



## DEANS COURT CHAMBERS

**C (by his litigation friend, the Official Solicitor) v Blackburn  
with Darwen Borough Council & A Care Home &  
Blackburn with Darwen Teaching Care Trust**

**[2011] EWHC 3321 (COP)**

1. This judgment may be of interest to those who are involved in COP cases which overlap with the MHA 1983 (and in particular s.7 of the MHA and Guardianship Orders).

2. S.8 of the MHA 1983 confirms that the effect of an order under s.7 is that it confers upon the guardian ‘*to the exclusion of any other person*’ decisions on a number of matters (the most significant of which is the issue of where the individual shall live).

3. This section, and the interrelationship that guardianship has with the jurisdiction of the Court of Protection, has now been

considered in *C v Blackburn with Darwen Borough Council & A Care Home & Blackburn with Darwen Teaching Care Trust* [2011] EWHC 3321 (COP). It was argued on behalf of C that the word ‘*person*’ could not extend to preventing a judge of the Court of Protection deciding where an individual should live, where that issue was before the Court, and where P was also subject to an order pursuant to s.7 of the MHA 1983. The Local Authority and the Trust argued that (a) in the particular circumstances of the case C was not deprived of his liberty (there being a secondary issue as to whether he either could be, or needed to be, subject to a standard authorisation via ‘DOLS’) and was also ineligible for this scheme and (b) that s. 8 prevents any Court from exercising a jurisdiction that would have the effect of emasculating the MHA 1983.

4. In respect of the matter of s.8, and its legal effect, Mr Justice Peter Jackson relied upon *GJ v The Foundation Trust & Ors* to the effect that in general the MHA 1983, where it applies, has primacy over the MCA. He also held that ‘*there are good reasons why the provisions of the MHA should prevail where they apply. It is a self-contained system with inbuilt checks and balances and it is well understood by professionals working in that field. It is cheaper than the Court of Protection*’ [34 & 35].

5. However, it is important to note the following caveat '*On the other hand, it is not in my view appropriate for genuinely contested issues about the place of residence of a resisting incapacitated person to be determined either under the guardianship regime or by means of a standard authorisation under the DOLS regime. Substantial decisions of that kind ought properly to be made by the Court of Protection, using its power to make welfare decisions under s.16 MCA*' [37].

6. In other words, local authorities may well conclude that in cases where there is a dispute about residence, and as to whether that is in the best interests of P or not, the correct court within which to determine that point (assuming a lack of capacity) is not by using section 7 MHA 1983 at all, but by way of an application to the Court of Protection instead.

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