



PUMP COURT  
CHAMBERS

**Court of Protection Update – Part 2**  
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- DOLS in 2020
- The government has recently updated its guidance
- The new version can be found at:  
[www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity](https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity)
- On the same page there is an “Easy Read” version of the provisions of the MCA 2005, decisions made for those lacking capacity and, especially important during the COVID-19 pandemic, medical treatment and consent.

# The main points in the guidance

- The Guidance only applies during the pandemic
- The basic provisions of the MCA 2005 still apply
- Each decision must be person specific and not for a class or number of people
- If a person who lacks capacity to decide on complex medical treatment is given life saving treatment, that situation is not a DOL if the same treatment would be given to someone who had capacity. There is more discussion about this in the updated guidance issued on 29<sup>th</sup> May 2020
- If there are new care arrangements which may be more restrictive than previously, a new authorisation may be needed. There is a new form for urgent authorisations.

# The updated guidance

- This guidance repeats some of the older content, particularly about life saving treatment
- It tackles the issue of testing
- The guidance suggests that testing may be needed in the event of P being moved to a new setting
- There may also be testing of someone who is asymptomatic but who may have had contact with someone who has tested positive. It is easy to see that this may be the case if a carer tests positive.

# Guidance on assessments

- The first version of the guidance suggested that previous assessments which had been undertaken might be used for any new DOLS authorisation, or for considering best interests. There are obvious problems.....
- The new version (29 May 2020) recognises the problems:

If an assessment has been carried out within the last 12 months (from when the new authorisation is being considered), then this may be relied upon without a further assessment taking place as long as the supervisory body is satisfied that there is no reason why the previous assessment may no longer be valid. However, great care should be taken in deciding to use a previous assessment and it should not be done routinely or without proper consideration of all the options. The older the assessment is (even within the previous 12 months), the less likely it is to be valid. It may not be appropriate to use previous best interests or capacity assessments again, without updating them, because normally they are more time- and context-specific than the others. Supervisory bodies should keep a record of cases where an older assessment (within the previous 12 months) is being relied upon, instead of a new assessment.

# Keeping to the rules

- What happens if someone who lacks capacity, needs to isolate but is not doing so?
- The Guidance suggests following the usual steps provided for in the MCA 2005 i.e. helping the person to understand and comply, but also suggests the MHA. It is not clear, but do they really mean s. 2 or s. 3?
- Failing that, advice from the local public health team can be sought
- If action is needed from a public health officer, he or she will inform himself about the individual, consider how to communicate with P, discuss the case with relatives and people involved with P
- And then consider public health powers.

# The Coronavirus Act 2020

- S. 51 and Sched 21
- These relate to potentially infected persons
- Powers under these provisions:
  - Imposition of a requirement to stay in a specified place
  - Returning the person to the place where they are required to stay
  - The officer must inform the person of the requirement to stay in that place and that it is an offence to break that requirement
- That all begs the question of P understanding all that anyway, or retaining that information.....

# DOLS – the boundaries

- *Re D (A Child) [2019] UKSC 42*
- Parents of a young person aged over 16 cannot consent to a deprivation of liberty
- Look at the Court of Appeal judgement in that case – freedom to leave means leaving permanently.
- *Wakefield MDC, Wakefield CCG v M and N [2019] EWHC 2306*
- The inherent jurisdiction – used to protect vulnerable adults – cannot be used to deprive a capacitous person of their liberty.

# Sex and its complications!

- There are quite a number of cases on this issue
- *Lincolnshire v Mr AB* [2019] EWCOP 50.
- This case looked (quite notoriously) at the sensitive situation where a couple who had been together for decades and had a loving relationship, but where one partner could no longer consent
- Other cases examine the intertwined difficulties of (1) the desire for sex; (2) the desire for a relationship and (3) access to the internet
- See *A local Authority v JB* [2019] EWCOP 50 and recently, *A Local Authority v AW* [2020] EWCOP 24. These cases illustrate the problems. Cobb J refers to his previous judgement in *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019 EWCOP 2](#)

# Medical treatment

- Hayden J issued guidance on 17 January 2020 – [2020] EWCOP 2
- It is intended to cover the period before a new Code of Practice is available
- It covers applications, the need for, and the type of case it is intended to cover
- It sets out the Court's expectations
- Important to know this exists

# NEW CASE!

- As I was speaking, the Court of Appeal was handing down judgement in a case about consent to sexual relations.

- The citation is:

A Local Authority v JB [2020] EWCA Civ 735 (11 June 2020).

The Court of Appeal looks at the cases decided by High Court Judges – worth a look.