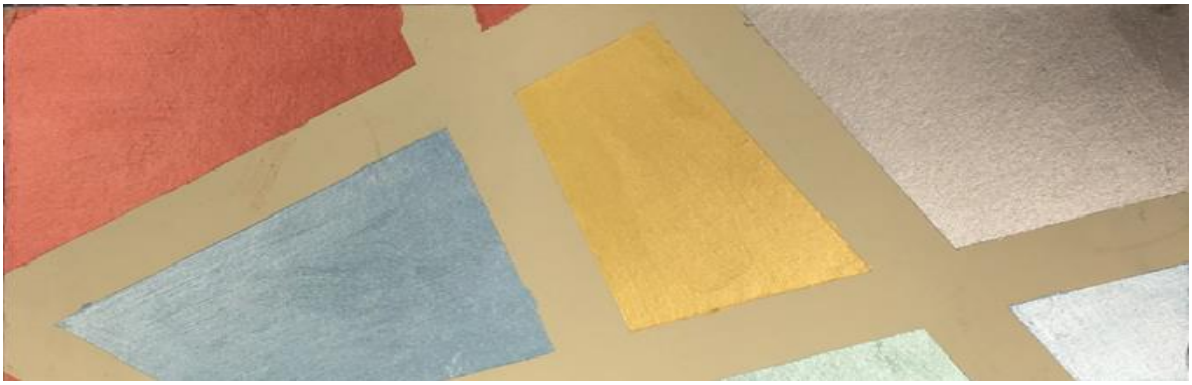
# JUDICIAL AUTHORISATION OF DEPRIVATION OF LIBERTY

December 2017



## A: Introduction

1. A procedure has been established by the courts to enable the authorisation of the deprivation of liberty of an individual over the age of 16 who lacks capacity to consent to their confinement. This procedure, usually 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), can be used in any setting where the DOLS authorisation procedure in Schedule A1 to the MCA 2005 cannot be used, and also where the person is between the age of 16 and 18.

2. The procedure is set out in Practice Direction 11A, and a form, COPDOL11 (until December 2016, PD10AA and COPDOL10 respectively). 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. As set out in section D below, the Court of Protection has not reached a satisfactory resolution of the issue of representation of the person concerned, such that in many cases any applications at present will be stayed – i.e. not progressed further by the court. However, we strongly suggest that local authorities and CCGs who are responsible for care arrangements that give rise to deprivations of liberty outside hospitals and care homes do not delay in making applications. The fact that the court may not be in a position then to progress the application does not alter the obligation on the public body in question to do what it must in order to

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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.

obtain the necessary 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 may therefore wish to 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 will need to be brought in two further categories of case:

    a. 16 and 17 year olds[3] who are not *Gillick* competent to consent to arrangements meeting the 'acid test' set down in *Cheshire West* where no person with 'true' parental responsibility has consented to the arrangements (and those arrangements fall within the scope of ordinary acceptable parental restrictions).[4] Where a 16/17 year old lacking mental capacity to consent to such arrangements is the subject of a care order, an authorisation under the procedure set out in this guide will be required.[5] It may also be that a local authority with safeguarding obligations under either the Care Act 2014 or the Social Services and Well-Being (Wales) Act 2014 would also have an obligation to bring an application where it is aware of private arrangements being made for a young person exceed the scope of restrictions a person with parental responsibility may properly consent to; at a minimum, the local authority must consider what steps can be taken to stop the confinement and, if it cannot be avoided, whether an application is required;

    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 for judicial authorisation: *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). In the last resort, however, 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.
[4] *Birmingham City Council v D* [2017] EWCA Civ 1695. This decision is under appeal to the Supreme Court at the time of preparing this guide (December 2017).
[5] In the event that they do not lack such capacity but lack *Gillick* competence, then the application would need to be the High Court under its inherent jurisdiction.

that the obligation will lie with the local authority with safeguarding obligations as the requirement to ensure that individuals are not arbitrarily deprived of their liberty is an aspect of the safeguarding obligations that Parliament has said should lie with local authorities.

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 new COPDOL 11 should be used from 1 December 2017. It is identical (save in its numbering) to the old COPDOL 10 form. 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 rep, 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 the court thinks that an oral hearing is appropriate.

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, but note that the Court of Appeal in *KW v Rochdale MBC* [2015] EWCA 1054 held that paragraph 11 of the model order should read:

> *"For the review period as defined below, [P] is to reside and receive care at [insert address] ("the placement") pursuant to arrangements made by [the Applicant] and set out in the Care Plan. P is deprived of his liberty but the same is in his best interests and is lawful."*

*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. 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)).

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 (there will be cases where a general practitioner's evidence 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. We note also that the requirement is of evidence of unsoundness of mind, rather than (as under DOLS) evidence of a mental disorder for purposes of the Mental Health Act 1983, but where a person has a specific diagnosis of a mental disorder, it should be given.

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 (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[6]) 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. 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

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

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*

12. 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 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.

13. 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.

14. 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.

15. 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.

16. 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, why they think that they have and will provide support which is in P's best interests, what reasons each person gives for supporting the care package being provided under the care or support plan, and over what period and how frequently they have visited or otherwise communicated with P.

17. 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*

18. 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*

19. 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.

20. 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.

21. 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).

22. 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.

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

24. 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.

25. 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

[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 in paragraph 11 below.

to be someone who supports the deprivation of liberty. Indeed, sometimes the most vocal are the best advocates for P.

26. 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.

27. 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.

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

29. 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.

## D: What the court will do

### The participation of P

30. 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.*"

31. 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

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

    f. 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;

    g. 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. We are still awaiting (as at December 2017) an unblocking of the resulting log-jam in which many cases are so stayed. As noted at the outset, we do not consider that this absolves 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.

33. 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. As at the time of preparing this note (December 2017), we understand that orders are usually being returned within 4-6 weeks of issue.

34. 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 COP DOL11.

## E: Useful resources

35. 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.

36. 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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