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CHAMBERS

What counts and what will sway the court in Deprivation of Liberty applications following the spate of recent cases concerning young people?

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What's the problem?

Lack of secure accommodation

Recent observations of Nuffield Family Justice Observatory on applications to the new national deprivation of liberty court pilot (from July and August 2022)

<https://www.nuffieldfjo.org.uk/resource/legal-outcomes-of-cases-at-the-national-deprivation-of-liberty-court>

Consent to accommodation, the use of the inherent jurisdiction to place young persons in unregulated homes and the difficult interface with young persons' Article 5 rights vs. welfare imperative for *highly vulnerable young people*

What is DOLS?

Deprivation Of Liberty Safeguards: is not a term found in family law statute. It arises from the Mental Capacity Act 2005: see section 21(a) and Schedule A1. However DOLS is used in a family context to encapsulate the steps the Court must take to ensure that a deprivation of liberty is lawful: particularly in the context of young persons of 16 or 17 years old.

The relevance to family lawyers arises from the incorporation of Article 5 ECHR into domestic law that requires the following

(5) 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...

(e) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

5(4). Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The components of a deprivation of liberty are threefold:

- (a) the objective component of confinement in a particular restricted place for a not negligible length of time;
- (b) the subjective element of lack of valid consent; and
- (c) the attribution of responsibility to the state: *Storck*, [74, 79], *Cheshire West*, [37], *Re. D*, [1].

The deprivation of liberty must be for one of the limited purposes prescribed by Article 5(1), materially (in the case of incapacitated adults) Article 5(1)(e) ('the lawful detention of persons ... of unsound mind'), and in accordance with a procedure attended by adequate safeguards in terms of criteria, length and review of detention, with a right of review by a court as required by Article 5(4).

In *Re A-F (Children)* [\[2019\] Fam 45](#), Sir James Munby P at [33] summarised the principle thus:

"...whether a state of affairs which satisfies the "acid test" amounts to a "confinement" for the purposes of *Storck component (a)* has to be determined by comparing the restrictions to which the child in question is subject with the restrictions which would apply to a child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability".

'The test is a matter of law; but whether an individual child does or does not satisfy the test is a matter of fact. In determining the question of fact Sir James Munby P at [43] advanced an indicative rule-of-thumb:

- "i) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined" for the purpose of *Storck component*
- 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 and upon the identification by the judge in the particular case of the attributes of the relevant comparator as described by Lord Kerr."

Legal status of accommodating children or young persons: options

A number of routes:

- s.20 Children Act up to age 21 years old
- Care orders s31: significant harm interim or final (until 18). S.22A and s.22C set out basis of accommodation
- S.25 secure accommodation order: must be approved accommodation
- Inherent jurisdiction

Leading Cases: Re T (A child) [2021] UKSC 35

“...well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation. These unfortunate children, who have been traumatised in so many ways, are frequently a major risk to themselves and to others. Those risks are of the gravest kind, and include risks to life, risks of grievous injuries, or risks of very serious damage to property. This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child’s liberty in a children’s home which has not been registered, there being no other available or suitable accommodation.” [166]

1. children who would have been placed in a secure children’s home if a place was available [the ‘Lord Stephens problem’] and

2. those who met the criteria but whose needs would be better met in an alternative placement [the ‘President’s problem’].

- Decided that the exercise of the High Court's inherent jurisdiction to authorise a child's placement in unregistered secure accommodation is not prohibited by the Children Act 1989 s.100(2)(d), does not cut across the statutory scheme in relation to secure accommodation contained in s.25, and would not constitute a breach of Article 5.
- The focus of an authorisation is on the child's welfare and safety, not on the potential commission of an offence under section 11 of the Care Standards Act 2000.
- The court authorises the placement of a child in an unregistered children's home or other setting but does not require the local authority to place the child there.
- Compliance with President's guidance <https://www.judiciary.uk/guidance-and-resources/addendum-to-practice-guidance-placements-in-unregistered-childrens-homes-in-england-or-unregistered-care-home-services-in-wales/> is a MUST

- a. The applicant must make enquiries with either Ofsted or the Care Inspectorate Wales (“CIW”) as to whether the home is registered. That process of enquiry means that either Ofsted or CIW are informed as to whether a home is being carried on or managed without registration.
- b. The applicant should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child
- c. The court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.
- d. The court will need to be satisfied that steps are being taken to apply for the necessary registration
- e. The court will wish to assure itself that the provider of the service has confirmed that it can meet the needs of the child.
- f. The court will need to be informed by the local authority of the steps the local authority is taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.
- g. Where an application for registration has been submitted to Ofsted or CIW, the court should be made aware of the exact status of that application.

Consent Issues

There is no scope for PR to be exercised to consent/approve DOL: *Re D (A Child)* [2019] where DOL (without authorisation) would be a fundamental violation of right of child.

If *Gillick competent* and young person consents, there *may* be validly consent and therefore no DOL. But caution must be exercised [see *LA v. D and others* [2016] EWCA].

Under 16 parental consent may be valid [*D (A Child) (Deprivation of Liberty)* [2015] EWHC 922. But caution over the terms of the DOL (is there medical treatment that is contingent on the DOLS for example that falls outside the exercise of reasonable scope of PR?)

16+ and no consent, no-one can provide consent on their behalf

Procedural safeguards also key [see §153]:

(a) The child must be made a party;

b) A Children's Guardian must be appointed;

c) There must be regular reviews by the court. There is no indication of how regular the reviews should be. It will depend on the facts of the case and will vary from a few days, to weeks or months. The court will need to be satisfied about the arrangements when considering making orders of 3 months or more

d) The court must undertake "considerable exploration of the circumstances to ensure that the proposal is appropriate" [155].

The court must be satisfied that the child is likely to suffer significant harm if the inherent jurisdiction is not exercised [140]. Lady Black says at [155] "...it [the court] will not give the LA the authorisation that they seek without considerable explanation of the circumstances, to ensure that the proposal is appropriate".

What not considered by Re T was the interaction between s.31(3) Children Act 1989 and the inherent jurisdiction. The basic point is that there is no inherent jurisdiction if it 'cuts across' a statutory provision [see s.100(c) and 100(d) Children Act.

The question is therefore this: Does the statutory prohibition in s 31(3) impliedly exclude the operation of the inherent jurisdiction to deprive such a child of their liberty, at least one who has mental capacity and is *Gillick* competent?

[Section 31(3) prohibits the making of a care order or supervision order for a child of 17 in the following terms: '(3) No care order or supervision order may be made with respect to a child who has reached the age of seventeen (or sixteen, in the case of a child who is married).']

Answer is NO: see *EBY (A Child) (Deprivation of Liberty Order: Jurisdiction) (17-year-old)* [2023] EWHC 2494 (Fam) (09 October 2023)

Derby CC v. CK [Compliance] [2021] EWHC 2931

1. An unwillingness or inability to comply with the terms of the President's Practice Guidance does not act per se to oust the inherent jurisdiction of the High Court to authorise the deprivation of a child's liberty in an unregistered placement confirmed in Re T. [62]
2. Compliance with the Practice Guidance is central to the safe deployment of that jurisdiction and in a manner consistent with the imperatives of Art 5
3. An unwillingness or inability on the part of a placement to comply with the terms of the President's Practice Guidance is a factor that informs the overall best interests evaluation on an application under the inherent jurisdiction
4. Each case will turn on its own facts
5. The court should not ordinarily countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply for registration.

Notwithstanding the coming in to force of the **Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021** amending the Care Planning, Placement and Case Review (England) Regulations 2010 (which make it unlawful for a Local Authority to place a looked after child in accommodation other than that which is expressly stated in Children Act 1989, s 22C(6)(a) to (c) ('CA 1989') and regulation 27A, courts can continue to authorise the deprivation of liberty of children placed outside of the scheme, under the court's inherent jurisdiction.

[A Mother v. Derby City Council v. Anor [2021] EWCA Civ 1867]

When it does not happen

Nottinghamshire County Council v LH (A child (No. 1) [2021] EWHC 2584

Poole J:

The court was invited by the applicant local authority to find that it was in the best interests of a 12 year old girl, who did not have a psychiatric condition requiring hospitalisation, to be deprived of her liberty on an acute psychiatric admission unit. Judge refused at first hearing, at second hearing approved bespoke placement.

A County Council v. Mother and Ors [2021] EWHC 3303

Holman J: not willing to 'rubber stamp' 14 year old's confinement to an acute paediatric ward to give placement a veneer of lawfulness.

Wigan BC v. Y [2021] EWHC 1982

McDonald J: refused approval of detention in a ward: violent and self harming, chemical restraint.

Practical Steps

Re A-F No 2 [2018] EWHC 2129

If likely to be an issue on issue of care proceedings, s.9 Judge in Family Court. No need for transfer to the High Court Family Division. S.9 can sit with 'two hats on'.

Evidence consistent with Black LJ's comments necessary: detailed evidence of necessity and proportionality ; the need to satisfy the s.25 CA 1989 criteria (even if there is no approved placement to go to). Must also address: the regime and feature of confinement.

Targeted position statements going to those features identified above.

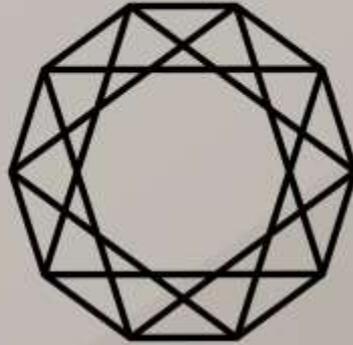
If granted; renewals at discretion of Judge but max length 12 months and renewals usually (depending on facts) around 3 months

Note interface of COP when child is 16+. Transfer provisions



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