Who can consent to a deprivation of liberty for children and young persons? - a practical guide

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Context

A person can be deprived of their liberty at any age, and in any place.

It is increasingly easier for practitioners to spot a deprivation of liberty when a person is over 18 – but perhaps not so simple when considering whether a child, or young person is deprived of their liberty. This article will look at children and young people who live in a variety of placement 'types' (eg, care homes, supported living accommodation, residential educational placements etc), and in the main, children and young persons with learning disabilities who require care plans to meet their needs.

A useful example of a care plan which gave rise to a deprivation of liberty is set out in the recent Judgment of Mr Darren Howe QC (sitting as a Recorder) in *T (A Child: Care Order: Beyond Parental Control: Deprivation of Liberty: Authority to Administer Medication)* [2017] EWFC B1 (5 January 2018) where authorisation was granted to deprive T of his liberty in a residential placement as:

' …. it is necessary, in order to keep T safe, to confine T to locked areas within X unit, to prevent him for leaving the buildings and to prevent him from leaving the grounds. I have seen a restraint log that details the limited occasions that it has been necessary to restrain T to prevent him causing harm to himself or to others' (para 32)

But when does the court need to authorise a deprivation of liberty? Can anyone else give consent to a deprivation of liberty on behalf of a child or young person?

The answer to this question begins by considering Article 5 ECHR. The key analysis is set out by the Strasbourg court in *Storck v Germany* (2005) 43 EHRR 96 (paragraphs 74, 89), repeated in *Stanev v Bulgaria* (2012) 55 EHRR 696 (paragraphs 117, 120) and summarised in the Supreme Court by Lady Hale in *Cheshire West* (paragraph 37) as follows:

'… what is the essential character of a deprivation of liberty? … three components can be derived from Storck …, confirmed in Stanev …, as follows: (a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state' (our emphasis)

As the law *currently* stands, there are a number of different ways in which parental responsibility can be used to provide valid consent to a deprivation of liberty for children and young persons. The court, therefore, may not always need to be involved in scrutinising care planning arrangements and authorising the same.

The following guidance is suggested with regards to who (and in what circumstances) a person can consent to a child or young persons deprivation of liberty - focusing on those aged between 10-25

Guidance

Children (10 - 16 years of age)

(1) A person with PR (*not* a Local Authority with PR) **can consent** to a confinement on behalf of a child who lacks *Gillick*[1] competence

(2) A social worker should not be *excluded* from assessing a child's competence to consent to their confinement, however evidence from a child and adolescent psychologist or (depending upon the nature of the child's difficulties) a child and adolescent psychiatrist may be more appropriate (*Re A-F (Children)* [2018] EWHC 138, the President, paragraph 53, departing from Keehan J in *A Local Authority v D, E and C* [2016] EWHC 3473 (Fam), paragraph 44)

(3) If valid consent to confinement is provided in respect of a child by a person with PR, there **can be no deprivation of liberty** and Article 5 ECHR is not engaged (and the child is not eligible for the safeguards guaranteed under Article 5)

[1] In the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 the court found that a child below 16 years of age will be competent to consent to medical treatment without parental or guardian consent if he or she *'reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring the decision'*.

(4) It must be considered whether the person with PR *is able* to exercise it *appropriately*, which will depend on the facts of the individual case. If a parents past exercise of PR has been seriously called into question, it may not be right or appropriate within the spirit of the conclusion of the Supreme Court in *P v Cheshire West & Chester Council* [2014] UKSC 19 to permit such a parent to consent (*Re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125, paragraphs 26-29, Keehan J)

The type of situation where this might be relevant is where the court is asked to authorise a deprivation of liberty of a child subject to a care order where the threshold criteria (per s.31(2) of the Children Act 1989) has been met and findings have been made (in the family court) against the childs parent(s) in relation to their ability to properly care for, or make decisions on behalf of their child

(5) It was queried by the Court of Appeal in *Re D (A Child)* [2017] EWCA Civ 1695 whether very young children met the threshold for confinement (i.e. may not meet the objective element of a DoL), however this point was not determined fully (see paragraph 39)

(6) Very recently (on 31 January 2018) the President, in *Re A-F (Children)* [2018] EWHC 138 (Fam) addressed the question of whether it was possible to identify a **minimum age** below which a child is unlikely to be 'confined' and hence deprived of their liberty (given the expectation that a comparable child of the same age would also likely be under continuous supervision and control and not free to leave)

(7) At paragraph 43 in *Re A-F*, the President provided a 'rule of thumb' as follows:

i) a child **aged 10**, even if under pretty constant supervision, **is unlikely** to be 'confined' for the purpose of *Storck* component (a);
ii) a child **aged 11,** if under constant supervision, **may**, in contrast be so 'confined', though the court should be astute to avoid coming too readily to such a conclusion;
iii) once a child who is under constant supervision has reached the **age of 12**, the court will **more readily** come to that conclusion.

That said, all must **depend upon the circumstances of the particular case**

(8) **If valid consent is absent**, any confinement which would amount to deprivation of liberty will need to be authorised by the state. For children, this will mean that a public authority should apply to the High Court for the exercise of its inherent jurisdiction (usually the Local Authority)

(9) Paragraphs 49 -51 of the Judgment of *Re A-F (Children)* [2018] EWHC 138 helpfully sets out the necessary procedure and evidence for an application under the inherent jurisdiction

Young persons (age 16-17 years old)

(1) A young person aged 16 and above must be assumed to have capacity unless it is established that they lack capacity (section 1(2) of the MCA 2005). As we know, the MCA 2005 applies to young people between the ages of 16 and 17 as well as adults

(2) If a young person lacks capacity, a person with PR (*not* a Local Authority with PR) **can consent** to their confinement on their behalf where it is within the scope of parental responsibility

(3) If valid consent is provided, there can be no deprivation of liberty and Article 5 ECHR is not engaged (and the young person is not eligible for the safeguards guaranteed under Article 5)

(4) It must be considered whether the person with PR *is able* to exercise it *appropriately;* which will depend on the facts of the individual case (as set out above)

(5) **If valid consent is absent**, any confinement which would amount to deprivation of liberty will need to be authorised by the state. For young persons between 16-17, this will mean that a public authority could either apply to the High Court (as above) for the exercise of its inherent jurisdiction or (perhaps more appropriately) to the Court of Protection[2] (as below)

(6) It is not possible for a deprivation of liberty of a 16-17 year old to be authorised pursuant to schedule A1 of the MCA 2005 by the Deprivation of Liberty Safeguards

Young persons (age 18-25[3])

(1) Young persons between 18-25 years of age will be assumed to have capacity unless it is established that they lack capacity (section 1(2) of the MCA 2005)

(2) PR ends once a child reaches majority[4] and authorisation for a deprivation of liberty of an incapacitated adult (age 18 and above) will depend on the *type* of accommodation they are placed in

(3) If the placement *is* a registered care home, this would require authorisation pursuant to the process set out in schedule A1 of the MCA 2005 and a standard authorisation ought to be

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[2] The MCA 2005 applies to children who are 16 years and over (see section 2(5)-(6) MCA 2005)

[3] This bracket has been suggested due to overlapping issues with the education law framework which in England include young persons to the age of 25. This is also now the position in Wales further to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 having recently received Royal Assent on 24 January 2018

[4] Section 3(1) of the Children Act 1989 explains the meaning of parental responsibility as *'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'* (our emphasis)

granted by the supervisory body for a maximum of 12 months; which would be subject to onward review thereafter

(4) If the placement *is not* a registered care home, authorisation for the deprivation of liberty would need to be made by way of application to the Court of Protection for authorisation in accordance with sections 4A(3) and 16(2)(a) of the MCA 2005 (known colloquially as a 'community DoLs')

(5) If there was full agreement that the placement was in the best interests of the 18-25 year old, authorisation could potentially be granted by the court (often on an administrative basis) in accordance with the streamlined procedure pursuant *to Re X and Ors (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X and Ors (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37 on Form COPDOL11

Emma Sutton and Jess Flanagan are experienced in representing young persons in complex cases in the Court and Protection and children and young persons in the High Court; including cases where the scope of a persons parental responsibility requires careful consideration