

# Deprivation of liberty: Court ruling leaves councils struggling to find representatives for people lacking capacity

Local authorities finding that paid professionals to take on role of relevant person's representative are in short supply

By [Andy McNicoll](#) on June 10, 2015 in [Adults](#), [Deprivation of liberty](#)

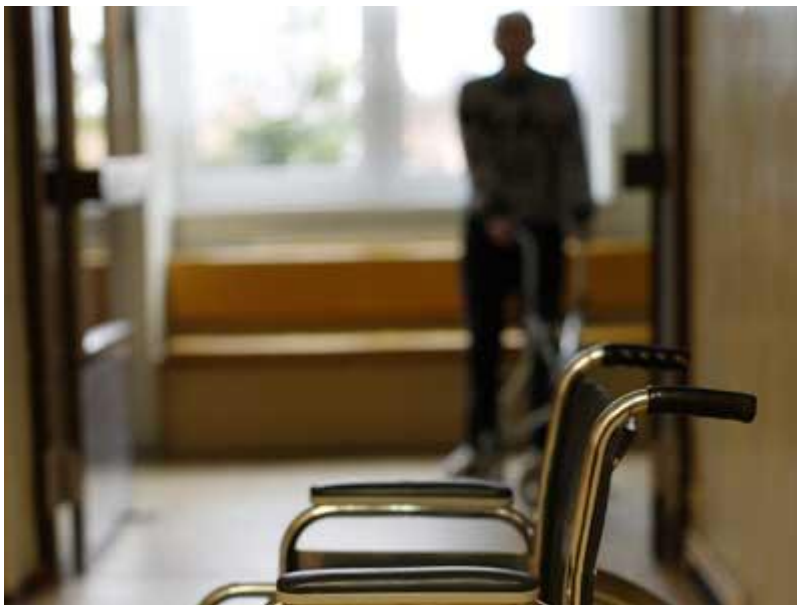


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A Court of Protection ruling has left councils struggling to find family members to support people lacking capacity to challenge decisions made about their care under the Deprivation of Liberty Safeguards (Dols).

The impact of the ruling, in the case of *AJ (by her litigation friend the Official Solicitor and a local authority)*, is forcing authorities to turn to paid professionals to take on the role of relevant person's representative (RPR) for people subject to the Dols. However, as the advocacy services from which paid RPRs are drawn are under severe pressure themselves, they too are in short supply.

The situation has added further pressure to a Dols system already under significant strain from the tenfold increase in cases triggered by the [2014 Supreme Court ruling in the 'Cheshire West' case](#).

Everyone who is deprived of their liberty in a care home or hospital under the Dols is entitled to an RPR. The RPR must represent and support the person in matters connected to the Dols authorisation. This includes making a legal challenge to the Dols authorisation if the person wishes to.

Other than in cases where a person with the capacity to select their RPR chooses to do so, or an attorney or deputy with authority to select an RPR does so on the person's behalf, best interests assessors (BIAs) must recommend a family member, friend or carer that they feel can fulfil the role. The local authority then decides whether to appoint them. Where a BIA cannot find a suitable family member, friend or carer, the local authority may appoint a paid representative, often an advocate.

It has been common for a family member or friend of the person to be selected as their RPR. However the court's judgement in the AJ case has triggered concerns over potential conflict of interests in loved ones taking on the role.

### **The AJ ruling**

AJ was an 88-year-old woman with dementia who lived with her niece (Mrs C) and her niece's husband (Mr C). She objected to a decision to move her to a care home on a long-term basis after a respite placement when Mr and Mrs C were on holiday.

The council appointed Mr C as AJ's RPR. An Independent Mental Capacity Advocate (IMCA) was instructed to support Mr C. Yet despite AJ's known opposition to the care home placement, no legal challenge was made to the Dols authorisation until more than six months after she was admitted into residential care.

There was no effective communication between Mr C as RPR and the IMCA. When the IMCA finally spoke to Mr C he realised that Mr C was not going to initiate proceedings to challenge the Dols authorisation. At that point the IMCA agreed to act as AJ's litigation friend and instruct solicitors to make an application to the Court of Protection on her behalf.

Mr Justice Baker found that the BIA in the case should not have recommended Mr C as AJ's RPR because it was clear that Mr C supported her being placed in the care home long term. As a result, his own views conflicted with supporting AJ in any challenge. The

court also found that the local authority should have scrutinised the BIA's decision, identified the conflict, and referred the matter back to the BIA.

## **The impact**

The judgement has led to councils increasingly turning to paid representatives to take on the RPR role in a bid to avoid similar conflicts. Paid RPRs are usually sourced from local advocacy services. However, social workers warned that the introduction of new advocacy duties under the Care Act, coupled with sustained pressures on Independent Mental Capacity Advocate (IMCA) teams, means paid-for RPRs are in short supply.

Steve Chamberlain, an independent BIA and trainer, said that the AJ ruling was right to reinforce a person's right to challenge Dols authorisations but acknowledged that it had created dilemmas for practitioners.

"It is leading to BIAs facing very difficult conversations with family members. Explaining Dols is complex to start with and the language of 'deprivation of liberty' already sounds like punishment. But now we're also having to tell a lot of people we don't think they can represent their loved one. It makes the whole discussion with family members much more complicated," he said.

"The other big question is whether we have the resource in place around advocacy to cope with this? RPRs do not have to be advocates, but in reality councils often use the same people for the RPR role. So coupled with the fact that we've now got a huge additional requirement for advocates under the Care Act will there be enough people to do it? At the moment, it doesn't feel that there will be."

## **Resource shortage**

Lorraine Currie, Dols lead for the Association of Directors of Adult Social Services (Adass), raised similar concerns.

"It is very, very difficult to find family members now as representative. That inevitably means more paid reps and it's really hard to get them because there aren't enough resources to go around," she said.

"The IMCAs are so stretched doing their day-to-day MCA cases that they can't pick up the paid RPR role as quickly as we need them to... And BIAs are struggling. They're saying it can feel really conflicted when you're having discussions with family members."

Asked about the ruling's implication, one Dols lead told Community Care: "There aren't enough advocates to provide meaningful paid representation to all who might now need it."

[Adass has revised its Dols forms](#) in light of the ruling in order to flag-up the responsibilities of BIAs and local authorities in the RPR selection process. The association is also scoping out possible solutions to boosting the pool of potential paid RPRs that councils can call on, including the potential for regionally or nationally-commissioned services.

The greater focus on RPRs being willing to challenge Dols authorisations also means local authorities are bracing themselves for more legal challenges.

### **Other implications**

The RPR dilemmas triggered by the ruling are only one implication to come out of the AJ case. The judgement also raised concerns over local authorities' use of respite placements.

Although the initial care home placement was set up for AJ as respite, it was hoped that she could remain in the home on a permanent basis if she was settled. AJ stated that she did not wish to be in the home and repeatedly asked to leave. No assessment under the Dols had been carried out prior to her arrival. An urgent authorisation was granted by the care home manager after she arrived.

The court found that the local authority should have either carried out a Dols assessment or made an application to the Court of Protection prior to AJ's arrival at the home to authorise a deprivation of liberty. Labelling the first two weeks of the placement as "respite" did not justify the council's failure to do this, the court found.

Currie said that she welcomed the fact the judgement highlighted that local authorities should not be using respite as a means of getting placements through "using the back door". The ruling also reinforced the need for councils to get a Dols authorisation or court application in place before a person is moved from their homes, she said.

### **A system under strain**

The ruling is an added pressure on a deprivation of liberty system that is already under severe strain after a landmark Supreme Court ruling in March 2014 triggered a ten-fold rise in cases. Currie said that a series of case law judgements coming out since the

Supreme Court ruling meant local authorities were having to react to an ever-changing picture.

“The system is dealing with far greater numbers than it was ever built to cater for,” she said.

The government has asked the Law Commission to review the legal frameworks for authorising deprivation of liberty in care. Draft proposals will be published in July. To learn more, [sign-up for a free Community Care webinar with one of the authors of the proposals.](#)