



COURT OF PROTECTION & THE MCA: CAPACITY TO CHANGE?

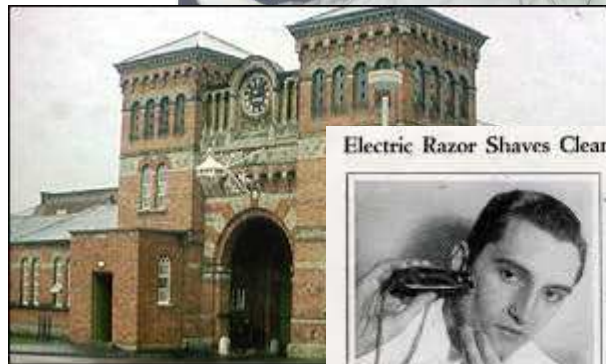
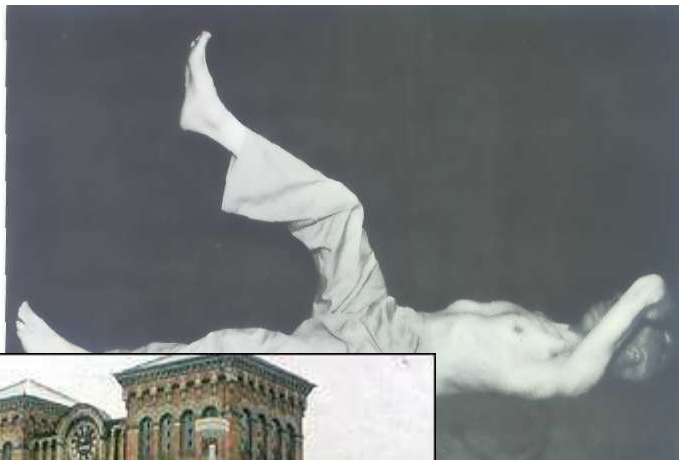
Professor Anselm Eldergill
District Judge, Court of Protection

Mental Health Law Conference 2015

Successes

Remember how it was

Progress is always slow



Electric Razor Shaves Clean Without Lathering Face



AT LAST the electrical dry shave is with us! Requiring no blades, no lather, no cleaning, the ingenious razor shown in action in the photo at the left gives a cleaner shave than any conventional type razor, it is claimed.

Plug the razor into a wall socket and it's ready for use—no hot water or towels needed. The razor cuts the hair in exactly the same way as the clippers used by barbers. It has but one moving part.

A tiny 1/10th horsepower motor revolving at 3,500 r.p.m. actuates a shearing blade which cuts the hair. The razor weighs but eight ounces. In use, it is pressed against the face, moved up and down over the surface to be shaved, and the job is done. The device never requires a new blade, and it is claimed to be impossible to cut one's self with it.

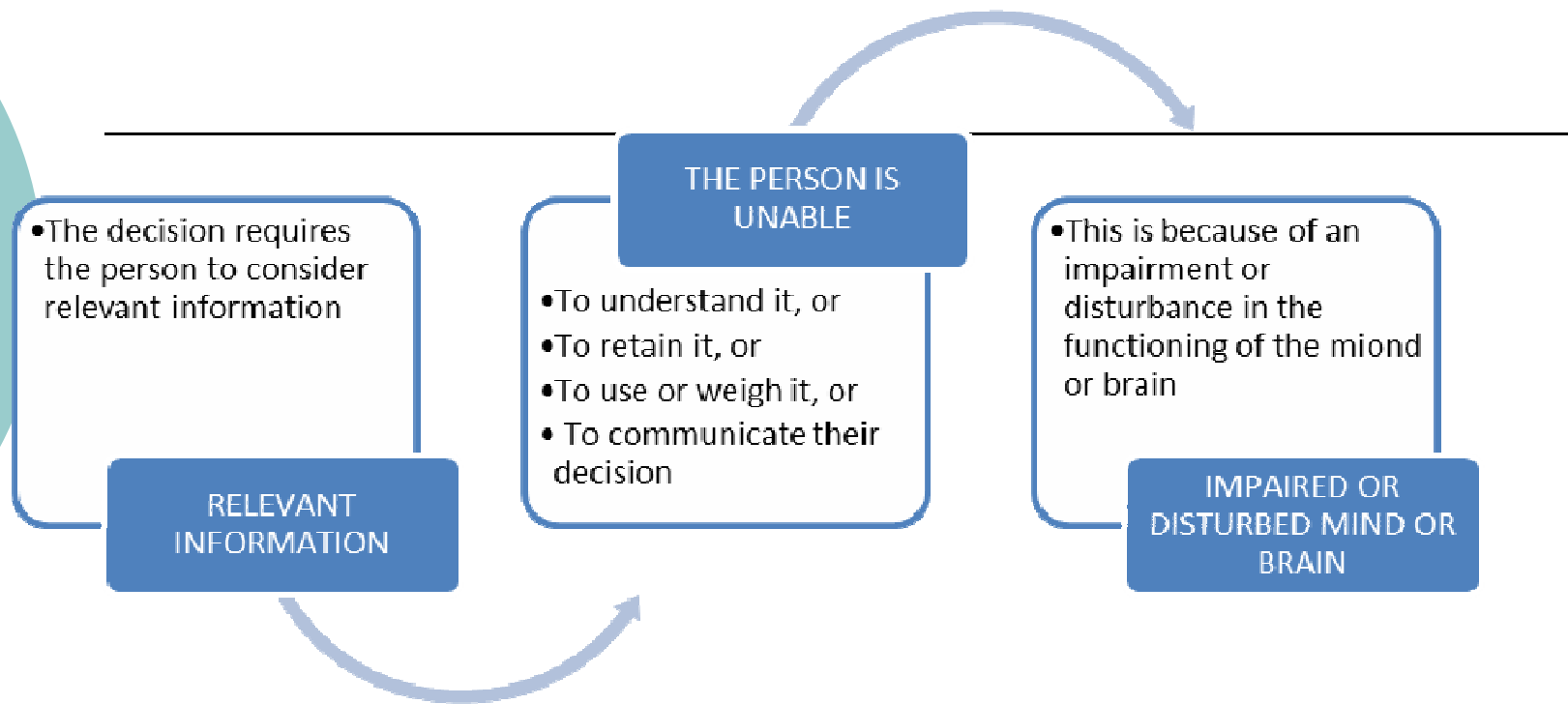
Either alternating or direct current can be used to operate it.

Operating on the principle of a barber's clippers, this electric razor gives a clean shave without use of lather.

- *A mental capacity court*
- *A PW jurisdiction*
- *The court is used*
- *A noticeable change of culture*
- *The success of LPAs*
- *DOLs*

INTRODUCTION: THE BASIC LAW

Definition of Incapacity



There may be an overly-demanding approach to what is 'relevant information' leading to the capacity bar being set very high and an overly-protective approach at the expense of personal liberty.

The MCA: Above and below the line

**ABOVE
THE LINE**

ADVANCE DECISION

LPA DONEE



*Require
Capacity
+ Adult*

**BELOW
THE LINE**

COURT OR DEPUTY

USE OF SECTION 5

The 5 Section 5 Conditions




1	The act is one undertaken 'in connection with' another' person's care or treatment;
2	The person doing it takes reasonable steps to establish whether the recipient has capacity;
3	S/he reasonably believes that the recipient lacks capacity;
4	S/he reasonably believes that it is in their best interests for act to be done;
5	If s/he uses restraint, s/he reasonably believes BOTH that it is necessary to do the act in order to prevent harm to the person and that the act is a proportionate response to the likelihood of their suffering harm and the seriousness of that harm.

DEFINITION OF RESTRAINT

For these purposes, a person restrains another person if he (a) uses, or threatens to use, force to secure the doing of an act which s/he resists, or (b) restricts their liberty of movement, whether or not they resist.


Personal welfare dispute

PW
PW Application
e.g.
Residence
Contact
Removal

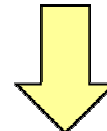


Standard Authorisation

(Name) (Signature)		(Date) (Signature)	
DEPARTMENT OF CORRECTIONS DEPARTMENT OF JUSTICE		(Date) (Signature)	
SUPERVISORY BODY'S DECISION STANDARD AUTHORIZATION			
The following standard authorization has been given:			
PART A - BASIC INFORMATION			
Full name of the person being deprived of civil liberty	Name		
Place and date of birth (or estimated age if unknown)	DOB		
	Est. age	Years	
Name and address of the hospital or care home in which their deprivation of liberty is authorized	Name		
	Address		
Name and address of the managing authority responsible for this hospital or care home (this is the person registered under Part 2 of the Care Standards Act 2000, or the NHS body that manages the hospital)	Name		
	Address		
Name and address of the supervisory body granting this standard authorization	Name		
	Address		
Person in control of the supervisory body	Name		
	Telephone		
	Email		



2015

7

Three streams and a murky river

Hospitals/Care homes: 6 Qualifying requirements

Assess whether the person meets the qualifying requirements

The supervisory body must secure that the following assessments are carried out:

- a) an age assessment
- b) a mental health assessment;
- c) a mental capacity assessment;
- d) a best interests assessment;
- e) an eligibility assessment;
- f) a no refusals assessment.

The supervisory body must give a standard authorisation if all of the six assessments conclude that the person meets the qualifying requirement in question. It must not give a standard authorisation if this is not the case.

*A new
Streamlined
Section 16
Procedure*



$$\mathbf{X = ECHR + AFFORDABILITY}$$

X Cases —Procedure

Application + Evidence

- Form COPDOL 10, verified by a statement of truth and accompanied by all attachments and evidence required by that form and its annexes, plus a draft order.
- 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.

Single Judge

- The paper application is referred to a single judge to 'triage' as 'box work'
- Proposed to use part-time tribunal judges from the Social Entitlement Chamber (one year ticket initially) as well as existing CoP judges in London and the regions
- The role of the judge at this stage is to decide whether the case is suitable for consideration without an oral hearing. This will be done by reference to the presence or absence of the 'triggers' referred to by the President in para. 13 of his judgment in Re X

Order or Directions

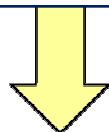
- If there are no such 'triggers' the expectation is that the judge will authorise the deprivation of liberty on the papers. It is envisaged that the majority of the applications can be dealt with in this way (without any breach of Article 5 of the ECHR).
- If one or more triggers is present, the judge will give case management directions (or possibly refer the matter to a full-time CoP judge) with a view to the holding of a hearing.

Anomalies

Personal welfare dispute

PW

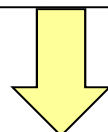
PW Application
DOLs element
Residence
Contact
Removal



Means-tested
legal aid
No RPR
Problems re OS
as litigation
friend

Standard Authorisation

Mental Capacity Act 2005 DEPRIVATION OF LIBERTY FORM No. 102	
SUPERVISORY BODY'S DECISION STANDARD AUTHORISATION	
The following standard authorisation has been given:	
PART A - BASIC INFORMATION	
Full name of the person being deprived (Print Name)	Name
Date of birth (or estimated age if unknown)	DOB
	Day Month Year
Name and address of the hospital or care home in which this deprivation of liberty is authorised	Name Address
Name and address of the care manager responsible for the capacity assessment (This is someone registered under Part 2 of the Care Act 2014, not a Social Worker)	Name Address
Name and address of the supervisory body giving this standard authorisation	Name Address
Place of contact of the supervisory body	Name Telephone Email

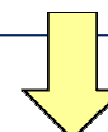


Non-means
Tested legal aid
IMCAs
Litigation Friend
RPR
CQC supervision
Part 8 reviews
Suspension

X DOLs Procedure

X

e.g.
Supported living
Own home

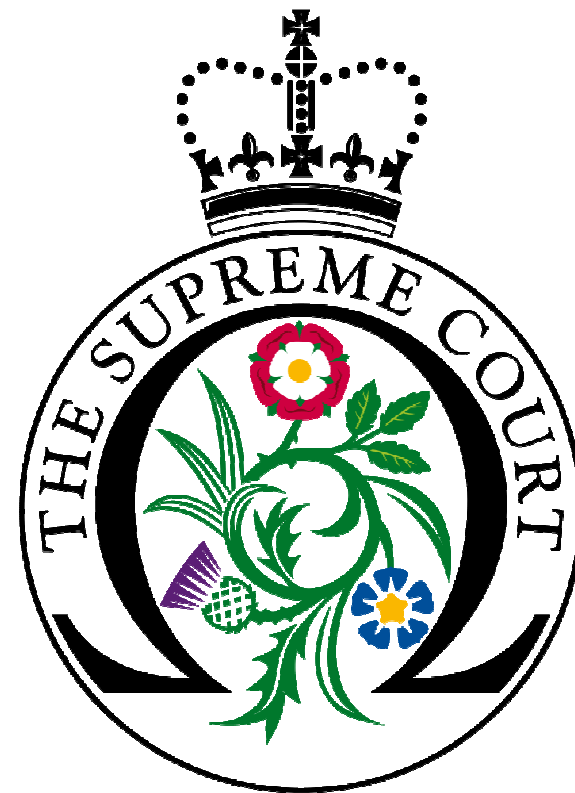


Means-tested
legal aid?
Party status?
Litig friends?
Paper orders
No RPR, IMCA
Support?

CHESHIRE WEST

The judgment may do no more than restore the classical interpretation of what constitutes a deprivation of liberty and reiterate that DOLs safeguards apply to locations other than hospitals and care home.

But only ‘may’. It depends on how the judgment is interpreted.





Issues

- | |
|--|
| <i>A. A Lowering of the Detention Threshold</i> |
| <i>B. Risk vs Capacity Model</i> |
| <i>C. Best Interests Test: Problems of Objectivity</i> |
| <i>D. The Importance of Liberty</i> |
| <i>E. Distinguishing between Liberty and Autonomy</i> |
| <i>F. Understanding the Historical Context</i> |
| <i>G. Considering Professional and Judicial Cultures</i> |
| <i>I. The type of court (and structures) needed</i> |
| <i>J. Specific Issues: Legal Aid, Publicity, etc</i> |

A lowering of the detention threshold

SECTIONABLE

DOLs DOES NOT
APPLY

(ELIGIBILITY
REQUIREMENT)

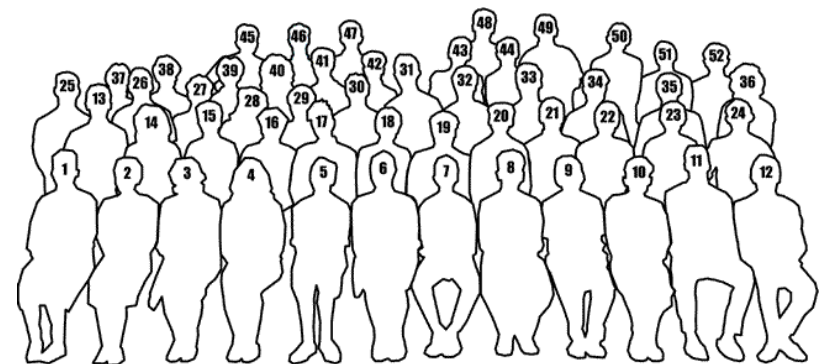
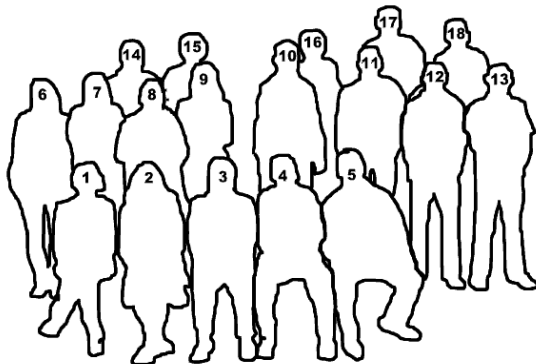
*1983 detention
threshold*

NOT SECTIONABLE

DETENTION UNDER DOLs

MENTAL HEALTH ACT MODEL

MCA DOLs MODEL



Hidden dangers

If a standard authorisation ('DOLs order') is in force the managing authority (hospital/care home) 'may deprive P of his liberty by detaining him' 'in circumstances which amount to a deprivation of liberty'. Schedule A1, paras 1 and 2

'Insofar as orders'

IT'S ALL POSITIVE!

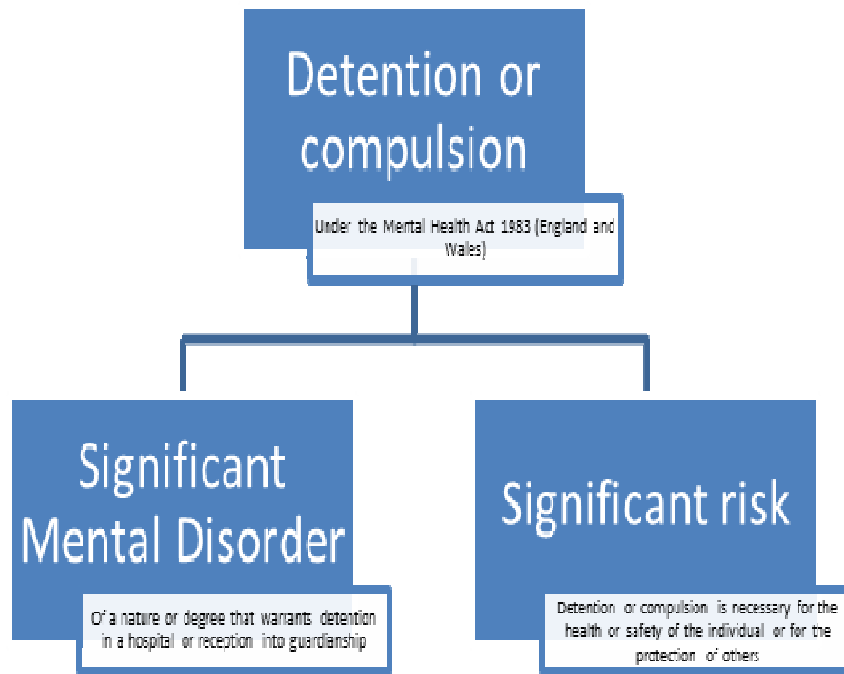
- **No new or extra population is being detained.**
- **We were always detaining these people — but doing it without any legal authority.**
- **Correctly interpreted, the DOLs scheme (inelegantly) plugged the Bournwood gap for care homes and hospitals. A proper legal authority or order is required for all deprivations of liberty.**

POTENTIAL NEGATIVE

- **The order not only protects the vulnerable — it empowers those in whose power the incapacitated person is.**
- **The care home and hospital now have, or think they have, legal authority to deprive the person of liberty in every and all areas of their daily life.**
- **Interference with liberty is no longer occasional, guilty, tentative or furtive but confidently asserted against a person incapable of resisting.**

THE
CAPACITY
MODEL

Risk model and capacity model



THE PERSON CANNOT
UNDERSTAND OR WEIGH
RELEVANT INFORMATION
ABOUT THEIR PERSONAL
WELFARE

THEREFORE THE PERSON IS
UNABLE TO DECIDE OR DO THE
THING IN QUESTION

THEREFORE I MUST DECIDE OR
DO IT FOR THEM AND DO WHAT
IS BEST FOR THEM

We are not interfering at all with their freedom to do anything they can do and wish to do. They remain just as free as before to do everything they can and wish to do.



The Best Interests Test

Subjective or Objective?



“Consultant X reports that she will benefit from treatment and that it is in her interests to have it . Her health is likely to decline without treatment.”

“She does not accept the multi-disciplinary care plan which the best interests meeting agreed was is in her best interests”

“An occupational therapist concluded that safe transfers require two staff and the use of a hoist but the family have not adhered to her recommendations.”

“He has type II diabetes. He saw the dietician who prepared a diet sheet excluding sugary foods but his wife has been observed giving him cake and biscuits.”

“He lacks insight”.

Objective analysis

Not objective outcomes

'The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is their welfare in the context of their wishes, feelings, beliefs and values that is important. This is the principle of beneficence which asserts an obligation to help others further their important and legitimate interests, not one's own.'



Manuela Sykes

Professional and judicial cultures



- The development of an adult safeguarding agenda against a background of limited resources has possibly skewed approaches. However, it raises the question: safeguarding the person against what ...? Loss of liberty, physical harm, neglect, lack of optimum treatment, interference with family life.
- Section 4 does not say health or safety is the primary consideration.
- There is a perception that some judges have never overridden the Official Solicitor's recommendation in PW cases, and never overridden the professional case (local authority/NHS) unless the Official Solicitor takes a contrary view. Hence, it is submitted, the judge adds 'little value' to the process from the viewpoint of the incapacitated person and their family.

The Importance of Liberty

'The importance of individual liberty is of the same fundamental importance to incapacitated people who still have clear wishes and preferences about where and how they live as it is for those who remain able to make capacitous decisions. This desire to determine one's own interests is common to almost all human beings. Society is made up of individuals, and each individual wills certain ends for themselves and their loved ones, and not others, and has distinctive feelings, personal goals, traits, habits and experiences. Because this is so, most individuals wish to determine and develop their own interests and course in life, and their happiness often depends on this.'



Capacity laws should be mainly facilitative (autonomy enhancing)

But ... the language of “personal welfare” or “health and welfare” orders skews discussion²⁰

The need to distinguish between liberty and autonomy

1. Although some dictionaries define autonomy as 'freedom', freedom and autonomy are not synonymous.
2. To be autonomous is to be self-directing or self-governing.
3. The term 'autonomy' is therefore more synonymous with independence.
4. Autonomy requires not only freedom from coercion but also that one is able to act independently.
5. Thus, a dead person has no autonomy.
6. A free person who is unconscious has no ability to act autonomously.
7. A free baby is entirely dependent on others to feed and clothe it and has little ability to act autonomously of others.
8. As the abilities of a free older person with dementia decrease, they become correspondingly more dependant on others to perform for them activities which previously they were able to execute autonomously.

Distinguishing between liberty and autonomy

In the case of someone in the final sad stages of dementia, confined to bed and so cognitively impaired as to be unable to form the idea of swallowing let alone mobilising, there is no coercion or interference at all with their ability to do the acts they will nor therefore with what they can do.

Such a person's actions are circumscribed by the ever-reducing inner circles of their own abilities rather than by external lines and limits on their freedom to act drawn and imposed by others. The boundaries exist within the person not without. The need for strict legal safeguards arises not from complete loss of liberty but from complete loss of autonomy, which leaves the person wholly dependent on and at the mercy of others, and so wholly vulnerable to abuse and inadequate care.



AUTONOMY

Requires

CAPACITY
for autonomous action

FREEDOM
to act autonomously

Reduced by

LACK OF CAPACITY
for autonomous action

RESTRAINTS
on autonomous action

Liberal obligations

BENEFICENCE
Vicarious decision
Practical assistance

**RISK-BASED, JUST,
LIBERAL, RULE OF LAW**

Understanding the Historical context

Insofar as psychiatric units are concerned, the DOLs regime largely replicates the statutory scheme set out in the 1930 Act.

A person who is unable to consent to admission to a psychiatric unit and who is not free to leave must be placed under a statutory order.



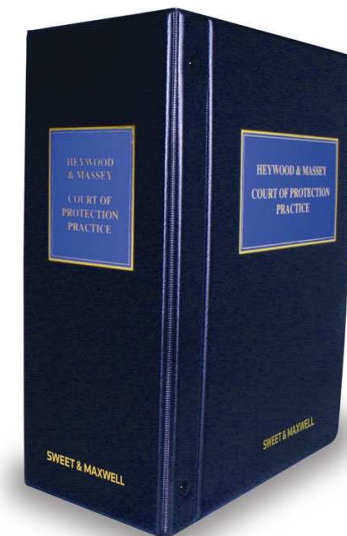
MTA 1930

‘Those who cannot remember the past are condemned to repeat it’

Type of Court Needed

CURRENT RULES AND PROCEDURES

- Court of Protection Rules 2007: 202 rules in 22 parts, supplemented by 62 practice directions, numerous prescribed forms and where necessary the Civil Procedure Rules 1998 and Family Procedure Rules 2010
- Practice Guidance
- Orders and regulations, e.g. Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007
- Codes of Practice
- The CoP rules are modelled on the rules devised for the High Court.
- There is no fast-track procedure for simple cases and no formalised short/single order process as an alternative to deputyship.



What kind of court and procedures are required?

Court structures



ACCREDITED

**Mental Health
Review Tribunal**

Into court

Litigation friend for P

See learned person

Present the facts

Present expert evidence

Present the law

Make findings

Apply the law

Grant remedies

Tribunal goes to person

P instructs own lawyer

Expert membership

More inquisitorial

Fewer legal rules

Make findings of fact

Simpler laws

Simpler remedies

Usually no costs awarded

HYBRID FAMILY COURT

HYBRID COURT AND MH TRIBUNAL

DELEGATES

- Guardians
- Deputies
- Appointees
- Litigation friends
- Court officers (ACOs)

COMMISSIONS

- Mental Health Commission
- Public Guardian

A MENTAL HEALTH COURT

Contentious work

President, Vice President, HCJ: Full CoP Rules, Serious Medical Trt, etc

CoP Judges
Circuit Judges, DJs

MHTs,
MHT Judges

Other ticketed
Judges

Allocation

*Non-contentious work
& Case management*

Or to OPG, as
with LPA and
EPA
Applications
+ Objections
to CoP

Solicitor to the Court of Protection

Solicitor
Team Ldr

Exec Off
Admin

Solicitor
Team Ldr

Exec Off
Admin

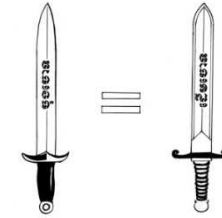
Solicitor
Team Ldr

Exec Off
Admin

Specific Issues



Legal aid and court fees



- Megyeri Case: Detained patients are entitled to take court proceedings 'at reasonable intervals'. The procedure must have a judicial character and provide guarantees appropriate to the deprivation. They should have access to a court and the opportunity to be heard in person or, where necessary, by representation. They cannot be required to take the initiative in obtaining legal representation before having recourse to a court. They should receive legal assistance.
- Consider the inconsistent way in which public money for legal representation is allocated and the inequality of arms under the current legal aid scheme.
- Consider the impact (and legality) of court fees.

Publicity

The Secret Court

Justice Secretary asks for review of Court of Protection's powers

Mr Grayling has written to Sir James Munby, president of the family division of the High Court of England and Wales, urging him to widen a review that he is carrying out into the working of family courts to include courts of protection. Mr Grayling wrote: "As you will be aware, the issue of transparency in the Court of Protection has recently attracted media attention. While we want to ensure that we balance the interests of safeguarding vulnerable adults with those of increasing the transparency of proceedings, I would welcome your views on how we might best achieve this."

2 May 2013



Daily Mail

Jailed in secret - for trying to rescue her father from care home where she believed he would die

- Wanda Maddocks is first person to be imprisoned by Court of Protection
- It settles the affairs of people too ill to make their own decisions
- Jailed because she ignored orders not to try to remove her father from home



Access and accountability

PRINCIPLES

- There seems to be no good general reason for not permitting accredited members of the press to attend hearings in the Court of Protection.
- In particular cases, it may (relatively rarely) be desirable in the interests of justice to require the press to be absent from part of the hearing. For example, where the presence of the press (and other people) would inhibit a person from giving their evidence on a sensitive personal matter, for example a sexual matter.
- In other cases, where no one is inhibited from giving their evidence, the public interest in enabling the press (on behalf of the public) to observe the way in which the proceedings are conducted and the issues resolved outweighs the public and private interest in strict privacy and confidentiality of information.

PRACTICALITIES

Listing

- Not: 'Before Judge A: The Case of P'
- Something more informative: Before Judge A: Case of P1 (Personal welfare case, local authority application to remove an older person to care home, for directions).

Website

- Development of a CoP website
- Restricted access part of the website for accredited press representatives, with named party listing information, orders, press notices re injunctions in force, etc.

Press Reporting

- Default position: Anonymised.

Reform: Some Pointers



1. Legally-qualified Solicitor to the Court and team leaders to improve case and file management techniques (OS model)
2. Simpler rules + fast-track procedure
3. Appoint more specialist judges with relevant experience in the area
4. Consider transferring non-contentious work to the Public Guardian
5. Consider dove-tailing CoP and MHT into a single Mental Health Court or provide transfer regulations.
6. Improve personal attendance and involvement
7. Utilise the Mental Health Panel of Solicitors
8. Default position of press access
9. Mental Health Commission in place of CQC
10. Review issues of race and culture