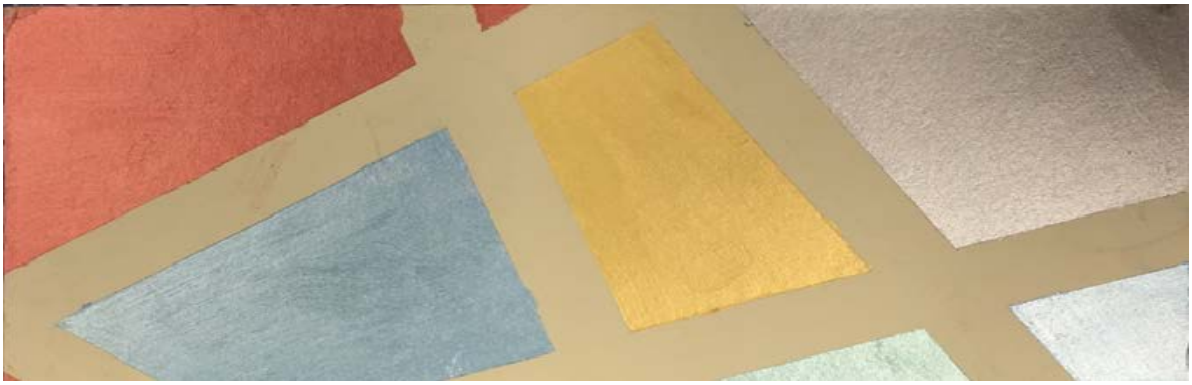
JUDICIAL AUTHORISATION OF DEPRIVATION OF LIBERTY

July 2022



A: Introduction

1. Until the Liberty Protection Safeguards are brought into force, 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 and 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 be 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. It includes judicial observations about the process from a workshop convened by Senior Judge Hilder on 24 May 2022, the minutes of which can be found here.

B: When to make an application

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

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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 liberty, 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. Applications have to be made to authorise deprivations of 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 will need to be brought in two further categories of case:

    a. 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.[3] This flows – we suggest – 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;

    b. 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. In *Re KL* [2022] EWCOP 24, Senior Judge Hilder identified that the streamlined procedure is unlikely to be appropriate for authorisation of deprivation of liberty for those aged 16/17 year olds. However, the focus of her judgment was upon whether it would be appropriate to invite the court to determine the application

[3] See the December 2019 39 Essex Chambers Mental Capacity Report.

through the streamlined procedure (in particular, without the young person being represented); she was not indicating that applications should not be made for authorisation. She noted that the court would be "unlikely to be critical" of an application being made on the conventional COP1 application to the appropriate regional hub court, or on the COPDOL11 form. In other words, the critical point is that applicants should expect that the court will want to consider the application with the benefit of representation for the young person (and with a hearing). More guidance about those under 18 and deprivation of liberty can be found here, where we also discuss the circumstances under which authorisation should be sought from the Family Division of the High Court (the only option for those under 16 or where the 16/17 year old has capacity to make the material decisions, but a potential alternative where the 16/17 year lacks that capacity).

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 are: (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 (6) any other reason that should lead the court to that think that an oral hearing is appropriate. In addition, following the *Re KL* [2022] EWCOP 24, it is prudent for any application in relation to a 16/17 year old to make clear that the applicant is simply using the form as a vehicle to provide the relevant information, and that they do not anticipate that the court will be able to determine the application without an oral hearing.

7. The COP DOL11 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. The material provided to the court will need to establish the following.

10. That P is 16 years old or more[4] and is not ineligible to be deprived of liberty under the MCA (the same eligibility requirements applying in respect of DOLS authorisations[5]). 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. We would anticipate that stating P's date of birth would 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)). Note, again, however, that applications in relation to 16/17 year olds, even if brought on the COPDOL11 form, will be unlikely to be determined on the streamlined procedure.

11. 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 (there will be cases where a general practitioner's evidence will suffice). The courts have indicated that explicit use of the term 'unsound mind' is not required so long as a diagnosis or description is given from which the judge can determine whether it falls within the meaning of the term. The courts have also indicated that proforma forms to be completed by doctors are acceptable: in any such form, it is important to include a prompt to include the date that the doctor last saw the person, and their qualifications. If it is genuinely not possible to obtain the evidence from a medical practitioner, then a letter should be filed with the application explaining the efforts which have been made and the responses were received. The matter will then be referred to a judge to give further directions.

12. Why P is said to lack capacity to decide on the measures proposed and the deprivation of liberty which is identified within the application. This should be set out in a COP3 form; a capacity assessment contained in another form can be filed additionally, but not in substitution for one. The judges have made clear that they do not consider the ADASS Form 4 alone (used for DoLS purposes) to be acceptable. The judges consider that a social worker is generally an appropriate person to undertake the assessment, although note that, if a social worker has completed the COP3, it will be necessary for a medical professional to provide evidence of P's unsoundness of mind.

[4] 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).
[5] By operation of s.16A (which will be repealed when the Mental Capacity (Amendment) Act 2019 comes into force.

13. Other points highlighted by the judiciary in relation to COP3 forms are the following:

    a. Each question must be answered succinctly but fully;

    b. The form must be signed by the person who has done the assessment;

    c. The form can cover all areas of decision-making under consideration, so long as each area under consideration is expressly identified, and the answers given to section 7 (i.e. the evidence about capacity to make the decision in question) are comprehensive. We note that this means that it is perfectly possible for a COP3 to be submitted that covers both the question of whether the person has capacity to decide on the arrangements which confine them and also in relation to entry into a tenancy (where this is relevant). In such a case, it is likely that continuation sheets will be needed, which should clearly be marked as such;

    d. Phrases such as "P has not satisfied me that that they have capacity" are concerning, because they reverse the burden of proof, and indicate that the assessor has not properly applied the MCA 2005.

14. 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 (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.

15. 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[6]), together with details of who will be using the measures, whether they are trained in such techniques, how often they have been used in the last 12 months, and how often they are revied. A clear explanation should be given as to why these are the least restrictive measures to deal with the relevant issues – as the judges have highlighted, "as a last resort" should be a baseline expectation, but quite often there are conflicting descriptions across documents, which will always require clarification, giving rise to delay. 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.

16. 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. 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)

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

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.

17. The judges have made clear in relation to care and support plans the following:

    a. That the information is preferably contained in a single document which explicitly identifies all measures amounting to deprivation of liberty for which authorisation is sought;

    b. If there are multiple plans, that they are all identified by name and date in a covering letter;

    c. If P is living in the family home, the care plan should include not just the public authority-commissioned care package but also an explanation of arrangements at home outside the hours of the care package. It would also be possible for the arrangements at home outside the hours of the care package may be explained in an additional document, again clearly identified in the covering letter;

    d. Where there is limited space on a care plan document, additional information (such as the PRN protocol/record) may be attached;

    e. It is helpful if the signature on the care plan is either on the first or the last page (not buried somewhere in the middle);

    f. It is important that the care plan sets out the address of the placement to which it, and the application, relate.

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

18. 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 needs to be set out. This will include explanation of why there 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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

24. If there is a tenancy agreement, further evidence which will be required will be:

    a. Evidence relating to P's ability to enter into (and, where relevant, terminate) a tenancy on the COP3;

    b. Clarification of who has the authority or needs to apply for the authority to sign it on P's behalf;

    c. When P has lived in particular accommodation for a settled period, an explanation will be required as to why it is considered to be in P's best interests that authority to terminate that tenancy is granted. (As the judges have noted, the court seeks to secure residence arrangements, not undermine them.)

25. The judges have also made clear in relation to tenancy agreements that:

    a. If the premise of the application is that P is moving from placement A to placement B, authority to terminate the tenancy at placement A and enter into the tenancy at placement may both be included within the application;

b. It is not likely that authority will be granted to terminate a tenancy of a placement where P is presently living and there are no immediate, fully explained plans to move;

c. Authority to terminate/enter into tenancy agreements is not a repeating exercise. If such authority was granted in the authorisation granted the previous year but not used, applicants will need to explain why;

d. The streamlined procedure is not an appropriate vehicle for housing advice: the applicant must tell the court what authority they are seeking, not expect the court to make a determination between tenancy agreements, licence agreements etc. See here for our guidance note in relation in relation to housing issues and mental capacity more generally;

e. The timescale for tenancy authorisation is the timescale of the application as a whole. If greater urgency is required, a COP1 application will be needed.

Procedural matters relating to the application

26. The following matters will need also to be addressed.

27. 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.

28. 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.

29. 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 (at least three) other people (Annex B) and P (Annex C). The judges have emphasised the following in relation to consultation:

    a. The requirement to consult is a safeguarding measure. If people with a proper interest in P are consulted, the prospects of a better outcome for P are improved. If an applicant considers it likely that person X will not agree to the application, it is more important to consult them, not less. If the applicant knows that the application is contentious, then it is not appropriate to use the streamlined procedure;

    b. Full names must be used when completing Annex B (not "Mrs. X.").

    c. It is not persuasive if the only people consulted are professionals involved in the care of P;

    d. Applicants should be aware that, if P has a property and affairs deputy, that deputy should be consulted. (It should not be down to the deputy to request this.);

e. It is not sufficient to state in Annex C that "we haven't consulted P as they would not understand." An attempt to communicate the essential purpose of the application, in terms appropriate to P's circumstances, must be made;

f. If consulting P will cause undue distress, then a COP9 application to dispense with the consultation requirement will be required, with a supporting statement. At that point, the application is likely to be taken out of the streamlined procedure, not least because distress may indicate objection.

g. P's views and wishes are important and should be noted. As the judges have emphasised, wishes and feelings do not need to be expressed verbally - a smile or nod may convey a response.

30. 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.

31. Whether a family member or friend is willing to be a litigation friend or a Rule 1.2 representative[7] and whether they are able to keep the care package under review. This is explored in detail in Annex B.

32. 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.

33. 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.

34. 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.

[7] 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". The role of a Rule 1.2 representative is discussed further below.

35. Any reasons for particular urgency in determining the application (although see below in Section D in relation to applications where the urgency has resulted from a failure to bring the application in a timely fashion).

36. 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:

    a. needing particular judicial scrutiny; or

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

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

37. 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*."

Making the application

38. The Court of Protection has set up an e-filing service for these applications, more details of which can be found here. To make this work effectively, the naming convention set out here should be used for files and attachments.

39. It is also important to make clear in the application the correct contact details for the person with whom the court should be communicating.

D: What the court will do

The participation of P

40. 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.*"

41. The judges have made clear that they are cautious about the appointment of a main carer as Rule 1.2 representative; as they are often necessarily involved in the implementation of the measures amounting to deprivation of liberty, this gives to the potential for an actual or potential conflict of interest.

42. The judges have made clear that an Accredited Legal Representative may be appointed to act, not as ALR, but Rule 1.2 representative, but, generally, only if there is no cost to P or such cost has been included part of a damages award.

43. 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.

44. Applicants may assist the representative in setting out their views, but it is important that the COP24 setting out the position of the Rule 1.2 representative contains their views, not words put into their mouth. Where a Rule 1.2 representative is identified, the court sends a bullet point list of matters to them for the representative to address; this list may also be shared with the applicant (and, if the applicant has the list, the applicant can share the list with the representative).

Progressing the application

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

a. 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 he has security for his 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;

b. Stay the application until a suitable Rule 1.2 representative can be identified. In *Re JM*, Charles J indicated that the court should follow this route, which leaves all concerned in an extremely unsatisfactory position. In at least some cases, the stay can be unblocked by the creative use of a General Visitor,[8] but whether or not the proceedings are stayed, and a noted at the outset, this does not absolve public authorities of their responsibilities to bring applications where they are required to, so as to discharge the obligations imposed upon them by Article 5(1)(e) ECHR to seek authority for deprivations of liberty for which they are either directly responsible or of which they have knowledge and are therefore "imputable" to them for these purposes;

c. 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.

46. The judges have made clear that, whilst they are sympathetic with the pressures that public bodies are under, there can be little excuse for submitting an urgent application stating that P is moving the next day: as they note, there will have been planning before this and the court cannot be expected to act immediately if only approached at the end of the process. They have also noted that any applications appear to have been drafted many months before filing, by which time it is not clear whether P has moved or not – at which point, the application will be returned for clarification. They have also noted that, if P is being discharged from a mental health hospital then a Community Treatment Order may be available to avoid 'urgent' applications (although we should note, editorially, that this cannot be squared judgment of the Supreme Court in *PJ*, which made clear that a CTO cannot authorise a deprivation of liberty; we think that the reference in the minute of the workshop meeting must have been intended to be s.17(3) MHA 1983).

[8] However, this is very much a last resort, and applicants should explain fully in the Annex B what attempts have been made to identify a representative and why one has not been identified

47. Where applications have been made complying with the matters set out above, that maximises the chance that they will be determined in a timely fashion. However, the court acknowledges that it is not always possible to deal with applications as speedily as is desired. One practical point which arises in consequence is in relation to care plans. If the plan has been updated before the application has been determined, it is sensible to send the new one without waiting to be asked.

48. The judges have indicated that there should only be limited space for interim applications to be made (on COP9 forms) within the streamlined procedure. An example of the situation when one might be made is where there needs to be a change of Rule 1.2 representative across several cases (for instance, because a paid representative retires). At that point, a COP9 can be filed, identifying each case by initials and case number only. A supporting statement must explain why there is a need to change the representative and confirm willingness of the new representative to be appointed in each case.

49. 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 no specific application for purposes of seeking a review, and that the model order provides that it should be made on a COP DOL11. A COP9 seeking an extension of time to file a review application will seldom be granted, as the judges take the view that there has been 12 months' notice of the review date; that the first order sets out the duration of the authorisation; that if the review application is not filed in a timely fashion, the authorisation will expire; and a new authorisation will not be granted without scrutiny of continuing circumstances. If an application is filed after expiry of the previous authorisation, the reason should be given on the first page of the COPDOL11. Further, in relation to reviews, the judges have made clear that, where possible, there should be coordination of application papers and statements from the Rule 1.2 representative:

    a. The applicant may send the representatives' statement to the court (but nb the statement must be the representatives'; not the applicant's);

    b. Where the representative sends the statement to the court directly, the court will hold it until the application is received but will not confirm receipt to the applicant. Only if the review application is not received by the time the previous authorisation expires will the court chase the applicant for explanation.

50. A final point is that an order authorising deprivation of liberty may be widely disclosed as necessary, including to any landlord affected by a tenancy authorisation. The majority of orders made contain express provision to this end, but the judges consider that the order may be disclosed to any person who reasonably needs confirmation of the authority granted in it even without such express provision.

E: Useful resources

51. 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.lpslaw.co.uk – a website set up by Neil which includes videos, papers and other materials relating both to the Liberty Protection Safeguards and the MCA 2005 more widely.
- 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.

52. 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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