



Accessing the Court of Protection: Step-by-Step Guide

SELF HELP TOOLKIT

Supporting you to be listened to



In this booklet you will find:



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A challenge has been identified

The person being supported by a Relevant Person's Representative (RPR) is objecting. What now?

In our 'A Guide to the Deprivation of Liberty Safeguards' booklet we talked about what an "objection" was.

We talked about what an "objection" may look like, how a person might be acting, or what they might be saying.

The RPR may find that the person they are supporting is objecting. They might be told that they are objecting by the staff at the care home or hospital (Managing Authority).

They could be told by somebody else involved in the person's life or care. For example, another family member or a social worker.

The RPR must not ignore where a person is objecting to their deprivation of liberty. Whether they are unhappy with the whole situation or just part of it. Even if they do not agree with the person's objections.

This booklet will help you understand what actions an RPR needs to take to:

- Carry out their role as RPR where the person is objecting.
- Make sure that the person's rights are protected and respected.

The person who has a Deprivation of Liberty Safeguards (DoLS) Authorisation in place, has a right to access the Court of Protection. The Court of Protection is a special court for people who have been assessed as being unable to make decisions (lack capacity). An application can be made to the Court of Protection to "challenge" the DoLS authorisation on the person's behalf.

A challenge has been identified

There is an important piece of caselaw (where the law has been updated as a result of a court case) called re. RD & Ors (2016) EWCOP 49:

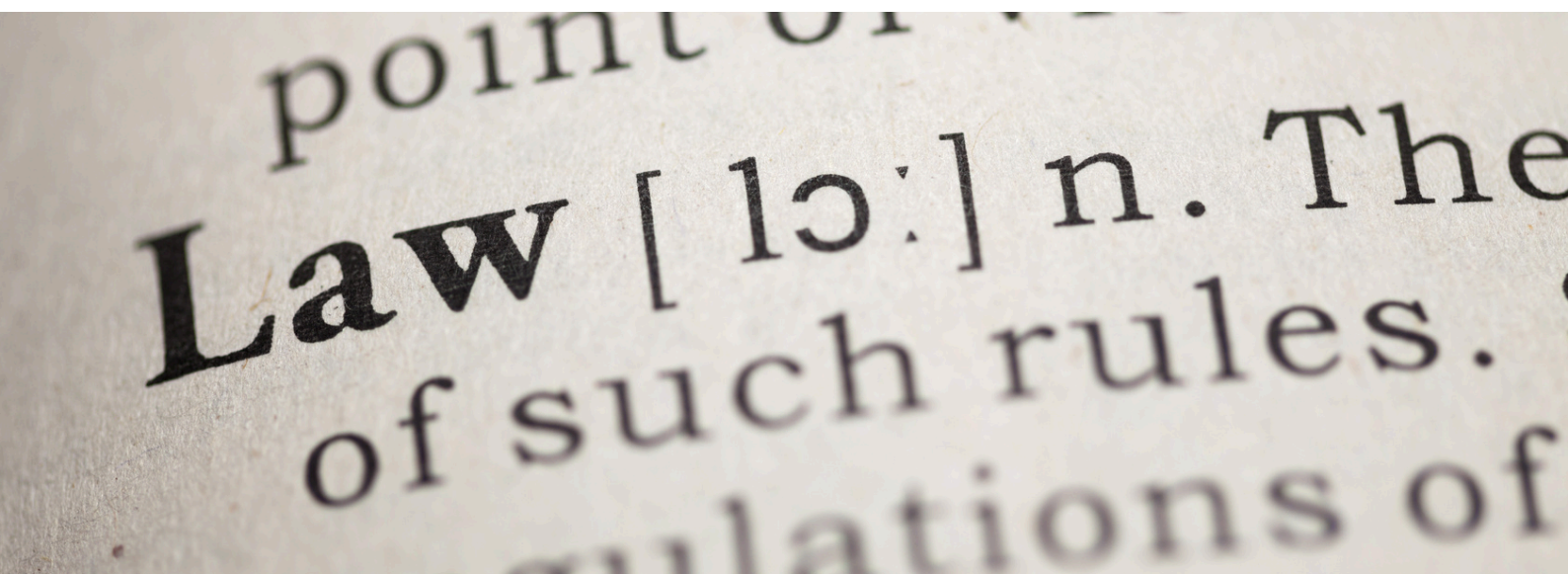
This piece of caselaw can help an RPR decide whether the person's objection needs to be taken to the Court of Protection.

Sometimes it might not be clear if the person is objecting to their deprivation of liberty, or parts of it.

That might be because they say different things to different people, or act in different ways at different times.

It might be because the person can't tell you how they are feeling but their behaviour gives you an idea that they are unhappy.

An example could be where a person is happy and likes where they live, until they are upset by something and then they ask to go home.



A challenge has been identified

The judge gave the following guidelines to follow when it is unclear whether someone is objecting:

1. The RPR must consider if the person wants to/would want to apply to the Court of Protection by:

Thinking about whether the person understands that they can ask for an application to be made to court. The person would only need to express that they do not want to have the current care arrangements in place.

If the person does not understand the above – then thinking about if the person is objecting in any way that tells you that they would like to make the application to court if they were able to understand this.

2. When thinking about the person's wishes, the RPR must consider the person's:

- Wishes and feelings about court.
- Wishes and feeling about living in care.
- Expressions of their emotional state and/or mental health.
- Objections to their current arrangement and how often these are happening.
- Consistency of their expressed wishes or emotional state.
- Any other reasons for their expressed wishes or emotional state. For example, are they unwell?

A challenge has been identified

3. When thinking about whether the person's behaviour means that they are objecting, think about:

- Possible reasons for their behaviour.
- Whether medication has been prescribed for depression or to sedate (calm) the person.
- Whether the person is trying to leave the care home/hospital.
- Whether the person is taking steps to prepare to leave. For example, packing belongings into bags/suitcases.
- How the person is with staff. For example, their relationships.
- Any records of "challenging behaviour" and the triggers for this behaviour.
- Whether the person's behaviour is because of some/all of their care arrangements.

4. When the RPR is carrying out the steps above, they might think that the person would want to make an application to court – even if the person cannot tell them.

For example, the person is trying to leave the care home every day but cannot say where they want to go.

OR

The RPR might think that the person does not want to make an application to court even if they say they do – as they do not really understand what the application is about.

For example, the person does not understand that the court might not say that they can go home OR the person wants to go home to live with their grandparents – who passed away a long time ago. So, the court could not make this decision as it is not a real option.

A challenge has been identified

5. If the person does not express a wish to make an application to the court, the RPR can still decide to do so.

The person might not understand that they have a DoLS Authorisation in place.

They might not understand or recognise that they are deprived of their liberty in a care home.

But their actions or their behaviours suggest that they are objecting to their circumstances regardless.

If something like this is happening, the RPR can decide that the court needs to make the final decision about what is in the person's best interest.

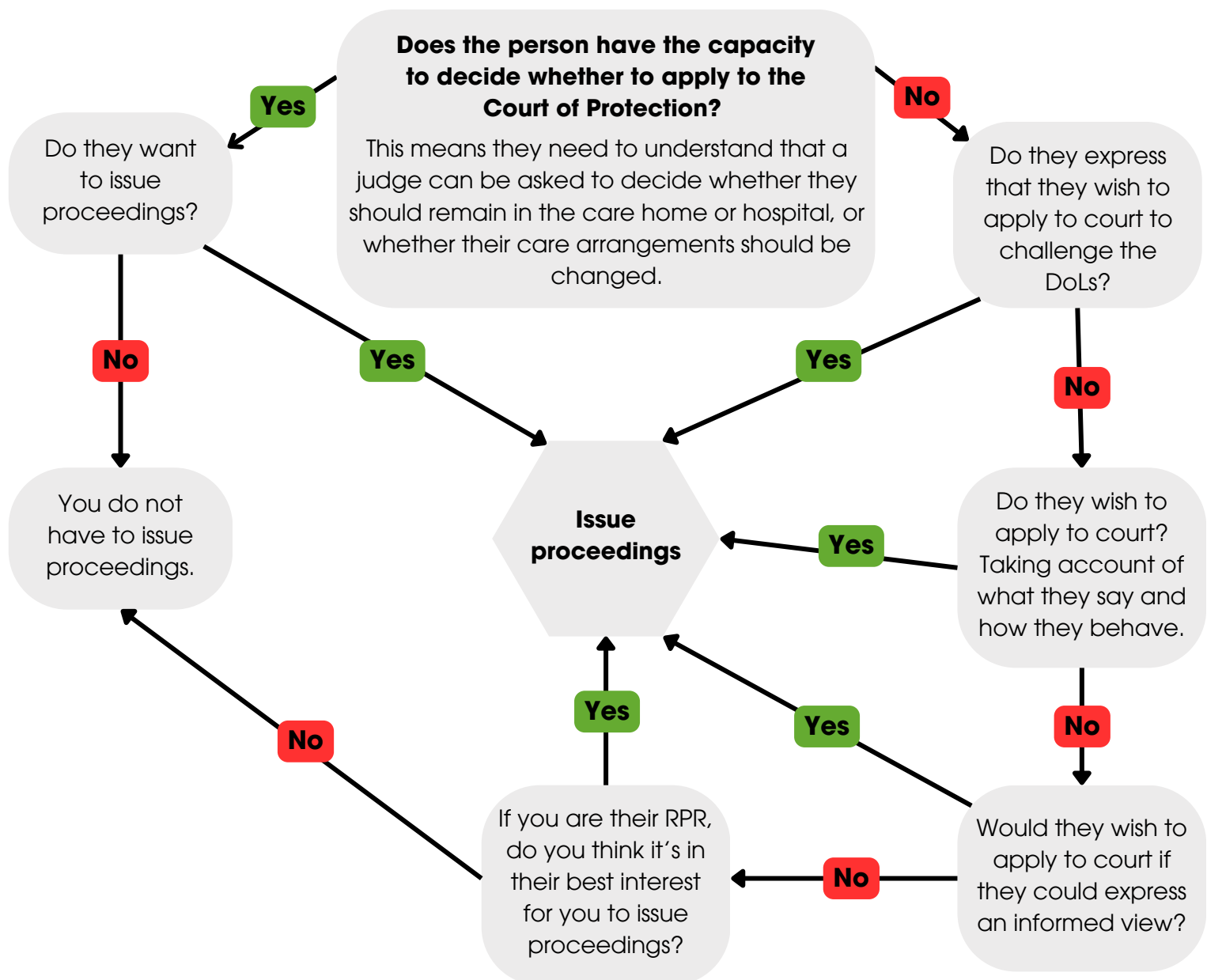
6. The RPR must consider the person's circumstances, their objections, and the whole picture of the person and their deprivation of liberty.

It can take more than one visit with the person for the RPR to decide whether to make an application to the Court of Protection. The RPR should also speak with staff who know the person well, and even other family members to help with their decision as to whether they need to make an application to the Court of Protection.

A challenge has been identified

This flowchart makes the above guidelines easier to understand and follow.

When to apply to the Court of Protection to challenge a DoLS Standard Authorisation:
(With thanks to Tor Butler-Cole, www.mentalcapacitylawandpolicy.org.uk/when-to-bring-an-s21a-application-flowchart/)



What to do before going to CoP

What can be done before going to the Court of Protection?

Where a person has been assessed as being unable to make decisions (lack capacity), their family, professionals and carers can sometimes make decisions for them in their “best interests.”

This “best interests” decision means including the person’s thoughts, wishes and feelings about the decision being made.

If everyone agrees what is in a person’s best interests and a decision can be made that is in line with what the person wants, then, sometimes, there will be no need to go to the court.

We will now talk about some actions that the RPR can take if the person they are supporting is objecting to their deprivation of liberty.

HOWEVER: if the person deprived of their liberty can understand that they can ask a judge within the Court of Protection to review their case/ objection AND they tell the RPR that this is what they want to do, the RPR MUST make an application to the court. This can happen without any of the following things being done.

What to do before going to CoP

REQUEST THE SUPPORT OF AN INDEPENDENT MENTAL CAPACITY ADVOCATE (IMCA):

Both the RPR and the person who has a DoLS Authorisation in place (known as the Relevant Person) have a right to access an IMCA.

The IMCA is known as the '39D IMCA'.

An IMCA is an independent person. They do not work for the local authority (Supervisory Body) or care home/hospital (Managing Authority).

The IMCA service is free to those who need support.

The local authority must ask an IMCA to support the RPR or Relevant Person if they are asked to.

The local authority can also ask for an IMCA to become involved if they think that the RPR or Relevant Person would benefit from their support.

An IMCA can provide extra support to the RPR or Relevant Person if they need it. This can be more than once during the time of an Authorisation.

The IMCA will speak with the RPR and the Relevant Person. They might also look at records within the care home/hospital and speak with staff. This is because the IMCA needs to know about the person.

What to do before going to CoP

The IMCA needs to make sure that the Relevant Person's rights are being protected and respected.

The IMCA can help the RPR understand their role, and what responsibilities they have.

The IMCA can only offer support whilst the Relevant Person has a DoLS Authorisation in place.

The role of the IMCA is to help the RPR and/or Relevant Person understand the Authorisation, including:

- What it means.
- Why it was granted.
- How this will affect the person.
- How long it will last.
- Any conditions.
- How to ask for a review.
- How to challenge by applying to the Court of Protection

The IMCA has the right to:

- Request a review of the DoLS Authorisation.
- Support an application to the Court of Protection.
- Be given copies of the DoLS assessments.
- Be given a copy of the DoLS Authorisation.
- Write a report for the Supervisory Body summarising their findings.

What to do before going to CoP

REQUEST A REVIEW OF THE DOLS AUTHORISATION:

In the Guide to a Deprivation of Liberty booklet we talked about how under certain circumstances, a review of the DoLS Authorisation can be asked for.

Please refer to this booklet for more detailed information about what reviews are and how they happen.

The RPR can make a request for a review to the local authority DoLS team.

There is a certain form used to ask for a review. This is called a Form 10 and can be found here: [Deprivation of liberty safeguards: resources - GOV.UK](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612222/Deprivation_of_liberty_safeguards_resources_-_GOV.UK.pdf)

There are certain reasons written in law (statutory) which would mean that a review of the DoLS Authorisation would happen. These are:

- If the person no longer meets one of the six assessments/ requirements. These are: age, no refusals, mental capacity, mental health, eligibility, or best interest. *For example, the person has regained capacity because they had been unwell but have now got better.*
- If the person is in hospital for their mental health, and another law called the Mental Health Act (1983) needs to be used.
- A person's situation has changed, and a condition needs to be changed, added, or removed. *For example, the person's circumstances have changed in a way which means that a condition is no longer necessary. OR something is not being done with the person that needs to be so that they remain well.*
- The reasons why a person is being deprived of their liberty change. There are differences between a person's situation now to when the DoLS authorisation was granted. *For example, the person has new restrictions in place, which need to be checked to see if they are in their best interest. This could be something like medication being given secretly (covertly) OR they have to be held by staff to make sure that they have a shower (physical restraint).*

What to do before going to CoP

When the local authority receives a review request, they will check that the reason for the request is for one of these statutory reasons.

It is important to make sure that as much information as possible is included in the form so that the DoLS Team can see why you are asking for a review. For example, what the person is saying, what the person is doing, what their objection is about.

Sometimes a review is not the right thing to ask for if someone is objecting to their deprivation of liberty. It depends if the reasons for asking for a review are met.

LET A SOCIAL WORKER KNOW:

If the person does not have a social worker, the RPR can contact the local council where the person is living.

They would need to tell them:

- That the person has a DoLS authorisation in place.
- That they are their RPR.
- That the person is objecting – and explain how.

It is important to tell the council that the person has a right to access the Court of Protection and that their objection has a right to be reviewed as soon as possible. This will help the council consider how urgently a social worker will need to be allocated.

If the person already has a social worker, the RPR needs to let them know that the person is objecting to their deprivation of liberty.

What to do before going to CoP

A social worker will be able to look at a person's situation. They might look at:

- Where they are living.
- The care that they need.
- The risks that would exist if they were not living in a care home or hospital.
- The restrictions that are in place.
- What funding is available for the person.

The social worker can work with the RPR, the person, the Managing Authority and other people who are involved in the person's care/treatment.

They would look at the person's whole situation.

It is important to think about what the person is objecting to and what can be done about these things.

The aim would be to see if the person's situation could be made better for them. For example, moving to a different care home, making sure they can access activities more often, or even thinking about whether they can go home with support from carers.

If things change then the person might be happier, and they might not object anymore.

What to do before going to CoP

The social worker along with the RPR, the person and other relevant professionals/people can make a decision about what is in the person's best interests.

They could make best interests decisions about where the person lives. Or about the care that they receive.

If this best interests decision is agreed by all people involved in the person's life and is in line with what the person would want to happen (they are happy with the decision) then an application to the court might not need to happen.

If the person themselves is not happy with the decision, the RPR might still have to ask for the court to make a final decision.

What happens if the person's funding comes from the NHS (CHC funding)?

If the person has CHC funding in place, then the local council would not be responsible for the person's deprivation of liberty.

The local Integrated Care Board (ICB - NHS body) would be responsible.

The RPR must contact the ICB and tell them the same information discussed above.

The ICB would act in the same way that the council would.

What to do before going to CoP

What happens if the person is funded by both the council and health service?

The RPR should contact the local council to tell them about the person's objection.

A social worker would then think about how involved the health service (ICB – NHS body) would need to be.

TALK TO A SOLICITOR:

Where a person has a DoLS authorisation in place, they have a right to 'legal aid'.

Legal aid is money that is used to pay for a solicitor.

Legal aid is available for both advice and representation before going to the Court of Protection.

There are solicitors who specialise (have experience and are allowed) to help with advice about DoLS Authorisations and the Court of Protection.

The RPR can speak to a solicitor if the person they are supporting is objecting.

They can do this to get advice about what to do (to make sure that they are carrying out the RPR role properly), and to make sure that the person's rights are protected and respected.

The RPR can talk to a solicitor, even if they do not ask them to represent the person in the Court of Protection. As long as it is about the person's objection.

The RPR can tell them what they have done to help the person who is objecting.

What to do before going to CoP

The RPR can find a solicitor in the following ways:

- The Citizens Advice Bureau can tell them about local solicitors who are able to help.
- www.solicitors.lawsociety.org.uk
- www.mhla.co.uk/find-a-lawyer/geographical-list/
- Call 020 7320 5650 (Monday to Friday, 9am until 5.30pm)

WHAT IF THE PERSON IS STILL OBJECTING?

Sometimes, even if all the above steps have been taken – the person might still be objecting.

Sometimes, there might be disagreements between people about what is in the person's best interests.

In these cases, the Court of Protection must be asked to decide what is in the person's best interests.



What is the Court of Protection?

The Court of Protection (sometimes referred to as 'CoP') is a special court. It was made because the Mental Capacity Act (2005) became a law.

The Court of Protection is a court in England and Wales.

The Court of Protection can make decisions on behalf of people who cannot make their own decisions - who have been assessed as 'lacking capacity'.

The court is not just in one place – there are lots of places where it meets. There is usually a local courtroom that can hold Court of Protection meetings (known as hearings).

There are lots of different judges who are part of the Court of Protection.

WHAT DOES THE COURT OF PROTECTION DO?

The Court of Protection can:

- Decide whether a person is able to make their own decisions about certain things. They can decide whether someone has capacity to make their own decision or not.
- Make a decision for someone who cannot make that decision themselves. This is called making a best interests decision.

The Court of Protection cannot:

- Choose something for a person which is not available for example, a particular care home.
- Tell the council (local authority) to provide a service which they do not think is required in order to meet the person's needs.
- Make a decision for a person who can make the decision themselves – they have capacity.

What is the Court of Protection?

WHAT DOES THE COURT OF PROTECTION HAVE TO DO WITH DOLS?

The Deprivation of Liberty Safeguards ('DoLS') are part of the Mental Capacity Act (2005).

For someone to be lawfully deprived of their liberty, there must be a DoLS Authorisation in place.

The DoLS Authorisation gives the person certain legal rights.

DoLS was introduced as the European Court of Human Rights (ECHR) decided that our legal system did not give enough protection to people who lacked capacity to consent to care or treatment, and who needed to be deprived of their liberty to keep them safe from harm.

The right which the DoLS protects is called Article 5.

This right comes from another law called the Human Rights Act (1998).

Article 5 tells us that:

- Everybody has a right to freedom unless they are lawfully detained.
- Everybody who is deprived of their liberty (detained) can ask a court to say whether the detention has been made lawfully.
- Everybody can challenge or appeal the decision to deprive them of their liberty.

Someone with a DoLS Authorisation in place can challenge this, or parts of it (for example, certain restrictions).

This challenge is known as a 'Section 21a application/challenge.'

What is a Section 21a Application/Challenge?

Where a person is objecting to their deprivation of liberty, their RPR must think about making a Section 21a application/challenge to the Court of Protection quickly.

A person must have a Deprivation of Liberty Safeguards (DoLS) Standard Authorisation in place to be able to make a Section 21a application/challenge.

A Section 21a application/challenge is the way that a person's objection is listened to by a judge. The judge would also listen to other information.

They would get information from the council and/or the health service (Supervisory Body). Sometimes a judge asks for information from the care home/hospital (Managing Authority).

It is called 'Section 21a' as this is the part of the Mental Capacity Act (2005) that talks about a person's right to have their deprivation of liberty reviewed by a court.

This is to make sure that the person's Article 5 right (Human Rights Act, 1998) is protected.

What is a Section 21a Application/Challenge?

A Section 21a application/challenge can be made where some or all of the following are happening:

- The person is objecting to living at the care home/hospital.
- The person is objecting to their care and support (restrictions).
- The person believes they can make their own decisions.
- The care home/hospital is not meeting the person's needs.

It is the person themselves that makes this Section 21a application/challenge, but the person might not be able to do this for themselves.

If this is the case, it is the role of the RPR to make this challenge/application on behalf of the person.

Even if the RPR does not think that the person should challenge their deprivation of liberty, the RPR must make sure that they represent the person's wishes.



What is a Section 21a Application/Challenge?

There is an important piece of caselaw (where the law has been updated as a result of a court case) called 'Re AJ (2015) EWCOP 5'.

- The case related to a person who was deprived of their liberty, with a DoLS Authorisation in place.
- The person was objecting to their placement.
- Nothing was done for a long time by the RPR, the local council (Supervisory Body) or even the Independent Mental Capacity Advocate (IMCA) to make sure that they had access to the Court of Protection.
- This meant that their Article 5 right was not being protected.
- The judge said it was important to make sure that people who are deprived of their liberty have access to the Court of Protection so that their Article 5 rights (Human Rights Act 1998) were protected.
- The judge said that there was a duty to make sure that a person deprived of their liberty is "entitled and enabled to have the lawfulness of their detention reviewed speedily by a court".
- They said that access to the court should not depend on someone who supports the person's deprivation of liberty.
- The judge also spoke of how important the RPR role was in making sure that the person deprived of their liberty was able to access the Court of Protection.
- The judge said, "a person is only eligible to be an RPR if they will take appropriate steps to support the person to challenge any Authorisation granted."

In other words, someone can only become a person's RPR if they are willing to make a Section 21a challenge/application to the Court of Protection.

How to make a Section 21a application / challenge to the Court of Protection

The following people can make an application to the Court of Protection, where a DoLS authorisation is in place:

- The person being deprived of their liberty.
- The person's Lasting Power of Attorney (LPA).
- The person's Court Appointed Deputy.
- The person's RPR.

The Independent Mental Capacity Advocate (IMCA) would need to ask the court if they can make an application.

The first step towards making a Section 21a application/challenge to the Court of Protection is to speak to a solicitor.

A solicitor can be found in the following ways:

- The Citizens Advice Bureau can direct to local solicitors who are able to help.
- www.solicitors.lawsociety.org.uk
- www.mhla.co.uk/find-a-lawyer/geographical-list/
- Call 020 7320 5650 (Monday to Friday, 9am until 5.30pm)

When the RPR contacts a solicitor, they will need to tell them that:

- They are the RPR for a person being deprived of their liberty.
- The person has a DoLS Standard Authorisation in place.
- They would like to consider making a Section 21a application/challenge to the Court of Protection.
- The person is objecting and how. For example, what they are saying, what they are doing.

The solicitor will ask the RPR some questions about the person and their situation.

How to make a Section 21a application / challenge to the Court of Protection

LEGAL AID

There is funding available for people who have a DoLS authorisation in place called “legal aid”.

This funding is “non means tested” which means that it doesn’t matter how much money the person has.

Access to legal aid is a right someone deprived of their liberty has. Taking a person’s objection to the Court of Protection will not cost them anything.

The solicitor will complete a form to apply for legal aid.

They usually complete this on the person’s behalf and will state that the RPR will be acting as the person’s “litigation friend.” This means that they are going to be supporting and representing the person and their wishes through the court process.

MORE DETAILS ON WHAT BEING A LITIGATION FRIEND MEANS CAN BE FOUND LATER IN THIS BOOKLET

How to make a Section 21a application / challenge to the Court of Protection

If the RPR does not want to be, or is not able to be litigation friend, there is an option to ask for an Accredited Legal Representative (ALR) to take on this role.

An ALR is a special role that some solicitors have. They will have completed special training and have been given permission by the court to become an ALR.

An ALR makes sure that the judge and the other parties involved in the case are aware of the person's wishes and feelings and that all steps taken are in their best interests.

Once the form is signed, this is sent to the Legal Aid Authority.

The Legal Aid Authority will review the form and the reasons why an application to the Court of Protection is being made.

If they agree with the details on the form, they will agree for legal aid to be funded.

They will provide a "funding certificate." This shows that court costs will be paid by the Legal Aid Agency.

The solicitor might say that "legal help" (a different type of funding) would be better at first – whether that is because the person needs legal help straight away or because it is not clear if the person is objecting.

Legal help allows the solicitor to complete some work without full legal aid being granted. The work is usually limited to phone calls, emails, and/or letter writing.

How to make a Section 21a application / challenge to the Court of Protection

OTHER FORMS/LETTERS:

The RPR might also get some forms and letters from the solicitor.

Some of these are to confirm that they have “instructed” (asked) the solicitor to support and represent the person.

They could be sent a “form of authority”.

Once signed, this form gives the solicitor permission to ask for information about the person. For example, their needs assessment, or copies of mental capacity assessments.

They might ask the local council or health service (Supervisory Body) for this information. They might also ask the care home or hospital (Managing Authority) for this information.



Litigation Friend

WHAT IS A LITIGATION FRIEND?

People who lack (or may lack) capacity to make their own decisions might not be able to understand how court proceedings work.

For someone to take part and manage (conduct) court proceedings they must have “litigation capacity.”

Litigation capacity is where someone can tell (instruct) solicitors about what they want to happen in the court proceedings. They must also be able to understand what the judge decides.

In the Court of Protection, the person has often already been assessed as lacking capacity about what is being looked at in court. For example, where they live, what care they need, or what restrictions are in place.

The person who the Court of Protection is making decisions about often cannot manage court proceedings.

This is because the decisions being made are about issues where the person does not have capacity.

If a person lacks litigation capacity, they need someone else to take part and conduct court proceedings for them.

This person is known as a “litigation friend”.

Litigation Friend

WHO CAN BE A LITIGATION FRIEND?

Someone can be litigation friend if they:

- Are 18 years old or older
- Have litigation capacity
- Are able to conduct proceedings on behalf of the person competently and fairly
- Have no interests against the person (there is no conflict of interest)
- Agree to be litigation friend

A litigation friend must either:

- Put themselves forward to be litigation friend
- Accept an invitation to be litigation friend

HOW DO YOU BECOME A LITIGATION FRIEND?

The court must agree to someone becoming a litigation friend.

Litigation friends are appointed:

- Without a court order: a “certificate of suitability” (a form is known as COP22) will be sent to the court. Usually by the solicitor. The court agrees that the person can be litigation friend.

OR

- With a court order: the court chooses the litigation friend. This is sometimes the “official solicitor.”

Litigation Friend

WHAT DOES A LITIGATION FRIEND DO?

Funding – legal aid:

If the person who the court proceedings are about can get legal aid, then an order will be made by the court. This order says that the litigation friend can ask for legal aid for the person.

If the person who the court proceedings are about cannot get legal aid, the court will make an order. The order says that the litigation friend can spend some of the person's money on legal fees.

The litigation friend must think about the work the solicitors are doing. That the solicitors are only doing what they need to do.

Working with solicitors:

The litigation friend becomes the solicitor's client.

They tell (instruct) the solicitor what they want them to do.

Examples of things that the litigation friend might instruct the solicitor about:

- What information they want to be shared with them. For example, all information, or only information which gives answers to questions asked.
- What they want to happen at each stage of court proceedings.

Litigation Friend

The litigation friend must:

- Ask the solicitor to explain things that they don't understand.
- Seek advice about what steps can/should happen in the proceedings.

CONDUCT COURT PROCEEDINGS:

A litigation friend will have to think about:

- Whether the person has capacity to make a decision about the issue being discussed.
- If the person lacks capacity around the issue, what would be in their best interests.

Sometimes what the person wants to be talked about in court is different to what the litigation friend thinks needs to be talked about. There is a disagreement.

When this happens the litigation friend must think about whether to “concede” the issue.

To concede is where it is accepted that nothing further can be done about the issue, and to agree with what has been said about the issue.

The litigation friend can concede even if the person themselves does not agree/want to.

Litigation Friend

For example, Bob has been found to lack capacity about his care and support needs, but he believes that he can make his own decisions and has capacity.

Within court proceedings, Bob's capacity was assessed by an independent doctor, who agreed that Bob lacked capacity about his care and support needs. There is also lots of other evidence in court that tells the judge that Bob lacks capacity.

Bob does not agree and wants his capacity to continue to be talked about. The litigation friend and solicitor agree that no further evidence is needed about Bob's capacity, and so concede that Bob lacks capacity about his care and support needs.

It is important to remember that the litigation friend is representing the person – their thoughts, wishes and feelings.

Sometimes the litigation friend can think that it would be better for the judge to make a decision about the issue for the person. This would not be conceding.

Litigation Friend

DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS), SECTION 21A CHALLENGES AND THE LITIGATION FRIEND:

A person who is subject to a DoLS Authorisation has a right to access the Court of Protection to challenge their deprivation of liberty or parts of it.

If the person wants to challenge the DoLS Authorisation, then the litigation friend should help them.

It is important that the litigation friend collects the person's views, wishes and feelings. This is so that they can be thought about during court proceedings.

During court proceedings the following issues about the person could be talked about:

- Their deprivation of liberty
- Their mental capacity
- Whether the current circumstances are the least restrictive option available to them
- What is in their best interests

Conversations about what is needed to help keep the person safe and well will happen.

A decision will be made by the Local Authority (Council) about what they believe the person needs to keep them safe and well.

Litigation Friend

The Local Authority will have to prove whether different levels of support or different accommodation/placements can meet the person's needs or not. They will consider less restrictive options for the person.

The litigation friend, with the help of a solicitor, will have to think about the information that they are given.

They can ask more questions if they need to. This is to make sure all the questions they/the person has asked are answered.

The litigation friend can make a decision about whether to continue with the challenge once all the information has been gathered (see above about conceding).

It is important to remember that the litigation friend is supporting the person who is deprived of their liberty through the court proceedings.

If the Local Authority decide that the person's deprivation of liberty is to stay in place with no changes AND the person is unhappy about this, then it would often be better for the judge to make the final decision.

The solicitor will talk to the litigation friend and give advice about what would be the best thing to do in this situation.

What the solicitor will do to support the RPR and the Relevant Person through the Section 21a application/challenge.

When the RPR has asked a solicitor to make a Section 21a application/challenge to the Court of Protection, they will offer the support and guidance throughout the process if the RPR is going to act as litigation friend.

The solicitor will help the RPR think about whether making the application to the court is appropriate and necessary.

The solicitor will offer the RPR advice, but they will only do what the RPR tells them to do – the RPR is responsible for “instructing” them.

The solicitor will visit the person with the RPR to help them understand the person’s circumstances and objections.

Earlier we talked about how the court asks that other things are tried to sort out issues, before going to court. A solicitor can support this.

The solicitor will gather information that is needed for the judge/court.

They will get some information from the RPR, from the person themselves, and from other people and professionals who are working with the person.

The solicitor will send this information to the court/judge.

The solicitor will arrange any meetings that need to happen. They will invite the people who need to be there to these meetings. The solicitor will support the RPR in these meetings.

What the solicitor will do to support the RPR and the Relevant Person through the Section 21a application/challenge.

The solicitor will fill out the forms needed to make the application to court (and for hearings through the process) and will send these to the RPR. These will include things such as draft orders, witness statements.

The RPR needs to look at these and check that they agree with what is in them. They might have to sign these and send these back to the solicitor.

The solicitor can help the RPR understand any documents that are written by other parties. For example, the local authority's witness/position statements.

The solicitor will ask the court for permission to arrange a hearing.

When a court hearing has been arranged, the solicitor will ask a barrister (a different kind of legal professional) to represent the RPR and the person they are supporting.

The barrister has special permission to speak directly to the judge.

The solicitor will give the barrister the information they need. The barrister might want to talk to the RPR before the hearing.

The solicitor will keep the RPR up to date with any information relating to the court proceedings that they need to know about.

The Court Process

The court process can take a long time.

This could be for many reasons including:

- When the judge and other people can attend court.
- Because of the time needed to gather the information that the judge needs to make a decision.
- Sometimes other “independent” people need to be asked to help get information, which can take time. (For example, where it is unclear if the person being deprived of their liberty has capacity to make certain decisions, an independent mental capacity expert can be asked to meet with the person and write a report that states if they have capacity or not.)

As discussed earlier in this booklet, the RPR has to ask a solicitor to make an application to the court for a Section 21a challenge/application.

Once the court has accepted the application, the relevant people become “parties to proceedings”.

If the RPR wants to act as the person’s litigation friend, they will be directly involved in court proceedings.

If the RPR does not want to be litigation friend and an Accredited Legal Representative (ALR) is appointed – the ALR will still speak to the RPR to get information needed for the court proceedings.

The Court Process

If the RPR is not acting as litigation friend, they can ask for permission to become a party to proceedings.

The person deprived of their liberty becomes known as “P” through the court proceedings.

The proceedings can be managed in different ways.

It is important to remember that the court can only make decisions on options that are available (as discussed earlier in this booklet).

Sometimes when the solicitors look at the information, they find that some information is missing. In these cases, the solicitor might say that this information is needed before a court hearing is arranged.

Sometimes formal meetings need to take place between the RPR, the litigation friend, the person they are supporting, solicitors, and other relevant people and professionals.

Examples of the names of these meetings include:

- Best Interest Meetings.
- Round Table Meetings.
- Advocates Meetings.

These meetings help gather information that is needed before a court hearing.

The Court Process

These meetings can help:

- Answer questions that the RPR, litigation friend, person they are supporting, or solicitor have.
- Identify where other people might need to become involved to answer questions. For example, whether the person has or lacks capacity to make decisions.
- People come to an agreement about what is in the person's best interests.
- Make it clear what options the judge is being asked to make a decision on.
- Avoid unnecessary hearings.

COURT HEARINGS

Court hearings are formal meetings with the judge, solicitors, and barristers.

Parties to proceedings are invited to attend.

The person being deprived of their liberty can also attend – but thought would need to be given as to whether this would be appropriate and in their best interests. This can be discussed with the solicitor.

Sometimes there are lots of hearings. Sometimes there is just one. It depends on the person's circumstances and how complex these are.

Sometimes when a hearing has been arranged, the parties agree that the hearing does not need to go ahead.

The Court Process

This could be because more information is needed, or because everyone is in agreement with what is in the person's best interests.

This is known as "vacating" a hearing.

If this happens then the solicitor has to ask the judge for permission to cancel the hearing.

They will write a court order with the reasons why this cancellation has been asked for. They will then send it to the court for the judge to look at.

The judge will either agree, and the hearing will be cancelled, or disagree and the hearing will go ahead.

Sometimes hearings are vacated, and a new hearing date is set. Or if time is needed, permission is given to the solicitor to arrange a hearing when they have all the information that is needed.

In some cases, hearings are vacated as all parties believe that the judge can make a decision based upon the evidence they can read. The solicitor would make this clear in the order that they send to the court.

This is known as the judge making their decision "on the papers".

The judge has to agree that they are prepared to make their decision in this way.

The Court Process

Prior to any hearing, the information (evidence) is collected and put into what is called a "court bundle".

The bundle might include:

- Previous court orders.
- Witness statements (where people provide information about the person, their needs, their wishes) of all parties.
- Position statements (where people have said what they think is in the person's best interests – what they are asking the judge to make a decision about).
- Expert evidence. For example, a report written by an independent mental capacity expert.
- The person's needs assessment.
- The person's DoLS assessments and Standard Authorisation.

The bundle is given to the judge and to the parties of the proceedings.

The judge reads this information to help them come to decisions.

Once the judge has made their final decision, the court proceedings end.

What is the Court of Protection like?

PARTIES TO PROCEEDINGS:

Usually, only people who have joined as parties to proceedings can attend court to take part in the hearing.

These are usually:

The party for the person being deprived of their liberty:

For example, the litigation friend, the person's solicitor, and their barrister. They are responsible for making sure that what the litigation friend/RPR and the person being deprived of their liberty are saying is being passed to the judge.

The party for the Supervisory Body (local council/health authority):

For example, a social worker/nurse assessor, their solicitor, and their barrister. They are responsible for telling the judge what their position is relating to the person being deprived of their liberty. What they feel is in the person's best interests, what care they can fund, and what options they have considered.

Sometimes other people have joined as parties to proceedings. For example:

- The RPR (if they are not acting as litigation friend).
- The Managing Authority – staff from the care home/hospital.
- Other family members.
- Other professionals.
- Experts. For example, an independent expert in mental capacity, independent best interest assessor, independent social worker.

Before any court hearing, the parties to proceedings will get a court order.

This will inform people of the date and time of the hearing, and whether it will be in person at a courtroom or held remotely.

What is the Court of Protection like?

THE COURT ITSELF:

Court of Protection hearings are normally in Crown or County Court buildings.

They are usually in the Family Court section of these courts. This can change – it depends on the courtrooms available on the day of the hearing.

Since the COVID-19 pandemic, hearings can now be held “remotely”. The hearing can take place without needing to go to a court building.

For remote hearings, parties will get an invitation to join a meeting from their computer, tablet, or phone.

If a party does not have any of these devices, they need to speak to their solicitor before the hearing is arranged.

A party can ask for an in-person hearing.

If a party would prefer a remote hearing, their solicitor might arrange to be with them so they can join the hearing together on the same device.

There are sometimes delays on the day of the hearing. The hearing can start later than planned or can last longer than planned.

It is important that parties give themselves lots of time to attend the court hearing.

What is the Court of Protection like?

PRE-HEARING CONSULTATIONS:

It is usual that parties will need to be available for one hour before any court hearing.

In this time “pre-hearing consultations” happen.

These usually involve a meeting with the litigation friend, any other party joined for the person, the person being deprived of their liberty (if they are attending court), their solicitor, and their barrister.

The other party will also have their own pre-hearing consultations. These will usually involve a person from the Supervisory Body (for example, social worker/nurse assessor), their solicitor, and their barrister.

The barrister might go to speak with the other party/parties in this time.

The purpose of these consultations is to try and agree upon what the court is being asked to decide. It also helps the barristers understand the person’s situation.

It is also a time when issues can be raised and discussed.

What is the Court of Protection like?

ATTENDING COURT IN PERSON:

When arriving at court there will be security before entering the building. It is a bit like airport security when travelling abroad.

There will be a place where people put their bags, and where they must empty their pockets.

Bags and belongings will be checked by the security team and given back.

There might be a metal detector that people must go through.

Some things are not allowed in court (for example, blades, which include things like pencil sharpeners). If someone has something that is not allowed, this will be taken off them. This will be given back when leaving the court.

If you have a drink, you might be asked to have a drink of this before being allowed to take it into the court.

Once through security, there will be boards with details of all the hearings of the day, saying what courtroom they are in.

If you are not sure where you should go, you can ask the court staff. You will need to tell them that you are attending for a Court of Protection hearing. The staff will show/tell you where you need to go.

Once in the right area of the court, there will usually be a waiting room.

What is the Court of Protection like?

There will usually be an usher, who is an Officer in Law. They are responsible for “booking” people into the court hearing, showing people into the courtroom when the judge is ready, and generally keeping order within the court.

Upon arrival you need to speak to the usher. Tell them who you are, which case you are attending for, and your role.

If your solicitor or barrister have arrived, the usher will point you in their direction. If not, they will ask you to take a seat.

Once you, your solicitor and barrister have arrived, you will usually go to a “conference” room within the waiting area. This is a private area where you can have the pre-hearing consultations.

Once the judge is ready, the usher will get you and the other party/parties. They will take you to the courtroom.

In the courtroom, the judge usually sits facing the other parties.

The barrister usually sits at the front, facing the judge.

You, the person you are supporting (if they are attending), and your solicitor usually sit behind your barrister, facing the judge.

This can be different – the layout of courtrooms varies.

You will be shown where you need to sit.

What is the Court of Protection like?

ATTENDING COURT REMOTELY:

You will usually be given an invite to join pre-hearing consultations.

You will also be given an invite to join the court hearing.

You can join these meetings on your computer, your tablet, or your mobile phone.

It is important to be somewhere where you will not be disturbed, and where no-one else is likely to walk in during the hearing.

Before the judge is invited into the hearing, the usher will go through some things relevant to the hearing. For example, that you are alone, confidentiality.

The judge will then join the meeting.

THE OPEN JUSTICE COURT OF PROTECTION PROJECT

In 2016, the “Court of Protection Transparency Pilot” was launched with the aim of increasing access to the court for the public and the media.

The pilot has since been adopted into court procedure.

It can help people experience court practice, even when they are not involved with the person whom the court hearing is about.

The Open Justice Court of Protection Project can give information about how you can join a hearing if you want to see what they are like before you are involved in one yourself.

This link will take you to their website: [Promoting Open Justice in the Court of Protection \(openjusticecourtofprotection.org\)](https://openjusticecourtofprotection.org)

What will be expected of me in court hearings?

It is important to be aware of some things before going to a court hearing.

General information:

Mobile phones should be switched off or on silent. Do not answer your phone or look at this when in the hearing.

No secret recording of the hearing is allowed. You would get into trouble for this.

The judge can be addressed as: Sir/Madam/Your Honour/My Lord/My Lady.

Listen to what the barrister calls the judge so that you know what to call them if you are asked to speak.

You should only speak in the courtroom if you are asked to do so. The judge will usually ask you if you want to say anything – giving you permission to do so.

If things are said that you do not agree with, be respectful. Parties might think different things. These things need to be talked about in court for the judge to understand things properly.

If you need to make any comments, speak to your solicitor/barrister. They might ask the judge for a short pause (adjournment) if they need to speak to you privately about something. Or they might just speak to you quietly in the courtroom.

If things are said that you do not understand – ask your solicitor/barrister.

What will be expected of me in court hearings?

For remote hearings:

You need to be somewhere private where you will not be disturbed by other people who are not party to the proceedings.

It might be helpful to close the door of the room that you are in and put a note on the door if you live with other people – so they know not to disturb you.

If you have someone with you – you need to tell your solicitor so that they can make sure that the usher and judge are aware and are in agreement with this.



Court Terminology

The words used in court can be very confusing.

The following link should help you to understand some of the words used in court proceedings (although these are general terms and not specific to the Court of Protection):

Microsoft Word - legalguide.doc (plainenglish.co.uk)

Below are some words/ phrases that are used in the Court of Protection and explanations:

A stay in proceedings	<p>Sometimes the court process pauses for a period of time, as information needs to be gathered or actions need to be taken which are needed for the court/judge to make a decision.</p> <p>This can often be for quite a long/unknown amount of time and so instead of ending proceedings and then starting them again in the future – they are paused.</p> <p>Usually, no future hearing date is set.</p>
Adjournment/stood down	<p>The proceedings would be paused for a brief time, and a hearing would be listed for a date in the future.</p> <p>OR</p> <p>It could be a short pause in proceedings if something needs to be talked about outside of the courtroom.</p>

CONTINUED >>>

Court Terminology

Advocates meeting	<p>This is usually a meeting between the parties' legal representatives (solicitors and barristers).</p> <p>As litigation friend you might be invited to this meeting.</p> <p>They usually take place a few days before hearings.</p> <p>The meeting is to identify and narrow issues which the court needs to consider.</p>
CoP	<p>This means the Court of Protection itself and is often used when referring to the court rather than saying the whole title.</p>
Court of Protection Visitor	<p>The judge might order a Court of Protection Visitor to visit the person deprived of their liberty.</p> <p>The visitor is an independent person.</p> <p>They help the court/judge with their decision making.</p>
Court proceedings	<p>Where legal matters are decided upon by a judge in a court of law.</p>
Directions hearing	<p>These normally happen at the beginning of proceedings.</p> <p>The judge makes certain decisions about what things need to be done, and by when.</p> <p>The judge can make these directions "on paper" rather than needing a formal hearing – if all parties agree with the actions and timescales before the hearing, and the judge agrees with their plan.</p>

CONTINUED >>>

Court Terminology

Directions order	<p>This tells the parties what is going to/is expected to happen, often with timescales given within the order.</p> <p>For example, it could be an order saying when and how a hearing has been arranged, what information is required by the court and when by.</p>
Draft order	<p>Sometimes the parties agree on actions/decisions before a court hearing – which can help the judge and save time.</p> <p>All parties will see the draft order and make changes if they need to.</p> <p>The draft order is then sent to the judge to review (sometimes in a hearing, sometimes ‘on papers’).</p> <p>If the judge agrees with what is in the draft order, it becomes an order.</p> <p>If the judge says that changes need to be made, these changes happen and then would become an order.</p>
Evidence	<p>Information about the person that the parties are using to form a position about what is in their best interests. For example, a mental capacity assessment, an assessment of a person’s care and support needs, accommodation options that are available for the person, the person’s wishes, thoughts, and feelings.</p>
Final hearing	<p>The last hearing in the court proceedings where the final decision of the judge is made.</p>

CONTINUED >>>

Court Terminology

Final order	The final decision of the judge is written up and given to all parties.
Hearing	A meeting with a judge about the case in question.
Independent Expert	A professional who is independent from the parties of proceedings, who is required to complete a piece of work which is needed to help the court/judge/parties make a decision/understand something that they cannot from the information that they already have. For example, a doctor who is an expert in mental capacity.
Litigation Friend	<p>Where the person themselves lacks capacity to participate in court proceedings, this is the person who represents and supports them.</p> <p>This person instructs the solicitor, reads forms, writes statements, and signs documents on behalf of the person who lacks capacity.</p>
On the papers/on paper	Where a judge looks at the evidence and makes decisions/says what actions need to be taken without having a hearing.
Order	<p>The written decision or direction of the judge. This is a document that all parties get – telling them what they have to do, by when.</p> <p>OR</p> <p>What the decision of the judge was at the final hearing of proceedings.</p>

CONTINUED >>>

Court Terminology

P	The person who the court proceedings are about.
Party / parties	<p>People who have agreed to take part in the court proceedings.</p> <p>These can be family members/professionals who are involved in the person's life.</p>
Position	The party's statement about their situation and what they want the court to do.
Round Table Meeting	<p>This is a meeting where the parties all come together to discuss issues prior to court hearings to come to some agreements about what needs to be done moving forward.</p> <p>OR</p> <p>They can be held after hearings if actions the judge has ordered to be completed have been done.</p> <p>The judge is usually asked for permission to have these meetings.</p> <p>Solicitors and sometimes barristers usually come to these meetings.</p>

CONTINUED >>>

Court Terminology

Section 49 report	<p>Section 49 of the Mental Capacity Act (2005) allows the court to request a report to be produced about the person deprived of their liberty when thinking about a question.</p> <p>The court can order (usually) the NHS body responsible for the area where the person lives to produce a report even if it isn't a party to the court proceedings.</p> <p>A section 49 report is often considered as an alternative to a report by an independent expert.</p>
Statement	<p>The written document telling the judge a party's legal or factual argument.</p> <p>It can also explain the person who is deprived of their liberty's thoughts, wishes and feelings.</p>
Vacated	<p>The hearing has been cancelled.</p>

The Court of Protection also uses forms, that you will need to read and sign.

This link will direct you to a website where you can find out more about the forms that the Court of Protection uses:

Court of Protection forms and guidance - GOV.UK (www.gov.uk)

CONTINUED >>>

Court Terminology

Below are some of the more common forms you might see and an explanation of what they are for:

COP22 – Certificate of suitability of litigation friend	A form which you will read and sign agreeing and confirming that you are willing and able to act as litigation friend for the person you are supporting.
COP24 – Witness statement	A form used for anyone providing information to the court about the person.



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admin@advocacyfocus.org.uk

Registered Advocacy Focus. Charity Number: 1086151

Company Limited by Guarantee Number: 4135225

Registered Office: Saturn House, Mercury Rise, Altham Business Park, BB5 5BY

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Notes

Space for notes, drawing or things you want to remember.



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