Supreme Court decides that parents cannot consent to a 16- or 17-year old's deprivation of liberty on their child's behalf: In the matter of D (A Child) [2019] UKSC 42

Summary

The Supreme Court has held that when a child is 16 or 17 and lacks capacity to make decisions, a parent cannot consent to living arrangements which would amount to a deprivation of that child's liberty on their behalf. Instead, an application must be made for authorisation of the child's deprivation under the Deprivation of Liberty Safeguards (DoLS) regime.

The Court did not give a clear direction as to what the procedure should be in respect of children younger than this.

The judgment will likely result in many applications being made by Local Authorities in respect of children being placed in care in circumstances amounting to a deprivation of liberty.

Facts

D (who is now aged 20) was diagnosed with ADHD, Asperger's syndrome and Tourette's syndrome. He also has a mild learning disability. From the age of 14 he was placed in a series of secure placements and hospitals for treatment, in circumstances which would amount to a deprivation of liberty absent any valid consent. His parents consented to these placements and the Court held that this was sufficient to legalise D's deprivation of liberty.

Once D turned 16, a DoLS authorisation was sought from the Court of Protection in order for him to remain in secure accommodation. It was this application which formed the subject of the Supreme Court Decision (despite the fact that D himself is now 20). At first instance Keehan J concluded that a DoLS was necessary; on appeal, the Court of Appeal then disagreed and favoured parental responsibility whilst D was still a minor. It was therefore for the Supreme Court to decide whether a DoLS is required or not.

Legal Background

Deprivation of liberty

The Court of Protection is regularly called upon to authorise measures proposed by public authorities which are said to be necessary for the care, treatment or safety of individuals but which amount to infringements of their right to liberty under Article 5 ECHR.

Such authorisations (for those aged 16+) are made pursuant to the Deprivation of Liberty Safeguards (DoLS) regime, created by the Mental Capacity Act 2005. Following the European

Court of Human Rights decision in **Storck v Germany [2005] EHRC 406**, it is recognised that a DoLS authorisation will be required when three conditions are met:

(1) The person is confined in a restricted place for a not negligible length of time;
(2) There is a lack of valid consent to that confinement; and
(3) That confinement is attributable to the state.

Consent

In order for a person to give valid consent, he or she must have capacity to do so. Children under 16 are deemed not to have capacity unless they are assessed to be 'Gillick competent' (see **Gillick v West Norfolk and Wisbech AHA [1986] 1 AC 112**).

The legal assumption is that anyone aged 16 or older has that capacity unless they have been assessed otherwise.

This is not problematic for over 18s: if they do not have capacity, an application must be made under the DoLS regime.

However, under 18s are also legally considered to be subject to parental responsibility, creating something of a muddy area for 16- and 17-year olds who lack capacity. Can the auspices of parental responsibility stretch to making decisions about depriving that young person of their liberty?

Decision

By a bare majority (three judges to two) the Court allowed the appeal, holding that parents cannot give valid consent on behalf of 16- and 17-year-olds. The majority decision was reached by Ladies Hale, Black and Arden. Lords Carnwath and Lloyd-Jones disagreed.

Even within the concurring Judges, there were differences of opinion: Lady Black concluded, obiter, that as a matter of common law, parental responsibility for a child of 16 or 17 does not extend to authorising a deprivation of the child's liberty [**paras 88-90**].

Lady Hale however preferred not to express a firm view on this point, and reaches the same conclusion via a different route: she felt that there may well be a '*general rule'* that '*parental responsibility extend to making decisions on behalf of a child **of any age** who lacks the capacity to make them for himself*' [**para 28**, emphasis added]. However, she says, there are limits on that general rule, and the child's rights under Article 5 ECHR create one such limit in the circumstances described in this case. This is because the restrictions on D were significantly outside '*normal parental control for a child of this age'* [**para 39**] and would have amounted

to a deprivation of liberty for someone of his age whether they had capacity or not. Making reference to *Cheshire West*, she concludes that D's mental capacity should not make a difference: D's human rights are the same either way, and thus Art 5 is engaged [**paras 40-42**].

Practical consequences: 16- and 17-year olds

Following the judgment, in every instance where a public authority seeks to impose measures which satisfy the first element of the Storck test in relation to a 16- or 17-year-old who lacks capacity, a DoLS order *must* be sought. Parental consent cannot negate that requirement. This reflects a wider trend in which parental rights have become increasingly subject to the overriding consideration of the child's own welfare.

What about children under 16?

The question remains whether the case is the same for children under 16, where the inherent jurisdiction of the High Court is invoked. Lady Hale indicated (obiter) that the same principle would logically apply in such cases [**para 50**].

However, Lady Black expressly refused to give a view on the matter as it was not argued before the court [**para 90**]. Similarly, Lord Carnwath expressed '*some concern'* in his dissent that Lady Hale had given this indication [**para 159**].

The stage is therefore set for that particular debate to be had in future. This leaves public authorities in a slightly unfortunate position as regards applications invoking the inherent jurisdiction in respect of under-16s whose parents consent to their confinement. However until a higher court considers this question, the judgment of Keehan J in the first D case, decided when D was 15 (**In re D (A Child) (Deprivation of Liberty) [2015] EWHC 922 (Fam)**), would appear to remain good law: this means that, for the time being at least, a court order is not required by law where parental consent is given for under 16s.

Rose Harvey-Sullivan and Kate Temple- Mabe both regularly appear in the Court of Protection and the family courts, and have previously acted in cases which have rested on the various **Re D** decisions. Please contact clerk Emma Wise, ewise@7br.co.uk, for further information.