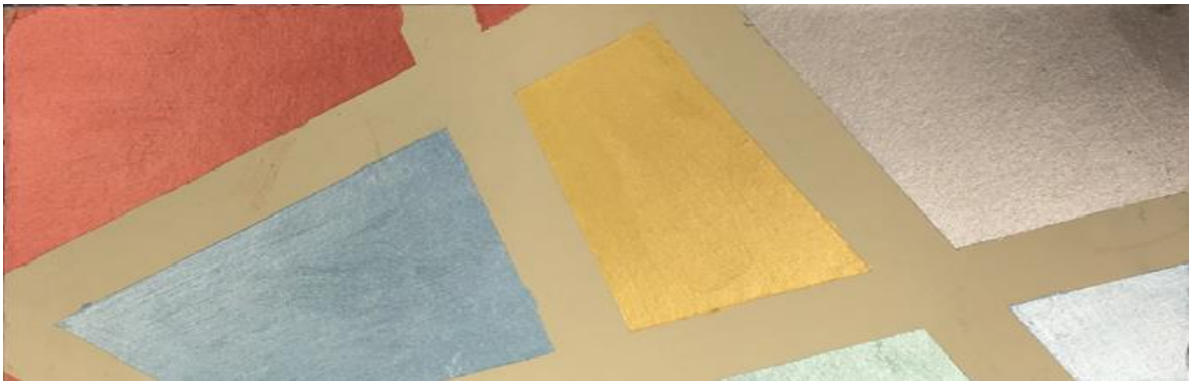
GUIDANCE NOTE: DEPRIVATION OF LIBERTY AND THOSE UNDER 18

February 2022



A: Introduction

1. The Children's Commissioner for England has identified a growing number of "locked up" children who do not appear in official statistics whilst an ongoing national shortage of appropriate secure accommodation and registered children's homes has resulted in some High Court judges refusing to authorise wholly inappropriate deprivations of liberty in hospitals.

2. This guidance is produced to help practitioners navigate the complex waters relating to deprivation of liberty relating to those under 18, complexity arising both from the substantive law (i.e. how does the concept of deprivation of liberty apply to those under 18?) and procedural law (i.e. how should deprivations of liberty be authorised?).

3. This guidance does not address issues relating to youth justice[1] or the use of the Mental Health Act 1983. Its focus is on welfare arrangements which deprive children and young people of their liberty. The term "child" is used to refer to someone under the age of 16, whilst a "young person" refers to a 16- or 17-year-old. The distinction is drawn to illustrate case law developments.

[1] In criminal law there are 3 types of secure accommodation: (a) secure children's homes (13 in England) which accommodate either for youth justice or welfare reasons; (b) secure training centres (2 in England for aged 12-17); and (c) young offenders institutions (boys aged 15-21).

Editors
Neil Allen
Alex Ruck Keene QC (Hon)
Arianna Kelly
Steve Broach
Victoria Butler-Cole QC

The picture at the top, "*Colourful*," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

B: General Principles of, and Responsibilities for, Decision-making[2]

(a) Children (under 16)

4. The decision-making approach is governed at common law by *Gillick* competence, derived from Lord Fraser's judgment in *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112. Such competence to make decisions is intended to reflect a child's increasing development to maturity. The test is whether the child has sufficient understanding and intelligence to enable them fully to understand what is involved in a proposed intervention to consent to it. The necessary degree of a child's understanding will vary accordingly to the particular matter and is thereby decision- and child-specific.

5. If a child is competent to decide, their consent provides the lawful authority to intervene. If a competent child refuses, alternative statutory authority (such as the Mental Health Act 1983) or an application to the Family Division of the High Court to invoke the inherent jurisdiction may need to be considered, depending in part on whether the decision is within the scope of parental authority.

6. If a child lacks sufficient understanding and intelligence to enable them fully to understand what is involved, those providing care look to the parents for the decision as they usually hold parental responsibility.[4] The scope of this is determined by whether this is a decision a parent should reasonably be expected to make: the more the intervention is against the child's will, the less it is reasonable to expect a parent to decide whether it is in the child's best interests. Sometimes a decision falls within the scope of parental responsibility but the parent's consent is invalid for other reasons (eg parents are distracted from their child's best interests due to acrimony, or a parent lacks decision-making capacity under the MCA 2005). According to the Mental Health Act Code of Practice (2015) para 19.48:

> *"In determining the limits of parental responsibility, decision-makers must carefully consider and balance: (i) the child's right to liberty under article 5, which should be informed by article 37 of the UNCRC, (ii) the parent's right to respect for the right to family life under article 8, which includes the concept of parental responsibility for the care and custody of minor children, and (iii) the child's right to autonomy which is also protected under article 8. Decision makers should seek their own legal advice in respect of cases before them."*

7. If the decision is within the scope of parental responsibility and one or both parents consent, that provides the necessary lawful authority to intervene. If they both refuse, or even if they consent but the decision is outside the scope of parental responsibility, alternative statutory authority (such as the Mental Health Act 1983) or an application to the Family Division of the High Court to invoke the inherent jurisdiction will be required for any deprivation of liberty to be lawful.

---

[2] See also Chapter 12 of the MCA Code of Practice and Chapter 19 of the MHA Code of Practice (2015). Further commentary is available in chapter 7 of Disabled Children: A Legal Handbook (3rd ed, Legal Action Group, 2021), available to download here.

[4] Meaning 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: see Children Act 1989 section 3. A local authority can be awarded shared parental responsibility by virtue of a care order under section 31.

(b) Young persons (16- and 17-year-olds)

8. The Mental Capacity Act 2005 generally applies to those aged 16 and over. Once a person turns 16, therefore, they are assumed to have capacity to decide for themselves. *Gillick* competence ceases to be relevant, at least insofar as it relates to questions of medical treatment[5] and deprivation of liberty.

9. If a young person refuses care or treatment with capacity, it is (at best) unwise to rely upon the consent of those with parental responsibility. Alternative statutory authority (such as the Mental Health Act 1983) or an application to the Family Division of the High Court to invoke the inherent jurisdiction is likely to be needed. For example, in *Re P (A Child)* [2014] EWHC 1650 (Fam), a capacitous 17-year-old decided to refuse urgent life-saving treatment following a drug overdose. Her mother consented but the Trust was reluctant to rely upon it. The inherent jurisdiction was invoked, and the court authorised the hospital to provide the treatment.

10. In *Re D (A Child)* [2019] UKSC 42, the Supreme Court held that there is no scope for the operation of parental responsibility to authorise what would otherwise be a violation of a fundamental human right of a child, see [49]. As such, parents of 16- and 17-year-olds cannot give consent to what would otherwise be a deprivation of liberty for the young person, where the young person lacks capacity to give consent themselves. This important case is discussed further below.

11. If a young person lacks capacity to make the relevant decision, there is then an interface between the MCA and the common law. Under the MCA, the best interests decision-maker (who may not be the parent) is given a defence to liability, whereas at common law those with parental responsibility can make the decision if it is within the scope. In the event of a dispute, the matter would need to go to either the Court of Protection or to the Family Division of the High Court.[6] Either way, and subject to issues of confidentiality, those with parental responsibility should generally be consulted about best interests.

(c) Adults (18 and over)

12. Certain aspects of the MCA only apply to adults. These are (1) the Deprivation of Liberty Safeguards in MCA Schedules A1-1A ('DoLS'); (2) Lasting Powers of Attorney; (3) advance decisions to refuse medical treatment; and (4) statutory wills.

C: Provision of accommodation and care for looked after children

(a) "Voluntary" Accommodation (s.20 Children Act 1989)

13. Where necessary, parents can arrange with the local authority for their child to be accommodated under section 20 of the Children Act 1989 which requires local authorities to provide accommodation for certain "children in need". Whilst there is a duty on the local authority to do so

[5] See *NHS Trust v X (No 2)* [2021] EWHC 65 (Fam) at paragraph 57.
[6] According to the MCA Code at para 12.24: "If a case might require an ongoing order (because the young person is likely to still lack capacity when they are 18), it may be more appropriate for the Court of Protection to hear the case. For one-off cases not involving property or finances, the Family Division may be more appropriate."

up to age 18 in certain circumstances (for example, where the parent is prevented from providing the child with suitable accommodation or care), there is a power to do so up to age 21[7]. There is no court involvement. The nature of this arrangement ranges from very short periods of respite to long-term care in residential, fostering, or kinship placements.

14. If accommodation is provided for more than 24 hours with the parents' agreement (or the young person's consent if aged 16 or over), then the individual is considered to be a "looked after child" for the purposes of section 22 of the Children Act 1989.[8] There is a modified form of "looked after" status for those children who receive relatively short periods of accommodation in a single setting, often described as "short break care" or previously "respite care".[9] However, it is important to note that the local authority does not acquire parental responsibility under section 20: this remains unaffected and with, typically, the parents.

15. This form of accommodation for children in need is often described as "voluntary" accommodation, in the sense that it is organised with the consent of those with parental responsibility (as opposed to that of the child), rather than being required by the State. If the parent lacks capacity to make the decision, the agreement is invalid and any removal unlawful.[10] Section 20(7) also prevents the local authority accommodating a child if someone with parental responsibility who is willing and able to provide it objects. Importantly, section 20(8) states that those with parental responsibility may at any time remove the child. The nature of this legal arrangement was aptly described by Jay J in *Bedford v Bedfordshire County Council* [2013] EWHC 1717 at para.15:

> *"It is important to recognise that the s.20 regime depends on parental consent and is non-coercive. Although a home may well choose to exercise powers at common law to restrain its inhabitants for self-protection or the protection of others, there is no power to compel children to remain there or to force their return in the event of their absconding."*

16. Young persons can decide to admit themselves into local authority accommodation, even against the wishes of their parents: section 20(11). Although there is no express right to discharge themselves, in the absence of an emergency protection order (section 44) or a care order (section 31), a local authority has no statutory power to keep them there (section 20(8)).[11]

(b) Care orders (Children Act 1989 section 31)

17. A care order can be made where the court is satisfied that the child "*is suffering, or is likely to suffer, significant harm and that the harm, or likelihood of harm, is attributable to ... the care given to the*

[7] See section 20(4)-(6) which requires the local authority to first ascertain the individual's wishes and feelings and give "due consideration" to them.
[8] Other "looked after" children include those under a care order, emergency protection order, and those on remand or under supervision with a residence requirement to live in local authority accommodation: see Children Act 1989 sections 21-22.
[9] See regulation 48 of the Care Planning, Placement and Case Review (England) Regulations 2010
[10] See *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam).
[11] Arguably there is a short power to protect the child from harm (such as withholding him from a violent or drunken parent) by virtue of section 3(5), which empowers those without parental responsibility to do "what is reasonable in all the circumstances for the purpose of safeguarding or promoting the child's welfare" (Hansard, H.L. Vol. 503, col. 1412; Vol. 505, col. 370). But this is only likely to be justified for the shortest of periods to enable the local authority to assess the situation and interview the parties.

child, or likely to be given … if the order were not made, not being what it would be reasonable to expect a parent to give … or the child being beyond parental control". The order can be interim (up to 8 weeks in the first instance under section 38 and then renewable) to investigate the child's home circumstances, or final (until they turn 18). The family courts cannot make a care order once a child has reached 17: section 31(3) of the Children Act 1989.

18. On the making of an interim care order, the child becomes a looked after child pursuant to section 22(1)(a) of the Children Act 1989 and section 22(3)(a) places a general duty on a local authority looking after any child to safeguard and promote that child's welfare. Section 22A states that it is a local authority's duty to provide accommodation to a child in its care and section 22C sets out the basis on which such accommodation is to be provided by a local authority.

19. The orders available to the family courts can be of a private or public nature. An example of a private law order would be a special guardianship or residence order for a child to reside with a relative or friend. A public law order, for example, would be a care or supervision order granted to a local authority. Or there could be a combination of the two.

20. The effect of a care order is to designate a local authority with a duty to receive and keep the child into its care while the order remains in force. The result is that parental responsibility is shared between the local authority and the parents, so negotiation and agreement is required, although the local authority can ultimately remove the natural parent or parents' parental responsibility. The family court thereby provides the gateway for a child into care: it has no continuing role as it is for the local authority to then decide how the child should be cared for: *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] 2 AC 291, [28].

(c) Inherent jurisdiction of the High Court

21. This jurisdiction can be exercised in relation to all those under 18 (and in certain circumstances for adults). The High Court's powers are limitless unless constrained by case law or statute (FPR 2010, PD12D, para 1.1) and extend beyond those of a natural parent. It can, for example, override the competent refusal of a child or young person or the capacitous decisions of those with parental responsibility: *Re W (A Minor) (Consent to Medical Treatment)* [1992] 4 All ER 627; *An NHS Trust v X (No.2)* [2021] EWHC 65 (Fam). More pertinently, as explained below, the inherent jurisdiction can be used to authorise a child or young person's deprivation of liberty.

(d) Wardship

22. Making individuals wards of court should not be done unless the issues concerning them cannot be resolved under the Children Act 1989. A local authority's power to bring proceedings is accordingly limited by section 100 of the 1989 Act and wardship ends on the making of a care order (section 91(4)). In contrast to care orders, the distinguishing features of wardship are that (a) custody of the ward is vested in the court; and (b) although day-to-day care and control of the ward is given to an individual or local authority, no important step can be taken without the court's prior consent.

D: Is Article 5 engaged?

23. A person is deprived of liberty for the purposes of Article 5 ECHR where three elements are satisfied: *P v Cheshire West and Chester Council* [2014] UKSC 19. First, the 'objective element' is that the person is confined for more than a negligible period. Second, the 'subjective element' is that there is no valid consent to that confinement. And the third is that the State is somehow responsible, either directly or indirectly.

(a) Confinement: the objective element

24. The youngest of children remain in the custody of those with parental responsibility but that is universal and not the business of Article 5. As children mature, the "dwindling right" of parental responsibility tends to fade from that right of control to, as they approach adulthood, "little more than advice".[12] The consequence of this is that a nuanced comparator test is used to determine whether a child is confined for Article 5 purposes.[13] Their arrangements are compared with the notional circumstances of the typical child of the same age, station, familial background and relative maturity who is free from disability. The greater the divergence, the more likely those arrangements amount to confinement. For examples at various ages, see Annex A.

25. The fact that the arrangements have been made in the person's welfare best interests are not relevant when determining whether they amount to confinement. Similarly, whether the person enjoys the arrangements is also irrelevant: "A gilded cage is still a cage".

(b) No valid consent: the subjective element

(i) Interim/final care orders and confinement

26. If a child or young person is confined by virtue of the care arrangements and is on a care order, unless they validly consent (see below), they are deprived of liberty as no consent by others can be given to such confinement. Accordingly, authorisation from the High Court will be required. The reasons were explained in *A Local Authority v D* [2015] EWHC 3125 (Fam):

> *"In taking a child into care and instituting care proceedings, the local authority is acting as an organ of the state. To permit a local authority in such circumstances to consent to the deprivation of liberty of a child would (1) breach Article 5 of the Convention, which provides "no one should be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law", (2) would not afford the "proper safeguards which will secure the legal justifications for the constraints 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…*
>
> *For these purposes, the local authority child care review, chaired by an independent reviewing officer, would not, in my judgment, afford the required safeguards and checks, sufficiently independent of the state."*

(ii) Competent consent of the confined child

27. If a *Gillick* competent child agrees to the arrangements which amount to confinement, there may

[12] *Hewer v Bryant* [1970] 1 QB 357.
[13] *Cheshire West* [77]-[79].

be valid consent (and therefore no deprivation of liberty) but caution needs to be adopted. In *A Local Authority v D and others* [2016] EWHC 3473 (Fam) a 15-year-old was *Gillick* competent and could consent to the arrangements which confined him. He would seek to push the boundaries of the restrictions and object/complain about some elements of them, and occasionally breach house rules. But it was held that he could and did in fact consent to confinement and so Article 5 was not engaged.

28. In determining whether to make an order under the inherent jurisdiction, the child's wishes and feelings attract respect but it is too simplistic to state that the High Court has no role if the child provides valid consent. That consent may be insecure. Any consent therefore forms part of the court's evaluation as to whether an order should be made: *Re T (A child)* [2021] UKSC 35.

(iii) Consent of the parent(s) for a confined child

29. For those under 16 whose arrangements amount to confinement, the parent(s) can provide consent if that is an appropriate exercise of parental responsibility. This would mean that no deprivation of liberty arises. For example, in *D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), a 15-year-old was confined to a psychiatric hospital unit but was not deprived of liberty because his parents could consent to the arrangements. Keehan J held:

> *"57…[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."*

30. In *Re Z (A child: deprivation of liberty: transition plan)* [2020] EWHC 3038 (Fam), a 14 year old boy with autism and PDA traits move to a residential school where he was confined. But no deprivation of liberty arose because his parents consented to those arrangements. The High Court was instead invited to authorise the transition plan which foresaw Z being deprived of his liberty during the journey to school and being subject to both physical restraint and chemical restraint by means of medication. Presumably, such circumstances were felt to go beyond the scope of parental responsibility which is why judicial authorisation was required.

(iv) Young persons (16–17-year-olds)

31. If a young person cannot or does not consent to the confinement, no-one (including parents) can provide such consent on their behalf. It seems to have been assumed by the Supreme Court in *Re D* [2019] UKSC 42 that the test for deciding whether a young person can consent is whether they have capacity to do so, applying the MCA. Accordingly, a deprivation of liberty arises if the other limbs of the test are satisfied and a legal procedure to seek authorisation will be required. The reasons were explained in *Re D*:

> *"49.* [It is] *not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and*

indeed everyone else involved, had D's best interests *at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by article 5. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child…"*

(c) State responsibility

32. Human rights are about the relationship between individuals and the State. The confinement of a child or young person can be attributable to the State either directly or indirectly. Direct responsibility arises where the State is actively involved in making and funding the arrangements. It also arises where, for example, a local authority has assumed statutory responsibilities for a looked after child or where there is a care order, or the child is a ward of court[14]. Indirect responsibility arises where the State knows or ought to know that someone is confined without valid consent and reflects the positive obligation on the State to protect a person from interferences with liberty carried out by private persons.[15]

E: Authorising deprivations of liberty

33. At the moment, pending the coming into force of the Liberty Protection Safeguards contained in the Mental (Capacity) Amendment Act 2019, the following civil[16] routes can be used to authorise the deprivation of liberty of a child or young person:

- Child: Mental Health Act 1983, secure accommodation order under the Children Act 1989 or an order under the inherent jurisdiction of the High Court. This guidance note does not address admission under the MHA 1983. Secure accommodation orders and inherent jurisdiction orders are addressed below.

- Young person: Mental Health Act 1983, secure accommodation order under the Children Act 1989 (in certain circumstances detailed below), an order under the inherent jurisdiction of the High Court or, if the young person lacks capacity to make the relevant decisions applying the MCA 2005, order made by the Court of Protection. In due course, LPS will apply to provide an administrative route to authorise deprivations of liberty of young people lacking capacity to consent to their confinement for the purposes of enabling care and treatment.

34. Substantively, there are two possible bases under which deprivation of liberty could be justified for purposes of the ECHR in the case of a child or young person:

    a. Article 5(1)(d), which provides that someone under 18 can be deprived of liberty for the purposes of educational supervision. The High Court may therefore authorise the deprivation

[14] For example, see *A London Borough v X, Y and Z* [2019] EWHC B16 (Fam) where a 17-year-old was made a ward of court so court retained control over living arrangements, despite the person living in family home and being cared for by family.
[15] See *Re D* [2019] UKSC 42 at [43]; "it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this…".
[16] Routes under the criminal justice system, for example remand under section 23 of the Children and Young Persons Act 1969, fall outside the scope of this guidance.

of a child's liberty if such an order is in the child's best interests.

b. Article 5(1)(e), which provides that it is lawful a person of their liberty on the grounds of "unsound mind."

35. Whilst both the High Court and Court of Protection are governed by the test of whether the deprivation of liberty is in the best interests of the respective child or young person,[17] it is necessary to be clear as to whether the deprivation of liberty is justified on the basis of Article 5(1)(d) or (e). It is unfortunate in this regard that the template orders originally proposed by Sir James Munby at the end of the judgment in *Re A-F No. 2* [2018] EWHC 2129 and subsequently adopted (see further below) do not spell this out.

36. It should be noted that the First-tier Tribunal (Special Educational Needs and Disability), which may make an order requiring a residential special school to be named in section I of a child's EHC Plan where it is obvious that the child will be deprived of his liberty, is not a body which can authorise the resulting deprivation. Orders of the Tribunal of this kind are permissive rather than compulsory, in that the parents are not obliged to send their child to the school ordered if they make alternative suitable arrangements.[18] If the child does attend the school, it is the school (which generally has a duty to admit[19]) and the local authority (which has a duty to secure the provision in section F of the Plan[20]) which must ensure that any deprivation of liberty is authorised, using the appropriate procedure as summarised above and described in more detail below.

(a) Secure Accommodation Orders

37. Section 25 of the Children Act 1989[21] provides that the family courts can make a secure accommodation order, the effect of which is to deprive the child of liberty. It is accepted that this procedure satisfies the requirements of Article 5(1)(d): *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 2 All ER 719; *A County Council v B* [2013] EWHC 4655 (Fam). The Family Court may not authorise a child[22] looked after by a local authority to be placed in secure accommodation unless it appears that:

(a) he has a history of absconding and is likely to abscond from any other description of accommodation; and if he absconds, he is likely to suffer significant harm; AND/OR

(b) if he is kept in any other description of accommodation, he is likely to injure himself or other persons.

38. The child's welfare is a relevant but not paramount consideration and the requirements in section 1 of the Children Act 1989 are not applicable: *Re M (A Minor) (Secure Accommodation Order)* [1995] 3 All ER 407.

[17] In the case of the High Court, the common law conception of best interests, in the case of the Court of Protection, the statutory test under s.4 MCA 2005.
[18] See *X County Council v DW* [2005] EHHC 162 (Fam).
[19] Section 43 of the Children and Families Act 2014.
[20] Section 42 of the Children and Families Act 2014.
[21] NB section 119 of the Social Services and Well-being (Wales) Act 2014.
[22] Where the child is under 13, permission is also required from the Secretary of State.

39. Whether accommodation is secure is a question of fact. It depends upon whether its purpose is to deprive liberty.[23] It is possible for accommodation not to have been designed for the purpose of depriving liberty but nonetheless have it as its primary purpose: *Re T (A Child)* [2021] UKSC 35. But a secure accommodation order cannot be lawfully made unless the accommodation has been approved as such by the Secretary of State. There are three types: young offender institutions, secure training centres, and secure children's homes. For children under 13 years old, the Secretary of State must give approval to the placement (regulation 4, CSAR 1991). A 16+ year old subject to the Children Act 1989 s.20(5) cannot be placed in secure accommodation unless an order was made before that age: (*Re G (Secure Accommodation)* [2000] 2 FLR 259). For children between 13 and 18 years old the family courts can authorise an initial maximum period of 3 months, after which on further application the court may authorise a period of 6 months at any one time.[24]

40. There is a shortage of registered secure accommodation. As a result, applications are being made under the inherent jurisdiction to authorise deprivations of liberty in unregistered secure children's homes and in other arrangements. Those carrying on or managing an unregistered children's home commit a criminal offence (s.11 Care Standards Act 2000) where a child or young person is placed therein. Moreover, the Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 are intended to ensure that looked after children under the age of 16 are only placed in children's homes or foster care.

(b) Inherent jurisdiction of the High Court (Family Division)

41. The Supreme Court has 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: *Re T (A Child)* [2021] UKSC 35. 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.[25] The court does not authorise the commission of any criminal offence or grant immunity from prosecution. It will be aware that an offence may be committed, but it does not determine whether an offence will be committed and whether there is an available defence. That is the role of the criminal justice system.

42. The High Court has held, notwithstanding the coming into force of the Care Planning, Placement

[23] The Children Act 1989 and relevant case law refer to 'restrict' liberty but here we use 'deprive' to reflect the Article 5 ECHR distinction.

[24] See regulations 11 and 12 of the Children (Secure Accommodation) Regulations 1991.

[25] See *Birmingham City Council v R, S & T* [2021] EWHC 2556 (Fam), in which Lieven J also made observations about a threatened prosecution by Ofsted of a placement where the 16 year old had been for a consider period of time. Lieven J observed (at [27]) that she would not be "not be making an order to authorise the deprivation of T's liberty at the placement for 4 weeks if I understood Ofsted's concerns to be around the quality of the care provided and T's safety. However I have very limited information about Ofsted's position and think therefore it is of the greatest importance that Ofsted let the court and BCC know their position as to any prosecution and why it was threatening prosecution against NFL. I hope if Ofsted's concerns were not about the quality of care but were rather about the principle of registration then this judgment will assist in explaining to them why I have continued to authorise the DOL."

and Case Review (England) (Amendment) Regulations 2021, orders can still be made under the inherent jurisdiction authorising the deprivation of liberty of an under 16-year-old in unregistered accommodation. However, this is subject always to the rigorous application of the President's Practice Guidance. If the care provider cannot or will not comply with that guidance, the High Court should not ordinarily countenance the exercise of its inherent jurisdiction.[26]

(i) When to apply

43. An application should be made where the circumstances in which the child/young person is, or will be, living constitute, at least *arguably* (taking a realistic rather than a fanciful view), a deprivation of liberty: *Re A-F*; *CGM v Luton Council* [2021] EWHC 709 (Admin). A child or young person whose arrangements amount to confinement will therefore require the safeguards of the High Court on educational or welfare grounds in any of the following circumstances:

    (a) In the case of a child (under 16) where it would be inappropriate to rely upon parental consent to the confinement;

    (b) Where the child is under an interim or final care order or in foster care (where no proxy consent is available);

    (c) In the case of a young person who does not, or cannot, consent to their own confinement;

    (d) Where the child or young person is to be accommodated in an unregistered secure children's home.

44. If a local authority does not make an application under the Children Act 1989 s.100(3) in circumstances where it is at least arguably a deprivation of liberty, it is appropriate to use habeas corpus proceedings which can be modified with the Family Procedure Rules 2020: *CGM v Luton Council* [2021] EWHC 709 (Admin). There is judicial reluctance to grant anticipatory orders as this would confer on the local authority a wide discretion to regulate a deprivation of liberty without the strict oversight that comes with granting the order: *Hertfordshire CC v NK and AK* [2020] EWHC 139 (Fam): [41]-[42].

(ii) How to apply

43. The procedure was set out in *Re A-F No 2*:

    (1) Interface with care proceedings

45. If, when care proceedings are issued, there is a real likelihood that authorisation for a deprivation of liberty may be required, the proceedings should be issued in the usual way in the Family Court (not the High Court) but be allocated, if at all possible, to a Circuit Judge who is also a section 9 judge. An additional box should be included in the C110A form with the wording "*Does the proposed care plan, or likely long-term care plan, for the child(ren) involve a possible deprivation of the child(ren)'s liberty within the meaning of Article 5 (on the basis that the child is or would be confined*

[26] *Derby City Council v BA & Ors (Compliance with DOL Practice Guidance)* [2021] EWHC 2931 (Fam).

to a greater extent than a child of comparable age)?"

46. Where care proceedings have been allocated for case management and/or final hearing to a judge who is not a section 9 judge, but it has become apparent that there is a real likelihood that authorisation for a deprivation of liberty may be required, steps should be taken if at all possible, and without delaying the hearing of the care proceedings, to reallocate the care proceedings, or at least the final hearing of the care proceedings, to a Circuit Judge who is also a section 9 judge.

47. The care proceedings will remain in the Family Court and must not be transferred to the High Court.[27] The section 9 Circuit Judge conducting the two sets of proceedings (Family Court care proceedings and High Court inherent jurisdiction proceedings) can do so sitting simultaneously in both courts. If this is not possible, steps should be taken to arrange a separate hearing in front of a section 9 judge as soon as possible (if at all possible, within days at most) after the final hearing of the care proceedings. Typically, there will be no need for the judge to revisit matters already determined by the care judge, unless there are grounds for thinking that circumstances have changed; indeed, the care judge should, wherever possible and appropriate, address as many of these issues as possible in the care proceedings judgment.

(2) Evidence

48. In cases where secure accommodation is required but unavailable, the applicant should make clear what attempts have been made to identify it, and should also be prepared to enable the court to proceed as if by reference to the section 25 Children Act criteria. If the application is for authorisation of the equivalent of secure accommodation (for instance for the delivery of medical treatment),[28] rather than as a workaround for the non-availability of secure accommodation, then the evidence will need to make this clear; the applicant should, similarly, be prepared to satisfy the section 25 criteria.[29]

49. In any case, the court must be provided with the detail of the proposed regime and the justification for why it is necessary and proportionate in meeting the child's welfare needs. All parties and the child have an express liberty to apply for further directions on short notice. The court must conduct reviews at intervals and when there has been a significant change.

50. The social work statement template should be used, with evidence addressing:

    i. The nature of the regime in which it is proposed to place the child, identifying and describing, in particular, those features which it is said do or may involve "confinement". Identification of the salient features will suffice; minute detail is not required.

    ii. The child's circumstances, identifying and describing, in particular, those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.

[27] Note that a District Judge or Circuit Judge has no power to transfer a care case to the High Court: see FPR 29.17(3) and (4) and PD29C.
[28] See, e.g. *In re C (Detention: Medical Treatment)* [1997] 2 FLR 180.
[29] See *Re T* at [152] and [153].

iii. Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.

iv. The views of the child, the child's parents and the Independent Reviewing Officer, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health (typically the most recent documents will suffice).

51. Where the care proceedings have been concluded for some time, the process will be the 'standalone' one indicated above.

(3) Review

52. Continuing review is crucial to the continued lawfulness of any "confinement". What is required are:

- Regular reviews by the local authority as part of its normal processes in respect of any child in care.
- A review by a judge at least once every 12 months, although more frequent reviews will be required until the placement is stabilised. For example, it is not uncommon for reviews to be measured in days/weeks at the outset where an unregistered placement is concerned. Once stabilised, the matter must be brought back before the judge without waiting for the next 12-monthly review if there has been any significant change (whether deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.
- The child must be a party to the review and have a guardian (if at all possible, the guardian who has previously acted for the child).
- If there has been no significant change of circumstances since the previous hearing / review, the review can take place on the papers, though the judge can of course direct an oral hearing. The form of the next review is a matter on which the judge can give appropriate directions at the conclusion of the previous hearing.

(4) Preparation for court

53. Key points include that:

- CAFCASS – and the parties – should use appropriately short and focused position statements.
- If a substantive order (interim or final) is to be made authorising a deprivation of liberty, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can, in an appropriate case, be given on paper without an oral hearing.
- The child must be a party to the proceedings and have a guardian (if at all possible the children's guardian who is acting or who acted for the child in the care proceedings) who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary

or that has already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge in person if that is what the child wants.

- A 'bulk application' is not lawful, though in appropriate circumstances where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

54. Where the High Court is asked to authorise an unregistered placement, then the President's Practice Guidance must be followed. Accordingly:

- The local authority must enquire with Ofsted or the Care Inspectorate Wales (CIW) as to whether the home is registered. This allows Ofsted or the CIW to be aware of an unregistered children's home.
- The local authority must inform the court of the home's registration status.
- The court should be aware as to why registration is not required or the reasons for the delay in applying for registration.
- The exact status of any application for registration that has been submitted.
- The court should be assured that the home can meet the child's needs.
- The local authority must inform the court how it will ensure that the home, the staff and the care given will be safe and suitable for the child.
- The court must make factual findings about the position before it authorises the placement.
- Following authorisation, the local authority must notify Ofsted or the CIW that the child has been placed and provide them with a copy of the order and judgment. If an application for registration is refused, the local authority should urgently advise the court.

55. If the proposal is to place an under 16 year old in unregulated accommodation then, whilst the High Court is able lawfully to exercise the inherent jurisdiction to authorise the position (but not to cloak the local authority with the public law power to place), MacDonald J emphasised in *MBC v AM & Ors (DOL Orders for Children Under 16)* [2021] EWHC 2472 (Fam) that:

- In deciding whether to grant a declaration authorising the deprivation of liberty, the existence or absence of conditions of imperative necessity will fall to be considered in the context of the best interests analysis that the court is required to undertake when determining the application for a declaration on the particular facts of the case:
- Whilst each case will turn on its own facts, the *absence* of conditions of imperative necessity will make it difficult for the court to conclude that the exercise of the inherent jurisdiction to authorise the deprivation of the liberty of a child under the age of 16 in an unregulated placement is in that child's best interests in circumstances where the regulations render such a placement unlawful.

- It is not appropriate to define what may constitute imperative considerations of necessity. Again, each case must be decided on its own facts.

- The court must ensure the *rigorous* application of the terms of the President's Guidance, which will include the need to monitor the progress of the application for registration in accordance with the Guidance. Where registration is not achieved, the court must rigorously review its continued approval of the child's placement in an unregistered home. Ofsted should be notified immediately of the placement. Ofsted is then able to take immediate steps under the regulatory regime.

(5) The authorisation

56. According to *Re A-F* [2018] EWHC Fam 138 at [46] to [49], there is no need for the court to make an order specifically authorising each element of the circumstances constituting the confinement. It is sufficient if the order (i) authorises the child's deprivation of liberty at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (ii) authorises (without the need to be more specific) medication and the use of restraint. The maximum length of authorisation is 12 months. Guidance was given in *Re Daniel X* [2016] EWFC B31 as to the process for seeking a renewal.

> *12 … the burden should be on the Local Authority to apply back to the court on an application for renewal of the order if appropriate and to prove their case again, albeit on paper, if unopposed and considered appropriate.*
>
> *34. It is agreed that 35 days before the expiry of this order Thurrock Borough Council, if it seeks to renew the order, will lodge an application to that effect and include medical evidence to confirm that Daniel still requires that type of accommodation; the evidence lodged will include evidence from the social worker about Daniel's up to date circumstances, possibly a school report, and a report from the [independent reviewing officer] that Y Home is still suitable for Daniel. The parents would then have the opportunity to respond within 14 days of being serve. If the parents agree to the order being renewed or do not reply, the court will consider the application on paper. The Court has the option of appointing a Guardian for Daniel under rule 16.4 of the FPR if thought necessary but I do not think it necessary for a Guardian to be appointed on issue of the application. The Court may make the declaration sought on paper or may list the application for a hearing.*

(c) Court of Protection

57. See the separate guidance note on this. The deprivation of liberty of someone lacking the relevant mental capacity can be authorised from the age of 16 (*Re X* [2014] EWCOP 25). Moreover, the Court can authorise a young person to be confined in children's homes and residential special schools: *Barnsley MBC v GS & Ors* [2014] EWCOP 46, paras. 23-24.

(d) Transfers to / from the Court of Protection

58. The MCA 2005 (Transfer of Proceedings) Order 2007 concerns the transfer of those aged 16-17.

Relevant considerations include:[30]

- where it is "just and convenient" whether the proceedings should be heard together with other proceedings that are pending in a court having jurisdiction under the Children Act;
- whether any order that may be made by a court having jurisdiction under that Act is likely to be a more appropriate way of dealing with the proceedings;
- the need to meet any requirements that would apply if the proceedings had been started in a court having jurisdiction under the Children Act;
- any other matter that the court considers relevant.

59. In *Re A-F No. 2* [2018] EWHC 2129 transfer was not directed, Sir James Munby directing himself by the following considerations:

- There could be no sensible basis for discharging care orders which were already in place.
- The children required the continuing protection of such aspects of the care regime as LAC reviews and the support of an IRO.
- While the care orders remained in place, the Family Court had a continuing, if much reduced, potential role in the lives of the children – for instance, if issues in relation to contact require to be determined in accordance with section 34 of the 1989 Act.
- For the time being, at least until they were approaching their eighteenth birthdays, the children were the responsibility of the local authority's Children's Social Care (LAC) Teams, who were much more familiar with practice and procedure in the Family Court and the Family Division than with practice and procedure in the Court of Protection.
- The children's guardians would be able to continue exercising that role so long as the cases remain within the Family Court and the Family Division; it was, at the least, doubtful whether they would be able to act as litigation friends in the Court of Protection.
- It may be easier to ensure judicial continuity if there is no transfer.

60. On the facts of the cases before him in *Re A-F*, Sir James Munby considered that:

> *…the benefits weigh heavily in favour of maintaining the forensic status quo. There are…so far as I can see, no reasons for thinking that…the children's welfare will be better safeguarded within the Court of Protection.*

61. It is suggested that in any case where there are no pre-existing care proceedings, and where the young person's impairments are likely to be life-long, it is not obvious that recourse should be had to the Family Court/Family Division as opposed to the Court of Protection. This is particularly so where it is likely that there will need to be court oversight over their situation upon majority (for instance where they will be deprived of their liberty in a community setting, where the DoLS regime

[30] See *B (A Local Authority) v RM, MM and AM* [2010] EWHC 3802 (Fam), [2011] 1 FLR 1635.

does not apply) – at that point, it is suggested that it is much more sensible to bring proceedings in the Court of Protection so that judicial continuity can be secured.

62. Further, given that the introduction of the Liberty Protection Safeguards will require greater familiarity amongst local authority social care teams with the MCA 2005, it is suggested that the balancing exercise undertaken by Sir James in relation to older children subject to care orders in *Re A-F* may well need to be revisited in due course. The coming into force of the LPS will also mean that recourse to court for authorisation of deprivation of liberty will be less frequent. That having been said, it is critically important to understand that the LPS will not provide a mechanism to remove a child from the care of their parents, as opposed to a mechanism to recognise a situation as giving rise to a deprivation of liberty and the provision of appropriate checks and balances. In any situation where a local authority wishes to remove a young person from the care of their parents, appropriate – judicial – authority will continue be required.

(e) Not authorising deprivations of liberty

63. There have been occasions where the courts have granted an authorisation even where they have been concerned as to whether the accommodation proposed was in fact suitable. Examples include:

- *Tameside MBC v L* [2021] EWHC 1814 (Fam), where the deprivation of the young person's liberty fell to be answered in the clear-eyed knowledge that his current arrangement was the only one presently available;

- In *Lancashire CC v G* [2021] EWHC 244 (Fam), there was no option but to authorise the confinement of a 16-year-old in an unregulated placement not fully equipped to meet her complex needs (see also [2020] EWHC 3280 (Fam) and [2020] EWHC 2828 (Fam));

- In *North Yorkshire CC v C* [2021] EWHC 2171 (Fam) a 15-year-old was in a secure children's home which could not meet her needs. She had twice been assessed as requiring a medium secure tier 4 hospital bed under the Mental Health Act 1983 but not detained.

64. However, it is important to note that an authorisation is **not** inevitable. The following cases illustrate situations in which the High Court has found that it cannot authorise, notwithstanding the fact that there no alternative was placed before it:

- In *Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)* [2021] EWHC 1982 (Fam), it was not in the best interests of a 12-year-old boy to authorise the deprivation of his liberty in a paediatric hospital ward in conditions which breached his Article 5 rights. MacDonald J held that the placement was manifestly harmful: he had been subject to both chemical and physical restraint and 5:1 staffing to attempt to control his challenging, violent and self-harming behaviour. The ward had to be shut to new admissions due to the risk he presented, and parts of the ward had been closed entirely. Other gravely ill children had to be moved to alternative hospitals and lists of elective surgeries for children in urgent need of such treatment had been cancelled.

- *Nottinghamshire County Council v LH, PT and LT; Nottinghamshire v LH, PT and LT (No. 2)* [2021] EWHC 2584 (Fam) and [2021] EWHC 2593 (Fam): Poole J held that the proposed continued

accommodation of a 12 year-old girl in an acute psychiatric unit could not possibly be described as a means of properly safeguarding her. He refused to authorise the deprivation of liberty in the first judgment; in a second judgment, he authorised the deprivation of liberty in (effect) a bespoke placement being created for her, but continued to decline to placement in the psychiatric unit in the interim.

- *A County Council v A Mother & Ors* [2021] EWHC 3303 (Fam): in relation to a 14 year old confined to a hospital paediatric unit when no secure accommodation was available, Holman J was *"simply not willing myself to apply a rubber stamp and to give a bogus veneer of lawfulness to a situation which everybody in the court room knows perfectly well is not justifiable and is not lawful"*.

F: Useful resources

65. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.

- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.

- www.lpslaw.co.uk – a website set up by Neil which includes videos, papers and other materials relating both to the Liberty Protection Safeguards and the MCA 2005 more widely.

- www.mentalhealthlawonline.co.uk – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.

- www.scie.org.uk/mca-directory/ - the Social Care Institute of Excellence database of materials relating to the MCA

66. Alex and Camilla Parker have also co-written practice guidance for Research in Practice on deprivation of liberty and 16-17 year olds. They discuss it in a shedinar here.

ANNEX A: APPLICATION OF THE CONCEPT OF DEPRIVATION OF LIBERTY TO THOSE UNDER 18

A: Sir James Munby's 'rule of thumb'

In *Re A-F (Children)* [2018] EWHC 138 (Fam), Sir James Munby set out his "rule of thumb" in relation to nuancing of the 'acid test' for younger children:

- A child aged 10, even if under pretty constant supervision, is unlikely to be "confined";
- 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;
- Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

B: 10-year-olds

Re Daniel X [2016] EWFC B31: 10-year-old with severe autistic disorder and severe learning disability in a specialist children's home: deprivation of liberty: "[i]*n order to keep Daniel safe he needs to be constantly supervised and Y Home has physical restrictions to prevent him leaving the premises and indeed, from moving freely around in the premises*."

C: 12-year-olds

CGM v Luton Council [2021] EWHC 709 (Admin): judicial review of local authority's failure to seek authorisation under the inherent jurisdiction. M was 12, was autistic and had ADHD. She was subject to a care order. The school where he was within a secure compound. M could not leave unaccompanied, was monitored at all times, had restricted use of her belongings, had restricted internet access, was not allowed to use a mobile phone or social media, and had free access to food only at mealtimes. Restrictive physical intervention was used at times and, if M left of her own accord, the police would be called to return her to the school. Mostyn J held that it was clearly arguable that this was a deprivation of liberty.[31]

D: 14½-year-olds

Northumberland County Council v MD, FD and RD [2018] EWFC 47: not a deprivation of liberty, Cobb J holding that the accepted wisdom was that a 14 year-old is not free to leave (remove permanently to live where and with whom she chooses). He considered that the only issue was whether she was subject to complete supervision and control. He considered (at paragraph 31) that: "'*complete' or 'constant' defines 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough',*

[31] Procedurally, Mostyn J identified that if the local authority does not make an application for authorisation of such a situation, then it would be appropriate for an interested party (here the father) to issue habeas corpus proceedings, and for the court then to make appropriate procedural modifications under the Family Procedure Rules 2020.

and/or 'unqualified'" (paragraph 31).[32] The place where RD resided was a large detached house in a rural setting accommodating six young people, with a staff ratio of 4:6; her regime was described as follows:

> *(i) RD is given a wake-up alarm call each morning, and then is left to her own devices to dress/wash and prepare for the day;*
> *(ii) She has her own room; there is a lock on the door which she can use to lock herself in, or to lock when she leaves for school (or otherwise) so that her belongings are safe; the staff have a master key; I have the impression that the lock is for RD's benefit not the staff's. RD is never locked in her room by the staff, nor are internal doors locked to manage her (or others') behaviour;*
> *(iii) RD helps around meal times "which are similar to many households" (per social worker) and she can choose to have free time after her supper with her peers and staff;*
> *(iv) RD can move around Lennox House as she chooses; there are generally staff around the communal areas to support the young people; it is said that the staff do not supervise the young people or place them "under surveillance";*
> *(v) In her leisure time, RD has the freedom to watch television in a communal area; she can have time in her room when she wishes to be alone;*
> *(vi) RD enjoys attending a boxing club; she is taken there (with another young person from Lennox House) by a member of staff;*
> *(vii) RD enjoys shopping and is taken into town by a member of staff who remains with her in town; she enjoys spending time with an animal therapist and enjoys horse riding;*
> *(viii) RD can go out into the grounds of Lennox House alone, but her visits outside the building are monitored by a member of staff watching (generally from within the house); if RD goes outside into the grounds in a group, a member of staff accompanies them to monitor/supervise;*
> *(ix) When RD was more settled, she was trusted to make short excursions in daylight hours from Lennox House alone to a local shop in the village; this opportunity has been denied her lately given her recent abscondences;*
> *(x) RD travels the hour to school by car or minibus with the other young people from Lennox House, accompanied by a member of staff. The staff member remains at the school during the hours in which RD is receiving her education, in case there are behavioural issues which require resolution; the member of staff is not generally in the classroom with her;*
> *(xi) RD enjoys fortnightly visits from her family; these visits often take place in the presence of staff, for both supervision and support – there are practical reasons for staff involvement: transport / unfamiliarity of the locality to the family. The family say that they welcome the staff on the visits, and have indicated that they would like this arrangement to remain in place until they feel more familiar with contact taking place in the community, which is unfamiliar to them;*
> *(xii) RD enjoys and seeks out opportunities for adult 1:1 time with a staff member; RD will often try to isolate a member of staff out to obtain this sole attention;*
> *(xiii) RD currently does not have her own mobile telephone (I believe a choice of her parents taken with her), but she can access the house phone at any time and make calls, which are not supervised; she does indeed call her parents most days, and calls her social worker when she feels the need to do so; there is no restriction (so I understand) on RD having a mobile phone;*

[32] Note, this is somewhat difficult to square with the Strasbourg jurisprudence, such as *Stanev v Bulgaria* (2012) 55 EHRR 22. In that case, Mr Stanev was able to leave the building where he resided and to go to the nearest village (and indeed had been encouraged to work in the restaurant in the village where his care home was located "to the best of his abilities") and had also been on "leaves of absence." However, he needed to have permission to leave the care home, and his visits outside were subject to controls and restrictions; his leaves of absence were entirely at the discretion of the home's management, who kept his identity papers and administered his finances. When he did not return from a leave of absence, the home asked the police to search for and return him and he was returned to the home against his wishes. He was, in consequence, the Grand Chamber held, "under constant supervision and was not free to leave the home whenever he wished," and was therefore deprived of his liberty.

> *(xiv) Internet is available in the unit, but it is regulated by a safety feature which blocks social media and inappropriate sites; RD has access to an iPad on site; iPad use is not supervised; search histories are checked randomly.*

On the basis of this, Cobb J considered that the position was finely balanced, but ultimately the regime was not sufficiently different from the watchful eye or supervision of a reasonable parent, on the basis that every 14-year-old is liable to appropriately imposed boundaries and sanctions.

A Local Authority v A Mother & Ors [2021] EWHC 3527 (Fam): deprivation of liberty. Fiona was accommodated in a children's home under a care order following a previous attempt on her life. She could access its grounds with a fob, was allowed to be unsupervised for 15 minutes at a time and rarely had her belongings searched or faced restrictions on her use of her telephone. She had not been physically restraint for over 5 months. However, she was not free to leave the perimeter of the property and her access to the outside areas has to be earned and could be withdrawn at any time. She was not free to be outside the placement unsupervised by an adult. The proposed restrictions would enable staff to enter the bathroom when she was in there to make sure she was safe. It would enable them to be able to search her and remove her possessions if they were concerned about her safety. Fiona was monitored every 15 minutes and there was CCTV in the communal areas:

> *"When I compare Fiona's situation to that of another child of her age, she is under a great deal more control and supervision than that other child would be. At 14 the doors to that child's home would not be locked to prevent her leaving. She would be able to be outside the property unsupervised to go to school and to see her friends or go to the shops. She would be able to lock the bathroom door and to have privacy when she needs it. She would not be subject to monitoring every 15 minutes."*

E: 15-year-olds

A Local Authority v D and others [2016] EWHC 3473 (Fam): Here, the staff knew the whereabouts of C at all times; he was never left alone in the unit; he was never left alone with other residents; he was subject to 1:1 staffing including during breaks at school; he was subject to constant observations by staff and has no free time when he is not observed; the external doors of the unit were locked at night; the bedroom doors were alarmed at night to ensure privacy and to ensure that the whereabouts of all residents were known; the internal doors were locked if C's behaviour necessitated it; C could not leave the unit unsupervised and could not leave unaccompanied without permission; he was monitored at all activities outside of the unit and was accompanied on all recreational and social events; he was not permitted any internet access and the use of his mobile telephone was restricted to four telephone numbers; and C could not travel alone on public transport. The court concluded that C was deprived of his liberty as he was confined, supervised and controlled 24 hours a day.

F: 16-year-olds

Hertfordshire CC v NK and AK [2020] EWHC 139 (Fam). In this case, AK was subject to the following regime:

> *The internal and external doors are not locked and AK is able to exit the property (AK has for example left for a cigarette with the knowledge of the staff and returned of his own accord);*

> *AK has flexible, unsupervised contact with his mother two or three times a week and the length of those visits is dictated by AK and his mother. AK is dropped off and collected by the staff from [Y]. The collection occurs when AK states he is ready to return;*
> *During his time on the unit he is subject to 2:1 supervision (AK has stated he would like this to reduce to 1:1 supervision)*
> *AK has* ***unlimited*** *access to, and use of his mobile telephone, the Internet and to his X-Box.*
> *When in his room at the unit AK is checked on every 15 minutes;*
> *AK's room is* ***not*** *searched and neither is AK;*
> *AK has a planned daily schedule and is rewarded financially for compliance.* (emphasis in original)

MacDonald J considered that AK was not deprived of his liberty because his position was not sufficiently different from a child of his age and station (paragraph 33)

G: 17-year-olds

It should be remembered that MEG, one of the three cases before the Supreme Court in *Cheshire West*, was 17 at the time the proceedings started, and was found to be deprived of her liberty.

A London Borough v X, Y and Z [2019] EWHC B16 (Fam): this case concerned a young person in the family home. The local authority sought to distinguish *Cheshire West* because he was being cared for at home. Theis J considered that he was deprived of his liberty:

> *It is clear the arrangements for his care, when compared with, for example that provided for his older sister when she was the same age, are very different. He is under the complete supervision and control of his parents, in particular his father, due to the nature of the orders made regarding parental responsibility. The level and extent of supervision he requires is illustrated by the fact that the school he will attend from January 2020 consider full time 2:1 support will be required during the time he is with them. That level of supervision is reflected when he is at home, he can't go out unsupervised, all his care needs are met by his parents both during the day and at night. The fact that these restrictions are for the benefit of the person affected, does not prevent them being a deprivation of liberty but is a factor in the lawfulness of the deprivation. As Lady Hale observed in Cheshire West at paragraph 46 'A gilded cage is still a cage'. Whilst it is unusual to have a young person living at home being deprived of their liberty, this case is unusual due to the degree of supervision and control required to be exercised in this case. The situation here falls outside the usual circumstances described by the majority in the Supreme Court in Cheshire West.*

.

Alastair Davidson
Senior Clerk
alastair.davidson@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085