

# Court of Protection Community Deprivation of Liberty applications – practical support for ICBs

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*They have a very clear understanding and knowledge of what the client needs, but also what is appropriate.*

Chambers and Partners

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# Introduction

- Elizabeth Stokes, partner
- Rosie Harding, solicitor
- Emily Johnson, solicitor
  
- Health and social care advisory team
  
- Practice areas:
  - Mental capacity/Court of Protection
  - Mental health
  - Primary care
  - Community care
  - Social care
  - CQC challenges

- When is an application to the Court of Protection required?
  - applying the 'acid test' in community settings
  - when can the COPDOL11 'streamlined' application process be used?
- Completing the COPDOL11 application
  - practical tips for completing Court forms
  - outline of evidence to be submitted alongside forms
  - common issues and queries
  - [hyperlink to COPDOL11](#) or scan the QR code – you may find it useful to have this open whilst we go through the webinar



# Focus

(cont.)

- What happens once the application has been submitted?
  - court authorisation process and timescales
  - length of authorisation and renewal process
  - next steps for the ICB following receipt of authorisation
- Top tips
- Time for questions & discussion (hopefully!)

## The 'acid test' and identifying a deprivation of liberty

The "acid test" set out in Cheshire West (Supreme Court judgement in 2014):

- Is P subject to continuous supervision and control? Think:
  - is P monitored 24/7?
  - would P be left on their own if they asked to be?
  - are P's movements controlled by staff?
- Is P free to leave? Think:
  - is P only able to go out if accompanied by carers?
  - what steps would be taken if P left and did not return?
  - is P allowed to choose where they want to live?

## When is Court authorisation of a deprivation of liberty required?

- The ICB will make an application for authorisation of the deprivation of liberty where:
  - P's care package meets the test set out in Cheshire West
  - the ICB is responsible for commissioning that care package; and
  - P's care package is not being delivered in a care home or hospital

# When can the COPDOL11 'streamlined' process be used?

A COPDOL11 application may be appropriate where:

- There is no dispute that P lacks capacity to make decisions as to residence/care; and
- All those with an interest in P's welfare, including the ICB and the care provider, agree that:
  - delivery of the package is in P's best interests
  - the package is the least restrictive option for providing care and accommodation to P

When might the streamlined route not be appropriate?

- Where P is 16 – 17
- Where there is disagreement as to P's capacity or best interests
- Where there is an advance decision, or decision made by an LPA or deputy that conflicts with the implementation of the care plan
- Where anyone (including the Judge) involved feels an oral Court hearing is required

**Tip:** There is guidance at the end of page 31 of the form. Use this as a checklist and if you are unsure, always seek legal advice.

What happens if the ICB doesn't make an application?

- Where the deprivation of P's liberty is unauthorised, those acting for them in their own right or P's family can make an application for finding of unauthorised/unlawful deprivation of liberty (ie a breach of the Human Rights Act 1998)
- If successful, there is a financial risk to the ICB (it may have to pay compensation)
- There is also a reputational risk to the ICB

What does the application consist of?

- The application form itself consists of:
  - COPDOL 11: Broadly, this covering form sets out what order you are asking the Court to make and why
  - Annex A: Evidence in support of the application
  - Annex B: Evidence of consultation with those with an interest in P's welfare
  - Annex C: Evidence of consultation with P

## Key Sections

- Whether the application is urgent
  - urgency often arises where the COPDOL11 is being used to authorise tenancy/transition arrangements
  - duty of full and frank disclosure – including factors which may suggest the arrangements are not in P's best interest or any factors indicating the order should not be made
  - even if not urgent – consider stating in this box that the Applicant relies on s.4B MCA 2005 pending the decision of the Court
- Order sought
  - what are you asking the Court to declare and/or to authorise?
  - maximum authorisation of 12 months – should you be asking for a shorter review period?

# COPDOL11 (cont.)

- Applicant's details
  - remember – this is the ICB, not the individual case manager
  - the case manager's contact details can be added though
- P's details and details of their accommodation
  - include as much detail as you can about P's personal circumstances
  - if P is subject to provisions of MHA (detention, CTO or Guardianship), seek legal advice
- Details of decisions already made, including previous Court proceedings
  - advance decisions – don't have the same legal standing as ADRTs but should be taken into account in terms of best interests
  - use OPG100 to contact the OPG if you are not sure whether P has LPA or Deputy
  - ensure any Deputy or LPA are consulted on the application
  - important to include details of previous proceedings

## Key Sections

- Capacity assessment
  - COP3 to be provided with every application – where possible, obtain this prior to preparing the COPDOL11 application
  - there are then two ways the ICB can deal with the assessment:
    - ask P's GP, psychiatrist or other registered medical practitioner involved in P's care to complete the assessment of capacity and fill in the COP3
    - this is the most straightforward way to manage
- OR**
- If P's GP or other registered medical practitioner approached refuses to provide a COP3 assessment of capacity:
  - ask P's GP for to complete a letter/template providing the diagnostic evidence (confirming that P has a mental disorder/presence of an impairment of, or disturbance in the functioning of the mind or brain) or to supply a recent clinic letter setting this out
  - an officer of the ICB (ideally a BIA, but anyone who can evidence suitable expertise and experience is able to complete a capacity assessment) completes the COP3 assessment of capacity and we submit the two documents together to satisfy the diagnostic and functional components
- Remember there must be a separate assessment of each domain (though only one form is needed)

# Annex A

(cont.)

- Details of P's circumstances
  - the Court wants to know who P is – try to include details of what is particularly important to P in addition to just a summary of diagnoses/needs
  - if P has moved placement prior to the application, ensure to include details – did all those with an interest agree it was in P's best interests? Was the transition fully planned?
  - will P have a tenancy agreement? If no one has authority to sign it on P's behalf, authority can be obtained as part of this application – is the ICB willing to sign?

# Annex A

(cont.)

- Care and support plan:
  - all care plans and risk assessments forming the care plan should be submitted
  - should be submitted as a single document (with index if needed), signed and dated by the care provider as the most up to date version on the front page
  - must be dated within the last 12 months
  - set out arrangements for review and ensure the reviews have taken place in line with this
- Best interest assessment:
  - should demonstrate the application is uncontested
  - explore key themes such as whether it is the least restriction option to meet need, other options considered, and P's wishes and feelings
  - some ICBs submit the most recent CHC review as evidence of a review on best interests – varying results
  - also must be dated within the last 12 months
- Transition Plan:
  - only needs to be submitted if P is moving to a new placement

# Annex A

(cont.)

## Key provisions of the care and support plan

- Point to note: If something is not relevant, for example P does not use AT or there is no use of restraint/sedation, state that. Address each section to ensure the position is clear.
- Level of supervision and periods of the day when supervision is provided
  - state the level of supervision, the hours of the day that supervision is in place and what its purpose is, for example, to safeguard P's health and wellbeing or to lessen a particular risk
- The use or possible use of restraint
  - if used or to be authorised, ensure to include PBS plan where available and refer to it
  - ensure information provided includes:
    - details of who will implement the measures and their training
    - how often measures have been used in the last 12 months
    - how often they are reviewed

# Annex A

(cont.)

- Use of sedation
  - similarly, if used or to be authorised, ensure to include the PRN protocol and refer to it
  - ensure information provided includes:
    - details of who will administer the meds and their training
    - how often the measures have been used in the last 12 months; and
    - how often they are reviewed
- Use of assistive technology; and
  - think about all forms of technology used to assist P – are cameras or breathing/movement sensors used?
- What would happen if P tried to leave
  - don't just state that P does not try to leave or could not leave without assistance.
  - think theoretically:
    - what would staff do if P tried to leave?
    - would they prevent them through physical intervention or follow them?
    - what efforts would be made to return P home?

# Annex A

(cont.)

- Why is this care package the right one?
  - refer back to the best interests review filed
  - set out a summary of why the care package is appropriate and, if accurate, that all those with an interest consider it meets P's needs and is the least restrictive option
- Changes to the care package
  - include recent changes and planned changes – increase or decrease in needs/risk? Changes to accommodation or care provider?
  - consider whether shorter review period is necessary
  - if none, set out when the care plan was last formally reviewed and when it will next be reviewed
- Deprivation of P's liberty
  - what factors do you think point towards the acid test being met when considering P's circumstances?
  - refer back to the factors that led to the decision to make the application

# Annex A

(cont.)

- Use of physical restraint/use of sedation
  - refer back to your earlier section where you summarised the restrictions
  - ensure to expand as the form requires in terms of the circumstances in which it is used, how frequently and why it is the least restrictive measure
- Prevention of contact
  - if there are restrictions on contact which are not agreed, seek legal advice on whether the COPDOL11 is the appropriate route
  - if P is not restricted from having contact with anyone but is wholly reliant on others to facilitate contact then you can tick "no" but state that as a relevant factor for the Court to consider
- Restrictions on accessing the community
  - set out measures in place to support P when out in the community and what support is given to P
  - consider providing a copy of P's activity planner

# Annex A

(cont.)

- Imputable to the state
  - presumably the ICB is commissioning the package hence making the application – as such the deprivation of liberty is imputable to the state
- Statement of best interests
  - again, refer to the best interests review, you need only set out a summary here
- Harm to P
  - when thinking about harm to P – consider:
    - would P be at risk of harm or self neglect?
    - how would they manage their care needs if not with the care package?
    - are they wholly reliant on others?
  - don't be afraid to say there would be a high risk of death if that truly is the case - it is important to give a full, true and accurate picture of risk to the Court

# Annex A

(cont.)

- Proportionality/least restrictive option
  - refer back to the best interests review
  - set out why the restrictions are proportionate to deal with the level of harm which may occur if they are not in place
  - what measures are in place to ensure P has independence/retains dignity?
  - set out what less restrictive options have been considered/tried and why they were not appropriate
- Why the streamlined procedure?
  - consider guidance on page 31
  - ensure you can reverse those points to show why the application is suitable – for example:
    - all those with an interest in P's care have been consulted - refer to the BI Review and comments above - and agree that the current/proposed package is in P's best interests
    - there are no objections to P's current/ proposed placement and care package
    - appropriate steps have been taken to consult P and P appears content and settled with the current arrangement
    - all those with an interest in P's welfare agree to this application and seek for it to be determined on the papers without the need for an oral hearing

# Annex B

- Consultation with those with an interest in P's welfare
  - consult those falling into categories a) – d) on page 17 of the form:
    - LPA/deputy; and
    - at least 3 people named by P or anyone engaged in caring for P/interested in their welfare
  - ensure those you are consulting having enough information to be able to comment.
  - note: questions are for you to complete having consulted with the person, rather than the person being consulted
- Proposed Rule 1.2 representative
  - person to be appointed to advocate on behalf of P for the purposes of the application
  - they must be able to keep the delivery of the care plan under review and be able/likely to make an application to Court for review if the care plan is no longer in P's best interests
  - must be 18+ and be actively involved with P
  - this is often a family member, but where P does not have anyone willing or able to act on their behalf, it can be a professional representative/IMCA
  - if there is more than one person willing to act – include details of all of them
  - the Court is becoming increasingly cautious about people involved in the provision of care acting as the R1.2 representative due to the potential for conflict of interest
  - will need to provide a COP24 Witness Statement for the Court

# Witness Statement of proposed Rule 1.2 Representative

- Ensure the proposed representative has the guidance from *Re VE* [2016] EWCOP 16 and understands what the role is
- Their statement must cover the following:
  - confirmation of their relationship with P and their willingness to act as Rule 1.2 Representative
  - so far as is possible, setting out P's past and present wishes and feelings/ beliefs and values that would be likely to influence their decision if they had capacity, and any other comments they may have as to P's capacity to make decisions
  - confirmation that they have read and considered the application and care plans
  - confirmation that they are in agreement with the application and care plans
  - confirmation of whether or not an oral hearing is required
  - so far as possible, confirmation that they have discussed the Court application, and the package of care with P
  - confirmation that they have read and understood the VE guidance
  - any other comments that would assist the Court in deciding whether the package of care is the least restrictive available option which best promotes P's best interests

# Annex C

- Consultation with P
  - often completed by the proposed R1.2 representative either because they already have a good rapport with P or to help build one
  - can be undertaken by case manager or BIA
  - ensure whoever completes knows to record facial expressions and any other response from P when given the information, not just verbal responses
  - if consulting with P would cause undue distress, it may indicate the application is not suitable for the streamlined procedure as it could be an indicator of objection

## Checklist: page 27

- COPDOL11
- Annex A
- Annex B
- COP3 +/- letter from registered medical practitioner
- COP24 from proposed Rule 1.2 representative +/- case manager
- Copies of any advance decision, LPA, Court orders including deputyship
- Care and support plan (including PBS plan and PRN protocol as required)
- Best interests review
- Transition plan if applicable
- Draft order – there's one in the Court of Protection handbook if needed
- Application fee- does the ICB have a PBA account?

## What happens after submission?

- Court considers the application on the papers, without the need for a Court hearing (if satisfied that is appropriate)
- The application will either be approved or returned to the ICB to provide further information with a “maybe” order
- If the application is approved, the deprivation of P’s liberty will be authorised for a maximum period of 12 months
- A copy of the order should be provided to P’s care provider and the Rule 1.2 representative

## Review Period/Renewal

### Usual provisions

- If changes to the Care Plan are proposed that render it more restrictive the ICB must apply to the Court for review **before any such changes are made**
- If an application cannot be made in advance, an application must be made as soon as possible afterwards
- If P remains under the care of the ICB and the care plan remains the same, the ICB must apply to Court to renew the DOL **1 month before it is due to expire** – start work on this early!

## Top Tips

- Consult with family and those with an interest in P's welfare as soon as possible
- Obtain all materials in advance of completing the form if you can – If not, add in reminders to self but ensure to remove them before filing
- Focus on the care plan: what are we asking the Court to approve?
- Use plain simple language in the forms
- If you notice gaps/discrepancies, the chances are the Court will too – so resolve them before the application goes
- It is okay to cross refer to earlier sections of the form and to repeat yourself – some of the questions are repetitive
- Use the draft index to keep track of what documents you have and what you are awaiting
- File updated care plans without waiting for requests from the Court

# Questions/ discussion



## Feedback form

We would be grateful if you would complete our feedback form, by [Clicking here](#) or by scanning the QR code below, thank you.



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When you submit this form, it will not automatically collect your details like name and email address unless you provide it yourself.

1. Your name

Enter your answer



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