

PRACTICE DIRECTION - DEPRIVATION OF LIBERTY

*This practice direction supplements Part 10A of the Court of Protection Rules
2007*

PRACTICE DIRECTION A – DEPRIVATION OF LIBERTY APPLICATIONS

Introduction

1. This Practice Direction is in three parts. Part 1 addresses the procedure to be followed in applications to the court for orders under section 21A of the Mental Capacity Act 2005 relating to a standard or urgent authorisation under Schedule A1 of that Act to deprive a person of his or her liberty; or proceedings (for example, relating to costs or appeals) connected with or consequent upon such applications. Part 2 addresses the procedure to be followed in applications under s.16(2)(a) of that Act to authorise deprivation of liberty under section 4A(3) and (4) pursuant to a streamlined procedure. Part 3 makes provision common to applications under both Parts 1 and 2.

PART 1 – APPLICATIONS UNDER SECTION 21A RELATING TO A STANDARD OR URGENT AUTHORISATION UNDER SCHEDULE A1

2. This Part sets out the procedure to be followed in applications to the court for orders under section 21A of the Mental Capacity Act 2005 relating to a standard or urgent authorisation under Schedule A1 of that Act to deprive a person of his or her liberty. By their nature, such applications are of special urgency and therefore will be dealt with by the court according to the special procedure described here. Other applications may, while not being DoL applications within the meaning of the term explained above, raise issues relating to deprivation of liberty and require similarly urgent attention; and while the special DoL procedure will not apply to such applications, they should be raised with the DoL team at the earliest possible stage so that they can be handled appropriately. The key features of the special DoL procedure are:

(a) special DoL court forms ensure that DoL court papers stand out as such and receive special handling by the court office;

(b) the application is placed before a judge of the court as soon as possible – if necessary, before issue of the application – for judicial directions to be given

as to the steps to be taken in the application, and who is to take each step and by when;

(c) the usual Court of Protection Rules (for example, as to method and timing of service of the application) will apply only so far as consistent with the judicial directions given for the particular case;

(d) a dedicated team in the court office (“the DoL team”) will deal with DoL applications at all stages, including liaison with would-be applicants/other parties;

(e) the progress of each DoL case will be monitored by a judge assigned to that case, assisted by the DoL team.

Before issuing an application

3. Potential applicants should contact the DoL team at the earliest possible stage before issuing a DoL application. Where this is not possible, the applicant should liaise with the DoL team at the same time as, or as soon as possible after, lodging the application. The DoL team can be contacted by telephone in the first instance and by fax.

4. The information that the DoL team needs, with as much advance warning as possible, is (1) that a DoL application is to be made; (2) how urgent the application is (i.e., by when should the Court’s decision, or interim decision, on the merits be given); and (3) when the Court will receive the application papers. In extremely urgent cases, the DoL team can arrange for a telephone application to be made to the judge for directions and/or an interim order even

before the application has been issued. Further brief details should be given which may include:

- (a) the parties' details
- (b) where the parties live
- (c) the issue to be decided
- (d) the date of urgent or standard authorisation
- (e) the date of effective detention
- (f) the parties' legal representatives
- (g) any family members or others who are involved
- (h) whether there have been any other court proceedings involving the parties and if so, where.

5. Contact details for the DoL team are:

PO Box 70185
First Avenue House
42-49 High Holborn
London
WC1A 9 JA

DX: 160013 Kingsway 7

Enquiries: 0300 456 4600

6. The public counter is open between 9.30 a.m. to 4.30 p.m. on working days. The DoL team can receive telephone calls and faxes between 9.00 a.m.

and 5.00 pm. Faxes transmitted after 4.30 p.m. will be dealt with the next working day.

7. When in an emergency it is necessary to make a telephone application to a judge outside normal court hours, the security office at the Royal Courts of Justice should be contacted on 020 7947 6000. The security officer should be informed of the nature of the case. In the Family Division, the out-of-hours application procedure involves the judge being contacted through a Family Division duty officer, and the RCJ security officer will need to contact the duty officer and not the judge's clerk or the judge.

8. Intending applicants/other parties may find it helpful to refer to:

(a) the Code of Practice Deprivation of Liberty Safeguards (June 2008), ISBN 978-0113228157, supplementing the main Mental Capacity Act 2005 Code of Practice: in particular Chapter 10, What is the Court of Protection and who can apply to it?; and

(b) the judgment of Mr Justice Munby in *Salford City Council v. GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam); [2008] 2 FLR 1295. Although this case was decided before the coming into force of the DoL amendments to the Mental Capacity Act 2005, it sets out helpful guidance on the appropriate court procedures for cases relating to the deprivation of liberty of adults.

9. The DoL team will be pleased to explain the court's procedures for handling DoL cases. Please note that the team (as with all court staff) is not permitted to give advice on matters of law. Please do not contact the DoL team unless your inquiry concerns a deprivation of liberty question (whether relating to a potential application, or a case which is already lodged with the Court).

DoL court forms

10. The special DoL court forms are as follows:

(a) DLA: Deprivation of Liberty Application Form: to be used for all DoL applications;

(b) DLB: Deprivation of Liberty Request for Urgent Consideration: this short form allows applicants to set out the reasons why the case is urgent, the timetable they wish the case to follow, and any interim relief sought. A draft of any order sought should be attached. Ideally, the DLB (plus any draft order) should be placed at the top of the draft application and both issued and served together;

(c) DLC: Deprivation of Liberty Permission Form: P (the person who is being, or may be, deprived of his/her liberty); and P's appointed representative, attorney or deputy do not need the court's permission to make a DoL application. Anyone else (including family members) needs permission;

Where the applicant needs permission to make a DoL application, the DLC form should be lodged and served together with a draft of the DLA and, where appropriate, the DLB. The DLB should always be placed at the top of the papers and (where this is so) mention that permission is required and that a completed DLC is attached;

(d) DLD: Deprivation of Liberty Certificate of Service/non-service and Certificate of notification/non-notification;

(e) DLE: Deprivation of Liberty Acknowledgement of service/notification.

These forms can be obtained from the Court of Protection office or downloaded from the court's website

http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_category=court_of_protection.

11. To ensure that papers relating to DoL applications are promptly directed to the DoL team at the court, it is essential that the appropriate DoL court forms are used.

12. The DoL court forms should be used for, and only for, DoL applications. If in such a case it is anticipated that other issues may arise, the DoL forms should identify and describe briefly those issues and any relief which may be sought in respect of them: sections 3.5 and 5 of form DLA, the Deprivation of Liberty Application Form, offer an opportunity to do this. "Other issues" are perhaps most likely to arise in the event that the court decides the DoL application in the applicant's favour. In such a case, if the applicant has already identified the "other issues" in his/her form DLA, the court will be able to address these, either by dealing with them immediately or by giving directions for their future handling.

13. Accordingly, unless the court expressly directs, applicants should not issue a second and separate application (using the standard court forms) relating to any "other issues".

14. Where an application seeks relief concerning a deprivation of P's liberty other than under section 21A in respect of a standard or urgent authorisation (for example, where the application is for an order under section 16(2)(a)), the dedicated DoL court forms should not be used. Rather the standard court forms should be used for such an application, but it should be made clear on them that relief relating to a deprivation of P's liberty is being sought, and the proposed applicant should contact the DoL team to discuss handling at the earliest possible stage before issuing the application.

How to issue a DoL application

15. To issue a DoL application, the following forms should be filed at court:

(a) form DLA

(b) form DLB (plus draft order)

(c) form DLC if appropriate

(d) the appropriate court fee.

Where a draft order is lodged with the court, it would be helpful – although not compulsory - if an electronic version of the order could also be lodged on disc, if possible.

16. In cases of extreme emergency or where it is not possible to attend at the court office, for example during weekends, the court will expect an applicant to undertake to file forms DLA and DLC and to pay the court fee unless an exemption applies.

Inviting the court to make judicial directions for the handling of the application

17. The following is a sample list of possible issues which the court is likely to wish to consider in judicial directions in a DoL case. It is intended as a prompt, not as a definitive list of the issues that may need to be covered:

(a) upon whom, by when and how service of the application should be effected;

(b) dispensing with acknowledgement of service of the application or allowing a short period of time for so doing, which in some cases may amount to a few hours only;

(c) whether further lay or expert evidence should be obtained;

(d) whether P/the detained person should be a party and represented by the Official Solicitor and whether any other person should be a party;

(e) whether any family members should be formally notified of the application and of any hearing and joined as parties;

(f) fixing a date for a First Hearing and giving a time estimate;

(g) fixing a trial window for any final hearing and giving a time estimate;

(h) the level of judge appropriate to hear the case;

(i) whether the case is such that it should be immediately transferred to the High Court for a High Court Judge to give directions;

(j) provision for a bundle for the judge at the First Hearing.

18. If you are an applicant without legal representation, and you are not sure exactly what directions you should ask for, you may prefer simply to invite the judge to make appropriate directions in light of the nature and urgency of the case as you have explained it on the DLB form. In exceptionally urgent cases, there may not be time to formulate draft directions: the court will understand if applicants in such cases (whether or not legally represented) simply ask the judge for appropriate directions.

After issue of the application

19. The DoL team will immediately take steps to ensure that the application is placed before a judge nominated to hear Court of Protection cases and DoL applications. During working hours, the application will be placed before a Judge at Archway Tower. Out of hours, at weekends and on public holidays, the application will be placed before the judge who is most immediately available.

20. As soon as the court office is put on notice of a DoL application, the DoL team will notify a judge to put the judge on stand-by to deal with the application. The judge will consider the application on the papers and make a first order.

Steps after the judge's first order

21. The DoL team will:

- (a) action every point in the judge's note or instruction;
- (b) refer any query that arises to the judge immediately or, if not available, to another judge;
- (c) make all arrangements for any transfer of the case to another court and/or for a hearing.

22. The applicant or his/her legal representative should follow all steps in the judge's order and:

- (a) form DLD should be filed with the court if appropriate; and
- (b) form DLE should be included in any documents served unless ordered otherwise.

The First Hearing

23. The First Hearing will be listed for the court to fix a date for any subsequent hearing(s), give directions and/or to make an interim or final order if appropriate. The court will make such orders and give such directions as are appropriate in the case.

24. The court will aim to have the First Hearing before a judge of every DoL application within 5 working days of the date of issue of the application.

25. Applicants can indicate on the DLB form if they think that the application needs to be considered within a shorter timetable, and set out proposals for such a timetable. On the first paper consideration the court will consider when the First Hearing should be listed.

26. If time allows and no specific direction has been made by the court, an indexed and paginated bundle should be prepared for the judge and any skeleton arguments and draft orders given to the court as soon as they are available. A copy of the index should be provided to all parties and, where another party appears in person, a copy of the bundle should be provided.

PART 2 – APPLICATIONS UNDER SECTION 16(2)(a) FOR AN ORDER AUTHORISING DEPRIVATION OF LIBERTY UNDER SECTION 4A(3) AND (4) PURSUANT TO A STREAMLINED PROCEDURE

27. This Part sets out the procedure to be followed in applications to the court under section 16(2)(a) to authorise deprivation of liberty under section 4A(3) of the Act pursuant to a streamlined procedure and applies only to such applications. Reference should be made generally to the decision of the Supreme Court in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another; P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19, and in relation to the procedure in these cases, to the judgments of 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 the application

28. To bring proceedings, the applicant must file an application using form COPDOL 10, verified by a statement of truth and accompanied by all attachments and evidence required by that form and its annexes.

29. The application form and accompanying annexes and attachments are specifically designed to ensure that the applicant provides the court with essential information and evidence as to the proposed measures, on the basis of which the court may adjudicate as to the appropriateness of authorising a deprivation of liberty, and in particular to identify whether a case is suitable for consideration without an oral hearing. The use of the form and its annexes is

mandatory and they must be provided fully completed and verified by the required statements of truth.

30. The applicant must ensure that the evidence in the application form, accompanying annexes and attachments is succinct and focussed.

31. A separate application must be made for every individual for whom the applicant requests an authorisation of deprivation of liberty. However, where there are matters in relation to which the facts are identical for a number of individuals, such as common care arrangements, the applicant may, in addition to addressing the specific issues relating to each individual, attach a generic statement dealing with the common care arrangements or other matters common to those individuals.

Deponent

32. The applicant must consider carefully who should complete the form and each annex with regard to the nature of the evidence required by each. There is no requirement that the same individual should complete and verify by statement of truth the form and each annex and indeed it might be inappropriate for this to be the case, where different people are best placed to provide evidence on different matters.

Applicant's duty of full and frank disclosure

33. The applicant has a duty of full and frank disclosure to the court of all facts and matters that may have an impact on the court's decision whether to authorise the deprivation of liberty. The applicant should therefore scrutinise the circumstances of the case and clearly identify in the evidence in support (in Annex A to form COPDOL 10) factors—

(a) needing particular judicial scrutiny;

- (b) suggesting that the arrangements in relation to which authorisation is sought may not in fact be in the best interests of the person the application is about, or the least restrictive option; or
- (c) otherwise tending to indicate that the order should not be made.

Pursuant to this duty, the applicant should also identify those persons, not consulted by the applicant, who are in the same category under paragraph 39 as persons with whom the applicant has consulted. Those persons must be listed in Annex B to form COPDOL 10 together with an explanation in that Annex of why they have not been consulted.

Draft order

34. The application must be accompanied by a draft of the order which the applicant seeks, including the duration of the authorisation sought, appropriate directions for review, and liberty to apply for its reconsideration.

Consultation with the person the application is about

35. Consultation with the person the application is about must take place before the application form is lodged with the court. The applicant must arrange for that person to be informed of the following matters—

- (a) that the applicant is making an application to court;
- (b) that the application is to consider whether the person lacks capacity to make decisions in relation to his or her residence and care, and whether to authorise a deprivation of their liberty in connection with the arrangements set out in the care plan;
- (c) what the proposed arrangements under the order sought are;
- (d) that the person is entitled to express his or her views, wishes and feelings in relation to the proposed arrangements and the application,

and that the person undertaking the consultation will ensure that these are communicated to the court;

(e) 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;

(f) 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.

36. The person undertaking the consultation must complete Annex C to form COPDOL 10.

37. The applicant must confirm that the person the application is about has been supported and assisted to express his or her views, wishes and feelings in relation to the application and the arrangements proposed in it, and encouraged to take part in the proceedings to the extent that he or she wishes, in accordance with section 4(4) of the Act.

Consultation with other persons regarding the making of the application

38. The consultation required by paragraph 39 below must take place before the application is lodged with the court.

39. The applicant must ensure that the following people are consulted about the intention to make the application—

(a) any donee of a lasting power of attorney granted by the person;

(b) any deputy appointed for the person by the court;

together with, if possible, at least three people in the following categories—

(c) anyone named by the person the application is about as someone to be consulted on the matters raised by the application; and

(d) anyone engaged in caring for the person or interested in his or her welfare.

40. When consulting such people, the applicant must inform them of the following matters—

(a) that the applicant is making an application to court;

(b) that the application is to consider whether the person the application is about lacks capacity to make decisions in relation to his or her residence and care and whether he or she should be deprived of liberty in connection with the arrangements set out in the care plan;

(c) what the proposed arrangements under the order are; and

(d) that the applicant is under an obligation to inform the person the application is about of the matters listed in paragraph 35 above, unless in the circumstances it is inappropriate for the applicant to give that person such information.

Dispensing with notification or service of the application form

41. Provided that the court is satisfied as to the adequacy of consultation with the person the application is about in accordance with paragraphs 35 to 37, and with other persons with whom consultation should take place in accordance with paragraphs 38 to 40, the court may dispense with notification of the issue of the application under rules 42, 69 and 70.

Court fees

42. An application fee is payable for all applications, and if the court decides to hold a hearing before making a decision, a hearing fee will be payable.

43. If an application is received without a fee it will be treated as incomplete and returned.

Permission to apply

44. The court's permission to apply is needed in order to make an application under section 16(2)(a). The application form includes provision to seek permission as part of the main application and applicants should ensure that permission is sought in this manner. The court will address the issue of permission at the time of considering the application. A separate application for permission should not be filed.

Applications suitable for the streamlined procedure

45. As soon as practicable after receipt the court officers will consider the suitability of the application to be the subject of paper determination, or to be considered at an oral hearing.

46 All applications considered suitable for the streamlined procedure will be referred to a judge for consideration without an oral hearing, as soon as practicable after receipt.

Applications not suitable for the streamlined procedure

47. If the judge considers that the application is not suitable for the streamlined process, case management directions shall be given.

Applicant to supply a copy of the order to each person consulted

48. The applicant must provide all persons consulted, including the person the application is about, with a copy of the order made pursuant to the streamlined procedure granting or refusing the authorisation of the deprivation of liberty.

Review of the authorisation

49. An application for a review of the authorisation of the deprivation of liberty must be made in accordance with the terms of the order.

PART 3 – PROVISIONS COMMON TO APPLICATIONS UNDER PART 1 AND PART 2

Hearing in private

50. Part 13 of the Court of Protection Rules 2007 provides at rule 90, as supplemented by Practice Direction A to Part 13, that the general rule is that a hearing is held in private. Rule 92 allows the court to order that a hearing be in public if the criteria in rule 93 apply.

Costs

51. The general rule, in rule 157 of the Court of Protection Rules 2007, is that in a health and welfare case there will be no order as to costs of the proceedings. The general rule applies to DoL applications.

Appeals

52. Part 20 of the Court of Protection Rules 2007 applies to appeals. Permission is required to appeal (rule 172) and this will only be granted where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard (rule 173).

53. Paragraph 9 of Practice Direction 11A (Practice Direction – Human Rights) does not apply to applications to which this Practice Direction relates.

