

Court of Protection Issues

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1 — Introduction

Successes

Remember how it was



Electric Razor Shaves Clean Without Lathering Face



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

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

A tiny 1/80 horsepower motor revolving at 3,500 r.p.m. actuates a shearing plate which cuts the hair. The razor complete weighs but eight ounces. In use, it is pressed against the face, moved up and down over the surface to be shaved, and the job is done. The device never requires a new blade, and it is claimed to be impossible to cut one's self with it.

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

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

Progress is always slow

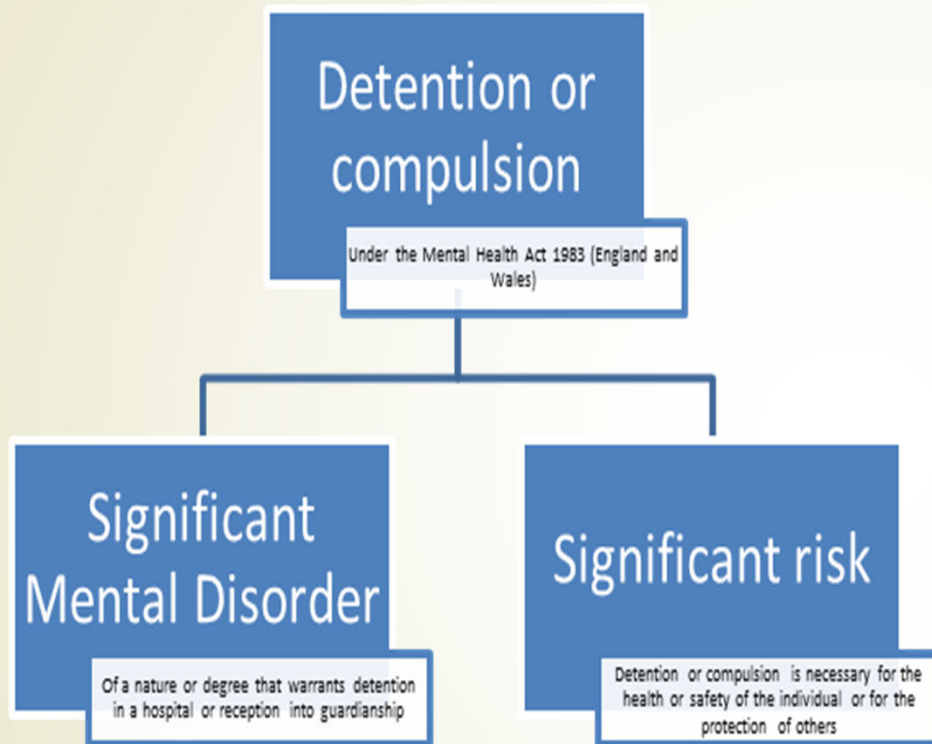
- ▶ A mental capacity court
- ▶ A PW jurisdiction
- ▶ The court is used
- ▶ A noticeable change of culture
- ▶ The success of LPAs
- ▶ DOLs

2 — Court of Protection Issues



Deprivation of Liberty

Detention & Compulsion: Two Models

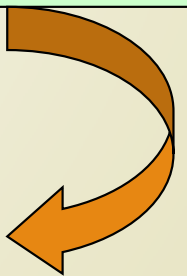


THE PERSON CANNOT UNDERSTAND OR WEIGH RELEVANT INFORMATION ABOUT THEIR PERSONAL WELFARE

THEREFORE THE PERSON LACKS LEGAL CAPACITY TO DECIDE OR DO THE THING IN QUESTION

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

What has happened here is that the person's freedom to do something they can do — to decide between alternatives — has been restricted. However, when it comes to justifying our act, our justification is that they are 'not able' to do the thing. We are not interfering at all with their freedom to do anything they can do and wish to do.



A lowering of the detention threshold

SECTIONABLE

DOLs/Sched A1
DOES NOT APPLY
(ELIGIBILITY
REQUIREMENT)

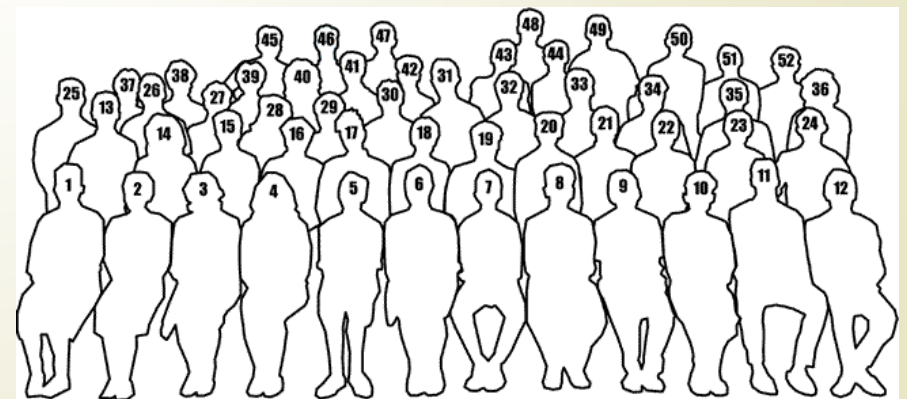
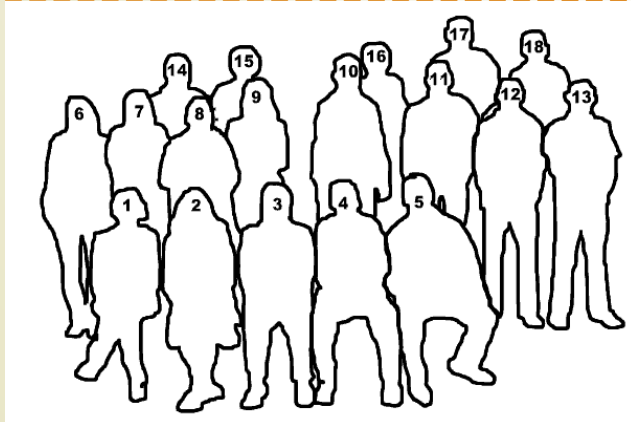
*1983 Act detention
threshold*

NOT SECTIONABLE

DETENTION UNDER DOLs

MENTAL HEALTH ACT MODEL

MCA DOLs MODEL



Hidden dangers

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

'Insofar as orders'

IT'S ALL POSITIVE!

No new or extra population is being detained.

We were always detaining these people — but doing it without any legal authority.

Correctly interpreted, the DOLs scheme (inelegantly) plugged the Bournemouth gap for care homes and hospitals. A proper legal authority or order is now required for all deprivations of liberty.

POTENTIAL NEGATIVE

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

DOLs: A Widening Net (Mission creep?)

10

1

Bournewood Gap: Make sure every incapacitated person DOL has **protection** of a legal order and right of appeal

2

Applications to detain sectioned patients in care homes as alternative to MHA detention in hospital **on basis that it is in their best interests** (although can be equally Draconian)

4

The Mental Capacity (Amendment) Act allows for the detention under the Mental Capacity Act of people who satisfy the criteria for being sectioned under the MHA 1983

3

Applications to detain sectioned restricted patients and others in care homes as alternative to MHA detention in hospital on basis that it is in their best interests **and necessary to protect the public from harm.**

*Community care?
A process of deinstitutionalisation?*

HOSPITALS



18,182
Mental Illness beds

49,988 new detentions
under the MHA 1983
in 2018/19

“COMMUNITY SETTINGS”



458,000
Care home beds

168,000 applications
under MCA DOLs
procedures in 2018/19

Supported living

3,396 applications
under MCA Re X
procedure in 2019



Probably around $\frac{3}{4}$ aged 75+. 53% had dementia in 2012

Liberty Protection Safeguards



Mental Capacity
(Amendment) Act
2019

CHAPTER 18

Mental Capacity (Amendment) Act 2019

PURPOSE

- The Act replaces Schedule A1 with a new DOLs Scheme (Schedule AA1)



Mental Capacity (Amendment) Act 2019

CHAPTER 18

The new framework

- Authorisations granted under Schedule **AA1** to the MCA 2005

The new authorisation scheme applies to all locations (hospitals, care homes, supported living, people's own homes). It also applies to 16 and 17 year olds. **However, the arrangements must not be 'excluded arrangements'.**

- Court of Protection Orders under s16

The court can authorise a DOL in all cases involving persons aged 16 or over. **No incapacitated person will be ineligible to be deprived of their liberty under s4/16 by reason of a conflict with the MHA powers.**

COP & Section 16A



Section 16 powers: Mental Health Act patients etc

16A(1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.

....

(4) For the purposes of this section—

(a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;

Schedule 2:

1 The Mental Capacity Act 2005 is amended as follows.

2 Omit (a) section 16A.

MCA and MHA Interface

HEADLINE

Subject to a couple of exceptions, the new Schedule AA1 Scheme supposedly replicates that currently found in Schedule A1



‘70.These provisions are intended to replicate the current effect of Schedule 1A to the MCA.’
Explanatory Notes to the Bill

The Authorisation Conditions

The [DOLs] authorisation conditions

13 The authorisation conditions are that—

- (a) the cared-for person **lacks** the **capacity** to consent to the arrangements,
- (b) the cared-for person **has a mental disorder**, and
- (c) the arrangements are **necessary to prevent harm to the cared-for person and proportionate** in relation to the likelihood and seriousness of harm to the cared-for person.

COMPARE WITH CURRENT SCHEDULE A1

No reference in the criteria to:

- Best interests
- LPAs or advance decisions
- Age
- Eligibility

In fact, the new approach simply separates out care/treatment and deprivation of liberty

The 'real conditions'

THE ARRANGEMENTS	ARE NOT EXCLUDED ARRANGEMENTS	AUTHORISATION CONDITIONS
<p>1. Are in the person's best interests</p> <p><i>(Apply usual best interests law)</i></p>	<p>4. They are in accordance with any 'mental health requirements' imposed by MHA guardianship, CTO, s17, conditional discharge</p>	<p>6. The cared-for person lacks the capacity to consent to the arrangements.</p>
<p>2. Consistent with any PW LPA or advance decision</p> <p>3. The person is aged 16 or over</p>	<p>5. They are not 'mental health arrangements', e.g. arrangements for enabling the medical treatment for mental disorder of someone on s17 leave, con dis or a CTO.</p>	<p>7. The cared-for person has a mental disorder.</p> <p>8. The arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.</p>

Example

Levi has severe dementia. In the opinion of his social worker and psychiatrist, it is in his best interests to be moved from his home to a care home. In particular:

- He lacks capacity to consent to this arrangement;
- He has a mental disorder, and
- The arrangement is necessary to prevent harm to him and proportionate in relation to the likelihood and seriousness of harm to him.

His daughter is his donee/attorney under a PW LPA and she disagrees with their opinion.

Case
Examples

Unlawful DOL?

- ▶ The new Section 4B is appallingly drafted.
- ▶ However, there is no urgent authorisation process under the new scheme and section 4B appears to stand in place of one.
- ▶ It seems designed to permit citizens to be deprived of their liberty for weeks or months on end while a responsible authority deals with a request for an authorisation under Schedule AA1.

EXAMPLE

- ▶ X has been discharged to a care home from hospital and he wishes to return home. A request for an authorisation has been submitted under Schedule AA1. It is likely to take many months to process. Section 4B provides that the DOL is lawful during this period provided that:
 - ▶ A) the steps taken are necessary in order to give vital treatment or care which the doer reasonably believes is 'necessary to prevent a serious deterioration in P's condition'; and
 - ▶ B) The doer reasonably believes that P lacks capacity to consent to the steps in question.

Participation and the COP

Why is P's participation important?

- It is P's life and the proceedings are for her/his benefit.

- Dignity — not allowing or facilitating participation degrades the individual and strips them of their rights as a citizen.

- One of the two basic principles of natural justice is *audi alteram partem*: "no man is to be condemned unheard". A legal right of access to courts for citizens whose rights are affected by the litigation is a basic constitutional right.

- Procedural safeguard against arbitrariness

- The judge understands the emotional context and the importance of the decision to P.

- It improves the quality of the decision-making.

- It often changes the outcome.

- P can ensure that questions are asked of witnesses/they are challenged on key points

Different ways of involving “P”

Attending the hearing

Meeting judge in chambers

Judge travels to P

Telephone call

Skype/video

By letter, email, W statement

Through Official Solicitor

Through Litigation Friend

Through lawyer/advocate

Through rep (RPR/Re X)

Special or General Visitor

Independent experts/s49 rpts

Case professionals, e.g. S Wkr, intermediary

Evidence, e.g. family, friends

Doc evidence of wishes

Appointment of an examiner

Interpreters/translation

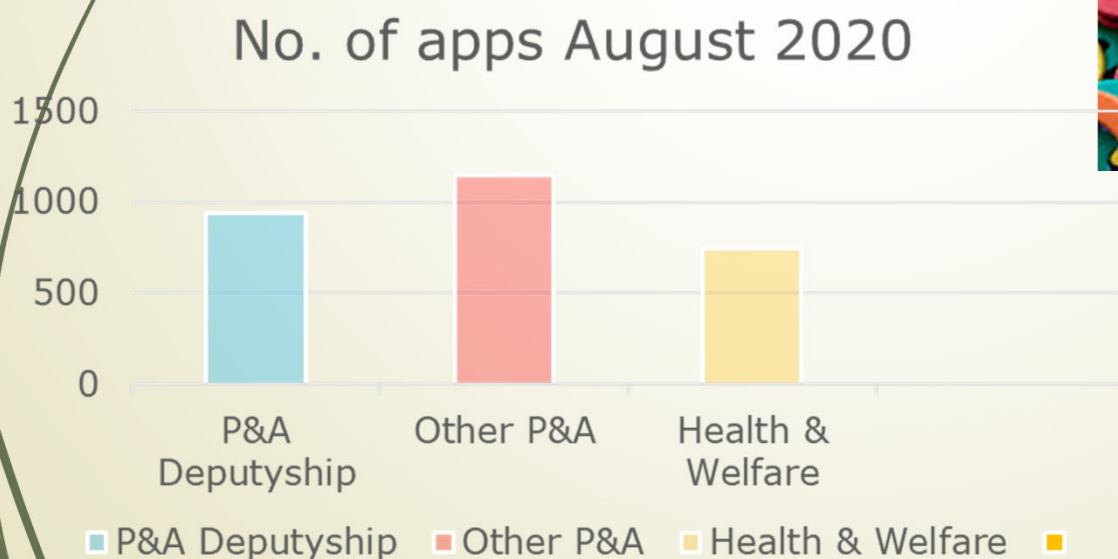
McKenzie Friends/Court Friends

Deputies and attorneys

Inferences from behaviour

The problem of numbers

- ▶ The London region is based at First Avenue House.
- ▶ In August 2020, FAH issued 2,841 applications.
- ▶ Delays issuing applications and orders
- ▶ There are 3 court rooms and approximately six judges FTE
- ▶ Public Guardian (Director)
- ▶ Special/General Visitor Reports



The Daily Telegraph

P&A Deputy Applications & Forms

- COP1 Application (What order is being sought, i.e. deputy order)
- COP1A Financial statement
- COP3 Capacity certificate
- COP4 Deputy's declaration
- Followed by notification (See PD 7A).

Click here to reset form Click here to print form

COP 14 1215 Court of Protection

Proceedings about you in the Court of Protection

For office use only

Application has been issued by the court

Complete the sentence that starts “This notice is to tell you that...” with the following words – **an application about you will be considered by the Court of Protection.** Please add the following information:

- the application raises the question of whether the person being notified lacks capacity in relation to a matter or matters and what that means;
- what will happen if the court makes the order or direction that has been applied for; and
- where the application contains a proposal for the appointment of a person to make decisions on behalf of the person to whom the application relates, details of who that person is.

You must also provide the person being notified with a COP5 Acknowledgment of notification.

P&A Deputy Applications

NO BEST INTERESTS INFO

- ▶ No statement of wishes and feelings concerning the application.
- ▶ No statement of beliefs and values.
- ▶ No box setting out person's wishes re their residence, sale of their house/flat, surrender of tenancy, retention or disposal of property, pets, etc.
- ▶ No statements re race or cultural issues.
- ▶ No statement of what steps have been taken to help P make their own decision or to involve them in decision-making, e.g. supported decision-making or execution of an LPA.
- ▶ No statement of the views of non-professional carers.

**FORM COP X
ANSELM ELDERGILL
PERSONAL STATEMENT**

Including
Wishes, Feelings, Beliefs and
Values

- No statement of what financial decisions the person still has capacity to make: All or nothing.
- No DOLs statement.
- No IMCA support
- HAS THE PERSON BEEN HEARD?

BAME Issues

- ▶ MCA forms (such as LPAs), court forms and advice leaflets are only available in English.
- ▶ There is no monitoring of take-up amongst BAME groups (court forms do not require information of ethnicity, person's first language, etc).
- ▶ There is nothing on the forms re race, cultural and religious requirements, e.g. with regard to investment of funds.



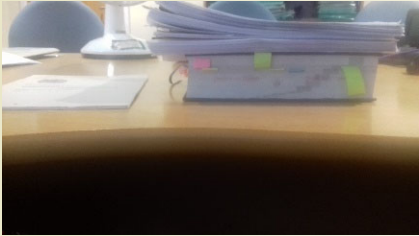
Systemic/Structural Issues

Structural/organisational issues

- ▶ *Looking into the distance, there are several ways in which a Court of Protection could be restructured.*
- ▶ *Would any of these options improve the service it provides to incapacitated people?*



Rules, Procedures, Forms



Original Act lying next to Blue Book and recent forms etc

COP Rules 2017 (24 parts/115pp), supplemented by 62 practice directions, numerous prescribed forms and where necessary the Civil Procedure Rules 1998 & Family Procedure Rules 2010

Practice Guidance

Orders and regulations, e.g. LPA, EPA and Public Guardian Regs 2007

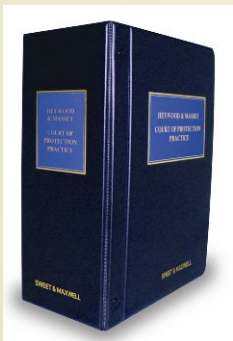
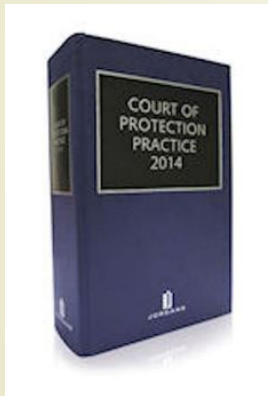
Codes of Practice

CoP rules modelled on rules devised for the High Court.

No fast-track procedure for simple cases

No short/single order process.

The Blue Book is now 2658pp.



Who has to understand and use them

Court structures



HYBRID FAMILY COURT

HYBRID COURT AND MH TRIBUNAL

- DELEGATES**
- Guardians
 - Deputies
 - Appointees
 - Litigation friends
 - Court officers (ACOs)
- COMMISSIONS**
- Mental Health Commission
 - Public Guardian

Into court

Litigation friend for P

See learned person

Present the facts

Present expert evidence

Present the law

Make findings

Apply the law

Grant remedies

Tribunal goes to person

P instructs own lawyer

Expert membership

More inquisitorial

Fewer legal rules

Make findings of fact

Simpler laws

Simpler remedies

Usually no costs awarded

A Mental Health Court?

A MENTAL HEALTH COURT

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

CoP Judges
Circuit Judges, DJs

MHTs,
MHT Judges

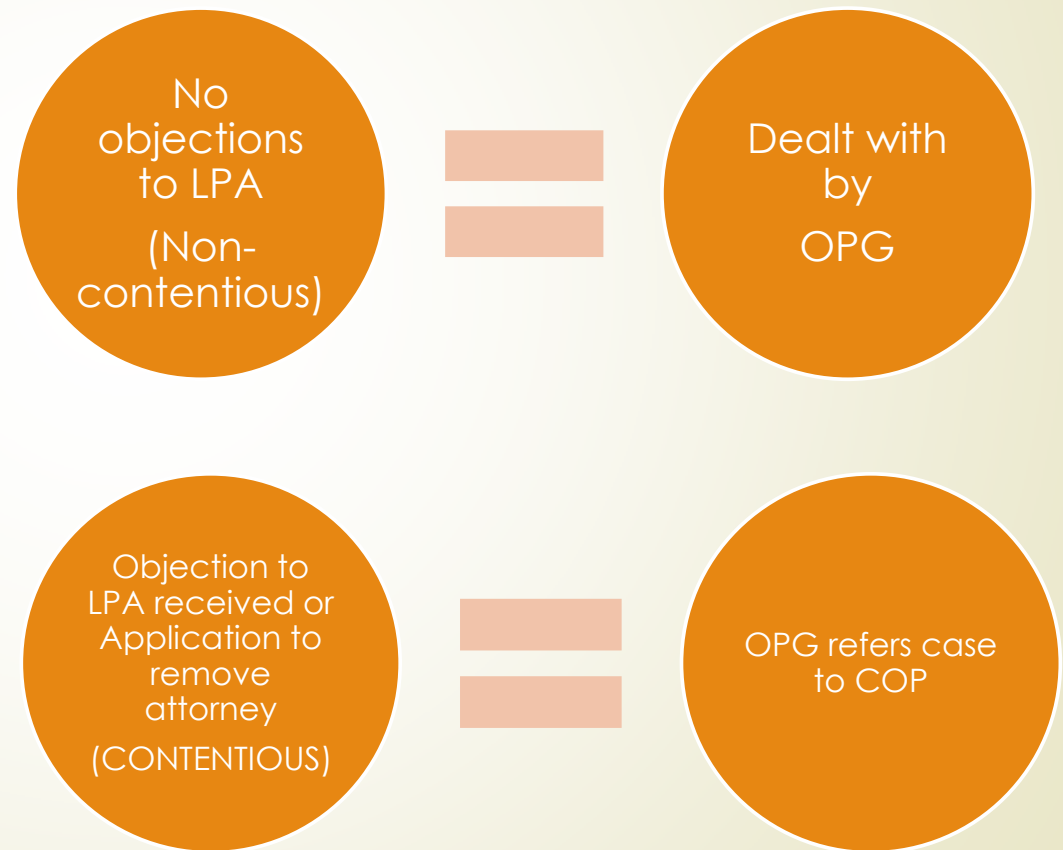
Other ticketed
Judges

Allocation

Contentious work

Should the COP be doing non-contentious work at all?

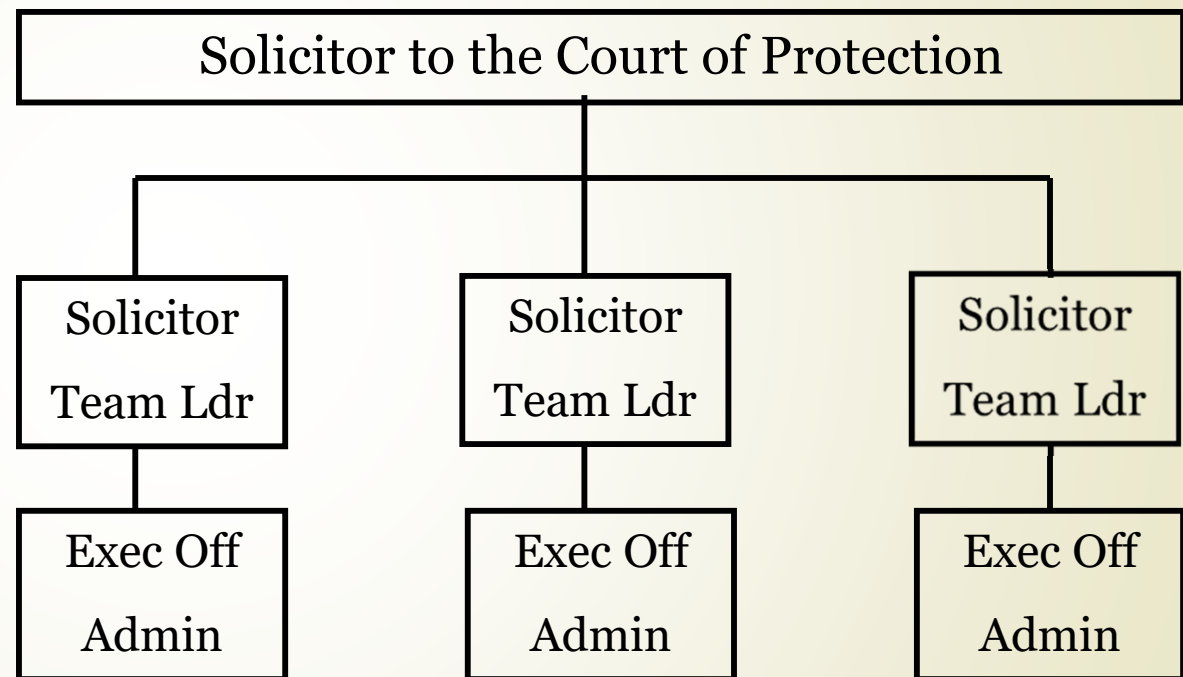
- Conventional courts deal with litigation. The Court of Protection is unusual in that much of its case load is non-contentious. For example, around 12,000 applications for a P&A deputy to be appointed where this is no objection.
- Should this work be done by the Public Guardian and the COP focus on contentious matters and special category cases, such as applications for a statutory will.



Is in-house legal input desirable?

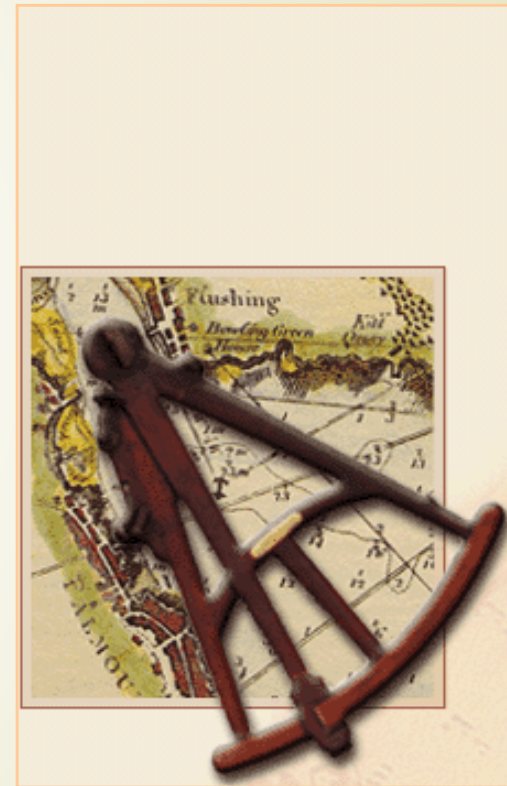
Non-contentious work & Case management

- ▶ The COP receives around 31,000 applications per year.
- ▶ These cases are processed by teams of civil servants without input from a lawyer.
- ▶ ACOs are authorised to make some orders, such as standard PA deputyship orders.



Pointers

1. Legally-qualified team leaders to improve case and file management techniques (OS model)
2. Simpler rules + fast-track procedure
3. Appoint more specialist judges with relevant experience in the area
4. Consider dove-tailing CoP and MHT into a single Mental Health Court. Personal attendance
5. Review issues of race and culture
6. Utilise the Mental Health Panel of Solicitors for panel deputyships and court representation
7. Mental Health Commission in place of CQC



3 — Mental Health Bill

The four pillars (1983 Act)



SIGNIFICANT CHANGES	
Nearest relative	Replaced by nominated person (watered down protection/dangerousness criterion)
Mental Health Review Tribunal	Discharge rate now down to around 6%
Mental Health Act Commission	Replaced by largely ineffective CQC in relation to legal protections. It is a quality assurance commission with no legal expertise. A major weakness.
Hospital managers	Future unclear



Two other matters

SIGNIFICANT CHANGES	
Discretionary discharge	Only in “exceptional circumstances” “consistent with the existence of the statutory criteria”: Serious misunderstanding of the statutory framework by Judge Jacobs in Betsi Cadwaladr case. Bill does not restate Parliament’s intention; a major weakness.
Interface with MCA/LPS	For example in relation to people with a learning disability or autism.