



## Deprivation of Liberty, Restriction / Restraint Court of Protection

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On behalf of the Swindon Safeguarding Partnership

# Instructions





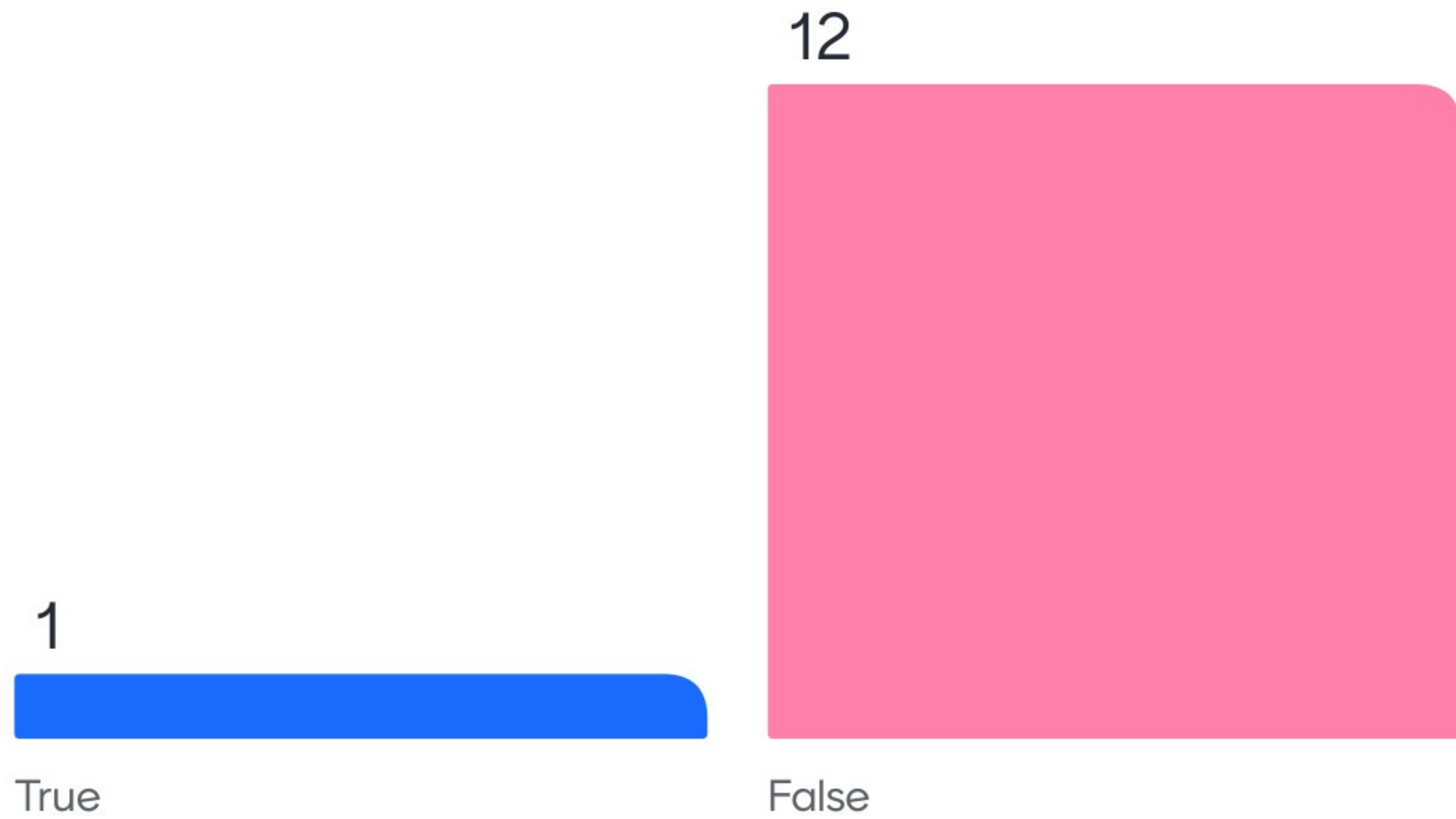
# Learning Objectives

- To understand the historical context of DoLS and the relationship between DoLS and the Human Rights Act
- The importance of case law in deciding whether a deprivation of liberty might be happening
- To be develop awareness of Community DoL processes
- Understand the types of restraint and when it is proportionate to employ restrictive processes
- The role of the Court of Protection

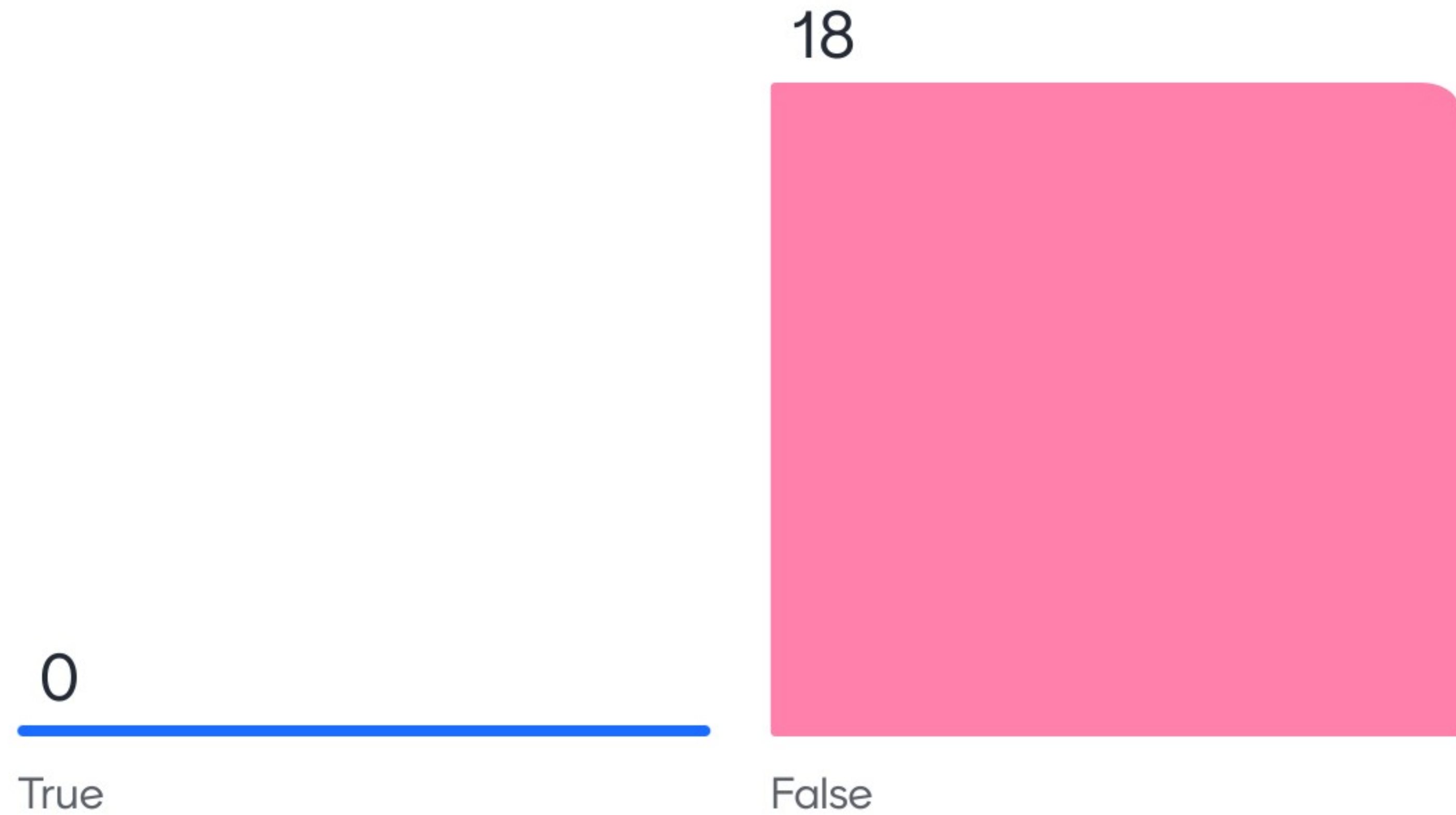




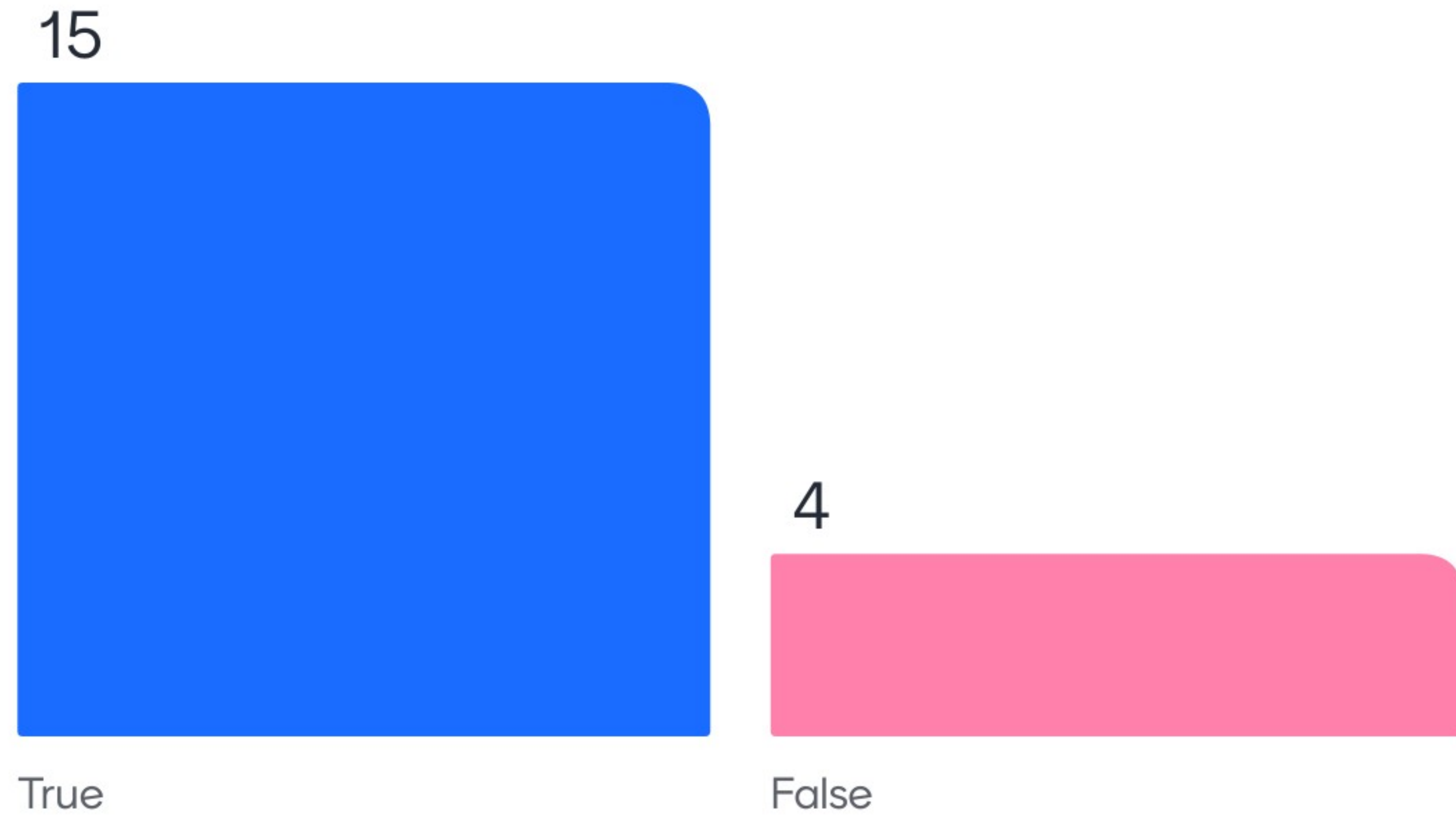
We only make an application for Deprivation of Liberty Authorisation when a person is objecting their care.



If someone has a DoLS authorisation to live in a care home, we should never let them out of the door & not let them go to stay overnight elsewhere.



You can make an application for a Deprivation of Liberty Safeguards (DoLS) authorisation for a young person aged 16 years old.





# Human Rights Act 1998

- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment.
- Article 4: Freedom from slavery and forced labour.
- Article 5: Right to liberty and security.
- Article 6: Right to a fair trial.
- Article 7: No punishment without law





# Human Rights Act 1998

- Article 8: Right to respect for private and family life
- Article 9: Freedom of thought, conscience and religion
- Article 10: Freedom of Expression
- Article 11: Freedom of Assembly and Association
- Article 12: Right to Marry
- Article 14: Prohibition of Discrimination







# Human Rights Article 5

5.1 " No one shall be deprived of their liberty except for specific cases and in accordance with procedure prescribed by law e.g after conviction, lawful arrest on suspicion of having committed an offence, lawful detention of person of unsound mind, to prevent spread of infectious diseases."

5.4 " Everyone deprived of liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a Court and release order if the detention is not lawful"



Any Questions?





# Bournemouth Gap

- Introduced into Mental Capacity Act 2005 (MCA) through the Mental Health Act 2007 as a result of the “Bournemouth ruling” HL -v- UK ECHR 2004
- Who lacked capacity to consent to being deprived of his liberty, held as informal patient in a locked psychiatric ward
- No legal process – Bournemouth Gap
- Breach of Article 5
- Lead to introduction of Deprivation of Liberty Safeguards procedure







# What is the purpose?

- Will prevent arbitrary decisions that deprive vulnerable people of their liberty .
- Safeguards are to protect service users and if they do need to be deprived of their liberty give them a representative, rights of appeal and for the “deprivation” to be reviewed and monitored.
- Safeguards cover people in hospital and care homes.
- DoLS Framework applies to 18 +  
Became a statutory obligation on 1st April 2009.



# Key Roles: Deprivation of Liberty Safeguards

(s4A and Schedules A1 and 1A)

**Best Interests Assessor (BIA):** Social Worker, Occupational Therapist, Nurse, Psychologist

**Mental Health Assessor:** s.12 approved doctor

**Managing Authority:** (In hospitals the body responsible for running the hospital. In care home the registered person). MA identifies DOLS may be occurring, refers to the SB

**Supervisory Body:** The local authority. SB appoints a Best Interests Assessor (BIA) & a Mental Health Assessor (MA) to complete 6 assessments.





# Key Roles

**Age Assessment:** Is the person 18 or over,

**Mental Health Assessment:** does the person have a mental disorder (MA completes this).

**Mental Capacity Assessment** (MA or BIA completes this).

**Eligibility Assessment** (Should MHA be used? MA or BIA if they are an AMHP)

**No refusals:** Does this conflict with a LPA or advanced decision.

**Best Interests Assessment:** completed by the BIA: Is the person deprived of their liberty? Is it in their best interests to be detained? Is it necessary for the person to be detained to prevent harm to himself/ herself (not to others). Is the deprivation of liberty a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm?

**Representative Selection:** Family, friends, LPA or IMCA.  
Safeguards as the can ask for a review.





# Defining Deprivation of Liberty

- Supreme Court Rulings:
- Pre 2014: Care Law Precedent Setting.
- P v Cheshire West & Chester Council
- P & Q v Surrey CC (2014) UKSC







# Supreme Court Judgement

If it were a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, and only allowed out with close supervision and unable to move away without permission, when a opportunity became available, then it must be a deprivation of liberty for a disabled person.

The fact that my living arrangements are made as comfortable and indeed may make my life enjoyable, should make no different : **A gilded cage is still a cage**



Select which of the following criteria determine if someone is deprived of their liberty:



1

There are locked doors.



7

The person is under continuous control and supervision

0

The person is trying to leave

0

The person is given medication to sedate them



2

Person lacks capacity to consent to be accommodated at the home/hosp



3

The person is not free to leave





# What is a DoL? THE ACID TEST

- The person lacks the mental capacity to decide whether or not to be accommodated there.
- The person must be under continuous supervision and control
- Is not free to leave



## So it's ok to deprive someone of their liberty if...

- In their own best interests & to protect them from harm
- If it is a proportionate response to the risks
- There is no less restrictive option available.
- **Based on the five core principles of the Mental Capacity Act 2005**







# Safeguards

- Rigorous process
- Personal Representative: Family member
- Paid Representative: IMCA
- Right to review
- Right of appeal to the CoP
- Third Party Referral





Mental Capacity Act	Mental Health Act
Applicable for persons aged 16+	No Age Limit
Relates to a person's functioning and their ability or inability to make a particular decisions	MHA is related to a person's status, as someone diagnosed as having a mental disorder
MCA focuses on a wide range of decisions an adult might have to make: for example health and welfare , financial and property matters.	MHA primary focuses on decisions about care and treatment of mental disorders
Can be used to authorise deprivation of liberty, through <u>DoLS</u> if 18+ or <u>CoP DoL</u> if 16+, but only when the person lacks relevant capacity	Can be used to authorise detention against someone whether they lack capacity or not.

Both Acts Protect The Rights Of People

## Mental Capacity Act Vs Mental Health Act



# Any Questions?





# Community DoL

- Deprivation of liberty in the community
- Their own home · Supported living · But not in a care home or hospital
- Court of Protection authorisation
- COPDOL 11 Application Form
- COPDOL 11 Checklist
- COP 3 Mental Capacity Assessment
- Mental Health Assessment
- Best interests Decision
- Care/Support Plan
- Additional information







# Community DoL Order

The DoL Order ensures that:

- The person is asked for their feelings about where and how they live.
- All those involved in their care agree that their care plan is in their best interests.
- The person is living in an appropriate place which meets their needs.
- The person has an advocate, if required, to support them to get their feelings heard.
- The care arrangements will be reviewed by a judge.
- The person or someone involved in their care has the right to appeal if they disagree with the arrangements.
- The arrangements are reviewed and will continue no longer than is necessary



# Community DoL

- Re V [2016] EWCOP 16
- Key responsibilities for representatives include:
- Weighing the pros and cons of P's care and support package and comparing it with other available options;
- Considering whether any of the restrictions are unnecessary, inappropriate or should be changed;
- Informing the court about what P has said, and P's attitude towards, the care and support package;
- Checking from time to time that the care and support package is being properly implemented.





Name different types of restriction and restraint...

4 responses

hiding medication in food

chemical

physical

environmental



# Restriction and Restraints

- frequent use of sedation/medication to control behaviour
- regular use of physical restraint to control behaviour
- the person concerned objects verbally or physically to the restriction and/or restraint
- objections from family and/or friends to the restriction or restraint
- the person is confined to a particular part of the establishment in which they are being cared for
- the placement is potentially unstable
- using locks or key pads which stop a person going out or into different areas of a building
- the use of some medication, for example, to calm a person
- close supervision in the home, or the use of isolation





# Restraint and Restrictions

- requiring a person to be supervised when out
- restricting contact with friends, family and acquaintances, including if they could cause the person harm
- physically stopping a person from doing something which could cause them harm
- removing items from a person which could cause them harm
- holding a person so that they can be given care, support or treatment
- bedrails, wheelchair straps, restraints in a vehicle, and splints
- the person having to stay somewhere against their wishes or the wishes of a family member
- repeatedly saying to a person they will be restrained if they persist in a certain behaviour.







# Restraint and Restrictions

## Section 5 (1)

If a person (D) does an act in connection with the care and treatment of another (P), the act is one to which this section applies if

- (a) before doing the act, D take reasonable steps to establish whether P lacks the mental capacity in relation to the matter in question and
- (b) when doing the act, D reasonably believes
  - (i) P lacks the capacity in relation to the matter and
  - (ii) that it will be in P's best interests for the act to be done.



# Restraint: Section 6

- (1) When restraint is being used s.5 cannot be used unless two conditions are satisfied:
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm occurring to P.
- (3) The Second is that the act is a proportionate response to
  - (a) the likelihood of P suffering harm and
  - (b) the seriousness of that harm





# Court of Protection - When to apply

- When there is a dispute about whether a person has capacity to make a particular decision
- When there is a dispute whether an action is in a person's best interests
- When there is a dispute about whether a person is being deprived of their liberty
- To question the validity of Lasting Powers of attorney
- The appointment of Deputies.

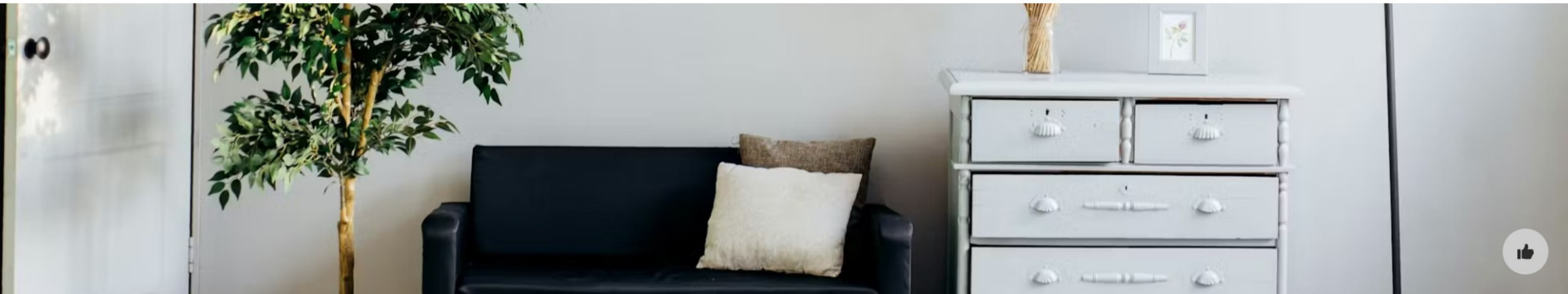


# When an application should be made

There is doubt about whether withholding or withdrawing life-sustaining treatment is in the patient's best interests (5.33).

There is a major disagreement regarding a serious decision, which cannot be settled in any other way; this includes where a person should live (6.12 and 8.28).

It is unclear whether proposed serious and/or invasive medical treatment is likely to be in the best interests of the person who lacks capacity to consent (8.24).



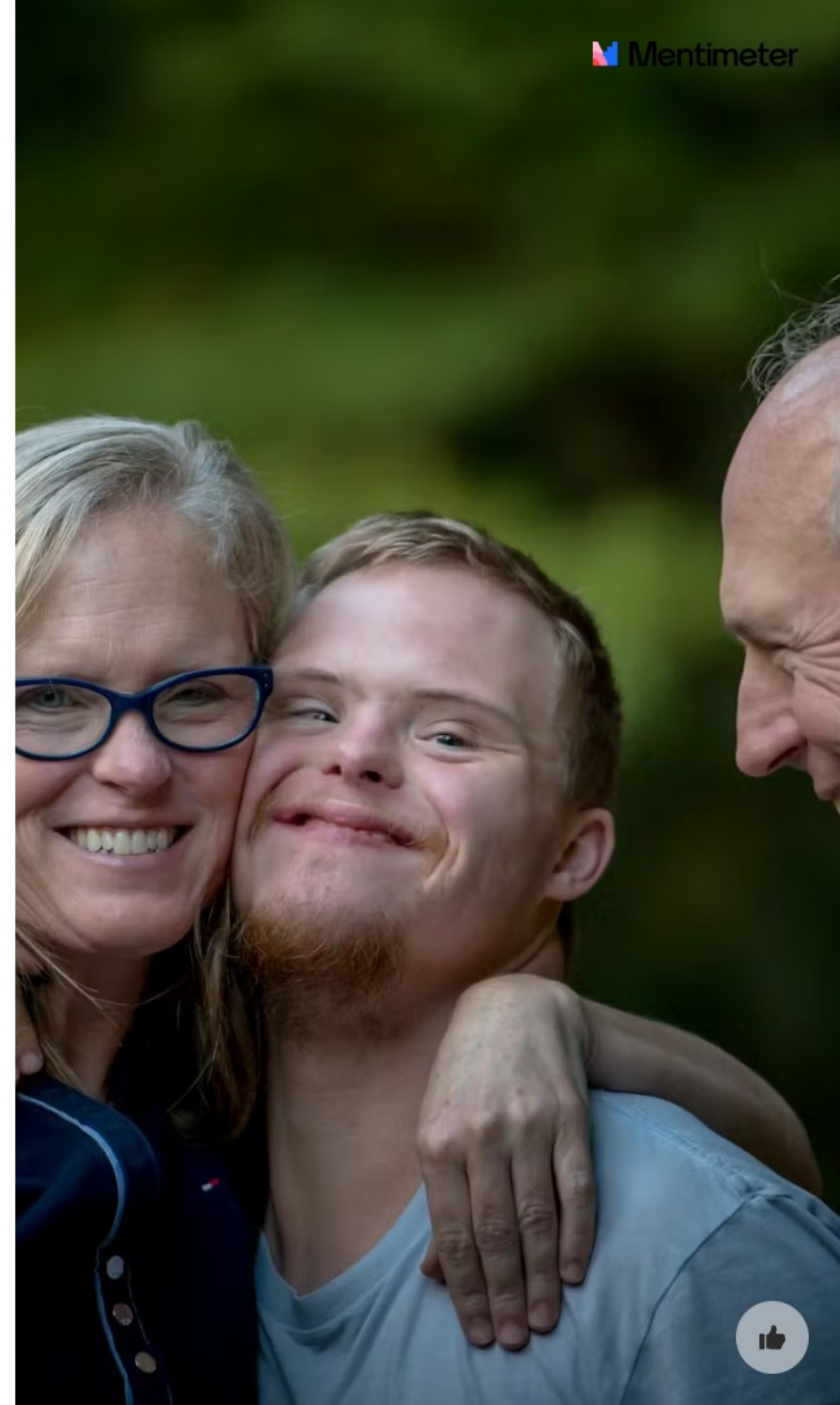


# When an application should be made

There is genuine doubt or disagreement about the existence, validity or applicability of an advance decision to refuse treatment (8.28).

A family carer or a solicitor asks for personal information about someone who lacks capacity to consent to that information being revealed (8.28).

**Stopping or limiting contact with a named individual because of a risk of harm or abuse to a person lacking capacity to decide on the contact (8.28)**







## Court of Protection: Re Steven Neary; LB Hillingdon v Steven Neary (2011) EWHC 1377 (COP)

Steven Neary, a young man with disabilities, into respite care for a few days at the request of his father and then kept him there for a year (including a period whilst he was subject to the DOLS regime) in circumstances which, as the Judge found gave rise to a breach of his rights under Articles 5(1) and 8 ECHR.

The judge further found that, by failing to (i) refer the matter to the Court of Protection sooner than 28 October 2010, and/or (ii) appoint an Independent Mental Capacity Advocate for Steven sooner than 29 October 2010, and/or (iii) conduct an effective review of the DOL best interests assessments under Part 8 of Schedule A1 of the Mental Capacity Act 2005, Hillingdon deprived Steven Neary of his entitlement to take proceedings for a speedy decision by a court on the lawfulness



# Nearly...

The purpose of DOL authorisations and of the Court of Protection

Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary.







# Neary...

The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to deprive a person of liberty at a particular place. It is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all. Using the DOL regime in that way turns the spirit of the Mental Capacity Act 2005 on its head, with a code designed to protect the liberty of vulnerable people being used instead as an instrument of confinement. In this case, far from being a safeguard, the way in which the DOL process was used masked the real deprivation of liberty, which was the refusal to allow Steven to go home.



# Case example

Fred has advanced throat cancer. He had capacity to make the decision about starting chemotherapy to treat his cancer but his condition has now progressed and he has been assessed as lacking capacity to make a decision about whether to continue with this treatment. The medical staff believe that further chemotherapy is not in Fred's best interests, particularly because the prognosis is not good, and in order to receive the treatment he has to be restrained, causing him a great deal of distress. His son and daughter disagree and state that their father would want the medical staff to do everything they could to treat his cancer. The primary care trust responsible for Fred's treatment applies to the court for a decision.







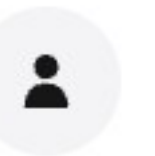
# Case Example

A safeguarding adult alert has been raised about Faye, who has autism. There are concerns that she is being neglected and financially abused in the family home. Faye has been assessed as lacking capacity to make decisions on these matters. The local authority is proposing to move her to a care home against the wishes of her family. It wants to put some restrictions on Faye's contact with her family after a move. The local authority makes an application to the Court of Protection regarding Faye's residence and contact with her family. **HRA Article 8**





Any Questions?





# Thank You!

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