



JUDICIARY OF
ENGLAND AND WALES

MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

Dear Director,

In the early days of the covid-19 pandemic health crisis, the Court of Protection established a group of practitioners, ('the Hive') whose task is to monitor and respond to the strains on the court system which, inevitably, arise in consequence of the social isolation requirements that we all face. Hospitals, Care Homes, families and people self-isolating alone all face different challenges, with varying degrees of hardship and distress. Those who are subject to litigation in the Court of Protection (P) are amongst those most vulnerable to the privations which arise in consequence of the need to protect public health.

The protection afforded to this group of people by the Mental Capacity Act 2005 is constructed in a way which promotes autonomy, guards liberty and seeks to identify best interests. It requires to be said, in terms which permit of no ambiguity, that these principles have, if anything, enhanced importance in times of national emergency. The Court of Protection has adapted to the exigencies of remote hearings with an alacrity that few would have thought possible only months ago. This has been achieved by the concerted efforts of all involved.

I am very conscious that those on the front line and particularly those in the Care Home system, have come under great pressure on many fronts. I am aware, from a variety of sources, that many carers have given selflessly and unstintingly of their time and energy. In some circumstances carers for those with dementia and other cognitive impairments have become their primary source of stability and, to use the phrase which I have heard so frequently, evolved in to "a substitute family". I have heard of Care Homes devising compassionate and humane arrangements to facilitate contact between P and family members in various creative and resourceful ways which adhere to the need for social distancing. Equally, I am alert to the fact that individuals in these circumstances may often react badly. I have been told that this can take many forms but commonly manifests itself either in depression and withdrawal from the world or alternatively in highly agitated behaviour. Both these presentations may provoke the necessity for medication. It is self-evident that this changed dynamic requires a constant evaluation of 'best interests'. Deprivation of liberty will always require strong and well-reasoned justification. The obligation to keep this in review has not diminished in any way in the present circumstances.

I am very clear that assessments of capacity can be conducted 'remotely' with both competence and fairness in the vast majority of cases. Key to this is the involvement of carers and family in the process. The incorporation of these important sources of information will, I strongly suspect, be a feature of the assessment process long after

the present public health emergency has passed. I have been greatly impressed with the protocol put in place by Ms Lorraine Currie, professional lead for Shropshire Council. Ms Currie is a visiting lecturer at Wolverhampton and Keele Universities and chairs the national DoLS leads groups. I anticipate that she will be well known to you. I have appended her protocol to this letter, in the hope that it may be considered and perhaps developed to formulate a consistent national approach. I emphasise that I pass it on to you because it strikes me as an effective way of respecting the autonomy of people in Care Homes and the continuing application of the fundamental principles of the Mental Capacity Act 2005 in what will be, at times, challenging circumstances.

It was expressed to me, at the Hive group, that there appear to be some who believe that careful adherence to proper legal process and appropriate authorisation may now, at times, be required to give way to other pressing welfare priorities. I understand how this view might take hold in establishments battling to bring calm and reassurance to intensely distressed people, both in the Care Homes and within their wider families. It is important, however, that I signal that whilst I am sympathetic to the pressures, I am very clear that any such view is entirely misconceived. **The deprivation of the liberty of any individual in a democratic society, holding fast to the rule of law, will always require appropriate authorisation. Nothing has changed. The Mental Capacity Act 2005, the Court of Protection Rules and the fundamental rights and freedoms which underpin them are indispensable safeguards to the frail and vulnerable.**

There has been a striking and troubling drop in the number of Section 21A (MCA 2005) applications which has occurred, in some areas, alongside a significant reduction in referrals to advocacy services. It needs to be emphasised that where there has been a failure properly to authorise deprivation of liberty one of the consequences is that, in the absence of authorisation, there will be a loss of entitlement to public funding and inevitably an obstruction to the individuals absolute right to challenge the deprivation of liberty. For the present I simply highlight my concern and restate the importance of the statutory requirements.

4th May 2020