



## Session 2:

# Applications to the COP: Procedure, Forms and Evidence required

Ulele Burnham  
Doughty Street Chambers  
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# What rules govern applications to the COP

- Mental Capacity Act 2005 and accompanying Schedules (e.g, Schedules A1 and IA)
- Codes of Practice:
  - MCA Code of Practice: <https://courtofprotectionhandbook.files.wordpress.com/2014/07/mca-code-practice-0509.pdf>
  - DOLS Code of Practice: [https://courtofprotectionhandbook.files.wordpress.com/2014/07/dh\\_087309.pdf](https://courtofprotectionhandbook.files.wordpress.com/2014/07/dh_087309.pdf)
- Court of Protection Rules 2017: <http://www.legislation.gov.uk/ukxi/2017/1035/contents/made>
- Court of Protection Practice Directions as of 1 December 2017: <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/cop-pds-consolidated-pd-amendments-20171123.pdf>

# Preparation of Bundles

- Practice Direction 13B:  
<https://www.judiciary.gov.uk/publications/practice-direction13b-court-bundles-effective-from-1-july-2015/>
- Applies to all hearings apart from urgent applications
- Must be provided by party in the position of the applicant
- Must be paginated and agreed by all parties where possible

# Contents of Bundle

- Preliminary Documents
- Any other case management documents required
- A time estimate
- Applications and orders including all Court of Protection Forms filed with the application
- Any registered enduring or lasting power of attorney
- Any urgent or standard authorisation given under Schedule A1 of the MCA
- Statements and affidavits
- Care plans (where appropriate)
- Experts reports and other reports
- Other documents, divided into further sections as may be appropriate

NB - These items are usually divided up into tabs such that TAB A = Preliminary Documents etc

# Contents of Bundle

- Preliminary Documents for Directions and Interim Hearings (4.2):
  - Case Summary
  - Chronology of relevant events
  - Issues for determination at the hearing
  - An outline of the likely factual and legal issues at the trial of the case
  - The relief sought at the hearing
  - A list of essential hearings
  - Further matters that should be included where appropriate: Para. 4.3 PD 13B

**NB** - All of this information is usually contained in a “Position Statement”

# Contents of Bundle

- Preliminary Documents for "Fact-Finding" Hearings:
  - The findings of fact that the court is being asked to make (e.g. that A (P's father) neglected P when in his care on X date; that it is not in P's best interests to reside with A)
  - Cross references to the evidence relied on to found those findings (e.g references to specific paragraphs in statements setting out the precise way in which A is said to have neglected P)
  - Where appropriate:
    - A Chronology
    - A Skeleton Argument and
    - A description of relevant family members and other persons who may be affected/interested

# Contents of Bundle

- Preliminary Documents for Final Hearings:
  - The relief sought
  - A skeleton argument
  - Where appropriate:
    - Chronology
    - Findings the court is being invited to make and factors based on such findings or agreed facts that the court is being invited to take into account
    - An appropriately particularised description of the alternatives the court is being invited to consider, and
    - A description of relevant family members and other persons who may be affected by or interested in the relief sought

**NB Further detailed guidance on timetable for preparing and lodging of the bundle, specific requirements for hearings in particular courts etc. is provided in PD 13B itself. These documents should be prepared by legal representatives of the relevant CCG to ensure they are compliant with the Practice Direction and the relevant Rules.**

# Fees

- See Form COP 44
- Application Fee - £400
- Appeal Fee - £400
- Hearing Fee - £500



# Forms

- All practice directions in relation to the starting proceedings or particular types of proceedings helpfully set out in website for Court of Protection Handbook  
at <https://courtofprotectionhandbook.com/legislation-codes-of-practice-forms-and-guidance/>
- Consideration only given here to the applications likely to have to be made by those involved in making arrangements for discharge of patients from MHA detention.

# Forms

All relevant forms necessary for making applications to the COP are found at:

[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court\\_forms\\_category=court%20of%20protection](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=court%20of%20protection)

# Forms

Applications most likely to need to be made in respect of discharge from MHA detention are:

- Personal Welfare Applications : s.15/16 MCA, started by COP1
- Challenge to a Schedule A1 authorisation: s.21A, started by COPDLA
- Application to authorise a deprivation of liberty by Re X procedure: Sections §A(3) and 16(2)(a), started by COPDOL11

# Personal Welfare Applications

- Relevant Practice Direction is Practice Direction 9A
- Permission is likely to be required for Personal Welfare applications but NOT for applications made under s.21A (Challenge to standard authorisation) or an application for an order authorising a deprivation of liberty under the Re X streamlined procedure.
- Likely to arise where:
  - Dispute as to capacity/best interests
  - Need for court authorisation for public body (CCG or LA) to enter into a tenancy agreement on P's behalf
  - Specific court authorisation is needed for a particular form of treatment.

# Personal Welfare Applications (1)

- Proceedings are commenced by way of COP1 Application.
- Extremely important to ensure that all of the guidance in PD9A is followed.
- Documents to be filed with the application form include supporting evidence.
- Supporting evidence can be filed on a COP24 witness statement form with additional pages where necessary OR on the COP1 application itself provided that the COP1 application is verified by a “statement of truth”.
- A “statement of truth” must say that “[The applicant] believes that the facts stated in this application form and its annexes are true.”

# Personal Welfare Applications (2)

Documents that must be filed with the application unless impractical or the court has directed otherwise (See paragraph 12 of PD9A for full list, what follows below is list of documents usually required in most/all personal welfare cases):

- **Assessment of capacity form (COP3):** All applications except those concerning the court's powers in relation to LPAs.
- **Annex A Supporting information for property and affairs applications (COP1A):** Where an order is sought relating to P's property and affairs.
- **Annex B Supporting information for personal welfare applications (COP1B):** where an order is sought relating to P's personal welfare.
- **Relevant order of the Court of Protection or another court:** Where the application relates to an order of the COP or other court.

# Personal Welfare Applications (3)

- Remember that the Court of Protection's power to determine an application only arises where there is reason to believe that the person concerned lacks capacity in relation to the matter (s.48 MCA).
- This means that it is important to provide evidence of a lack of capacity even where the applicant is unable to complete a COP3 assessment of capacity.
- PD9A paragraph 14 specifically states that an application can still be brought without a COP3 (e.g where the applicant is unable to take P to a doctor or where P refuses to undergo the assessment). However, in this situation a witness statement should be filed explaining:
  - Why the applicant has not been able to obtain an assessment of capacity;
  - What attempts if any have been made to obtain an assessment of capacity; and
  - Why the applicant knows or believes that P lacks capacity to make a decision or decisions in relation to any matter than is the subject of the proposed application.

# Personal Welfare Applications (4)

Example:

Dispute as to P's capacity to enter into/terminate a tenancy agreement. Tenancy agreement necessary for P to live in proposed supported living accommodation.

\*NB this example may likely involve having to make an application to the court to authorise a DOL in supported living accommodation but for these purposes we are only considering an application in relation to capacity to enter into/terminate a tenancy agreement.



# Personal Welfare Applications (5)

Forms/evidence required for example re tenancy agreement:

- COP1:
  - Section 4.1 What order are you asking the court to make?
    - A declaration that P lacks the capacity to enter into a tenancy agreement.
    - A declaration that it is in P's best interests for [the applicant] to enter into a tenancy agreement on P's behalf.
    - An order authorising [the applicant] to enter into a tenancy agreement on P's behalf.

# Personal Welfare Applications (6)

Forms/evidence required for example re tenancy agreement:

- COP1
  - Section 5.1 Please give details of all respondents who are to be served with this application
  - **Full names including title, relationship to P and full address including postcode**
  - **In this example respondents will probably include P’s close family “any person (other than P whom the applicant reasonably believes to have an interest which means that person ought to be heard in relation to the application (as opposed to being notified of it)” (PD (A para.2)**

# Personal Welfare Applications (7)

Forms/evidence required for example re tenancy agreement:

- **COP1**
  - Section 5.2
  - **Full name including title of all persons who are to be notified, relationship to P and full address including postcode**
  - **This may be a member of P's family who is not close to P but the persons to be notified will vary according to nature of the application.**
  - **Persons who have been named as respondents should NOT also be notified in Section 5.2**
  - **The applicant must seek to identify at least 3 people who are likely to have an interest in being notified and they should be notified that the application has been issued , whether it relates to P & A or Personal Welfare and of the orders sought.**

# Personal Welfare Applications (8)

## COP3 Assessment of capacity

- Best if this is completed by a s.12 MHA doctor or GP
- Can be completed by social worker or other social/healthcare practitioner who understands how to complete a capacity assessment
- Remember that if it is not possible to complete this, witness evidence confirming reasonable belief in lack of capacity and explanation for inability to complete COP3 should be filed.

# Personal Welfare Applications (9)

## COP 3

- Important for assessor to understand the relevant test for capacity in specific area in relation to which order/direction sought. Remember capacity is decision/issue specific.
- Important for assessor to be aware of relevant test for tenancy agreements: London Borough of Islington v QR [2014] EWCOP 26

# Personal Welfare Applications (10)

## COP3

- According to QR the **information relevant to a decision to move to supported living accommodation** was:
  - She will have to give up the tenancy of her flat.
  - The terms of the CTO will determine where she lives
  - AOT will not at this stage allow her to live in her flat or in any other accommodation which does not provide on site 24 hour support
  - The move to supported accommodation will offer her greater independence and control over her life than are currently available at ABC
  - She will have self contained accommodation
  - She is at risk of falling ill again, with life threatening consequences, if she does not take her medication
  - Her history has demonstrated over a long period of time that without 24 hour support she will not take her medication. While she has had 24hour support in hospital and at ABC she has taken her medication and has not relapsed.

# Personal Welfare Applications (11)

According to QR the information that **P** needed to understand, use and weigh to sign a tenancy agreement for supported living accommodation is:

- Her obligations as tenant to pay rent, occupy and maintain the flat
- The landlord's obligations to her under the contract
- The risk of eviction if she does not comply with her obligations
- The purpose of and terms of the tenancy which is to provide her with 24 hour support so that she takes her medication and can maintain her mental health
- The landlord/support staff's right to enter her flat without her permission in an emergency if there is serious physical danger or risk to her
- If she moves to supported living accommodation the CTO will be changed to require her to live there

# Personal Welfare Applications (12)

- Attention should be paid to Practice Direction 1A which relates to P's participation in proceedings before the COP
- Court under an obligation to make sure that it considers what directions are necessary to make sure that P takes an appropriate part in proceedings and the court is properly informed about P
- Useful therefore to provide information about P's wishes and feelings (e.g. from IMCA or IMHA)
- Court will decide whether P should be joined (this happens in most cases) and joining P only takes effect upon the appointment of a Litigation Friend OR an Accredited Legal Representative (ALR)
- Litigation Friend of last resort - professional litigation friend - is the Official Solicitor : <https://www.gov.uk/government/organisations/official-solicitor-and-public-trustee>



# Personal Welfare Applications (12)

**This should indicate why we advise that an early request for legal advice in relation to applications to the COP is absolutely vital!**

# Deprivation of Liberty Applications

There are two types of application that are likely to be made to have to be made to the COP in relation to deprivations of liberty in the context of discharge from MHA detention:

- Applications for court orders under s.21A of the MCA relating to a standard/urgent authorization under Schedule A1 MCA: \* **NB Special DoLs Forms to be used.**
- Applications under s.16(2) MCA to authorize a deprivation of liberty under s.4A(3) or (4) pursuant to the streamlined procedure: \* **NB Form COPDOL11 to be used.**
- These applications are governed by PD 11A

# Section 21A Applications

- Special urgency since they pertain to the liberty of the subject
- Special DoL Forms are used and application placed before a judge as soon as possible and, if necessary, before issue for directions
- A dedicated team (“the DoL team”) will deal with the applications at all stages, including liaison with would be applicants and other parties
- The progress of each DoL case will be monitored by a judge assigned to that case, assisted by the DoL team

# s.21A Applications (1)

## Urgent Applications

- In extremely urgent cases the DoL team can arrange a telephone application to be made to the judge for directions and/or interim order *before* issue
- Applicant must contact DoL team and provide details contained in para. 4 PD 11A
- Contact details for DoL team - supposed to be on [www.gov.uk](http://www.gov.uk) website in relation to the Court of Protection but not there. Contact COP and send application forms with £400 fee to:
- PO Box 70185  
First Avenue House  
42-49 High Holborn  
London  
WC1A 9JA
- DX: 160013 Kingsway 7

# S.21A Applications

## Urgent Applications

- DoL team can receive calls and faxes between 9-5. Public Counter open between 9.30 and 5.30. Faxes received after 4.30 will be dealt with on next working day.
- Out of hours applications (by telephone) must be made to security office at the Royal Courts of Justice. Contact to be made by phone on 020 7947 6260. Security Officer to be informed of nature of case and your contact details. Once judge allocated, judge will call applicant.

# DoL Forms

- **DLA:** Deprivation of Liberty Form to be used for all DoL applications
- **DLB:** Deprivation of Liberty Request for Urgent Consideration: Reasons for urgency should be set out here along with timetable to be followed and any interim relief sought. Draft order to be attached.
- **DLD:** Deprivation of Liberty Certificate of Service/non-service and Certificate of Notification/non-notification
- **DLE:** Deprivation of Liberty Acknowledgement of Service/notification

**NB** Specific advice from legal department should be sought.

Forms can be found at:

[http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court\\_forms\\_category=court%20of%20protection](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=court%20of%20protection)

# Issuing a DoL Application

- DLA, DLB and appropriate court fee to be filed at court
- In cases of extreme emergency (e.g. weekends) court will expect applicant to undertake to file relevant forms and pay the court fee unless exempted
- Judge will consider application having been informed of it by DoLs team and will make a first order on the papers
- Applicant and/or legal representative should follow steps in the court's order and file DLD as appropriate. DLE should be included in any documents served unless otherwise ordered

# First Hearing on DoLs Application

- Court will fix a date for subsequent hearings and make directions including interim/final orders as appropriate
- Court will aim to have the **First Hearing** before a judge of every DoL application within **5 working days of the date of issue**.
- Applicants can indicate that a shorter timetable is necessary on DLB
- Indexed and paginated bundle should be prepared for judge together with skeleton arguments and draft orders as soon as available. **\*NB this is the task of legal representatives**
- It is usual, in non-urgent cases, for the parties to agree for the timetable to be adjusted to enable the Official Solicitor or other litigation friend to be joined etc.



# Streamlined Procedure

- Procedure for authorising deprivations of liberty other than pursuant to Schedule A1; i.e. authorisation by the court
- Procedure first outlined by the President of the Court of Protection in *Re X and Others (Deprivation of Liberty)* [2014] EWCOP 25 and in *Re X and Others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37.

# Making a Re X Application

- COPDOL11 verified by statement of truth and accompanied by all attachments and evidence required by that form and its annexes
- Separate application must be made for every individual for whom an authorisation is sought.
- Applicant should consider carefully who should complete application where different people are best placed to provide evidence on different matters
- Applicant has duty of full and frank disclosure and must identify specific factors in the evidence in support which indicate that:
  - Application requires particular judicial scrutiny
  - The authorisation sought may NOT be in the best interests of P or may not be the least restrictive option
  - (or tend to indicate) that the order should not be made.

# Making a Re X application (1)

- Applicant must consult:
  - Any donee of LPA
  - Any Deputy appointed by the Court PLUS
  - Anyone named by P as a person to be consulted on matters raised
  - Anyone engaged in caring for person or interested in welfare

# Making a RE X Application (2)

- Consultees must be informed of:
  - Application to court
  - That the application is to consider whether P lacks capacity in relation to residence/care and whether she should be deprived of her liberty in connection with the arrangements set out in the care plan
  - What the proposed arrangements are
  - That the applicant is under an obligation to inform P of specific matters identified in para. 35 of PD 11A

# Making a RE X application

Applicant must arrange for consultation with P before application lodged at court and P must be informed of:

- Fact of application
- That application is to consider whether s/he lacks capacity to make decisions in relation to residence/care/DOL and whether to authorise a DOL in connection with arrangements set out in care plan
- What the proposed arrangements under the order sought are
- That P is entitled to express his/her views, wishes and feelings in relation to the proposed arrangements and that the person undertaking the consultation will ensure that these are communicated to the court
- That the person is entitled to seek to take part in the proceedings by being joined as a party or otherwise, what that means, and that the person undertaking the consultation will ensure that any such request is communicated to the court.
- That the person undertaking the consultation can help him or her to obtain advice and assistance if he or she does not agree with the proposed arrangements in the application
- **PD 11A para. 35**
- **NB: Person undertaking consultation MUST complete Annex C to Form COPDOL 11**
- **Applicant must confirm that P has been supported/assisted to express views and encouraged to take part in proceedings in accordance with s.4(4)MCA**

# Practical Considerations: RE X applications

- Care plan is all important document - court will not authorise if care plan is incomplete or does not adequately describe arrangements.
- Guidance provided in *RE NRA* [2015] EWCOP 59 at paras 225-228 as to matters that should be covered in any RE X application.
- Draft order should contain proposed timetable for review
- Court may decide the matter is not suitable for the streamlined procedure if relevant matters not set out with sufficient clarity (or may do so in any event) and will then give direction for hearing etc.

# Practical Considerations: Re X Applications (2)

NRA Guidance cont'd:

- ii) if P is already living at the placement in respect of which a welfare order is sought the following information should be provided, namely the date P moved there, where he or she lived before, why the move took place, and how the move was working
- iii) any recent change or planned change in the care package and the reasons for it should be provided
- iv) there should be a **specific requirement to explain why the identified sedation or restraint are or may be used, and why they are the least restrictive measures to deal with the relevant issues**
- v) there should be a question about the **tenancy agreement (if there is one) and who has the authority or needs to apply for the authority to sign it on P's behalf,**
- vi) there should be a specific question as to why it is thought the case is not controversial and can be dealt with on the papers

# Practical Considerations: Re X Applications (1)

- NRA Guidance indicates that following should be set out in the material addressing the arrangements:
  - the level of supervision (1:1, 2:1 etc); the periods of the day when supervision is provided; the use or possible use of sedation or restraint; the use of assistive technology; and what would happen if P tried to leave
  - an explanation of whether or not a transition plan has been produced, a provision to append 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



# Practical Considerations: Re X Applications (3)

- vii) there should be a question directed to participation of family and friends over the years and the nature of the care and support they have provided and their approach to issues relating to its provision in the past and so whether and the reasons why it is thought that family or friends have provided and will provide balanced support for P in his or her best interests
- viii) there should be a question that requires the reasons why family and friends support the care package to be set out
- ix) there should be a question directed to **the willingness of a family member or friend to be a litigation friend or a [Rule 3A](#) representative and their ability to keep the care package under review,**
- x) there should be questions **directed to the suitability of family members or friends for such appointment that direct the author of the answers to particularise the answers by reference to the history of P's care, and**
- xi) there should be a question on what options have been considered and why the care package advanced has been chosen as the appropriate one.



# The MHA/MCA Interface: Recent cases and Problem Areas

Ulele Burnham & Oliver Lewis  
Doughty Street Chambers

West Midlands Annual Update Training 12 & 19<sup>th</sup> March  
2018

# Deprivation of Liberty: MHA or DoLS

**Figure 5: Options grid summarising the availability of the Act and of DoLS**

	Individual <b>objects</b> to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder	Individual <b>does not object</b> to the proposed accommodation in a hospital for care and/or treatment; or to any of the treatment they will receive there for mental disorder
Individual has the capacity to consent to being accommodated in a hospital for care and/or treatment	Only the Act is available	The Act is available. Informal admission might also be appropriate. Neither DoLS authorisation nor Court of Protection order available
Individual lacks the capacity to consent to being accommodated in a hospital for care and/or treatment	Only the Act is available	The Act is available. DoLS authorisation is available, or potentially a Court of Protection order

# Ineligibility for DoLS

A person is ineligible for a Schedule A1 authorisation if s/he falls into Cases A-E of Schedule 1A, MCA. In practice:

- **Case A:** P is **detained** under sections 2, 3, 35-38, 44, 45A, 47, 48, 51 MHA
- **Case B:** P is **liable to be detained** under the sections above, is not detained and
  - A DoLS authorisation would be inconsistent with a requirement imposed in connection with liability to detention (e.g. P subject to a conditional discharge the conditions of which require residence at a place other than an care home or hospital); OR
  - The care and treatment proposed to be given under a DoLS authorisation “consists in whole or in part of medical treatment for mental disorder”.

# Ineligibility for DoLS

- **Case C:** P is subject to a “community treatment regime”, i.e a community treatment order pursuant to s.17A MHA or similar obligation, and:
  - A DoLS authorisation would be inconsistent with a condition of the community treatment regime (e.g. P subject to a CTO the conditions of which require residence at a place other than an care home or hospital);  
OR
  - The care and treatment proposed to be given under a DoLS authorisation “consists in whole or in part of medical treatment for mental disorder”.

# Ineligibility for DoLS

- **Case D:** P is subject to a “guardianship regime” (i.e a guardianship application under s.7 MHA, a guardianship order under s.37 MHA or similar obligation and
  - A DoLS authorisation would be inconsistent with a requirement imposed in connection with the guardianship regime ((e.g. P subject to a requirement to reside in a place other than an care home or hospital);  
OR
  - The DoLS authorisation would authorise P to be a “mental health patient” (i.e. to be accommodated in a hospital for medical treatment for mental disorder) and P validly objects to some or all of the relevant treatment

# Ineligibility for DoLS

- **Case E:** It is proposed that P be detained in hospital for the treatment of mental disorder and:
  - P is “within the scope of the Mental Health Act” in so far as it is possible to make an application under either s.2 or 3 MHA
  - The necessary medical recommendations are in place
  - The treatment in question is necessary for P’s health or safety or the protection of others (s.3(2)(c) MHA) and cannot be provided under the MCA
  - P validly objects to some or all of the proposed treatment.

# Guidance on ineligibility

AM v SLAM [2013] UKUT 0365 (AAC)

- (1) Is the purpose of the DoLS authorisation to authorise P's accommodation as a "mental health patient" (i.e. being accommodated in a hospital for the purpose of being given medical treatment for mental disorder :para. 16(1) Sch. 1A) ?
- (2) Does P object to being a "mental health patient" or to being given some or all of the "mental health treatment" (i.e. medical treatment of mental disorder: para 16(1) Sch. 1A)?

- P objects → ineligible → DoLS cannot be used
- P does not object → eligible → DoLS authorisation can be given



# Guidance on whether MHA or MCA should be used where both available

AM v SLAM [2013] UKUT 0365 (AAC)

*Whether detention under the MHA warranted: Three Questions for MHA decision maker*

- (1) Does P have capacity to consent to admission as an “informal patient” under s.131 MHA
- (2) Can the hospital treat lawfully under the MCA?
- (3) If there a choice between reliance on MHA 1983 and MCA 2005 Sch A1, which is the least restrictive way of best achieving the proposed assessment/treatment?

# Where neither MHA nor MCA available

## **A NHS Trust v A [2014] Fam 161**

- P refusing to eat or drink
- Trust applied for declarations that he lacked capacity to litigate and to make decisions re nutrition and hydration and that was lawful to force feed
- Interim declarations made in these terms but P struggled to prevent nasogastric tube from being inserted
- DOL required in order to force feed P
- Clinical consensus was that P was suffering from delusional/paranoid personality disorder causing him to believe that hunger strike would cause UKBA to return his passport and grant asylum AND that he lacked capacity re nutrition and hydration

# Where neither MHA nor MCA available

## **A NHS Trust v A [2014] Fam 161**

- Court accepted evidence that P would die without artificial nutrition/hydration
- P had said on occasions that he did not wish to die and his family did not wish him to die

## **BUT**

- P actively resistant to force-feeding
- P's written statement (not an advance decision) evidenced his wish not to be force fed
- Hunger strike was a legitimate form of protest
- Force-feeding was degrading and unpleasant and would involve DOL
- Recovery would accelerate return to Iran where he feared persecution by authorities

# Where neither MHA nor MCA available

## A NHS Trust v A [2014] Fam 161

Court concluded that:

- P lacked capacity re nutrition/hydration and in his best interests for an order to be made permitting forcible nutrition/hydration which would require a deprivation of liberty
- P's detention pursuant to s.3 MHA by time of the final hearing made him ineligible for DoLS pursuant to Schedule 1A MCA.
- Ineligibility also meant that the Court of Protection could not authorize the deprivation of his liberty under s.16A MCA even if such an order would preserve life.

# Where neither MHA nor MCA available

**A NHS Trust v A [2014] Fam 161**

Court's conclusions (cont'd):

- P could not be force-fed under the MHA since purpose of admission for treatment under s.3 MHA was to administer anti-psychotic medication via nasogastric tube and not to administer food and water: When P previously treated with anti-psychotic drugs this did not change his views about the hunger-strike.
- Force-feeding was therefore treatment of “physical” rather than “mental” disorder and therefore not “treatment” which could be given without his consent under the MHA (see. S.145)
- Force-feeding in this case could only be, and was, authorised pursuant to the High Court’s inherent jurisdiction

**NB : Where P ineligible and clinicians/AMHP unwilling to make application for admission under MHA, application should be made to High Court (preferably also in its capacity as the Court of Protection) to determine eligibility and authorise any DOL under inherent jurisdiction.**

# Can those with capacity be deprived of their liberty on discharge from MHA detention?

**M v Secretary of State for Justice; J v Welsh Ministers [2017] 1 WLR 4681**

## **MM**

- MM had diagnosis of mild learning disability and autistic spectrum disorder. Behaviours described as including pathological fire-setting
- Convicted of arson and subject to 37/41 restriction order in 2001
- Had capacity to consent, and did consent, to conditions of discharge which objectively amounted to a deprivation of liberty
- Upper Tribunal determined that FTT had power to impose conditions which amounted to a DOL and a person with capacity could give valid consent

# Can those with capacity be deprived of their liberty on discharge from MHA detention?

**M v Secretary of State for Justice; J v Welsh Ministers [2017] 1 WLR 4681**

**PJ**

- PJ also diagnosed with mild learning disability and autistic spectrum disorder
- Convicted of a.b.h and threats to kill in consequence of which was detained under MHA between 1999-2007. Re-detained under s.3 in 2009
- Subject to CTO in 2011 which significantly restricted liberty and amounted to a DOL

# Can those with capacity be deprived of their liberty on discharge from MHA detention?

## Conclusions of Court of Appeal

### MM

- “There is nothing in the terms of sections 37, 41 and 42 of the MHA which provides a power in either the Secretary of State or a tribunal to detain or otherwise deprive a patient of his liberty outside a hospital” [16]
- If such a power could be implied it would be “unconstrained, without criteria, time limits or analogous protections” [20]
- As per MHA Code of Practice at 14.17: threat of coercion is likely to invalidate apparent consent; and it is doubtful whether valid consent can prevent compulsory confinement being a deprivation of liberty. Hypothetical consent does not give the Tribunal a power that the statute does not provide.



# Can those with capacity be deprived of their liberty on discharge from MHA detention?

## Conclusions of the Court of Appeal in PJ

- Purpose of CTO scheme is to balance protection of the public/medical treatment without patient being detained in hospital.
- As RC retains power to detain, contrary to purpose of scheme if RC could only restrict freedom of movement. So deprivation of liberty is permitted under a CTO but **must be less restrictive than treatment in hospital.**
- CTO scheme has sufficient safeguards- conditions must be in writing and for specific purpose
- FtT does not have power to to scrutinise the conditions imposed by the RC- **challenge through judicial review**

# Implications

- Significant restriction on potential discharge of *capacitated* forensic patients (s.37/41) where risk-reduction measures in community amount to a DOL
- *Incapacitated* forensic patients can be subjected to a Schedule A1 DOL or Court of Protection Order so long as the provisions of Schedule 1A do not preclude a DOL
- Capacitated patients *may* be required to be detained in *inappropriate* conditions (hospital) which do not satisfy the principle of least restriction and are not in their best interests in terms of rehabilitation or relapse prevention.
- Creates potential tension between presumption of capacity on the one hand and principle of least restriction on the other

# Possible Solutions

- **Carefully conduct and scrutinise capacity assessments.** Capacity assessments should be robust. It may be that some recidivist offenders appear to demonstrate capacity in relation to future risk by verbal agreement but on further interrogation they are demonstrably unable to incorporate past risk into decision-making for future.
- **Begin discharge planning process as early as possible and conduct it as thoroughly as possible:** Attempts should be made reduce measures which would amount to a DOL and replace by other risk management measures.