DEPRIVATION OF LIBERTY - BRIEF OVERVIEW OF THE LAW

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Deprivation of Liberty - Brief Overview of the Law

1. Care and support is provided to young persons in a very broad range of living arrangements. These include (but are not limited to) the family home, foster homes, adoptive homes, children's homes (secure, non-secure, and certain special schools), care homes, residential special schools, boarding schools, further education colleges with residential accommodation, and hospitals.

2. Where there is an issue regarding deprivation of liberty occurring in the family home, private fostering home, or adoptive home, this falls outside the scope of this talk. This is because parental responsibility rests solely with the parent(s) rather than the State and so is analogous to the family home.

What amounts to a deprivation of liberty?

The Law

3. By virtue of Article 5 of the European Charter of Human Right (A5), "*every person has a right to liberty and security of person."* Article 5 of the ECHR protects the right to liberty and security of person. No person – of *any* age – shall be deprived of their liberty unless (a) it is justified on a ground specified in Article 5 such as being of "unsound mind" or "detention of a minor by lawful order for the purpose of educational supervision", and (b) it is done in accordance with an Article 5 compliant legal procedure.

4. What amounts to a deprivation of liberty, has been clarified in the Supreme Court judgment, of which you are likely aware, namely, *P, Q & others v Cheshire West [2014] UKSC 19.* The relevant questions for consideration are:

    a. The individual is unable to consent to the deprivation of liberty;
    b. Is the person subject to continuous supervision and control; and
    c. Is the person free to leave?

5. The following factors are irrelevant as to whether there is any such deprivation:
    a. The person's compliance or lack of objection;
    b. The relative normality of the placement (whatever the comparison may be); and
    c. The reasons or purpose behind any particular placement.

6. **This criteria must be considered comparatively to a child of the same age who is without disability – this is the 'nuanced' aspect of the acid test.**

7. *"The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place*." (per Lord Kerr, Cheshire West)

8. As a general rule, the younger the person is, the greater the level of constraint to which they would typically be subject. For example, a 5 year old, for example, regardless of their disability, would be under continuous or complete supervision and control wherever they are and not free to leave. The fact that they are under such control, whether in the care of their family or the State, does not mean they are deprived of liberty. However, if the level of constraint typically afforded to a non-disabled 5 year old is provided to a disabled 16 year old, then those constraints must be taken into account in determining whether the acid test is satisfied.

9. In deciding whether someone is deprived of their liberty, it is therefore necessary to consider the extent to which the care arrangements differ to those typically made for someone of the same age and relative maturity who is free from disability.

10. These questions may help establish whether an individual is deprived of their liberty in this context (examples from existing LS Guidance):

a. Compared to another person of the same age and relative maturity who is not disabled, how much greater is the intensity of the supervision, support, and restrictions?
b. Can the person go out of the establishment without the carer's permission?
c. Can they spend nights away? How do the arrangements differ to the norm for someone of their age who is not disabled?
d. To what extent is the person able to control his or her own finances? How does this differ to the norm for someone of the same age who is not disabled?
e. Can the person choose what to wear outside school hours and buy his or her own clothes?
f. To what extent do the rules and sanctions differ from non-disabled age appropriate settings?
g. Are there regular private times, where the person has no direct carer supervision?
h. What is the carer to person ratio and how different is this to what would usually be expected of someone of that age who is not disabled?
i. Is physical intervention used? If so, what type? How long for? And what effect does it have on the person?
j. How structured is the person's routine compared with someone of the same age and relative maturity who is not disabled?
k. To what extent is contact with the outside world restricted?

11. The local authority has a duty imposed upon it, to consider whether any children in need, or looked-after children, are, especially those in foster care or in a residential placement, are subject to restrictions amounting to a deprivation of liberty. (*A local authority –v- D & other [2015] EWHC 3125 Fam*.)

12. Applying this aforementioned criteria and the imposed duty to consider this criteria, the local authority should give careful consideration to children within its care who may be subject to a deprivation of liberty either in a foster care setting, residential placement or, those who benefit from respite care in Short Break Units.

Consideration of Groups of Children

Children under 16 who are subject to care orders or interim care order or accommodated under s.20 with social care needs.

The law

13. In the case of a child who is under the age of 16 and subject to an interim and/ or full care order, the legal position is that the natural parent of that child, or adult with parental responsibility for that child, is unable to consent to the deprivation of liberty. In such a circumstance, the local authority has contended and/or a court has decided that threshold criteria of s.31(2) of the Children Act 1989 is satisfied, namely, the child is likely or is suffering significant harm and that harm is attributable to the care being provided to him is not what is reasonable to expect a parent to give him. For such a reason, the exercise of parental responsibility has previously been seriously called into question and it is stated by Mr. Justice Keehan in *A local Authority v D & others [2015] EWHC 3125 that:*

> *[27] "not right or appropriate within the spirit of the conclusion of the Supreme Court in Cheshire West to permit such a parent to consent."*
>
> *[28] Where a child or young person is in the care of the local authority and is subject to an interim care order, the reasoning at paragraph 27 (above) applies with even greater force, especially when one considers the effect of an interim care order which, includes the power of the local authority to restrict "the extent to which a parent may meet his parental responsibility for the child." (s.33(3)(b) Children Act 1989."*

14. In answer to the question as to whether the local authority itself could consent to the deprivation of liberty on behalf of the child, all reported and supportive case law strongly suggested not. Or better put "an emphatic no." The basis for the local authority being unable to consent is highlight in Cheshire West, Lady Hale highlights that to permit a local authority to consent would (1) be a breach of article 5, (2) would not afford the proper safeguards which will secure the legal justifications for the constraint under which they are

made out, and (3) would not meet the need for a periodic independent check on whether the arrangements made for them are in their best interests.

15. In brief, when a child who is subject to a care, or interim care order, is being deprived of their liberty or any such deprivation is being considered, the only body able to consent to that deprivation is the court or the child, if competent to do so.

16. If the child is accommodated pursuant to section 20 then a local authority is never able to consent to the deprivation of liberty for the reasons highlighted at the paragraphs above. Another person, who has parental responsibility for that child, may be able to give parental consent. The nature of parental consent and the extent to which is can be relied upon is a matter which is considered in detail at paragraph 25 below. When a child is accommodated under s.20, whether or not the parent (never the local authority), can provide consent is fact dependent on the individual case. (*A Local Authority v D & other*).

17. An example of when it would be appropriate for a parent of child to give consent to the deprivation of liberty would be when the local authority and parents are working co-operatively, in the best interests of the child and the reception of that child into care is for a short-period upon agreement of the parents but may amount to a deprivation of liberty. On the other hand, a parent who has agreed to their child being accommodated under s.20 as a prelude to care proceedings would most likely be painted with the same brush, or subject to the same constraints as those parents who are subject to a full or interim care order.

18. Therefore, it is a matter of judgment, considering the individual circumstances as to whether a parent can consent if the child is accommodated under s.20.

19. In the event that the local authority intends to rely upon the consent of a parent to measures which, absent consent, would constitute a deprivation of liberty it is important for local authorities to ensure that parental consent to the particular circumstances giving rise to it is properly and thoroughly documented. Parents need to know what they are being asked to agree to where their child's liberty is at stake (*Re D [2017] EWCA Civ 1695*).

What application needs to be made to the court, and how can a local authority make any such application?

20. The court of protection has no jurisdiction for children under the age of 16 and therefore this is not the appropriate forum to make any application. There are two options for a local authority which is seeking to authorise the deprivation of liberty for a person under the age of 16, where a parent is unable to give consent (either because the child is subject to a care or interim care order, or because to give any such consent would not be a proper exercise of parental consent.)

21. The first option would be to make an application for a secure accommodation order pursuant to s.25 of the CA 1989. This should always be the local authority's first consideration. Full consideration must be given as to whether the s.25 criteria are met and whether the placement of the child is in an approved establishment (is registered as a secure accommodation under regulation 3 of the Children's Secure Accommodation Regulations 1991). The s.25 criteria are to be read disjunctively and not conjunctively and therefore is it not necessary for both 25(1)(a) and (b) to be met. (*Re D Secure Accommodation Order (No.1) [1997] 1 FLR 103*.)

22. In the event that the criteria in s.25 CA 1989 are not met then the only appropriate forum for an application to authorise the deprivation of liberty would be to invoke the inherent jurisdiction of the High Court.

23. The local authority can only make an application under the inherent jurisdiction with leave of the court (s.100(3)) and any such leave will only be granted if the court is satisfied that the local authority could not achieve what it is trying to achieve by any other order, or there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm. (s.100(4)). In the case of application to authorise deprivation of liberty, it would usually be the case that the inherent jurisdiction is invoked on the basis that the child would be likely to suffer harm should it not be exercised. (*A local authority v D & other [38 (9)]*).

Procedure upon Application

Applying for a Secure Accommodation Order

24. Any application should be made in Form C1 and supplemental C20. The respondents to the application would be every person who has, or had prior to the making of a care order, parental responsibility for that child and the child. The application must be served, in addition with Form C6 on any respondents 1 day prior to the date of the hearing or directions appointment.

25. Any such application must be made in the family court and any judge of the family court is able to make the order.

Applying to invoke the inherent jurisdiction of the High Court

26. A local authority can only make any such application with permission to do so. The application must be made on Form C66 and must include written evidence in support which sets out:
    a. the question that the application wants the court to decide or the order that is sought and the legal basis for the same;
    b. if the application is made under an enactment it must identify the enactment;
    c. if the applicant or the respondent is applying in a representative capacity, what that capacity is; and
    d. the statement of case must be verified by a statement of truth.

27. The substantive application may include the permission application. The respondents to the application would be any parent, guardian or child and the application must be made to the family division of the High Court. The general rules for service under Part 6 of FPR are applicable to any application, although it is possible to make an urgent and/or out of hours application.

28. The local authority can only make an application under the inherent jurisdiction with leave of the court (s.100(3)) and any such leave will only be granted if the court is satisfied that the

29. local authority could not achieve what it is trying to achieve by any other order, or there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm. (s.100(4)). In the case of application to authorise deprivation of liberty, it would usually be the case that the inherent jurisdiction is invoked on the basis that the child would be likely to suffer harm should it not be exercised. (***Re D (A Child) (Deprivation of Liberty)*** **[2015] EWHC 922 (Fam)** & ***A Local Authority v. D & Othrs*** **[2015] EWHC 3125 (Fam)**)

Young people between 16 and 18 years who reside in permanent placements with social care needs

The law

30. Whether or not these children are subject to a deprivation of liberty would of course be determined by reference to the Cheshire West and nuanced acid test (comparison with a non-disabled child of the same age). In the case of children who reside in permanent placements, detailed consideration needs to be given to those permanent placements and whether or not they amount to a deprivation. Relevant factors to be taken into consideration include:
    a. The level of supervision the individual is subject to;
    b. The access they have to the community and local neighbourhood and whether this is supervised or otherwise;
    c. How they are transported to and from school;
    d. The level of monitoring and security of the placement (i.e. security gates, alarms (on windows or doors), monitoring of who enters);
    e. Is restraint used, and if so, the frequency, duration and intensity of the same;
    f. Are the children actively deterred from leaving, would they be immediately brought back if they did so?
    g. Access to mobile phones and/or other electronic equipment.

31. Given that the comparison is with a young person of the same age without any disability, children of 16 and 17 are allowed considerable more freedom than those of more tender years and such any significant curtailment of their liberty (such as not being allowed into the community unsupervised, being deterred to leave the placement and/or being transported to and from school) are likely to amount to a deprivation.

32. Up until recently it had been considered that only the young person themselves was able to give consent to the deprivation of liberty and that a parent and/or guardian exercising parental responsibility would be unable to give consent to the deprivation. This arose from *Birmingham City Council v D & W [2016] EWCOP 8*, however this decision was overturned on appeal in Re D [2017] EWCA Civ 1695.

33. The Court of Appeal held that:

(a) There is no bright line at 16 so parents can continue to consent to such confinement up to the age of 18 if that is an appropriate exercise of their parental responsibility;

(b) Where such consent was taken from a parent by a local authority it was important that such consent was fully informed and accurately recorded, preferably in writing;

(c) Although D satisfied the acid test, he was not deprived of liberty because there was valid consent from his parents;

(d) The "zone" of parental responsibility was to be ascertained by reference to general community standards in contemporary Britain, the standards of reasonable men and women. The question was whether the restrictions being imposed by the particular parent in the particular case fell "*within ordinary acceptable parental restrictions upon the movements of a child*" (para 84).

(e) Obiter, the court endorsed the nuanced acid test approach set out by Lord Kerr in Cheshire West, this represents the first time it has been expressly approved as an approach by the Court of Appeal.

(f) The Court expressly interpreted what had previously been implied, namely that in *Cheshire West,* the freedom to leave component of the acid test did "*not mean leaving for the purpose of some trip or outing approved by* [others]" but rather:

> "*leaving in the sense of removing himself permanently in order to live where and with whom he chooses...*" (para 22).

34. Practitioners should note the views expressed at paragraph 144 by the President as regards to the tension, in his considered view, between the application of the nuanced acid test (a comparative approach determined by reference to a 'typical' or 'normal' child) and the principle ('*the learning*') underpinning the approach to *Gillick* competence (that being a child specific approach determined by reference to the understanding and intelligence of the particular child).

35. It would also be appropriate at this juncture to reiterate that it would never be appropriate for a local authority, if they hold parental responsibility for the young person, to consent to the deprivation on their behalf.

36. It would appear that the law in relation to this age group is relatively clear. In essence three questions must be asked, (1) would the placement (absent valid consent) amount to a deprivation of the young person's liberty, if the answer to this question is yes, then (2) is the young person able to consent? If the young person is unable to consent due to a lack of capacity or as a result of immaturity, then (3) do the child's parents consent and would such consent be an appropriate exercise of their parental responsibility. If the answer to two and three is no then the only option for any local authority would be to make an application to the court for authorisation of the deprivation. In answering question one, regard must be had to both the acid test and the nuanced acid test.

What application needs to be made?

37. Prior to any further consideration of the application which any local authority could make, it must be made clear that the court of protection only has jurisdiction in relation to 16 and 17 year olds if they lack capacity within the meaning of s.2(1) Mental Capacity Act 2005 ("MCA 2005") being, "*at all material time he unable to make a decision for himself in relation to a matter because of an impairment of, or disturbance in the functioning of, the mind or brain*." and s.3 MCA 2005. Whether or not a person has capacity is decided on the balance of probabilities.

38. The MCA 2005 is not applicable if the person lacks capacity due to a lack of maturing (i.e. they are not Gillick Competent) or that as a result of that lack of maturity they feel unable to make a decision for themselves.

39. If the young person does lack capacity then it is possible to make an application to the Court of Protection for the authorisation of the deprivation of liberty, pursuant to section 16 (2) (a) of the MCA. Whilst the Court of Protection would have jurisdiction in this circumstance, it is still open to the local authority to make an application pursuant to s.25 CA 1989 or to invoke the inherent jurisdiction of the High Court. Therefore, recourse is not only found in the Court of Protection.

40. In any event, the Court of Protection is able to transfer any such application made to it to either the High Court or the Family Court if it believes that it would be more appropriate for the application to be made in that forum. It the local authority feels that it would be more appropriate to make an application in the family and/or High Court, then the procedure detailed at paragraphs 11 to 14 above, would be applicable.

41. The court does not have power to make an order under s 25 of the CA 1989 in respect of a young person over the age of 16 (who is not subject to a care order), but the order may be made prior to a child becoming 16, even if it extends beyond the child's sixteenth birthday. (*Re G (Secure Accommodation) [2000] 2 FLR 259*.) However, the court may make an order in respect of a child over 16 if he is the subject of a care order (*Re W [2016] EWCA Civ 804*).

Duration of Orders

42. Any order authorising a deprivation of liberty cannot be for an indefinite period and must be subject to periodic review. As stated by Munby LJ (prior to becoming the President of the Family Division) in ***Re BJ (Incapacitated Adult) [2010] 1 FLR 1373***:

> *"Regular reviews by the court are not merely desirable, not merely a matter of good practice; they go, as both the Strasbourg jurisprudence and the domestic case-law make clear, to the very legality of what is being done."*

When can parental consent be relied upon and how should this consent be recorded?

The Law

43. Parental consent can be relied upon for a child up to 18 years of age. (*Re D [2017] EWCA Civ 16695).* In such a case, the giving of consent must be an appropriate exercise of parental responsibility and the child must not be subject to a care or interim care order.

44. Sir James Munby, the President of the Court of Protection, stated:

> *"84. This has an important corollary. Given that there is no longer any 'magic' in the age of 16, given the principle that 'Gillick capacity' is 'child-specific', the reality is that, in any particular context, one child may have 'Gillick capacity' at the age of 15, while another may not have acquired 'Gillick capacity' at the age of 16 and another may not have acquired 'Gillick capacity' even by the time he or she reaches the age of 18: cf, In Re R (A Minor) (Wardship: Consent to Treatment) [1992] Fam 11, pages 24, 26.*
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> *85. Pausing there to take stock. As of 1985, when Gillick was decided, the position in our domestic law in relation to that aspect of "custody" variously described in Hewer v Bryant as "the power physically to control the infant's movements", the "ability to restrict the liberty of the person" or "the personal power physically to control the infant" and, more generally, as "physical control" or "physical possession" - in other words, the powers with which we are here concerned - can be summarised as follows:*

> *i) The parental power was precisely as described by Sachs LJ subject only to the substitution, when applying the principles set out by Sachs LJ in relation to the concept of the age of discretion, of the test of what we now call 'Gillick capacity' in place of the previous fixed ages.*
>
> *ii) The ambit or extent of parental responsibility, the extent of the "zone" of parental responsibility, in any particular case was to be ascertained by reference to general community standards in contemporary Britain, the standards of reasonable men and women in 1985 (now 2017). To adopt Dame Elizabeth's words: Are the restrictions being imposed by this parent in this case "within ordinary acceptable parental restrictions upon the movements of a child*"?"

45. When considering what is an appropriate exercise of parental responsibility, it is appropriate to have regard to the disability and needs of the child in question. Indeed in Re D [2015] EWHC 922 (Fam) Mr. Justice Keehan stated:

> "*The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.*"

46. It was notable that the following factors seemed to weigh heavily when considering whether or not parental consent for deprivation of liberty could be obtained:
    a. The parents of the D were making decision which D was incapable of making;
    b. The parents were acting in the best interests of their child;
    c. The parents were acting on medical, inclusive of treating clinicians, advice;
    d. The parents paid a close interest to D's care; and

e. The parents worked in co-operation with those treating D.

47. Assistance may be derived from the MHA Code of Practice (2015) [England] at para 19.41 assists in determining the scope of parental responsibility by reference to, in summary, the following matters:

(i) Is this a decision that a parent should reasonably be expected to make? Consider factors such as:

a. The type and invasiveness of proposed intervention.
b. The age, maturity and understanding of child or young person: parental role should diminish as the child develops greater independence.
c. Does it accord with the child or young person's current wishes or will they resist?
d. Have they expressed any previous views?

(ii) Are there any factors undermining the validity of parental consent?

a. Does the parent lack capacity to consent?
b. Is the parent not able to focus on what is in their child or young person's best interests (eg due to an acrimonious divorce)?
c. Is there significant distress/conflict between parents which means they are unable to decide what is best?
d. Is there conflict between decisions of those with parental responsibility?

48. The more coercive the confinement needs to be, the more likely it is that the decision will fall outside the scope of parental responsibility in my opinion. For example, a *compulsory* admission to a psychiatric ward of an objecting incapacitated 16/17-year-old should not be attempted on the basis of parental consent. That would, it has been suggested, be outside the scope and the young person would need Article 5 safeguards (of the MHA). Alternatively, where there is a conflict between the expressed wishes and feelings of a child and the proposed exercise of parental consent, it is my view that such a situation should be brought before the court

49. In general, what appears to be the most important factor when deciding whether or not agreement to deprivation is within the ambit of the exercise of parental responsibility is the co-operation of the parents with the professionals involved in their child's care and perhaps, more importantly, that the parents are acting in what they believe to be, and what is in fact likely to be, the best interests of that child, taking into his consideration the child's particular needs and care requirements.

50. In my opinion, if parental consent can be obtained then it would be sensible to record this is an appropriately drawn up document which stated clearly that the accommodation to which the parents were agreeing to place their child amounted to a deprivation of his liberty and that having considered it to be in the child's best interests, the parents, agree that, as an exercise their parental responsibility, they have consented to the child being placed in such accommodation; the nature of the restrictions to be imposed should be set out clearly, as should the parents' ability to withdraw their consent should they wish to.

Conclusion

51. It is hoped that this outline of the law as above will assist in understanding when action needs to be taken in respect of deprivation of liberty. It is important that all are mindful of any type of deprivation and this may include children who are detained because they pose a sexual and/or other risk to members of the public or themselves.

52. In my view, there are a number of aspects relating to the deprivation of children's liberty in which further developments can be expected. Such issues include the consent of the child and the assessment of competence, placement outside of the jurisdiction in circumstances wherein there is to be a deprivation of liberty, and the characterisation of the relevant comparative child within the application of the nuanced acid test.

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