

IMCAs and the Court of Protection

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IMCAs and the Court of Protection

- Role of CoP in welfare disputes
- Procedures and parties to CoP proceedings
- How IMCAs can bring matters to the CoP
- Funding and legal representation in the CoP

Functions of the Court of Protection

The main functions of the Court of Protection are:

- To make declarations as to whether or not someone has the capacity to make a particular decision.
- To make declarations as to the best interests of a person who lacks capacity.
- To make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to a person who lacks capacity.

Additional functions of the Court of Protection:

- To make single, one-off orders; for example, an order authorising the execution of a statutory will, or an order for the sale of a house and the investment of the net proceeds of sale.
- To appoint a deputy to make decisions in relation to the matter in which a person lacks the capacity to make a decision.
- To resolve issues involving LPAs and EPAs.
- To make a declaration as to whether an advance decision to refuse treatment exists, is valid, or is applicable to a particular treatment.
- To exercise an appellate jurisdiction in DoLS cases.

CoP and capacity

- Where there is a dispute as to capacity, s.48 MCA applies:
- “The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—
- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P’s best interests to make the order, or give the directions, without delay.”
- “Reason to believe” has been interpreted by the Courts as meaning “sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard”.

CoP and Welfare

CoP's welfare jurisdiction is versatile and can include:

- Disputes about change of residence:
 - e.g. P lives at home, local authority believes in P's best interests to move into residential care, P or P's family disagrees
 - e.g. P is in hospital and fit for discharge, dispute arises about where P to be placed upon discharge
- Disputes about serious medical treatment, e.g:
 - withdrawal of life-sustaining treatment
 - abortion
 - Surgical or other serious medical treatment where best interests not clear

CoP and Welfare

- CoP can also adjudicate on:
 - Disputes about P's contact with others
 - Disputes about P's capacity to marry
 - Disputes relating to P's proposed travel abroad
 - Disputes about P's capacity to consent to sexual contact
 - Disputes relating to P's social care

How are CoP proceedings commenced?

- Typical scenario:
 - P lacks capacity, there is a dispute as to their best interests, and that dispute cannot be resolved on the ground and/or urgent intervention from the court is required.
 - Proceedings can in that scenario be issued (on an urgent basis) seeking best interests declarations from the court.
 - This will result in a judicial determination as to best interests, which all parties must adhere to – financial deputy, case manager, local authorities etc.

Who makes the application to CoP?

- In practice the Court will expect the relevant local authority (i.e. the council for the relevant social services department) or NHS trust to make the application
- MCA Code of Practice, para 8.8:
 - “For cases about serious or major decisions concerning medical treatment ... the NHS Trust or other organisation responsible for the patient’s care will usually make the application. If social care staff are concerned about a decision that affects the welfare of a person who lacks capacity, the relevant local authority should make the application.”
- However, applications can be brought by P, or by a family member or by a person who is interested in P's welfare.
- Para 7(2) MCA IMCA (General) Regulations 2006 states:
 - “IMCA has the same rights to challenge the decision as he would have if he were a person (other than an IMCA) engaged in caring for P or interested in his welfare”

Who are the parties to CoP proceedings?

- The party making the application to the CoP is known as the Applicant.
- Other parties are the “First Respondent”, “Second Respondent”, etc
- Parties to proceedings can include:
 - The local authority
 - The NHS Trust
 - Family members
 - ‘P’
- Where P is a party, and P lacks litigation capacity, the Court will appoint a litigation friend to act on behalf of P.

Can an IMCA be litigation friend?

- While the Code does not refer to an IMCA bringing proceedings as P's litigation friend, the Code does envisage IMCAs bringing matters to the attention of the Court
- Para 10.37 MCA Code of Practice:
 - “In particularly serious or urgent cases, an IMCA may seek permission to refer a case to the Court of Protection for a decision. The Court will make a decision in the best interests of the person who lacks capacity.”
- Para 10.38 MCA Code of Practice:
 - “The first step in making a formal challenge is to approach the Official Solicitor (OS) with the facts of the case. The OS can decide to apply to the court as a litigation friend (acting on behalf of the person the IMCA is representing). If the OS decides not to apply himself, the IMCA can ask for permission to apply to the Court of Protection. The OS can still be asked to act as a litigation friend for the person who lacks capacity.”

Can an IMCA be litigation friend?

- Rule 140 of CoP rules says:
 - 1) A person may act as a litigation friend on behalf of [P] if he—
 - (a) can fairly and competently conduct proceedings on behalf of that person; and
 - (b) has no interests adverse to those of that person.
- Thus, if an IMCA keeps in mind his/her duties as an IMCA and considers that there is no conflict between that role and that of litigation friend, there is nothing in Rule 140 to prevent an IMCA from acting as litigation friend.

Why should an IMCA act as litigation friend?

- The Official Solicitor is litigation friend “of last resort”.
- If contemplating bringing proceedings as litigation friend for P, good practice is to inform the OS. However, if another person is willing and able to conduct proceedings fairly and competently, the OS will usually be happy for someone else interested in P’s welfare to carry out role of litigation friend.
- In practice, OS rarely brings makes applications to CoP on behalf of P. In circumstances where P’s capacity or best interests need to be determined by the CoP, and where the local authority, NHS trust or family members decline to make the application, it is left to IMCA to make the application.
- IMCA is permitted to make application in his/her own right, but would need to fund his/her own legal representation.
- If applying in P’s name as P’s litigation friend, P will often qualify for legal aid.

Procedure and costs in the CoP

- An IMCA wishing to apply to the CoP on P's behalf should approach a solicitor specialising in MCA and CoP work for advice.
- The solicitor will investigate funding options, including P's eligibility for legal aid.
- Most solicitors will not charge for initial advice while funding options are being investigated.
- Acting as litigation friend does not require specialist training or legal expertise.
- Solicitors will advise the IMCA on their role and duties as litigation friend, as they would any parent, sibling or other lay family member acting as litigation friend.

How will the CoP help P?

- CoP can make declarations:
 - That P has, or lacks, capacity
 - That it is in P's best interests to reside in place A
 - Authorising deprivation of liberty
 - That it is in P's best interests to undergo particular medical treatment
 - Prohibiting named persons from having contact with P (injunction order)

Example Orders from the COP

- Injunction order

- **AND UPON** District Judge [xxxx] being satisfied that an interim injunction order should be made against [XXX] as being necessary, proportionate and in the best interests of AB.
- **IT IS ORDERED THAT**
- Until further order [XXX] is forbidden
 - from staying overnight with MW at any address; and
 - from having any direct contact with AB between the hours of midnight and 8am.

Order to prevent marriage and leaving the jurisdiction

- CD and EF are until further order of the Court prohibited (whether by themselves or by instructing or encouraging any other person) from:
 - Causing or encouraging GH to leave accommodation arranged for her by the local authority or the X Day Centre.
 - Causing or allowing GH to undergo any civil or religious ceremony of betrothal or marriage.
 - Taking GH out of the jurisdiction of England and Wales.
 - Applying for or obtaining any passport or other travel document in the name of GH.

Deprivation of Liberty Order

- AND UPON the court being satisfied that a) IJ has a mental disorder of a nature and degree warranting compulsory confinement and, b) that confinement as set out below is necessary and appropriate:
- It is lawful, being in IJ's best interests, that:
 - She reside at XXXX or such other accommodation as arranged for her by the local authority; and
 - the local authority by its employees or agents (including staff at XXXX) may use reasonable and proportionate measures to prevent IJ from leaving such accommodation, if so advised and in accordance with the care plan dated xxxx. There be liberty to any party to apply to discharge or vary this part of this order at any time on 48 hours notice to all parties.

IMCAs and the CoP

- Local authorities, NHS trusts and families not always willing or able to apply to the CoP
- MCA Code of Practice envisages IMCAs bringing matters to the CoP
- IMCAs can bring matters to CoP in own right, but IMCA organisation would have to fund legal representation and resources are scarce
- IMCAs can bring matters to the CoP as P's litigation friend and, where P financially eligible, representation can be funded by legal aid

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