Community Deprivation of Liberty Protocol

Directorate	SCHH, Central Bedfordshire Council		
Service	Adult Social Care		
Author	Salma Kantharia LGSS Law Dan Baker Central Bedfordshire Council Tanya Unitt-Jones Central Bedfordshire Council		
Approved by	Head of Service – Integrated Services		
Approval date	30th July 1999	**Date of EIA**	
Review date	24th November 2020	**Review Outcome**	Tanya Unitt-Jones Laura West Amy Thulbourne Dan Baker
Next review date	24th November 2022	**Version**	10

Community Deprivation of Liberty Protocol

1. The aim of this Protocol is to ensure officers working for or on behalf of Central Bedfordshire Council respond in a timely manner when a person's care and support arrangements potentially give rise to a deprivation of their liberty.
Furthermore, those that command the highest urgency are prioritised appropriately. This Protocol sets out the criteria most commonly applied which indicates that an urgent response may be needed so as to safeguard the individuals concerned and preserve their Article 5* rights. It also explains how those considered as low or medium priority should be addressed and monitored before being referred to court.

2. The Mental Capacity Act applies to all persons' aged 16 and above. Those young people aged 16 – 17 will be managed by Childrens' Services. This protocol will be shared with Childrens Services for their information. This protocol applies to all settings other than Residental and Nursing homes or hospitals.

3. Article 5* – European Convention on Human Rights ('A.5 ECHR') Right to Liberty and Security

3.1 Article 5 ECHR protects your right to liberty and security. It focuses on protecting individuals' freedom from unreasonable detention, as opposed to protecting personal safety. You have a right to your personal freedom. This means you must not be imprisoned or detained without good reason.

3.2 As interpreted by the European Court of Human Rights, and by the courts in this country, a Deprivation of Liberty under Article 5(1) has been identified as having three elements:

i. The objective element: i.e. that the person is confined to a particular restricted place for a non-negligible period of time;
ii. The subjective element, i.e. that the person does not consent (or cannot, because they do not have the capacity to do so) to that confinement;
iii. State imputability: i.e. that the deprivation of liberty can be said to be one for which the State is responsible.

4. Cheshire West and the 'Acid Test'

4.1 In March 2014, the Supreme Court handed down a judgment in two cases: *P v Cheshire West and Chester Council and P & Q v Surrey County Council*, which has become known as 'Cheshire West'. This judgement provided an 'acid test' for deciding what care and support arrangements amounted to the 'objective element' of a deprivation of a person's liberty:

i. Is the person subject to continuous supervision and control?
ii. Is the person free to leave?

4.2 In all cases, the following are not relevant to the application of the test: (1) the person's compliance or lack of objection; (2) the relative normality of the placement (whatever the comparison made); and (3) the reason or purpose behind a particular placement. The focus is not on the person's ability to express a desire to leave, but on

what those with control over their care arrangements would do if they sought to leave. Acid test – continuous control and supervision -

Excerpt below is from a more recent judgement which explores what is meant by continuous control and supervision (*A Local Authority v AB* [2020] EWCOP 39). The judge's reflections within the judgement may help our understanding of the bar, for example, paragraph's 13 – 15 and my highlights:

"13. […] *it seems to me that the question of supervision and control must be viewed in the context of the prescribed condition of residence. Thus whilst she may be free to leave the property as she chooses, she is always subject to state control requiring her to return should she be otherwise unwilling to do so. The fact that she generally willingly returns does not of itself negate this point. Again whilst the supervision of her coming and going is not intrusive, it is the fact that all her movements are known and noted. Moreover, while she is free to do as she pleases in the community, there will inevitably be some obligation to restrain or control those movements should they become seriously detrimental to her welfare. That control could lawfully be implemented without recourse to the Court.*
14. When considering a deprivation of liberty it is not sufficient just to see what actually happens in practice but to consider what the true powers of control actually are. Again, the power to enter someone's private residence is a major intrusion on liberty however much, as it is here, it is to the benefit of the protected person for it to happen.
15. When looking at all these matters it is essential to consider them in the round and to ask whether in all the circumstances that actually prevail, or might reasonably come about, the arrangements amount to a deprivation of liberty. In my view they do here. In reaching that conclusion I have drawn upon the policy set out by Baroness Hale and that has, I should acknowledge, been a critical factor in my conclusion. However much these arrangements may be to the benefit of AB, and undoubtedly they are, one has to reflect on how they would be observed by an ordinary member of the public who, I strongly suspect, would regards them as a real deprivation of liberty. The policy that everyone should be treated the same leads me to the conclusion that I have set out."
https://www.mentalcapacitylawandpolicy.org.uk/continuous-supervision-and-control-a-further-judicial-take-on-deprivation-of-liberty/

4.3 Therefore, taking account of the previous judgments in the European Court of Human Rights and by the courts in this country, a deprivation of liberty may exist when the person is;

i. under the complete or continuous supervision and control of those caring for them, and,
ii. is not free to leave the place where they live,
iii. and they do not have the mental capacity to consent to such arrangements, and,
iv. that deprivation may be the responsibility of the state.

4.4 Whilst the above applies, it is important to note that a Community DoL application to court may be necessary even if the person is a self-funder and where the local authority is on notice / aware that P is being deprived of his / her liberties.

4.5 The following could be used as a working interpretation/guidance for staff:

4.6 Mental capacity – does the person have capacity to consent to their care and support plan that is/will be in place for them? And, can they consent to any deprivation of liberties that may be the result of this care and support plan. If not, they lack mental capacity for the purposes of the acid test.

4.7 Not free to leave – if the person were to walk out of the door, would they be brought back? If so, they are not free to leave for the purposes of the acid test. If a person requires 1:1 support to leave and they are not free to do so until such time as their carer (formal or informal) is free to take them out, then this could amount to not being free to leave.

4.8 Free to leave should we make a stronger link to this arm of the text is about permanently leaving

Court of Appeal has commented that 'not free to leave' means not free to leave that accommodation permanently.

D (A Child) [2017] EWCA Civ 1695

As I read her judgement (see paras 40-41), Baroness Hale was using "free to leave" in the sense I had described in **JE v DE** ***[2006] EWHC 3459 (Fam),*** *[2007] 2 FLR 1150, para 115:*

"The fundamental issue in this case … is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses …"

4.9 Continuous supervision and control –Does the person's care and support plan result in their day to day decisions being made by someone else and with the possibility of their own wishes feelings being overridden? If so, this could mean that the person is under continuous supervision and control. Examples include where their welfare is under observation or managed due to risks arising from or related to examples such as walking around; falling; confusion; distress; incontinence; adverse behaviour; medications; safeguarding; or other physical or mental health difficulties. If yes, they are under continuous supervision for the purposes of the acid test. Does the person have the ability to make decisions about what to do and when, that are not subject to agreement by others? If no, they are under control for the purposes of this test

4.10 The Supreme Court has now brought within legal scrutiny, those individuals who live in supported living arrangements, those in their own home (this could include those with a physical disability) and 16-17-year olds. At present those persons aged 16 and 17 are managed by childrens services.

4.11 For ease of reference the person the application is about is referred to as "P".

4.12 Please follow these steps when considering and applying for an authorisation for a Community Deprivation of Liberty. Remember where "P" demonstrates capacity in the relevant areas then a Community DoL application is not required.

5. Stage 1

5.1 When considering the issues around DoL in the community in respect of specific individuals and their care and support arrangements, practitioners should follow these steps:

i. Consider the support that a person will need to contribute meaningfully to their needs assessment and any subsequent assessments which may be required. Ensure that the person is enabled to have their voice heard throughout the care management process and that their wishes are recorded. Consider the use of advocacy, family and friends that the person may want to help them in any decision-making process.
ii. Undertake a needs assessment under the Care Act 2014.
iii. Establish if P has the mental capacity to make decisions about the issues in the care plan that give rise to P being under continuous supervision and control and not free to leave. For example, this might include issues such as: (a) his/her accommodation; (b) his/her care and support; and (c) any other relevant issues such as covert medication / Assistive Technology (CCTV). A formal assessment under the Mental Capacity Act 2005 must be undertaken to evidence this. For issues such as covert medication, this would need to be undertaken by coleagues in health services.
iv. Best Interests analysis and decision making must be clearly recorded on the person's record, using the appropriate CBC form, along with details of all disagreements, disputes and how these were resolved or if not why not and the current status of any dispute.
v. Ensure that the completed needs assessment under the Care Act 2014 and Care and Support plan are attached to SWIFT as wll as the Mental Capacity Act 2005 assessment and best interest decision.
vi. Where it has been assessed that someone may be deprived of their liberty, the following documentation will be required to present to the monthly Community DoL Meeting;

- Care Act Assessment or Review
- Care and Support Plan
- Mental Capacity Act Assessment
- Best Interest Decision
- Legal Instruction Form
- Prioritisation and Restrictions Tool Template

NB: When undertaking the above:

- Ensure that the acid test is considered and met and set out your reasons in writing. Is the person subject to continuous supervision and control? Is the person free to leave?
- Review and document whether care and support can be delivered in a less restrictive manner including reasons for your decision.

6. Stage 2

6.1 If following the above, it is believed that P cannot consent to accommodation and or care arrangments that may amount to a deprivation of their liberty, then the *Prioritisation and Restrictions Tool* must be considered and completed with a referral to the Community DoL Meeting within a 28-day period of when the possible deprivation of Liberty has been identified.

7. Prioritisation and Restrictions Tool

HIGH	MEDIUM	LOW
• Continuous 1:1 care during the day and / or night • Sedation/medication used to control behaviour • Physical restraint used – equipment or persons • Restrictions on family/friend contact (or other Article 8 issue) • Objections from individual (verbal or physical) • Objections from family /friends • Attempts to leave, packed bags ready to leave, looks out of the window and makes requests to leave, objects to / resists care and support • Confinement to a particular part of their accommodation • New or unstable living arrangements/accommodation • Other concerns relating to risk of legal challenge / complaint regarding deprivation of liberty / ECHR • Already subject to a court DoL authorisation which is due to expire in the next 3 months	• No High Priority factors apply • Asking to leave but not consistently • Not making any active attempts to leave • Appears to be unsettled some of the time • Person is moved from their home in an urgent situation but no objection from person and/or family/carer • Restraint is used as part of an agreed MDT best interest care and support plan with no signs of distress and/or objections from the adult (e.g. body positioning supports in a wheelchair) • No confinement or movement to a particular part of their accommodation – assistive technology is/or maybe used to track or survey the person's movements or whereabouts. • No objections from the person in relation to the accommodation care and/or treatment arrangements (verbal or physical) • No challenge from family/friends or LPA/EPA or legal representative(s) that the current accommodation and /or treatment options are not the person's best and not the least restrictive option • Known to leave the accommodation but happy to return with support	• No High Priority factors apply • No specific restraints or restrictions being used. E.g. in a placement not objecting, no additional restrictions in place. • End of life situations, intensive care situations which may meet the acid test but there will be no benefit to the person from the safeguards • Appears to meet some but not all aspects of the acid test and may require legal clarification on whether the acid test is met • Settled in their accommodation with no evidence of objection Person is moved from their home in a planned way with no objections from person and/or carer/family/LPA/EPA/Deputy

8. Stage 3

8.1 In all cases, a summary of how the criteria has been applied from the *Prioritisation and Restrictions Tool* and the resulting priority will be provided using the template Appendix 1.

8.2 In discussion with your supervisor and your team manager, you will need to decide on all cases in the community where the acid test is met and P lacks capacity to consent to any deprivation of liberty. These will all need to be added to the Community DoL Tracker.

8.3 "Where the person is receiving end-of-life care, decision-makers should use their professional judgement as to whether DoLS assessments are appropriate and can add any value to the person's care or treatment." The distinction between nearing death and palliative care needs to be thoroughly explored and discussions need to be clearly documented on the Prioritisation and Restrictions tool.

8.4 Of the cases identified, in conjunction with your supervisor and team manager, you will need to decide which cases are 'High' priority and need to be progressed more urgently. For these cases, you will send the required documentation to the relevant administrator to be included in the Agenda for the Community DoL Meeting

9. Prioritisation and Restrictions Tool Template

9.1 The following exert will be completed by the relevant practitioner on the template provided in Appendix 1.

9.2 *"I have assessed that the current care and support that [insert customers name] receives may meet the acid test and as a result a deprivation of liberty applies. After completing the Prioritisation and Restrictions Tool I have assessed the current situation as [delete as appropriate: High / Medium / Low] priority because [insert rationale behind decision]. I have discussed this with my supervisor and team manager who support the escalation of this case to the Community DoL Meeting."*

10. Community DoL Meeting

10.1 These meetings occur on a monthly basis and consider all potential applications for a Community DoL authorisation. The meeting has representation from the safeguarding services by the Mental Capacity Act Lead and the Lead for Quality Standards, LGSS Law and Integrated Services Senior Management Team. Each application will be discussed and decisions regarding next steps will be made in collaboration with the practitioner. A decision will be made as to whether a court application should be made through the Court of Protection 'streamline process' .

10.2 This may result in the practitioner completing Court of Protection forms COP3 and COPDOL11 which would be forwarded directly to a nominated legal representative. The Community DoL Meeting completes and maintains a tracker that will oversee the progress of all applications including the renewal process. The

relevant administrator needs to be copied into all community DoL correspondence especially any court orders.

10.3 At the Community DoL Meeting, consideration will be given to whether an alternative course of action needs to be taken and the Chair will provide feedback of this decision to the allocated case worker, their supervisor and team manager. As an example, a Community DoL may not be appropriate in the following circumstances (this is not an exhaustive list):

- Any contest by P or anyone else that the person is under 16.
- That the relevant medical evidence is not available which demonstrates that P is of unsound mind.
- That medical evidence is not available to demonstrate that P lacks capacity to consent to care arrangements.
- P does not have a relevant Care and Support Plan which states the nature of P's care arrangements and why the care and support amounts to a deprivation of liberty, that the arrangements are not imputable to the state and there is no best interests' statement.
- A failure to comply with consulting with P and any other relevant persons in P's life about the application and to canvas their wishes, feelings and views.
- Any concerns arising out of information supplied in accordance with recording of the views of P or any relevant persons as well as the providing of details of any person who might act as litigation friend or representative for P.
- The application may contain information that needs to be specifically brought to the Courts attention regarding any matters that need particular judicial scrutiny: For example, any suggestions that the arrangements may not be in P's best interests or be the least restrictive option or any other reasons why the order should not be made.
- Any objections made by P.
- Any potential conflict with a previously made advance decision or a decision made by the Lasting Power of Attorney or by P's deputy.
- If the court thinks that an oral hearing is necessary or appropriate.

10.4 At the Community DoL Meeting, legal advice is to be sought if any of the above circumstances apply to enable the most appropriate way forward to be identified. Legal representation will be available for all Community DoL Meetings. The outcome of the advice will be communicated to the Team Manager who will be present at the meeting and will pass this on to the allocated worker.

11. Once an Application has been Approved

11.1 Once an application is made to the court and the court has approved the DoL, it can only grant a DoL authorisation for a period of up to 12 months. If an individual's placement/care plan has been authorised by the Court of Protection (either through an application made by this authority or another authority) then the care plan will need to be kept under review and a renewal application to the Court of Protection is likely to be needed by at least 1 month prior to the expiry of the authorisation.

12. Transfer of Responsibility to another Local Authority/CGG

12.1 In the event that an individual's care and support arrangements are authorised by the Court of Protection, and the responsibility for the individual transfers to a CCG /alternative local authority (i.e. if they become eligible for CHC funding or otherwise become the responsibility of a CCG), then the CCG/local authority must be informed in writing that:

- A court order authorising the deprivation of liberty resulting from the individual's care plan is in place;
- Inform the CCG/local authority of the renewal date for the authorisation and that a further application to court will be necessary by 1 month prior to the expiry of the court order;
- Any changes to the care plan to make it more restrictive will require an urgent application to court; and
- You must provide a copy of the order and care plan approved by the court to the CCG and/or receiving local authority.

13. Additional Concerns

13.1 If there are concerns aside from the main DoL issue, such as, the need to sign a tenancy agreement when there is no one with legal authority to do so but the landlord requires it, there are issues about family contact, issues around end of life care, disputes within the family or concerns about the care someone is receiving, then the practitioner should have discussions with their manager to consider making a request for legal advice. ***This may require an urgent application to LGSS Law subject to the issue(s).***

14. In the Event of a Person's Death

14.1 If an individual passes away whilst an application is being considered by the Court of Protection, or an authorisation has already been given, it is important that the practitioner informs LGSS Law so that they can update the court and bring any proceedings or authorisation to an end.

15. Useful information for consideration in Preparation of Court Applications

15.1 An information checklist is provided below to ensure that all information required is contained within the body of the application (COPDOL11) or in attached documents. Failure to provide the required information may result in the case not being suitable for the streamlined process for authorisation to deprive a person of their liberty.

I. Have completed an updated needs assessment/review under the Care Act 2014?
II. Have you identified the reasons for the urgency in determining the application?
III. Have you confirmed that P is 16 years old or more and is not ineligible to be deprived of liberty under the Mental Capacity Act 2005?
IV. Have you attached the relevant medical evidence stating the basis upon which it is said that P suffers from an unsound mind?

V. Have you attached the relevant medical evidence stating the basis upon which it is said that P lacks the capacity to consent to the care arrangements?
VI. Have you attached a dated copy of P's care and support plan?
VII. Does the care and support plan state the nature of Ps care arrangements and why it is said that they do or may amount to a deprivation of Liberty?
VIII. Have you stated the basis upon which it is said that the arrangements are or maybe imputable to the state?
IX. Have you attached a statement of best interests?
X. Have steps been taken to consult P and all other relevant people in P's life (all relevant people must be identified) of the application and canvassed their wishes, feelings and views?
XI. Have you recorded any relevant wishes and feelings expressed by p and any views expresses by any relevant person?
XII. Have you provided any relevant advance decision by P and any relevant decisions under lasting power of attorney or P's deputy?
XIII. Have you identified anyone who might act as a litigation friend or rule 1.2 Representative for P?
XIV. Have you listed any factors that ought to be brought specifically to the courts attention, any factors that need additional judicial scrutiny, any suggestion that the arrangements may not be in P's best interests or not be the least restrictive option or any other reason that indicates that this order should not be made? Please note that the applicant is under a specific duty to make full and frank disclosure to the court of all facts and matters that might impact on a court's decision.
XV. Has the legal department been provided with a purchase order number?

Community Deprivation of Liberty Protocol

Appendix 1

Prioritisation and Restrictions Tool Template

Community Deprivation of Liberty

Name:	**Swift No:**
Lead Worker:	**Manager:**
Priority:	**Date of DoL Meeting:**

"I have assessed that the current care and support that [insert customers name] receives may meet the acid test and as a result a deprivation of liberty applies. After completing the Prioritisation and Restrictions Tool I have assessed the current situation as [delete as appropriate: High / Medium / Low] priority because [insert rationale behind decision]. I have discussed this with my supervisor and team manager who support the escalation of this case to the Community DoL Meeting."

Appendix 2

Responsible Local Authority/Clinical Commissioning Group

Your ref:
Our ref:
Date:

Dear LA/CCG,

Community DoL Responsibility for person, DOB.

I am writing to inform you that the Court of Protection has granted an order authorising the deprivation of X's liberty for a period of 12 months commencing on the (date).

The current court order dated …… will require a renewal of the authorisation on the (insert date). The renewal needs to be submitted to the Court of Protection one month prior to the expiry of the Court order.

Please be aware that our legal representative will be writing to the Court of Protection to advise that future applications will be made by your organisation.

Any changes to the care and support plan which may make it more restrictive will require an urgent application to the Court. Please find attached a copy of the current Court order and care and support plan that has been approved by the Court of Protection.

Please can you confirm receipt of this letter and enclosures?

Yours Sincerely

Appendix 3

Within the application, the local authority will try to ascertain whether there is anybody suitable, such as a close relative or friend to act as the individual's Litigation Friend or a Rule 1.2 Representative.

The role of the Rule 1.2 Representative or Litigation Friend is to ensure the individual's participation in the overall process is secured and that their views/wishes and feelings are made known, where they cannot do this themselves, due to a lack of capacity.

Rule 1.2 representative

In short, The Court have suggested that the rule 1.2 representative's role is, *"as someone who knows the position on the ground, to consider whether from the perspective of the individual's best interests, whether you agree or do not agree that the Court should authorise the individual's package of care and support."*
Re VE [2016] EWCOP 16

Key responsibilities of a Rule 1.2 Representative include:

- Weighing the pros and cons of the individual's care and support package and comparing it with other available options;
- Considering whether any of the restrictions are unnecessary, inappropriate or should be changed;
- Informing the court about what the individual has said, and the individual's attitude towards, the care and support package;
- Checking from time to time that the care and support package is being properly implemented.

Whilst the role of a rule 1.2 representative is a Court appointed role and therefore it must be taken seriously, a rule 1.2 representative is usually somebody who knows the individual extremely well and therefore, meeting the key responsibilities shouldn't be too onerous, and is something that a family member or close friend would likely be doing in any event.

Litigation Friend

If the court feels that the individual should be involved in the court process directly, they may appoint a Litigation Friend to act on behalf of and represent that individual. The Litigation Friend will step in and take the place of the individual in the court process, representing them and securing their participation within the Court process. If necessary and appropriate, the Litigation Friend can appoint a Solicitor and give instructions to them, on behalf of the individual.

Key responsibilities of a Litigation Friend include:

• Making decisions that are in the best interests of the person.
• Making every attempt to communicate and explain to the individual what is going on within the Court process. Trying in so far as is possible to ascertain their wishes and feelings about the same.

- If requested, attend court and possibly speak to a judge on behalf of the individual.(as aforementioned, there may be solicitors/legal professionals involved to assist)

Rule 1.2 Representative v Litigation Friend

In normal circumstances, where everyone is in agreement about the care and support that the individual receives and that this is in the individual's best interests, it would be usual practice for there to be a rule 1.2 representative appointed.

When everyone does not agree as to what is in the best interest of the individual, it is may be more appropriate for there to be a Litigation Friend appointed.

The Local Authority will look at the circumstances of the individual and weigh up which role either a Litigation Friend or Rule 1.2 Representative is most suited to the case, and put this forward within their application. The Court will then make the final decision when it reviews the application.

Appendix 4

Information Leaflet: Deprivation of Liberty in Community Settings.

What is a Deprivation of Liberty in community settings and what are the steps that might be necessary to protect and support people.

1. Introduction:

The purpose of this leaflet is to assist social care practitioners when having discussions with people about Deprivation of Liberty (DoL) in community settings. It may also be given to family members and/or friends of people that may be deprived of their liberty if considered helpful. Practitioners should also have discussions directly with the relevant person themselves (the person receiving the care and/or treatment) in ways that are appropriate to their needs and circumstances.

Example of why such protections are needed:

> *Steven, a young man with autism, needed temporary care while his father was unwell. The father assumed his son would stay at his usual respite care home, but the local council responsible for Steven placed him in a specialist unit because of concerns about his behaviour. His father expected this to be a temporary move and for Steven be home again within weeks. When the council insisted on keeping Steven in the unit for longer, his father challenged this decision. Steven had been detained in the unit for almost a year when the Court of Protection ruled that the council had breached his Article 5 rights and unlawfully deprived him of his liberty. The court order enabled Steven to return home.*
> (Re Steven Neary; LB Hillingdon v Steven Neary (2011) EWHC 1377 (COP))

2. The Starting Place: The Human Rights Act 1998 and Article 5: Right to Liberty.

Human Rights are the basic rights and freedoms that belong to everyone. They apply to all people equally, regardless of race, sex, nationality, ethnicity, disability or any other status of an individual. This is why human rights are often referred to as 'universal' rights and freedoms.

> The UK Supreme Court reinforced the universal character of human rights[1]:
>
> *"[….] people with disabilities, both mental and physical, have the same human rights as the rest of the human race. It may be that those rights have sometimes to be limited or restricted because of their disabilities, but the starting point should be the same as that for everyone else […]"*

Article 5 of the Human Rights Act 1998 protects all people's rights to **liberty** and **security.** It focuses on protecting everyone from unreasonable detention. It is vital to understand that 'detention' and 'liberty' does not just apply to settings that might typically come to mind, such

[1] See para 45 of Cheshire West Judgment (https://www.supremecourt.uk/cases/uksc-2012-0068.html)

as those relating to the criminal justice system or mental health inpatient hospitals. A person could potentially be 'deprived of their liberty' in any setting, including one's own home. The focus should be on the arrangements and limitations in place and not necessarily the specific location or type of accommodation.

Article 5 states that it is unlawful for someone to be deprived of their liberty without their consent unless it has been authorised by a fair and proper legal process. It provides protection from situations where a person's freedom may be taken away inappropriately.

3. Care and Treatment

It is recognised that some people require particular care or treatment that will amount to a deprivation of their liberty. In other words, a person's care or treatment might require that they are under: ***'complete/continuous supervision and control,'*** **and are** ***'not free to leave'*** **the care setting or accommodation where they reside.** This is the current threshold for what amounts to a deprivation of liberty, known as the 'acid test'.[2]

When a person is unable to give their informed and valid consent to such arrangements, including when this is due to an impairment, illness, or injury that affects the functioning of their mind or brain, this is considered to be a Deprivation of their Article 5 right to Liberty.

Such care arrangements should always be considered as a last resort however, in many situations, this may be unavoidable and, in the person's, best interests to keep them safe from harm.

> It is important to understand that identifying a particular care arrangement as a 'deprivation of liberty' does not necessarily mean that the care is in some way 'wrong' or inappropriate, rather, that the level and nature of the required arrangements simply warrants additional safeguards and a higher level of authorisation to be lawful.

Case law explains that a person, without the relevant mental capacity to give their consent, could be considered as deprived of their liberty even if they appear happy or accepting of the care arrangements. Likewise, such a person could also be considered as deprived of their liberty even if the care is normal for a person with similar needs or when the purpose of the care is completely understandable.

It is vital that we understand that the systems are there to protect those that could *potentially* have their rights inappropriately or disproportionately infringed. It is important that systems are in place to ensure that care is appropriate and decisions are made in a fair and proper way.

[2] Cheshire West Judgment (https://www.supremecourt.uk/cases/uksc-2012-0068.html)

4. Authorisation

If a person cannot consent to care that amounts to a deprivation of their liberty, the local authority cannot authorise the care arrangements. This is also the case for any appointed attorneys or court appointed deputies.

If the relevant person is over the age of 16, these cases must be referred to the Court of Protection by those that are responsible for the arrangements. This is a court specifically set up to deal with certain financial and welfare matters relating to people who lack the capacity to make these decisions themselves.

This remains to be the case even if the arrangements were put in place without the council being involved or providing any funding. There is a positive obligation upon local authorities to uphold human rights and freedoms.

There is a current procedure (known as the 'Re: X procedure') which allows for non-controversial applications to be considered by a judge ‘on paper’ and without an oral hearing.

> The court is able to look at the circumstances and check that the care provided is necessary and proportionate, is least restrictive, and is in the person’s best interests. The court can authorise the deprivation for up to 12 months; and when the authorisation period is due to expire, the case needs to be presented to the court again if the care arrangements need to continue.

In preparation, a social worker, case manager or care co-ordinator will be required to complete the necessary court paperwork with legal guidance being received. The required paperwork will include a mental capacity assessment and best interests analysis as well as gathering any ascertainable wishes and feelings of the relevant person and valuable insights from those involved in the person’s life.

A Doctor will also need to be consulted so that the application includes a statement about the person’s mental health, or relevant cognitive impairment. This is often the person’s GP or in some circumstances another doctor / consultant involved in the person’s care.

If the individual has a close relative or friend, they may be asked to consider being what is referred to as a Rule 1.2 Representative or a Litigation Friend.

The role of the Rule 1.2 Representative or Litigation Friend is to ensure the individual’s participation in the overall process is secured and that their views/wishes and feelings are made known, where they cannot do this themselves, due to a lack of capacity.

Once the judge is satisfied that the care arrangements are necessary and proportionate, the deprivation can be authorised. The judge may seek additional clarification from the Local Authority on any points.

5. Timeframe

Due to the demands on Local Authorities and the Courts, by the unanticipated high number of cases being referred for authorisation, the DoL process may be subject to delays.

At the moment, all local authorities are prioritising cases using nationally recognised risk assessment tools and good practice principles. Unfortunately this does mean that some cases are waiting for prolonged periods before being dealt with, especially where the person has been in receipt of their care for a number of years, and where they are settled and no concerns have been raised by anyone involved.

The current process is designed to protect the human rights of people who are unable to protect themselves. In the future, these processes will change and a new piece of legislation has already been enacted.

The new process, commonly referred to as the Liberty Protection Safeguards, is aiming to simplify the processes. In most cases this will enable the authorisations to be agreed as part of the assessment process when the care arrangements are being set up and reviewed. This will vastly reduce the number of cases that need to be presented to the courts. However, until it is implemented, the current authorisation process will continue.

Appendix 5

Considerations on Mental Capacity Assessments for the purposes of a Community Deprivation of Liberty (DoL) authorisation.

1. Introduction

This guidance will reflect on the challenges around assessing mental capacity for the purposes of a community deprivation of liberty court application (note: The CoP form 3 is completed). This is to support practitioners phrase the question/decision on the mental capacity assessments that are presented to the community DoLS high risk meeting.

2. The Complexities

When assessing mental capacity we are normally required to think in terms of **a matter** at the **material time** – because capacity is 'time specific' and 'issue specific.'

> *Section 2 of the Mental Capacity Act 2005 states that "a person lacks capacity in relation to **a matter** if at **the material time** he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

Capacity assessments should be undertaken as part of usual care and support planning for each aspect of a person's care and support where there is doubt or concerns about their ability to make such decisions.

At the time of writing this guidance, the following is considered to be relevant information on each **care** decision assessed:

(a) With what areas the person under assessment needs support;
(b) What sort of support they need;
(c) Who will provide such support;
(d) What would happen without support, or if support was refused.
(e) That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

At the time of writing this guidance, the following is considered to be relevant information on each **residency** decision assessed:

(a) The two (or more) options for living.
(b) Broad information about the area.
(c) The difference between living somewhere and just visiting it.
(d) The activities that the person being assessed would be able to do if he lived in each place;
(e) Whether and how the person being assessed would be able to see friends and family if he lived in each place;
(f) The payment of rent and bills. This is not required to be understood in any detail beyond the fact that there will have to be a payment made on their behalf, as for most cases concerning protected persons, the payments will be made by an appointee;
(g) Any rules of compliance and/or the general obligations of a tenancy. Again, the rules are not required to be known in any great detail by the person under assessment but a basic understanding of the fact that there are restrictions, and the areas in which they would operate, will be necessary.
(h) Who they would be living with at each placement;
(i) The sort of care they would receive in each placement;
(j) The risk that a family member or other contact may not wish to see the person being assessed should they choose a particular placement against their family's wishes (if applicable).

NB: these lists should be treated as no more than guidance to be expanded or contracted or otherwise adapted to the facts of the particular case.

However, a deprivation of liberty is rarely (if ever) purely about one type of arrangement/intervention. Often it will be a group of arrangements that, when taken together, amount to a deprivation of that person's liberty; collectively amounting to 'continuous supervision and control' and not being 'free to leave.'

Focusing on the wording contained in the Court of Protection paperwork (CoPDoL11) may be of assistance, as it requires us to confirm the following:

- "I confirm that P has been assessed as having an impairment or disturbance in the functioning of the mind or brain and **lacks capacity to consent to the measures proposed and the deprivation of liberty** which is identified within the application."

Again, the question relates to consenting to 'measures' (plural) which reflects that the practitioner is required to make a determination on the person's mental capacity to consent to a range of care or treatment being proposed which is causing the deprivation of liberty.

(See here: https://www.gov.uk/government/publications/form-copdol11-application-to-authorise-a-deprivation-of-liberty-sections-4a3-and-162a-of-the-mental-capacity-act-2005)

Similarly, looking forward to the future, when the Mental Capacity (Amendment) Act 2019 is implemented, the capacity assessment question contained in this legislation centres on consenting to the **'arrangements'** (again plural) that give rise to a deprivation of the cared-for person's liberty.

3. The suggested approach

As part of usual care and support planning processes, there will often need to be Mental Capacity assessments undertaken about various aspects of a person's care and treatment. These assessments should be both issue and time specific.

However, when it comes to a community derivation of liberty authorisation, the assessment of capacity should draw upon all these separate capacity assessments and take a step back. The Community Deprivation of Liberty capacity assessment should focus on the care plan/care arrangements as a whole.

It is recommended that the capacity assessment question satisfies the DoLCoP11 statement;

Capacity to consent to the measures proposed (in the care plan) and the deprivation of liberty which is identified.

The capacity question text should then also outline the care plan and any liberty restricting measures. This might include things like:

- the prescription and administration of **medication to control** the individual's behaviour, including on a PRN basis.
- the provision of **physical support with the majority of aspects of daily living**, especially where that support is provided according to a timetable set not by the individual but by others
- the use of **real-time monitoring** within the home environment (for instance by use of CCTV or other assistive technology)
- varying levels of staffing and frequency of **observation by staff.**
- the regular **restraint** by family members or professional carers which should always be recorded in the individual's care plan. This includes the **use of physical intervention/restraint**, even if used to provide personal care tasks, breakaway or block techniques, distraction methods, staff withdrawing, physical touches or holds. This includes **mechanical restraint,** such as wheelchairs with a lap strap or harness (e.g., Crelling), reinforced glass in mobility vehicles, protective helmets. This also includes **chemical restraint,** such as medication with a sedative or tranquilising effect.

- the **door being locked**, and where the individual does not have the key (or the number to a keypad) and is unable to come and go as they please, strongly suggests that they are not free to leave
- the individual **regularly being locked in their room** (or in an area of the house) or otherwise prevented from moving freely about the house
- decision on **where to live** being taken by others
- decision on **contact with others not being taken by the individual**
- access to the **community being limited** by staff availability
- a member or **members of staff accompanying a resident to access the community** to support and meet their care needs
- **restricted access to finances**, with money being controlled by staff or family.
- **restricted access to personal items** to prevent harm
- **restricted access to parts of the property**, such as the kitchen or certain cupboards therein, to minimise health and safety risks
- **restricted access to modes of social communication**, such as internet, landline or mobile telephone, correspondence
- **positive behavioural reward systems**, to reward "good" behaviour
- **restricted access to family**, depending on level of risk and availability of staff and resources
- **lack of flexibility,** in terms of having activities timetabled, set meal-times, expected sleep times

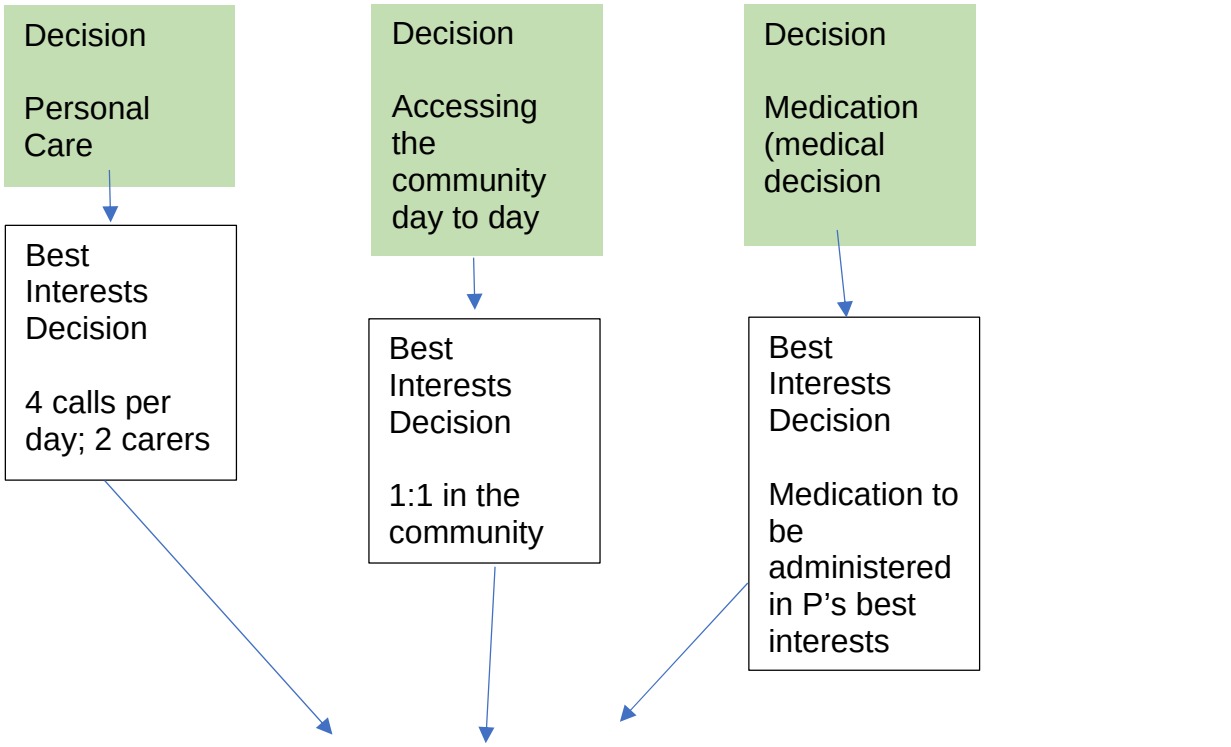
(not an exhaustive list and cited by the Law Society)[3]

3

https://www.lawsociety.org.uk/topics/private-client/quick-reference-guide-to-identifying-a-deprivation-of-liberty-in-the-supported-living-setting

Community Deprivation of Liberty Protocol

Process overview example:



DoLS Capacity Assessment.

Drawing upon the above separate considerations of capacity – and considering the impact of the best interests decisions collectively:

Does the person lack capacity to consent to the measures proposed and the deprivation of liberty which is identified within the care plan?

Best Interests Decision

Follow usual Best Interests Decision-Making processes and include consideration of:

- Provide detail of what the harm would be, how serious it would be and how likely it is to arise if P were not subject to this care plan.
- Why the arrangements are considered necessary and proportionate in relation to the identified harm.

3. Conclusion

It is important that care planning includes capacity and best interests decision making at a decision specific level. However, as discussed in this guidance document, the question of consenting to '*the measures proposed (in the care plan) and the deprivation of liberty which is identified within the application'* can seem at odds with this.

The two stage approach is needed where, after assessing capacity at an individual level, capacity is then considered more widely -
Is the person consenting to the care plan that results in them being under 'continuous supervision and control' and not being 'free to leave'?

It is recommended that the capacity assessment wording mirrors the CoPDoL11 paperwork:

Capacity to consent to the measures proposed (in the care plan) and the deprivation of liberty which is identified within the application.

NB: It is also important to apply the broader MCA 2005 requirements and principles.
The above guidance is focussed on additional thoughts around capacity and community DoL and must be considered within the context of the wider MCA 2005 requirem