (1) weighing the pros and cons of P's care and support package and comparing it with other available options; (2) considering whether any of the restrictions are unnecessary, inappropriate or should be changed; (3) informing the court about what P has said, and P's attitude towards the care and support package; and (4) checking from time to time that the care and support package is being properly implemented. Charles J summarised the role in this way: "[i]*n short, the court is asking you, as someone who knows the position on the ground, to consider whether from the* perspective *of P's best interests you agree or do not agree that the Court should authorise P's package of care and support.*"

33. It may also be possible to identify a statutory advocate who can act as a Rule 1.2 representative, such as an IMCA or Care Act advocate. However, as was analysed in considerable detail in *Re JM*, this is unlikely to be an option in many cases given the other demands on their services. In *Re JM*, Charles J also made clear that he did not consider that local authorities (or by analogy NHS bodies) were under any statutory obligations to commission statutory advocates to provide Rule 1.2 representatives.

Progressing the application

34. Where no suitable Rule 1.2 representative can be identified, then the court has the following options:

    a. Appoint a General Visitor to prepare a section 49 report. In *Re KT* [2018] EWCOP 1, Charles J held that the Secretary of State for Justice was obliged to ensure that the COP acts lawfully and so can apply an ECHR Convention-compliant and fair procedure. In the absence of a Rule 1.2 representative, and as a last resort, the court can therefore appoint a General Visitor whose work will be funded by the court service. His Lordship provided draft directions for an order appointing the General Visitor.

    b. To join P as a party. However, as non-means tested legal aid is not available for these types of applications, then it is unlikely that P will get legal aid, a fact that the court will be very mindful of. Moreover, if P is a party then P must have a litigation friend, or an Accredited Legal Representative. Where no suitable person can be found to act as a Rule 1.2 representative, it is unlikely that anyone will be able to act as litigation friend. The Official Solicitor, whilst litigation friend of last resort, (1) will only act where she has security for her costs of instructing solicitors to act on P's behalf; and (2) is in any event at or near capacity so will not be in a position to act as a litigation friend in all *Re X* cases. It may be possible for an Accredited Legal Representative to be appointed from the panel that now exists, but, again, an ALR will require funding, and the court will be mindful that P is very unlikely to be eligible for legal aid.

35. Where there is agreement from everyone, including the potential Rule 1.2 representative where one can be identified (or a litigation friend for P/ALR where one has been identified and confirmed their willingness to act and to consent to the order), the requisite order can be made on the papers. If there is no agreement, or there is some other factor which makes it appropriate for the matter to be heard 'live,' the court will make the relevant directions (which are likely to be similar to those made in ordinary personal welfare cases: see here).

36. The authorisation, even if initially made on the papers, can typically last for one year unless circumstances require a shorter period. The review can, where appropriate, be done on the papers. Note that there is, as yet, no specific application for purposes of seeking a review, and that the model order provides that it should otherwise be made on a new COP DOL11.

E: Useful resources

37. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.
- www.courtofprotectionhandbook.com – website accompanying the Legal Action Group's *Court of Protection Handbook*, including Rules, Practice Directions, precedents and procedural updates
- www.mclap.org.uk – website set up by Alex with forums, papers and other. resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA.

38. Other useful materials relating to the *Cheshire West* decision can be found in Chapter 11 of Deprivation of Liberty: a Practical Guide, commissioned from the Law Society by the Department of Health, to which both Alex and Neil contributed.

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