

**Gloucestershire Mental Capacity Act Governance Group
(MCAGG)**

**MCA14 - ACCESSING THE COURT OF PROTECTION - GOOD
PRACTICE GUIDANCE**

Final Version (April 2014)

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This guidance relates to welfare cases only and not applications relating to financial or health matters. It is noted that GHNHSFT have their own guidance.

It is very important for practitioners to be aware of situations when the Court of Protection should be accessed. There are situations when it is necessary to access the Court of Protection. However, most of these situations relate to medical intervention. In relation to Adult Social Care, whether or not the Court of Protection should be accessed, is specific to each case. However, there are general guidelines such as:

- There is a serious disagreement regarding a serious decision, which cannot be settled in any other way and this includes where a person should live (Para 6.12 Mental Capacity Act Code of Practice);
- Where consideration is being given to stopping or limiting contact with an individual in receipt of Adult Social Care (Para 8.28 Mental Capacity Act Code of Practice);
- Where a family carer or personal representative asks for personal information regarding the person who lacks capacity to consent to that information being revealed.
- Deprivation of Liberty – where a service user lives in a supported living environment the onus is on the Local Authority to bring the matter to the Court of Protection (*Hillingdon LBC v Neary & others [2011] EWHC 1377 (COP)*).

In [Re A \(Adult\) and Re C \(Child\); A Local Authority v A \(2010\) EWHC 978 \(Fam\),](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/COP/2010/978.html&query=(2010)+and+EWHC+and+978+and+(Fam)&method=boolean)
[http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/COP/2010/978.html&query=\(2010\)+and+EWHC+and+978+and+\(Fam\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/COP/2010/978.html&query=(2010)+and+EWHC+and+978+and+(Fam)&method=boolean)

Mr Justice Munby (now Lord Justice Munby) gave guidance on when the Court of Protection should be accessed. “*The local authority, it is to be noted, may provide advice and assistance, but there is nothing to suggest that it can intervene to regulate or control matters without judicial assistance*”. “*But, and this is a key message, whatever the positive obligations of a local authority under Article 5 may*

be, they do not clothe it with any power to regulate, control, compel, restrain, confine or coerce". In summary, significant disputes between the LA and a family member regarding a person who lacks capacity must be taken to the Court of Protection to be decided.

Accessing the Court of Protection means making an application to the Court for a determination by the Court in respect of a specific question regarding the person who lacks capacity, for example, where the person should live and receive care or any person the service user should or should not have contact with.

If practitioners consider the Court of Protection should be accessed regarding an Adult Social Care matter, Legal Services should be contacted for an initial discussion. Practitioners should be come to know that accessing the Court of Protection should be a normal part of social work practice.

Steps before accessing the Court of Protection:

Although there may be a dispute between Adult Social Care professionals and family/carers regarding where a mentally incapacitated person should live and receive care, there are steps which should be considered before seeking to make an application to the Court of Protection. Consideration should always be given to dispute resolution with the family/carers. This can include a Best Interests Meeting (see [Appendix 13 on Best Interests Meeting Guidance](#) – informal mediation and further discussion with Adult Social Care managers. Consideration should be given to following the complaints procedure or, alternatively, the family could be referred to the Local Government Ombudsman. The Court of Protection should be seen as the Court of last resort and efforts should always be made to try and resolve issues without seeking a need of the Court. However, this of course may not always be possible.

The Court of Protection can only make decisions that could have been made by the person who lacks capacity, for example, where they should live or whether indeed they have capacity or not.

Who should apply to the Court of Protection?

The Mental Capacity Act Code of Practice places the responsibility on making applications to the Court of Protection with the decision making body. It is often going to be Adult Social Care who is the 'decision maker' and, therefore, the responsibility in most cases will lie with Adult Social Care.

In the Court of Protection judgement in *Neary v London Borough of Hillingdon* (2011) the Judge made it clear that a Local Authority could not tell a parent that if they did not like the decision made by the Local Authority the parent could make an application to the Court of Protection. In the Neary judgement, it is clear that the responsibility lies with the Local Authority as decision maker (in this case it concerned a Deprivation of Liberty Safeguard) and if the Local Authority did not make an application when it should have done, it could breach the human rights of the service user. In the Neary case, this concerned a breach of Article 5 (the right to liberty).

The Neary judgement is a clear reminder to Adult Social Care practitioners that where a dispute arises which should be resolved by the Court of Protection, the onus rests with the Local Authority to make that application. If the Local Authority fails to make the necessary application, it will face criticism from the Courts, should an application be made by another party.

Applications to the Court of Protection can be made by the person themselves with the necessary support. Should the person lack mental capacity regarding the application or lack capacity to litigate, the Official Solicitor will be requested to act as Litigation Friend (a person who acts as a competent representative for the person lacking capacity and to make decisions on their behalf). Applications can also be made by third parties including family members and Independent Mental Capacity Advocates (IMCAs) on behalf of someone who lacks capacity to make the application themselves.

Applications can also be made by the Public Guardian but only in respect of concerns regarding the way in which Attorneys and Deputies carry out their role.

The Public Guardian cannot make applications about decisions regarding a person's treatment or welfare.

In a case where the Local Authority makes an application to the Court of Protection regarding a mentally incapacitated individual, the Official Solicitor will normally be invited to represent the individual concerned in the proceedings.

Applying to the Court of Protection:

Where an application is made by a Local Authority, permission is required from the Court of Protection to make the application.

If the application is made by either: the person concerned; the person's Litigation Friend; an Attorney appointed under a Lasting Power of Attorney to which the decision relates; a Deputy appointed by the Court for matters in relation to decisions the Deputies have to make or the Official Solicitor, permission is not required from the Court and they can make an application directly.

To make an application to the Court requires the following Court forms to be completed:

- COP1, Application Form;
- COP1B, Supporting Information for Personal Welfare decisions;
- COP2, Permission Form (if required);
- COP3, Assessment of Capacity Form.

The COP3, Assessment of Capacity Form, may be completed by a registered medical practitioner, for example the GP of the person to whom the application relates; - psychiatrist – AMHP – social worker – psychologist – nurse or occupational therapist who has examined and assessed the capacity of the person to whom the application relates. In some circumstances it might be appropriate for a registered therapist, such as a speech therapist or occupational therapist, to complete the form. The COP3 Form has two parts to it; one to be completed by the Applicant and Part B to be completed by the practitioner. It is always good practice to ensure that an

assessment of capacity using the Gloucestershire MCA2 is made for the purposes of completing the COP3, even where there has been a previous assessment of capacity. Practitioners should note that under the Mental Capacity Act, mental capacity is decision and time specific. The most up-to-date mental capacity assessment is important for the Court in taking its decision.

Evidence:

When making an application to Court, it is important to present enough evidence initially for the Court to grant permission to the Local Authority to bring the case and, secondly, to support any application being made. It is recommended that at the application stage, a first witness statement from the key worker is required. The purpose of the statement is to set out the background to the application and why the Local Authority believe an Order from the Court is necessary. In addition, any background material, for example, safeguarding, minutes, deprivation of liberty, safeguard authorisations, professionals' reports, etc, should be submitted to the Court. The more relevant information the Court has, the more likely it is to grant permission and the more likely the Local Authority are to obtain any necessary Interim Orders.

The evidence in each case will of course be different and discussion should take place with Legal Services regarding the relevant evidence for each application.

Interim Orders:

It may be the case that when making an application to the Court, the Local Authority considers that it is in the best interests of the individual lacking capacity to remain in a placement or to be moved to an alternative placement. Court of Protection proceedings can take some time and it may be necessary to apply to the Court for an Interim Order either for a person to remain in their current place of residence pending a final resolution by the Court or to move somebody in the interim in their best interests. If practitioners believe that an Interim Order may be necessary, then they should have that discussion with Legal Services before the application is made to the Court.

Urgent applications:

There may be circumstances when an immediate decision needs to be made by the Court of Protection. If this is the case, Legal Services should be contacted and contact should be made with the Court as a matter of urgency.

Urgent applications may be relevant in Deprivation of Liberty Safeguards cases or where it is necessary to protect the well being of an individual. The Court also has an out of hours' service for evenings and weekends and is available 365 days a year 24 hours a day. Staff can make an emergency application or seek guidance by calling the Court on 0300 456 4600 and asking to speak to the Urgent Business Officer. The Urgent Business Officer will discuss the case and make arrangements to receive the application and present it to a Judge. Urgent Business Officers are available 10.00 am to 4pm.

If staff need to make an application outside of normal office hours (e.g. at the weekend or before 9am or after 4pm on a weekday) they can telephone the Royal Courts of Justice switchboard on 020 7947 6000.

Parties to a case in the Court of Protection:

When the Local Authority makes an application to the Court of Protection, the individual lacking capacity will be named as one of the Respondents in the case. Other Respondents in the case may include the individual's partner, an independent Advocate or a party identified by the Court as being relevant to the proceedings.

Deprivation of Liberty:

The process for authorising Deprivation of Liberty Safeguards for people in Care Homes or Hospitals does not apply to those in Supported Living Establishments. An application to the Court of Protection is necessary to authorise a DoL for a service user in Support Living.

If a service user is moving from a residential or hospital setting into Supported Living any DoLS authorisation made by the Supervising Authority will lapse when the move

takes place and a Court Ordered DoL authorisation will be necessary. It is important to consider whether an application to Court of Protection is needed in plenty of time before a move takes place so that the Court process can be initiated. If unsure, practitioners are advised to contact Legal Services

The Court of Protection will consider the welfare issues as well as DoLs and the Court will look at the move to Supported Living and whether it is in the Best Interests of the service user.

The application process and evidential material will be similar to that set out above.

Tenancy Agreements for persons lacking mental capacity:

If a person lacks the mental capacity to sign the tenancy agreement or terminate it, then anyone intending to sign on the person's behalf can only do so if they are authorised to do so by the Court of Protection (unless the person had capacity to make a power of attorney and has done so). Therefore, where a service user lacks mental capacity to sign or terminate a tenancy agreement, an application must be made to Court of Protection. The Court can authorise the Local Authority to sign or terminate the tenancy. Guidance is available from the Court of Protection –

[*'Applications to the Court of Protection in relation to tenancy agreements' \(February 2012\)*](#)

http://www.mentalhealthlaw.co.uk/images/COP_guidance_on_tenancy_agreements_February_2012.pdf.

It is also noted Birmingham Community Healthcare NHS Trust have produced some specific proforma's to assess a persons capacitated understanding of a tenancy. In Gloucestershire the key assessment framework is the MCA2.

Further information:

'Good practice guidance on accessing the Court of Protection' (SCIE Guide 42 May 2011) can be found at:

<http://www.scie.org.uk/publications/guides/guide42/>

39 Essex Street Chambers produce regular case law updates <http://www.39essex.com/newsletters/>. In November 2010 they produced '*Preparing care plans and best interests assessments for Court of Protection proceedings*'.

The multi-agency Policy, Procedure & Guidelines on the Mental Capacity Act 2005 (April 2014) can be found at:

www.gloseshire.gov.uk/mcapolicy

Section 16 is about the Court of Protection

Date:

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