

Deprivation of Liberty Safeguard Guidance for making an application to the Court of Protection

What is a deprivation of liberty?

In March 2014 the Supreme Court ruled that 'P', a profoundly disabled man, was deprived of his liberty because of the complete and effective control exercised over his life by those looking after him. The Supreme Court also decided that a deprivation of liberty can occur in domestic settings where the State (e.g. CCG) is responsible for imposing such arrangements. This includes supported living placements in the community as well as some other domestic arrangements. Such arrangements must be authorised by the Court of Protection.

As a result of this case, there are two key questions to ask – 'the acid test' – in order to decide whether a person (who does not have the mental capacity to consent to the arrangements) is being deprived of their liberty –

The individual has to have been deemed to lack capacity with regard to making decisions around the care and support they are receiving and;

- (1) Is the person subject to continuous supervision and control?
- (2) Is the person free to leave?

NB: for a person to be deprived of their liberty, they must BOTH be subject to continuous supervision and control AND not be free to leave. The focus is not on whether the person is expressing a desire to leave, or trying to leave, but on what those with control over their care arrangements would do if they tried to leave. Consideration is for cases that have 24 hour commissioned care.

When applying the 'acid test', the following factors are NOT relevant:

- (1) The person's apparent compliance with or lack of objection to their living and support arrangements;
- (2) The relative normality of the placement – for example they are able to participate in external activities; and
- (3) The reason or purpose behind a particular placement – for example they need a high level of support because of physical disabilities.

When every element of the 'acid test' is satisfied an application will need to be made to the Court of Protection to authorise a deprivation of liberty. (See appendix 1).

To enable the CCG to make the application to the Court of Protection they require support from the relevant team. (CHC, CWPT or CAPT)

The Team role and responsibility to support the CCG in processing the Court of Protection application is as below:

- (1) The Nurse Assessor will Complete the proforma (appendix 3)
- (2) The Nurse Assessor will forward by secure email to the CCG the following information;
 - (a) The Court of Protection proforma;
 - (b) The individuals decision support tool/assessment;
 - (c) Mental Capacity Assessment/ Best Interest forms (MCA1 & 2 appendix 2) decision specific with regard to, how and where their care needs should be met.
 - (d) Any other relevant information e.g. Care plan/Care prescription, support plan, best Interest minutes, correspondence from the GP or Consultant stating 'impairment of, or disturbance in the functioning of the individuals mind or brain'.
 - (e) Court of Protection COP3 Form

The CCG role and responsibility is to complete the Court of Protection application COPDOL11 (appendix 4).

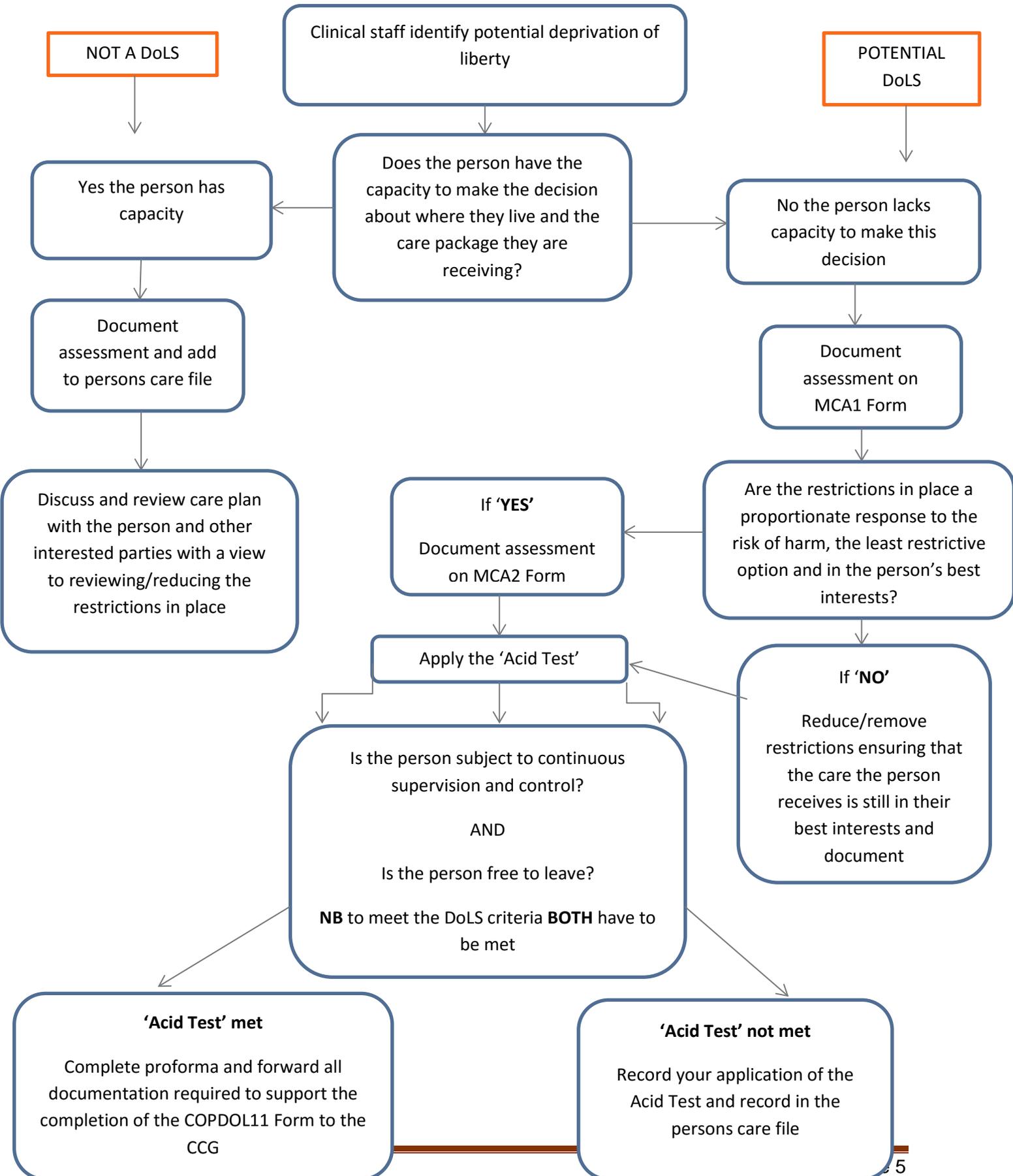
The below documents are required for a DoLS application;

- (1) COPDOL11 application
- (2) COP3 Evidence of capacity (appendix 4)
- (3) Mental Health Assessment
- (4) a copy of any advanced decision
- (5) a copy of any Lasting Power of Attorney
- (6) any relevant Court orders

- (7) Care and support plan (please ensure the dated care or support plan is clearly labelled so it can be identified within the application).
- (8) Best Interest Statement.
- (9) The application fee.

Letter to be sent with the application (Appendix 8)

Appendix 1- Consideration for Court of Protection Application



	Response		Comments
	Yes	NO	
Q1. Is there an impairment of, or disturbance in the functioning of the Individuals mind or brain? (For example, symptoms of alcohol or drug use, delirium, concussion following head injury, conditions associated with some forms of mental illness, dementia, significant learning disability, long term effects of brain damage, confusion, drowsiness or loss of consciousness due to a physical or medical condition)			<i>Please provide summary of reasons:</i>
If you have answered YES to Question 1, PROCEED TO STAGE 2			
If you have answered NO to the above, there is no such impairment or disturbance and thus <u>THE INDIVIDUAL CANNOT LACK CAPACITY</u> within the meaning of the Mental Capacity Act 2005. Sign/date this form, record the outcome within the Individual records and PROCEED NO FURTHER WITH THIS RECORD OF ASSESSMENT OF CAPACITY			
STAGE 2 - ASSESSMENT			
Having determined impairment or disturbance (Stage 1) and given consideration to the case, location and timing; relevance of information communicated; the communication method used; and others involvement, you now need to complete your assessment and form your opinion as to whether the impairment or disturbance is sufficient that the Individual lacks the capacity to make this particular decision at this moment in time.			
	Response		Comments
	Yes	NO	
Q2. Do you consider the Individual able to understand the information relevant to the decision and that this information has been provided in a way that the individual is most probably able to understand?			
Q3. Do you consider the Individual able to retain the information for long enough to use it in order to make a choice or an effective decision?			
Print your name job title qualifications Date sign			
	Response		Comments
	Yes	NO	
Q4. Do you consider the Individual able to use or weigh that information as part of the process of making the decision?			

Q5. Do you consider the Individual able to communicate their decision?			
<p>If you have answered YES consistently to Q2 to Q5, the Individual is considered on the balance of probability, to have the capacity to make this particular decision at this time. Sign/date this form and record the outcome within the Individual records and PROCEED NO FURTHER WITH THIS CAPACITY ASSESSMENT. If you have answered NO to any of the questions, proceed to Q6.</p>			
Q6. Overall, do you consider on the balance of probability, that the impairment or disturbance as identified in STAGE 1 is sufficient that the Individual lacks the capacity to make this particular decision?		<p>On the balance of probability, the Individual Lacks Capacity to make this decision at this particular time. Sign and date this form and proceed to consider 'Best Interests'</p>	
Signature and Print name, job title, qualification:			Date assessment completed

Mental Capacity Act 2005

FORM MCA2

Record of actions taken to make a Best Interest Decision

Name of Individual:	
Date of Birth of Individual:	
Name of Decision making Officer:	
Date best interest decision making process started:	
Please give the name and status of anyone who assisted with making this best interest decision:	
Name	Status

Description of the decision to be made regarding the individual (in relation to their care or treatment):

--

PART 1 DETERMINING LACK OF CAPACITY

Every adult should be assumed to have the capacity to make a decision unless it is proved that they lack capacity. An assumption about someone's capacity cannot be made merely on the basis of an Individuals age or appearance, condition or aspect of his or her behaviour.

	Response		Comments
	Yes	NO	
Has the Individual been determined as lacking capacity to make this particular decision at this moment in time?			<i>Guidance: give date of capacity assessment (form MCA1)</i>

If you have answered YES, PROCEED TO PART 2 of this document.

If you have answered NO, identify decision(s) to be made and complete capacity assessment.

PART 2 – DETERMINING BEST INTERESTS

All steps and decisions taken for someone who lacks capacity must be taken in their best interests.

	Response		Please Provide Your Comments:
	Yes	No	
<p>Q1. Avoid Discrimination – Guidance Have you avoided making assumptions merely on the basis of the Individuals age, appearance, diagnosis /condition or behaviour?</p>			
<p>Q2. Relevant Circumstances – Guidance: Have you identified all the things the Individual would have taken into account when making the decision for themselves?</p>			
<p>Q3. Regaining Capacity – Guidance: Have you considered if the Individual is likely to have capacity at some date in the future and if the decision can be delayed until that time?</p>			
<p>Q4. Encourage Participation – Guidance: Have you done whatever is possible to permit and encourage the Individual to take part in making the decision? Q5. Special Considerations – Guidance: Where the decision relates to life sustaining treatment, have you ensured that the decision has not been motivated in any way, by a desire to bring about their death?</p>			
<p>Q6. The Persons Wishes – Guidance: How has consideration been given to the Individuals past and present wishes and feelings, beliefs and values, that would be likely to influence this decision?</p>			
<p>Q7. Written statements – Guidance: Have you considered any written statement made by the person when they had capacity?</p>			

<p>Q8. Consult Others – Guidance: Have you where practicable and appropriate, consulted and taken into account the views of others including those engaged in caring for the Individual, relatives and friends, persons previously named by the Individual, Attorney under a Lasting or Enduring Power of Attorney or Deputy of the Court of Protection?</p>			
<p>Q9. IMCA – Guidance: If the decision relates to serious medical treatment or changes to accommodation and there is no one identified in Q8, you must consider instructing an Independent Mental Capacity Advocate and receive a report from an IMCA. See IMCA referral document for relevant guidance regarding referral to the IMCA service</p>			
<p>Q10. Avoid Restricting Rights – Guidance: How have you given consideration to the least restrictive option for the individual?</p>			
<p>Q11. Other Considerations – Guidance: What other factors have you considered such as emotional bonds, family obligations that the person would be likely to consider if they were making the decision?</p>			
<p>Q12. Having considered all the relevant circumstances, what decision/action do you intend to take whilst acting in the Best Interests of the Individual?</p>			
<p>Signature: Print name job title, qualification</p>			<p>Date:</p>

Appendix 3 – Proforma to be completed by Nurse Assessor

Details	
Mr/Mrs/Miss	
First Name(s)	
Last Name	
Date of Birth	
Address	

Please give details of:	
The date of the individuals last CHC assessment	
The date of the next review	

Please tick documents attached:	
MCA Forms 1 and 2	
CHC Decision Support Tool/other relevant assessments	
Care Plan/Care prescription/support plan	
Best Interest Minutes	
Correspondence from GP/Consultant stating mental disorder	
Any other relevant information to support the DoLS application	

Name.....

Signature.....

Job title.....

Date.....

Appendix 4 – Links below for COPDOL11Form and COP3 Form

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/689223/copdol11-eng.pdf

<https://www.gov.uk/government/publications/make-a-report-on-someones-capacity-to-make-decisions-form-cop3>

Appendix 5

Witness Statement under Rule 1.2 (2)(c) must include all the required elements, including confirmation that they have seen the application and the care plan and agrees with their contents, and confirmation of whether or not an oral hearing is required

I..... would like to act as representative for....

I have been involved in life since..... (For example He/She has lived with myself until.... Or I have been involved in ...life and continue to have close involvement in....life which includes regular visits to.... Home.

I believe I am an appropriate representative in...life as I am his parent who has advocated for him all of his/her life. I also ensure he/she is appropriately cared for and will continue to do so.

I... agree with the application. I have been involved in the whole process including the mental capacity assessment, Best Interest meetings, development and review of the care plan and have read all the documentation appropriate to this hearing.

I consider an oral hearing is not required.

I confirm I have seen the relevant authorities concerning such a role.

Appendix 6

Guide to becoming a Litigation Friend or Rule 3A Representative

1. Introduction

The Deprivation of Liberty Safeguards are processes that care providers and local authorities must follow if a cared for person will be deprived of their liberty in a care home or hospital. A change in the law in 2014 means that local authorities may need to apply to the Court of Protection on behalf of an adult who lives in community settings, whose care package is deemed to be a deprivation of liberty and who lacks the capacity to consent to these care & support arrangements.

Within the application, the local authority will identify a close relative or friend to be involved in the Court process as either a **Litigation Friend** or a **Rule 3A Representative**.

This guide sets out who these people are, their responsibilities and why they are necessary.

2. Rule 3A Representative

A Rule 3A Representative is the name given by the court to a person who is willing and able to oversee a person's care and support needs and tell the court of any changes to the person's health or needs.

The Rule 3A Representative's role also includes:

- To review and consider what is in the person's best interest;
- To make sure the care provided is meeting the needs of the person;
- To make sure the care provided is the least restrictive option available and to challenge decisions if necessary.
- Keeping the care package under review and raise any points relating to it or changes in the person's behaviour or health to the Court.

3. Litigation Friend

A Litigation Friend is the name given to an appointed person when the court feels that a cared for person can be involved in the court process directly.

A Litigation Friend is regarded by the court as being "an Officer of the Court".

The information contained in this guide is not intended to be legal or other professional advice.

The Litigation Friend will take the place of the person in the court process and will be able to give instructions to the person's solicitor if they have one.

A Litigation Friend must:

- Make decisions that are in the best interests of the person.
- Make every attempt to communicate with the person about what is happening in the case.
- They could potentially be required to pay any costs ordered by the court, although in the majority of Deprivation of Liberty cases the adult who is the subject of the application will have care costs paid so this generally doesn't apply.
- Attend court and possibly speak to a judge on behalf of the person.

4. The difference between a Litigation Friend and Rule 3A Representative

When everyone does not agree as to what is in the best interest of the cared for person involved, it is more appropriate for there to be a Litigation Friend, rather than a Rule 3A Representative.

This could be because of a family dispute, the person not agreeing with decision that has been made about their care or a family member being motivated by their own interests.

The Local Authority will review the facts and review if it believes a Litigation Friend or Rule 3A Representative is needed. The Court will make the decision.

5. Who can be a Litigation Friend or Rule 3A Representative

Litigation Friends and Rule 3A Representatives do not need any specialist training or legal expertise. They must be:

- 18 years old or over
- actively involved with the person and have detailed knowledge of them
- able to act in their best interests

6. How to become a Litigation Friend or Rule 3A Representative

If a person has shown an interest in being a Litigation Friend or Rule 3A Representative and the Local Authority considers it appropriate, their name will be included in the Local Authority's application to the Court when applying to authorise the deprivation of liberty for the person. This will be considered to be in their best interests.

7. Before being appointed the Court may ask for the following:

Rule 3A Representative

The Court may request that the person wanting to be a Rule 3A Representative draft a witness statement that provides information on the person's past and present wishes and feelings. The Mental Capacity Code of Practice provides guidance in relation to the Mental Capacity Act.

Litigation Friend

The Court may ask for a Certificate of suitability of litigation friend to be completed.

8. Financial assistance for Litigation Friend or Rule 3A Representative

In the Court of Protection the general rule is that there will be no costs where the process relates to the person's personal welfare. However if the person acts unreasonably or not in the person's best interests as Litigation Friend or Rule 3A Representative they may be ordered to pay costs.

9. If you no longer wish or able to be a Litigation Friend or Rule 3A Representative

To end the role as acting as Litigation Friend or Rule 3A Representative, you will need to make an application to the court by completing a COP 9. If the person dies, the order automatically ends. If the person is no longer deprived of their liberty the Local Authority will inform the Court who will then review the application and may order that the person is removed from being Litigation Friend or Representative if they feel it is appropriate.

<https://www.gov.uk/government/collections/mental-capacity-act-making-decisions>

Appendix 8 – Sample letter to be sent with application to the Court

Our Ref:

Add CCG address

Date

DoLS Team

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

Dear Sirs

Re: __ DoLS Application

Please find attached:

1. COPDOL11
2. COP3
3. COP24
4. COP 24-witness
5. Draft order (3 Copies)
6. Issue fee of £500 payable to HMCTS
7. Various documents in support of the application
 - Positive Behaviour Support Plan
 - Record of Meeting dated
 - Best Interests Decision Record
 - Psychiatrist Letter dated
 - Summary of Needs
 - Best Interests Decision Record
 - Mental Capacity Assessment Record
 - Care Plan
 - Risk Assessment

ADD/Delete above as appropriate.

I look forward to hearing from you once you have processed the application. Please let me know if you require any further information or clarification.

Yours sincerely