Guidance: Deprivation of Liberty - in community settings

This guidance has been produced in consultation with Suffolk Legal to support social work practitioners with making applications to the Court of Protection; where customers without the capacity to consent to the arrangements, living in the community are deprived of their liberty.

Following the Supreme Court ruling of 19 March 2015; the courts have explored the response required by local authorities where customers living in the community fulfil the “acid test” for what constitutes a deprivation of liberty, namely they:

- Are not free to leave
- Are under continuous supervision, monitoring and control

On 25 September 2015 in the Court of Protection Mr Justice Charles clarified in his judgement the response that local authorities are required to undertake when the above conditions have been met. In summary he concluded that;

1. The streamlined “Re X” procedure currently used for Court of Protection (CoP) applications to authorise a deprivation of liberty should continue to be used, subject to a number of improvements aimed at drawing more information from social services authorities at the outset (these have been included in Section B of this guidance)

2. Family members, in particular family members that have been devoted to caring for P for years, are generally trusted by the Court as capable of advocating for P’s best interests;

3. In the majority of cases where there is every reason to trust the judgement of the family members, P need not be joined as a party to the proceedings. It may be preferable to family members to be formally appointed as a representatives of P so the Court can exercise a degree of direction over them and provides for an identified person who is responsible for keeping P’s arrangements under review;

4. In cases where there are no suitable family members to consult, the Court will fill the deficit by the increased use of s.49 MCA reports and witness summonses to elicit the necessary information.

Whilst previously awaiting clarity from the CoP social work practitioners were advised that whilst they should continue to carry out the pre-requisite stages for making a CoP application to authorise a deprivation of liberty, the applications would be on hold until the judgement was handed down. Now the judgement has been approved, social work practitioners are required to complete the CoP Forms, so as to seek to obtain the authorisation from the Court of Protection for the deprivation of liberty that is occurring.

Furthermore where social work practitioners hadn’t undertaken this process previously and they now identify customers who meet these requirements, they should follow this process.
In essence, the application process remains largely unchanged but now also requires the social work practitioner to provide additional information as listed in Section B below.

Section A
Social work practitioners, who have identified customers requiring a CoP application to be made authorising their deprivation of liberty, should complete;

- the COP DOL10 form
  and
- the COP3 form

(It is good practice when completing these forms to save them from the website. This enables amendments to be made and prevents them having to be re-typed from the beginning as would otherwise be required).

The completed application forms should be sent electronically to Suffolk Legal at legalacs@suffolk.gcsx.gov.uk but only when the following documents are also provided;

i. Mental capacity assessment regarding decisions around understanding care needs and where to live
ii. Copy of Best Interest meeting minutes / decision
iii. Updated support plan
iv. Letter from customer’s GP confirming customers ‘unsoundness of mind’
v. Copies of any LPA / Deputy orders

Section B
Social work practitioners should ensure that within the CoP forms (or by way of a separate document, if necessary) the following information, highlighted by the judgement to provide more details to support the courts, should be included (if applicable):

i. If the proposed placement has not yet taken place, information about any transition plan

ii. If the customer is already living at the placement, the date they moved there, where s/he 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 the change

iv. An explanation as to why any identified sedation or restraint are or may be used, and why they are the least restrictive measures to deal with the relevant issues

v. Information as to any tenancy agreement, and who has the authority or needs to apply for the authority to sign it on customer’s behalf

vi. Confirmation that the CoP application is not controversial i.e. there are no disputes from family / professionals as to the best interests of the customer

vii. Information regarding the participation of family and friends over the years, the nature of the care they have provided, their approach to issues relating to its provision in the past, and the reasons why it is thought that they will provide objective and balanced support for the customer in his / her best interests

viii. Obtain views from family and friends as to why they support the care package and set these out individually

ix. Consult with the family and friends as to their willingness to act as a litigation friend/Rule 3A representative for the customer and ascertain their ability to (if appointed) to keep the customer’s care package under review. As a bare minimum, any litigation friend/Rule 3A Representative would be required to have regular contact with the customer and would be required to provide a written statement to the court prior to each 12 month review with reference to the history of the customers care. They would be expected to highlight any concerns to professionals regarding the customer’s best interests

x. Information regarding other options which have been considered for the customer and why the current care package (or proposed care package) has been chosen as the appropriate one

xi. Highlight any conflicting interests e.g. between different service users within the current / proposed placement

xii. Provide an analysis of and reasons for any restrictive practices – these should be in the form of care records, care plans and / or CF6 recording where possible

xiii. A short statement from the customer’s carers, or a record of the views of the customer’s carers

Further details regarding the Supreme Court ruling of 19 March 2014 and the wider provisions of the Mental Capacity Act and the Deprivation of Liberty Safeguards including policy documents and guidance can be accessed on the Suffolk MCA Website; www.suffolk.gov.uk/mca

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