



**PREPARING CARE PLANS, TRANSITION PLANS
AND BEST INTERESTS ASSESSMENTS FOR
COURT OF PROTECTION PROCEEDINGS**

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Introduction

This short paper¹ is designed to assist local authorities and other statutory bodies applying to the Court of Protection with preparing evidence to support applications relating to health and welfare.

A common complaint from the Court, other parties or the Official Solicitor is that there is insufficient written information about what is proposed for P, why the proposed option is considered to be in P's best interests, and the details of the care plan and transitional arrangements. Often, the relevant issues have in fact been considered by professionals working with P, but the written documentation such as care plans and witness statements does not reflect this adequately.

The checklists below list the sort of information and detail that is likely to be required to support an application to the Court and within proceedings. We hope they will serve as a useful guide to non-lawyers preparing evidence and documentation in best interests cases (whether or not there are court proceedings contemplated). They should not, however, simply be applied to every case since not every element will necessarily be relevant. Furthermore, because the checklists are the product of the experience of the 39 Essex St Court of Protection team we do not claim that they are exhaustive (and certainly do not serve as a substitute for following the reams of guidance issued by the Government).

A. Checklist for Best Interests evidence

1. *Clinical and social work information about P including diagnosis, prognosis, presentation, history.*

Although this information will be contained in the various records, it is helpful to have a summary of relevant details so that anyone unfamiliar with the case can have a picture painted of P and P's care needs.

2. *P's wishes (including IMCA reports if available).*

¹ Which has been the subject of very helpful comments from Beverley Taylor at the Official Solicitor's office, although it should not be read as a document with the official imprimatur of that Office.

P's wishes must be taken into account in making a best interests decision and it is therefore important to make sure that a clear record of P's wishes is kept, whether obtained directly from P, or through reports from third parties such as family members, paid carers, or advocates. This applies whether P expresses consistent or inconsistent wishes – in either case, the information about what P has said will need to be considered, although clearly in the former case it will likely be accorded more weight.

Information should also be included about steps that have been taken to improve P's understanding of the issues in dispute, and to assist P in expressing his or her wishes.

3. *Views of family members.*

Careful recording of the views of family members is helpful, including family members who are not parties to proceedings. A record should also be kept of decisions taken as to why particular family members have not been consulted (if relevant).

4. *Details of every option considered for P.*

It is critical to 'show your working'. If the team working with P have decided that a particular option is in P's best interests, it can be tempting only to explain in detail that preferred option. The other parties and the court need to know what all the possible options are, even if they include options that can immediately be discounted (for example, the option of doing nothing where P faces a serious risk to his or her wellbeing).

Make sure that options proposed by family members are included in the list of possibilities, even though they may not be recommended by the professionals working with P.

5. *Factors for and against each of the options under consideration.*

For every option, details of the benefits and risks or disadvantages to P must be set out.² It is often easiest to do this in table form, or using bullet points, so

² Following the well-established 'balance sheet' approach identified by Thorpe LJ in *Re A* [2000] 1 FLR 549 at 560: "There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal. ... Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw

that the reader can easily see the issues and can compare the various options under consideration. Don't forget to include practical implications for P as well as less tangible factors such as relationships with family members and care home staff.

6. *The likelihood of the pros and cons of each option eventuating.*

Give some indication of whether the risks and benefits you have identified are likely to occur or not, and why you take this view.

7. *The relative seriousness and/or importance of the pros and cons of each option.*

It may not always be obvious which benefits and disadvantages you place particular importance on and why. A common tension is between avoiding risk and promoting independence: explain why you have given more weight to one approach in the particular case.

8. *Reasons for identifying a particular option as being in P's best interests and for rejecting the other options.*

Although it may seem clear in light of the analysis of benefits and disadvantages, it is helpful to set out separately a conclusion about which option you consider to be in P's best interests and why. This is particularly important where there is a dispute and where the option you prefer does entail significant disadvantages to P, such as a loss of independence, intrusion into a longstanding relationship, or inevitable distress caused by a change of environment.

up a balance sheet. The first entry should be of any factor or factors of actual benefit. In the present case the instance would be the acquisition of foolproof contraception. Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant. An obvious instance in this case would be the apprehension, the risk and the discomfort inherent in the operation. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant." Whilst this pre-dates the coming into force of the Mental Capacity Act, the Courts have continued to adopt the approach.

9. *If proposed option entails risks or disadvantages to P, reasons why these are thought to be outweighed and steps to be taken to minimise them.*

Having decided that certain risks are worth taking in P's best interests, or that certain disadvantages are outweighed by benefits, it is important to show that you have considered what could be done to reduce these risks or disadvantages and set out detailed plans for dealing with them. This might include additional care or staff support for particular periods of time, or the provision of financial assistance to ensure that relationships can continue.

10. *Detailed contingency plans if the proposed option is implemented.*

Where there is the prospect that a proposed option may fail in the short or medium term, there must be thought given to what will happen in those circumstances, to reassure the other parties and the court that hasty and off-the-cuff decisions will not suddenly be required, to the possible detriment of P.

B. Checklist for Care Plans

1. Take into account the guidance given by Munby J (as then was) in ***R(J) v Caerphilly County Borough Council*** [2005] 2 FLR 860:

"46... A care plan is more than a statement of strategic objectives – though all too often even these are expressed in the most vacuous terms. A care plan is – or ought to be – a detailed operational plan. Just how detailed will depend upon the circumstances of the particular case. Sometimes a very high level of detail will be essential. But whatever the level of detail which the individual case may call for, any care plan worth its name ought to set out the operational objectives with sufficient detail – including detail of the 'how, who, what and when' – to enable the care plan itself to be used as a means of checking whether or not those objectives are being met."

2. The assignation of specific responsibilities to individuals is particularly important in the CoP context.
3. Take into account the factors set out in checklist A above wherever the care plan involves the making of decisions for or on behalf of P.

4. Ensure, where appropriate, that consideration is given to the person-centred planning approach in the previous Government's *Valuing People* guidance.
5. Where the care plan involves any degree of restraint, identify the precise nature of the restraint, the rationale for it, plans to minimise the need for restraint (and contingency plans in case the need for restraint is escalated). If, in the consideration of the need for restraint, it emerges that the requirement goes beyond restraint into a deprivation of the person's liberty then authorisation will be required for that deprivation (how this will be achieved will depend on the setting, and whether the DOLS procedures apply).
6. Be realistic. There is nothing that the OS/Court of Protection likes less than to see a care plan founded upon optimism alone: if this means that it is necessary to set a series of apparently limited objectives on the way to a more distant goal, then so be it.

C. Checklist for Transition Plans

1. Details of P's current and proposed care, including full care plans for each setting.
2. Step-by-step account of how P will be moved from A to B including:
 - a. Timing.
 - b. Personnel involved.
 - c. Who will take responsibility for the transition on the day and subsequently.
 - d. What will happen from P's perspective (eg. moving possessions, arrangements for meals on the day etc).
 - e. Whether police will be present and if so, details of their involvement (note that unless physical force and/or restraint and/or sedation are essential, it is best to plan on the basis that they will not need to be authorised by the court, and then to return to court in the event the transition does not work and further steps are required).
 - f. Monitoring in days/weeks immediately following move.

3. Where police will be involved in the removal, ensure that the transition plan includes information sufficient to satisfy the guidance given by Coleridge J in *Re MP; LBH v GP* [2009] FD08P01058:

“In the event that it is expected that the assistance of the Police may be required to effect or assist with the removal of a vulnerable/ incapacitated adult (“P”) which the Court is being asked to authorise, the following steps should generally be taken:

- (1) the Local Authority/NHS body/other organisation/person (the Applicant) applying to the Court for an authorisation to remove P should, in advance of the hearing of the Application, discuss and, where possible, agree with the Police the way in which it is intended that the removal will be effected, to include, where applicable, the extent to which it is expected that restraint and/or force may be used and the nature of any restraint (for example, handcuffs) that may be used;*
- (2) the Applicant should ensure that information about the way in which it is intended that removal will be effected is provided to the Court and to the litigation friend (in cases where a person has been invited and/or appointed to act as P’s litigation friend) before the Court authorises removal. In particular, the Court and the litigation friend should be informed whether there is agreement between the Applicant and the Police and, if there is not, about the nature and extent of any disagreement;*
- (3) where the Applicant and the Police do not agree about how removal should be effected, the Court should give consideration to inviting/directing the Police to attend the hearing of the Application so that the Court can, where appropriate, determine how it considers removal should be effected and/or ensure that any authorisation for removal is given on a fully informed basis.”*

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