
Court of Protection Update

Mental Capacity Act, adult welfare
and deprivation of liberty

Mathieu Culverhouse
Public Law Department

CoP, MCA and DoL - overview

- The legislation
- Resolving disputes about capacity
- Examples of welfare disputes
- Deprivation of Liberty
- Case law update
- Practical steps

Position pre-MCA

- 2 million people lack capacity to make decisions for themselves (dementia, learning disabilities, mental health problems, stroke, brain injury)
- Up to 6 million informal carers with no clear guidance as to how decisions are to be made and by whom and no legal basis for “next of kin”
- Court of Protection had jurisdiction over financial affairs only
- Mental Health Act 1983 – restricted powers
- “Inherent jurisdiction” of High Court developed in piecemeal fashion
- Need for a comprehensive and workable legal framework.

MCA – the statutory principles

- Person must be assumed to have capacity unless established that lacks capacity.
- Person not to be treated as unable to make a decision unless all practicable steps have been taken to help to do so.
- Person not to be treated as unable to make a decision merely because makes unwise decision.
- Act done under MCA for or on behalf of person who lacks capacity must be done in best interests.
- Can purpose be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action?

MCA and capacity

- Sections 2 & 3 MCA define what is meant by lack of capacity.
- Section 2:
“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 of, the mind or brain”
- No universal test and there is a different test for different purposes.
- Section 3:
A person is unable to make a decision for himself if he is unable to:-
 - Understand the information relevant to the decision.
 - Retain that information.
 - Use and weigh that information as part of the process of making the decision-making.
 - To communicate his decision (whether by talking, using sign language or any other means).

MCA and best interests

- The term 'best interests' is not defined by the MCA.
- S.4 MCA however provides a non-exhaustive checklist of matters which should be taken into account:-
 - The person's past and present wishes and feelings (including any written statement made when had capacity)
 - The beliefs and values that likely to have if had capacity
 - Factors would consider "if able to do so"
 - Views of others, including, if appropriate, anyone caring for the person or interested in their welfare, any Attorney or Deputy

Resolving disputes about capacity

- What if issue of capacity is not clear?
- For example, different professionals have different views?
- Or if P is asserting own capacity?
- In case of dispute, can be referred to the Court of Protection (CoP) to make a declaration on the issue of capacity.

Resolving disputes about capacity

- MCA recognises that full evidence on capacity might not be available at early stage of proceedings.
- S.48 MCA says CoP can make interim orders/directions if “there is reason to believe that P lacks capacity in relation to the matter”.
- In case of Re F, judge said: *“What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard ... the concept ... is really quite easily recognised”*.

Resolving welfare disputes

- If P lacks capacity, CoP can make orders and/or declarations in P's best interests.
- CoP is one of the tools for safeguarding vulnerable adults
- CoP's safeguarding powers are wide and can include:
 - Serious medical treatment, including life and death cases
 - Disputes about social care
 - Disputes about residence, including deprivation of liberty
 - Disputes about contact with others
 - Marriage and sexual contact – though CoP will only rule on capacity, not what is in P's best interests

Welfare disputes – example 1

- P is 20-year-old man who suffers serious head injury in a road traffic accident.
- Taken to hospital where his condition stabilises but he remains in a coma or persistent vegetative state, receiving artificial nutrition and hydration (“ANH”), for two years.
- At a regular annual review, his treating clinician forms the view that it would be in P’s best interests to withdraw ANH. Family does not agree with this decision.

Welfare disputes – example 1

Discussion points:

Scenario 1: After discussion with the family, there remains a dispute and the hospital remains firmly of the view that withdrawal of ANH would be appropriate. What steps can the hospital take to safeguard P's best interests and to protect its own position?

Scenario 2: Despite the family's objections, the hospital withdraws ANH from P and P's condition starts to deteriorate. What steps can the family take to protect P?

Welfare disputes – example 2

- P is 25-year-old woman with degenerative brain disease caused by a complication from measles. She becomes pregnant and family believes is in her best interests to have termination.
- Family take P to local hospital but after speaking to P they are concerned that she cannot consent, so they decline to carry out the procedure.
- Family are very concerned about the impact of pregnancy on P, both in respect of her physical and psychological wellbeing.

Welfare disputes – example 2

Discussion points:

- What do the clinicians need to establish on the issue of consent? What questions should they be asking themselves?
- If the clinicians decline to act because P has not given consent, what steps can the family take to safeguard P's best interests?

Welfare disputes – example 3

- P is 45-year-old man with learning disabilities, lives at home with his mother.
- Local authority becomes concerned that mother no longer able to cope due to age and frailty. Propose that P should move into local authority accommodation. Mother does not recognise difficulties and does not agree to proposal.
- P goes to local authority accommodation for a planned one-week respite placement. At the end of the week the LA declines to return P, citing “safeguarding issues”.

Welfare disputes – example 3

Discussion points:

- What are the issues here?
- Has the local authority acted appropriately?
- What can P's mother do in these circumstances?

Deprivation of Liberty: Article 5 ECHR

- Article 5: no one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law.
- Article 5 (4) : everyone who is deprived of his liberty ... shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily ...
- Article 8: everyone has the right to respect for his private and family life...

Increased layers of legislation on DoL

- Human Rights Act 1998
- Mental Capacity Act 2005 + Code of Practice; safeguards for those lacking capacity and the “best interests” test.
- Mental Health Act 2007
- Deprivation of Liberty Safeguards

s.5 MCA – care and treatment

The MCA provides legal protection from liability for carrying out certain actions in connection with the care and treatment of people who lack capacity to consent, provided that:

- *reasonable belief that the person lacks capacity in relation to the matter in question*
- *reasonable belief the action you have taken is in the best interests of the person.*

s.6 MCA – restraint

- Use of restraint not protected under section 5 unless:
- (1) Reasonably believes that it is necessary to prevent harm
- (2) Proportionate response to that risk and likely nature of that harm
- Depriving liberty excluded – “Bournewood”

Deprivation of Liberty Safeguards

Provisions of the Code of Practice

“The deprivation of a persons liberty is a very serious matter and should not happen unless absolutely necessary, and in the best interest of the person concerned. That is why the safeguards have been created: to ensure that any decision ... is made following defined processes and in consultation with specific authorities”

Deprivation of Liberty Safeguards

- Admission to a care home or hospital
- Applies to state run and private arrangements (e.g. private hospitals and care homes)
- Deprivation of liberty elsewhere only where permitted by the Court of Protection
- Regardless of the nature of the care or treatment, e.g. applies to treatment for physical ailments

Deprivation of Liberty Safeguards

For authorisation, the following must be established:-

- Person has a mental disorder under MHA 1983
- Incapable of making a decision about care/ residence
- Proposed deprivation is in their best interests
- No less restrictive means of meeting their best interests

CoP and deprivation of liberty

- What do we mean by “deprivation of liberty”?



CoP and deprivation of liberty

- Restraint
- Restriction
- Deprivation of Liberty
- *“The distinction between a deprivation of, and a restraint upon, liberty is merely one of degree or intensity and not one of nature or substance” HL v United Kingdom*
- Each individual case must be assessed on its own circumstances

CoP and deprivation of liberty

Factors identified in DoLS Code of Practice include:

- Degree of control over care and movement
- Presence of any physical restraints
- Advance decision that the person will not be released.
- Ability to maintain social contact of choice
- Refusal to accede to personal or relatives request for discharge
- Continuous supervision, monitoring or control

Salford v GJ - [2009] EWHC 3310 (Fam)

- P has significant needs and lived in “supported living”, ie not a registered care home or hospital
- P clearly lacks capacity and this issue not disputed
- P subject to significant restrictions on liberty. Expresses wish to leave the placement, but not permitted to do so unaccompanied
- All parties agree that these restrictions are in P’s best interests

Salford v GJ - [2009] EWHC 3310 (Fam)

- Court finds that these restrictions amount to a deprivation of liberty
- Placement does not fall under DOLS regime and so cannot be authorised Schedule A1 MCA
- Deprivation of liberty therefore requires authorisation by CoP
- CoP makes order which authorises DoL and provides for system of review broadly in line with DOLS regime

G v E - [2010] EWHC 621 (Fam)

- E is 18 year old man with learning disabilities caused by rare genetic disorder
- From age of 10 lived in foster placement with F. When E turns 18 this becomes “adult carer placement”. Clear that E and F are very close and regard each other as family
- E has limited verbal communication. Makes comments at school which cause concern and are reported to LA
- LA removes E from F’s care, citing safeguarding concerns, and places in respite and later supported tenancy

G v E - [2010] EWHC 621 (Fam)

- E was deprived of his liberty when he was placed in a respite unit, and later in a supported tenancy, where staff exercised complete control over his care, assessments, treatment, movement and contact.
- The deprivation of liberty was a breach of E's right to liberty pursuant to Art 5 ECHR because the local authority failed to comply with the procedures laid out in the MCA, either by applying the DOLS procedure under Schedule A1, or by applying to the Court under ss 16 and 48.
- The local authority also breached E's right to a family life pursuant to Art 8 ECHR by removing him from his foster mother, failing to give adequate consideration to his family life, failing to involve his foster mother in the decision making process and impeding contact with his foster mother for several months.

P & Q v Surrey CC [2011] EWCA Civ 190

- Two sisters, aged 18 and 19, both suffer from learning disability
- P lives in foster placement, where has own bedroom. House not locked, but if P had tried to leave the placement, family would have restrained her. Attends college every day and goes out on trips and holidays
- Q lives in supported living placement (ie not registered care home). Has own bedroom, which is not locked, but Q is accompanied whenever she leaves. Also attends college. Sometimes requires physical restraint when attacks other residents. Requires continuous supervision and control to meet care needs
- Question for court is whether P and/or Q deprived of liberty

P & Q v Surrey CC [2011] EWCA Civ 190

- Two of three elements of DOL not in dispute:
- Both P and Q lack the capacity to make decisions about residence and therefore neither could validly consent to confinement
- Second element is that confinement is attributable to the state, which was the case for both P and Q
- Issue for CoA was third element: whether there is an objective confinement

P & Q v Surrey CC [2011] EWCA Civ 190

CoA held:

- Happiness not relevant to DoL, but is relevant to best interests, which is a condition of being “lawful”
- Criteria to be considered are:
 - whether objections to arrangements have been expressed;
 - whether drugs which might suppress objections used;
 - normality of the living arrangements and opportunities for leaving the place of residence for the purposes of recreation, education and social contact.

P & Q v Surrey CC [2011] EWCA Civ 190

CoA held:

- Q's circumstances differ from P's because not living in a family home;
- Outbursts sometimes led to need for physical restraint, and Q required medication for control of her anxiety.
- These factors meant Q's case closer to the border of DoL, but given small size of residential home, lack of objection, attendance at education, good contact with family and her active social life, Q not DoL, and follows that neither is P

Post P & Q DoL cases

London Borough of Hillingdon v Steven Neary and ors [2011] EWHC 1377 (COP)

LA removes P from father's care. Eventually uses DOLS process, but subsequently criticised for failing to take into account right to family life in best interests process and failing to refer matter to CoP where there is a clear dispute.

Cheshire West and Chester Council v P and M [2011] EWHC 1330 (Fam)

P lives in supported living, in circumstances similar to Q (P & Q). P's occasionally aggressive behaviour and habit of touching and eating incontinence products require physical intervention at times, leading to conclusion that he is DoL.

Welfare CoP – practical steps

- Who should make the application to the CoP?
- The CoP will usually expect the relevant statutory body to apply.
- In most cases this will be the local authority, but where the issues are purely medical, the NHS Trust should apply.
- However, it can be difficult to persuade statutory bodies to apply, particularly when they are not currently involved because care package funded through damages.

Welfare CoP – practical steps

- If local authority / NHS Trust refuse to apply, others can apply instead:-
 - If a financial Deputy has been appointed, can apply to the CoP seeking declarations as to P's best interests
 - Family members and others involved in P's care
 - Independent Mental Capacity Advocate (IMCA)
 - In urgent cases, application can be made in P's own name with a litigation friend

MCA & welfare - summary

- CoP can resolve disputes about capacity or welfare
- CoP has broad welfare jurisdiction, including disputes about medical treatment, residence, care and contact.
- Applications can be brought by local authorities, NHS Trusts, Financial Deputies, family/carers, or in P's own name.
- CoP will make orders in P's best interests to safeguard P's welfare.