

## Deprivation of Liberty –

How do you control - and overcome - the difficulties with DoL authorisations and challenge them successfully?

# Authorisations of Deprivation of Liberty

## The Basics –

- Currently dealt with under Sch. A1 MCA 2005
  - Urgent or standard authorisations.
  - 6 qualifying requirements
  - Capacity Assessments.
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# What are the difficulties with current authorisations?

- We are still working with a system which is not “fit for purpose” HL Select Cttee.
- LPS delayed.
- Until the new scheme is implemented – have to work with a system which is cumbersome and bogged down in delay.

1. Delay

2. Assessments

## Difficulty 1 - Delay

- The DoLS regime was designed for a relatively small number of cases and is not equipped to deal efficiently with the present level of demand.
- 2014 Supreme Court judgement of Cheshire West gave a significantly wider definition of a deprivation of liberty than that which had been previously understood
  - “acid test” for deprivation of liberty: whether a person is subject to continuous supervision and control and is not free to leave.
- Since Cheshire West, courts and local authorities have struggled to cope with the increased number of cases. An aging population has also resulted in more applications being made in an already overstretched system. Huge backlog of pending applications.

- A couple of figures to illustrate this:
  - the Government’s original impact assessment, completed in 2008, considered that very few people who lack capacity would need to be deprived of their liberty, with expected cases beginning at 5,000 in the first year but dropping to 1,700 in the following years.
  - In 2018-19 however, the number of DoLS applications in England were recorded by NHS Digital as totalling 240,455.
- Example - in 2020, a complaint to the Ombudsman regarding significant delay in making a standard DoLS authorisation was upheld. The council was also found to be at fault for failing to process DoLS applications as it should for other people which could result in injustice.

*Cheshire east Council (19 010 786) decision date 18 December 2020.*

*"Mr X complained about the Council's delay issuing a DoLS authorisation for his father and about issues relating to financial assessment. There was no fault in the way the Council handled issues about financial assessment. But the Council was at fault for a significant delay in making a standard DoLS authorisation for Mr X's father. Mr X's father was not caused significant injustice by this. The Council is also at fault for failing to process DoLS applications for other people and there is potential injustice to them. The Ombudsman recommends the Council takes action to address the wider problem."*

# Difficulty 2

## Assessments

The number and quality of assessments is also a cause of delay and a difficulty with DOL authorisations.

- A large number of assessments have to be carried out (age, mental health, mental capacity, best interests, eligibility and no refusals) and the requirements must be met before a DOL can be authorised.
- Varying degrees of quality of assessments, for example:
  - different interpretations of terms such as 'to use' or 'to weigh up'
  - not correctly applying the relevant information
  - not taking all practicable steps to help a person make a decision
  - unsupported statements for example 'P could not understand the information' with no explanation
- The better the quality of the assessments at the outset of proceedings, the more straightforward proceedings will be with fewer delays.

- How can this difficulty be addressed?
    - More training for capacity assessors
    - Quality assurance before assessments are signed off – (prevent delay for P and ensure court time is used more effectively)
    - In DP v LB Hillingdon [2020] EWCOP 45, it was held that if an assessment is not sufficient, the court can request the initial capacity assessor for further evidence when possible [41]. This could encourage capacity assessors to complete a more thorough assessment if they know they will have to do it again if it is unsatisfactory.
    - Liberty Protection Safeguards, which will be discussed later, will reduce the number of assessments required to three – capacity/medical/necessary and proportionate
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## The challenge to the authorisation

- S.21A provides;

*(2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—*

- whether the relevant person meets one or more of the qualifying requirements;*
- the period during which the standard authorisation is to be in force;*
- the purpose for which the standard authorisation is given;*
- the conditions subject to which the standard authorisation is given.*

## The right to challenge

- Applications should be made – Re RD and Ors [2016] EWCOP 49
- Unqualified right of access to the court.

*Guidance from Baker J – Consider whether P has capacity to issue proceedings.*

*Consider whether P is objecting to the arrangements, either verbally or by their behaviour, in a way that indicates they would wish to apply to the CoP if they had capacity to do so.*

- No need to show prospects of success.
- Remember Part 8 review process and seek to resolve things informally.
- Need to remember the obligation on the state to ensure that a person deprived of liberty is not only entitled but enabled to have the lawfulness of his detention reviewed speedily by a court (Neary)

## Controlling Challenges

- The LA obliged to consider. May instigate the challenge themselves.

Common grounds –

- The quality of assessments underpinning the authorisation.
- Capacity Assessments - need to be of sufficient quality.
  - specific issues around fluctuating capacity.
- Consider the appointment of a s.39 IMCA

# Fluctuating capacity

- Specific issue which arises in assessments
- Open to challenge
- GSTT & SLAM v R [2020] EWCOP 4 – Hayden J
  - It is never proper for the court to make a decision under s.16 in respect of a person who currently has capacity, considering the wording of the section and s.1(2) MCA 2005 (that a person is not to be treated as unable to make a decision, unless all practical steps have been taken to help him to do so without success).
  - Although there is no such limitation in s.15(1)(c) and the court is able to declare whether an act yet to be done will be lawful or not (in respect of a person who currently has capacity to make the decision), Hayden J was clear that the power to make declarations of lawfulness under s.15(1)(c) does not extend to authorisation of deprivation of liberty. This is because the MCA itself limits the circumstances under which it can be used for these purposes.
  - Hayden J held that it would, however, be lawful to use the inherent jurisdiction to authorise a deprivation of liberty in such circumstances.

- The Longitudinal Perspective – In *Cheshire West and Chester Council v PwK* [2019] EWCOP 57, Sir Mark Hedley had to consider (in the context of a s.21A challenge) whether PwK had capacity to make a number of decisions, including in relation to residence; care and support needs. Sir Hedley found that '21 [...] *all the relevant decision-making with which I am concerned lies in the field of repeat rather than isolated decisions. Dr Rippon's view, which was not really the subject of challenge, was that where a longitudinal perspective was adopted then PwK lacked capacity in all relevant areas*'.

- Possible ways to overcome this difficulty:

- If the person lacks capacity most of the time, applying a longitudinal approach, the court can make a declaration that P lacks capacity
- DoLS Code of Practice para 8.24 – *'Where the regaining of capacity is likely to be temporary, and the authorisation will be required again within a short period of time, the authorisation should be left in place, but with the situation kept under ongoing review'*
- The person with fluctuating capacity could, when they have capacity to do so, give advance consent that when they lack capacity, the necessary support can be imposed even if they are saying no at the time.
- There does not need to be an order in place for a person to receive emergency treatment if that becomes necessary nor to be transported to hospital in an emergency situation.

## The use of conditions

- Conditions can be attached to the authorisations where appropriate.  
Eg – when and how frequent is P objecting to the deprivation? Notes to be kept  
- in cases of fluctuating capacity – records to be kept of P's wishes expressed.

## Controlling the process

- How limited are the grounds of challenge?
- Re UF [2013] EWHC 4289 Charles J
- DP v Hillingdon [2020] EWCOP 45
- Consideration of the court not limited to the qualifying requirements.
- Court doesn't take over the responsibility for the deprivation of liberty.
- Therefore a SA should be renewed or varied by the supervisory bodies, not extended by the court. However, Courts will still renew when in proceedings, although the Hillingdon case would lead to that being queried.

## Challenges to the authorisation

- Often focused on either the mental capacity requirement or best interests.
- Particular areas – fluctuating capacity.
  - Hillingdon cont. -
  - No interim capacity declarations – s.48 isn't drafted to reflect that and it's now dealt with in recitals instead.
  - Delay

# The procedure

- Identify the appropriate parties.
- Identify evidence and disclosure required early on – this could be in the initial draft order, or in the first directions order where it is agreed
  - Social care records (for an appropriate period of time)
  - Third party records (e.g., care home/hospital records)
  - Additional capacity evidence (SW? S49? – note practice direction for getting timeframes)
- Identify issues with capacity assessment if there are any:
  - Capacity assessor must explain purpose, identify relevant information, presumption of capacity, salient details
  - Issue of lack of engagement can be a problem – this is key reason it is important that P is told and understands the importance and purpose of the assessment
- Witness statements
  - Ensure detail is in statements first time and MCA principles have been clearly applied
  - Clear rationale, evidence based, consideration of opposing points, thorough analysis

# LPS

- Will change the procedure.
  - There will only be 3 assessments: the "Capacity" assessment, the "Medical" assessment and the "Necessary and Proportionate" assessment.
  - The Liberty Protection Safeguards aim to create a new simplified legal framework which is accessible and clear, and provides a simplified authorisation process capable of operating effectively in all settings (e.g. care homes, nursing homes, hospitals, supported living, people's own homes, day services, sheltered housing, extra care, Shared Lives etc).
  - Implementation awaited.
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## Concluding thoughts

- Practitioners still working with a system that is encumbered by delay and a lack of resources.
  - All recognise the need for LPS to be implemented.
  - Challenges will continue to be made, must be made in a timely and thorough fashion.
  - Vital that practitioners are aware of their duties to bring cases before the court where there is a challenge, and ensure that P's voice is heard.
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- Thank you for listening.

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