

The Application of Deprivation of Liberty Safeguards (DoLs) in Children's Services

Summary

This briefing is on the application of Deprivation of Liberty Safeguards (DoLs) in the care of children. It highlights a recent case which illuminates what a deprivation of liberty would be for a looked after child in residential or foster care and who and in what circumstances can they consent to a deprivation of liberty for a child. It makes clear that where a child is on an interim care order or care order a local authority cannot consent to a deprivation of liberty and that where a child is accommodated under s20 of the Children Act 1989 whether parents can consent will depend on the particular circumstances of the case. Where parents cannot consent to deprivation of liberty the local authority will have to seek leave from the high Court for the Court to exercise its inherent jurisdiction in order to lawfully deprive a child of their liberty.

Detail

On 19th November 2015 Community Care reported on a recent bulletin from a leading mental capacity law firm 39 Essex Chambers which followed the case of a 14 year old boy where a Judge authorised the deprivation of the child's liberty within the current placement using the inherent jurisdiction powers of the high court.

The bulletin from 39 Essex Chambers can be accessed at (http://www.39essex.com/content/wp-content/uploads/2015/11/MC-Newsletter-November-2015-HWDOL.pdf?utm_source=Newsletters&utm_campaign=c07a0c5aea-MCL+Nov+2015&utm_medium=email&utm_term=0_0dd23690b2-c07a0c5aea-47207585).

DoLs was introduced in April 2009 as part of the implementation of the Mental Capacity Act 2005 (MCA). The aim of DoLs and the related legislation and guidance is to ensure that there is better legal and administrative protection for all those who may for whatever reason lack capacity to consent to the care they are receiving including where they live and how they are cared for on a day to day basis. Prior to the MCA there was a lack of clarity about how the liberty and human rights of those lacking capacity to consent to their care arrangements, including where these restricted their movement and choices, should be protected. The bulk of people whom the act was intended to help had serious disabilities including those arising from dementia, learning disabilities and serious mental health problems.

At the time of the implementation of the DoLs provisions there was little consideration of whether and how the provisions might apply to children. A code of practice was issued for what was always going to be a complex and sensitive area of practice. Since implementation practice and case law has been developing. For adult services the implementation has become increasingly demanding and complex as case law has extended the people who need DoLs assessments and related legal processes.

A key judgment was in what is called the Cheshire West and Chester case which greatly expanded the scope of what deprivation of liberty meant. Baroness Hale said in her judgment in this case:

“If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage.”

The Supreme Court said that disabled people should not face a tougher standard for being deprived of their liberty than non-disabled people.

There have been extensive discussions and reviews of the implementation of DoLs and proposals made for reform but there is no consensus on the best way forward.

There has been limited discussion of DoLs and how it may apply to children. The case reported by Community Care makes clear that social workers and local authorities need to consider whether DoLs applies to children in care or cared for away from home in other settings.

The particular case concerned a 14 year old boy (AB) who was residing in a children’s home under an interim care order. He had previously been accommodated under s20 of the children act 1989. He had moderate to severe learning disability, Attention Deficit Hyperactivity Disorder, a statement of special educational needs and was under the care of child and adolescent mental health services. He was happy, settled and wished to remain in the children’s home but lacked capacity to make the decision.

His care regime provided for the following:

- There were three staff members on duty during the day, and two at night, for the three child residents;
- AB was not on one-to-one supervision within the unit and could be left unsupervised for short periods. But his behaviour plan stated: “Staff must be aware of where AB is at all times. AB should be checked regularly. Staff must be authorised to work alone with AB. AB must never be left alone with another resident.” He was under 15-minute observations.
- Took medication for ADHD under supervision;
- He was not allowed to leave the unit (e.g. to go to school) unaccompanied and was closely supervised when out of the unit;

- He was only taken on public transport if calm and settled, with a staff member sat beside or behind him;
- If he behaved negatively when out and, despite warnings, he continued, he would be immediately returned to the placement;
- If he were to leave the placement unaccompanied, staff would call social services and the police to assist with his return;
- The front door was locked at night and if he left his room, staff must redirect him back unless he wanted a drink or the toilet.

The judge agreed with the parties that, applying the criteria from the Cheshire West case, the circumstances amounted to continuous supervision and control and he was not free to leave. He was deprived of his liberty.

While this care plan is restrictive it is easy to imagine that other children with similar needs or who have one to one supervision because of the risk of absconding, self-harming behaviour or risk of exploitation may have similarly restrictive regimes and where their degree of consent is at least ambivalent or is not actively given or there is uncertainty about capacity to give consent.

Having agreed in this case that there was deprivation of liberty the case then focused on whether there was valid consent from those with parental responsibility. The full argument is set out in the briefing form Essex Chambers referenced above.

The core of the judgment is:

- (1) “Local authorities are under a duty to consider whether any children in need, or looked-after children, are, especially those in foster care or in a residential placement, subject to restrictions amounting to a deprivation of liberty;
- (2) The Cheshire West criteria must be rigorously applied to the individual circumstances of each case;
- (3) The comparison to be made is not with another child of the same age placed in foster care or in a residential home, but simply with another child of the same age;
- (4) A deprivation of liberty will be lawful if warranted under statute; for example, under s.25 of the Children Act 1989 or the Mental Health Act 1983 or under the remand provisions of LASPO 2012 or if a child has received a custodial sentence under the PCCSA 2000;
- (5) Where a child is not looked after, then an apparent deprivation of liberty may not in fact be a deprivation at all if it falls within the zone of parental responsibility exercised by his parents (see Re D). The exercise of parental responsibility may amount to a valid consent, with the consequence that the second limb of Cheshire West is not met. In those circumstances, the court will not need to make any declaration as to the lawfulness of the child's deprivation of liberty;
- (6) Where a child is a looked-after child, different considerations may apply, regardless of whether the parents consent to the deprivation of liberty;
- (7) Where a child is the subject of an interim care order or a care order, it is extremely unlikely that a parent could consent to what would otherwise amount to a deprivation of liberty. In those circumstances, a local authority cannot consent to a deprivation of liberty;

- (8) The local authority must first consider whether s.25 of the Children Act is applicable or appropriate in the circumstances of the individual case. This will require an analysis of:
- (1) Whether any of the regulations disapply s.25;
 - (2) Whether the intended placement is accommodation provided for the purposes of restricting liberty and, thus, secure accommodation within s.25; and
 - (3) Whether the test set out in s.25.1(a) or (b) is met.
- (9) If it is not, then the s.100(4) leave hurdle is likely to be crossed on the basis that any unlawful deprivation of liberty is likely to constitute significant harm;
- (10) Irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under s.25 or the inherent jurisdiction, the local authority should cease to impose such deprivation as soon as (1) the s.25 criteria are not met, or (2) the reasons justifying the deprivation of liberty no longer subsist. Authorisation is permissive and not prescriptive.”

What this amounts to is that parents can give consent for deprivation of liberty if it falls within the zone of parental responsibility. Deprivation of liberty can also be lawful if warranted under statute i.e. s.25 of the children act, secure accommodation provisions.

However where a child is looked after then different considerations apply even where the parents' consent to deprivation of liberty. Their consent may be adequate where the child is accommodated under s 20 but where the child is the subject of an interim care order or care order it is unlikely a parent could consent and nor can the local authority. This means that where there is a deprivation of liberty the local authority must either use a statutory route, not likely to be appropriate or to meet the secure accommodation criteria in the kind of case described above, or seek leave of the high court to invoke its inherent jurisdiction to make an order for deprivation of the child's liberty as it did in the case referred to above.

In conclusion this judgment makes clear that if a child or young person is under an interim care order or care order and satisfies the test for deprivation of liberty i.e. the restrictions on the child are greater than those appropriate for a child of the same age and relative maturity who does not have a disability. This is a difficult and nuanced judgement about what are reasonable and age appropriate restrictions.

The judgment also makes clear that local authorities are under a duty to consider whether any children in need or looked after are subject to restrictions amounting to deprivation of liberty. We can expect further developments in case law.

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