

GUIDANCE ON THE RELEVANCE AND USE OF THE INHERENT JURISDICTION OF THE COURTS

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WHAT IS INHERENT JURISDICTION?

The High Court has an inherent jurisdiction to protect adults at risk whether or not they lack capacity. The Court can exercise this jurisdiction where it is lawful, necessary and proportionate to do so. The Court should not exercise the jurisdiction in any way contrary to the Mental Capacity Act 2005 or any supplementary framework.

WHO CAN BENEFIT FROM AN INHERENT JURISDICTION ORDER?

- Inherent jurisdiction is available to all adults at risk whether that vulnerability was as a result of:
 - Mental incapacity
 - Inability through physical impairment to communicate a decision, or
 - External factors such as coercion, constraint, undue influence or anything else that deprives the individual of the capacity to make a decision.
- Inherent jurisdiction exists to facilitate the process of unencumbered decision making by those who would otherwise be restrained by external pressure of physical disability.
- Inherent jurisdiction is a possible route for dealing with cases of adults at risk whose circumstances are not covered by the Mental Capacity Act 2005.

WHAT INHERENT JURISDICTION CAN DO

- Inherent jurisdiction is essentially a protective jurisdiction.
- Inherent jurisdiction re-establishes the individual's autonomy of decision making by using the powers of the court under its inherent jurisdiction would enhance rather than breach a vulnerable adult's right to privacy and family life.
- Inherent jurisdiction can be used whether or not the adult at risk possesses capacity.

WHAT INHERENT JURISDICTION CANNOT DO

- Inherent jurisdiction cannot be used to compel a capacitated but at risk person to do or not do something which they have, after due consideration, decided to do or not to do.
- No inherent jurisdiction orders would be made relating to the governance of the adult at risk's behaviour. That is, an inherent jurisdiction order can restrict the perpetrator but it does not in any way regulate the actions of the victim who is at liberty to breach the order.

WHEN SHOULD INHERENT JURISDICTION BE APPLIED FOR?

- Inherent jurisdiction can be granted as a last resort when all other means of collaborative working have been exhausted.

WHAT TO THINK ABOUT BEFORE APPLYING FOR INHERENT JURISDICTION

- The operation and implications of any hoped for remedy may well amount to a deprivation of the victim's liberty (DoLS) and further an infringement of their human rights (e.g. to privacy or family life).
- An inherent jurisdiction order will not provide a 'quick fix' even if granted on an interim basis.
- Applying for an inherent jurisdiction order is a time consuming and costly process.

AN INHERENT JURISDICTION CASE STUDY: DL-v-A Local Authority & Others 2012 EWCA civ 253

In this case the two elderly adults concerned plainly had mental capacity to make decisions for themselves. The Local Authority's case sought to invoke the inherent jurisdiction for the couple's protection claiming that they lacked capacity as a result of undue influence and duress brought to bear on them by their son DL. This included physical assaults, verbal threats, controlling his parents' movements, preventing them from leaving the house and controlling who could visit them plus seeking to coerce them into transferring ownership of the house to DL. As is usual in these types of cases it raised a preliminary point of law to be considered before the case could continue. This first hearing took place on the 19th April 2011. It was acknowledged that DL's parents wished to preserve their relationship with their son and did not want any proceedings to be taken out against him. It was also recorded that the Local Authority had considered (and rejected) using criminal proceedings. It had considered and rejected making an application to the Court of Protection under the MCA. It considered and rejected an application for an ASBO and further considered and rejected an application under Sect 153A of The Housing Act 1996. An interim Injunction was made ex parte and without notice against the son DL restraining him from assaulting or threatening them, from preventing others having contact with them, coercing them, degrading behaviour, giving orders to staff, interfering with their care, refusing professional access to them and acting aggressively to staff. An Official Solicitor was appointed. On the 29th June 2011 DL was granted leave to appeal the injunction. This was heard on the 28th March 2012 and the original Order/Injunction was upheld but with no participation by DL's parents. The reasoning by the Court was that the parents " had been deprived of their capacity to make the relevant decision, or disabled from making a free choice, or disabled from giving or expressing a real and genuine consent by reason of such things as constraint, coercion, undue influence or other vitiating factor".

This case therefore highlights an obvious problem in that whilst any relief obtained restricts the perpetrator it does not in any way regulate the actions of the victim who is at liberty to "breach" the Order. Further in the above case the parents/vulnerable victims played no part in the proceedings. Had they done so there is every likelihood that they would have pleaded with the Court not to make such an Order. In any event DL remained living with them which raises the question as to whether they refused to report any breaches of the Order

A further factor is the length of time that the case "ran" (approx. 11 months). There is no recording of the impact that such proceedings had upon the parents, in fact one parent lost capacity during its course.

HOW TO APPLY FOR AN INHERENT JURISDICTION ORDER

1. Get clearance from Senior Management for costs of £15,000.00 minimum and be prepared for a timescale in terms of months in the case of a full hearing.
2. Contact the Legal Department to instruct specialist Counsel to present the case; higher advocacy rights of audience apply. That is, advocacy assessments based on the Solicitors' Regulation Authority higher rights of audience competency standards must have been passed.
3. A preliminary decision would be taken on the merits of the case on application which, if successful, would lead to a full/contested hearing with the possible inclusion of the Official Solicitor.