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DEPRIVATION OF LIBERTY SAFEGUARDS IN THE COURT OF PROTECTION

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INTRODUCTION

Deprivations of Liberty are currently authorised in different ways depending on the circumstances, for example:

- Under the Mental Health Act 1983
- By the responsible body (normally the local authority) under the Mental Capacity Act 2005 if the person detained lack capacity, is over 18 and is in a hospital or care home
- By the High Court under the Inherent Jurisdiction when the person detained is under 16

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INTRODUCTION

- By the Court of Protection where the person detained is 16 or 17 or is over 18 but outside a hospital or care home.

In due course the Liberty Protection Safeguards will create an administrative scheme for the authorisation of a deprivation of liberty, where the person concerned is over 16 and lacks capacity to consent to such arrangements. An implementation date for this is yet to be confirmed.

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WHAT IS A DEPRIVATION OF LIBERTY?

The term derives from Article 5 ECHR which states that everyone, of whatever age, has the right to liberty and can only be deprived of their liberty in accordance with a procedure prescribed by law.

Any person deprived of his liberty by arrest or detention is 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 (Article 5(4))

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WHAT IS A DEPRIVATION OF LIBERTY?

For a deprivation of liberty to arise three conditions must be met:

(a) The objective component of confinement in a particular restricted place for a not negligible period of time;

(b) The subjective component of lack of valid consent; and

(c) The attribution of responsibility to the state.

(*Storck v Germany* (2005) 43 EHRR 6)

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WHAT IS A DEPRIVATION OF LIBERTY?

In *P v Cheshire West* [2014] UKSC 19, [2014] AC 896 the Supreme Court clarified the objective elements of a deprivation of liberty as being that a person is under continuous supervision and control and is not free to leave (the 'acid test').

The fact that the arrangements for that person have been made in their welfare best interests is not relevant to whether those arrangements amount to a deprivation of liberty – "a gilded cage is still a cage".

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WHAT IS A DEPRIVATION OF LIBERTY?

Whether someone under 18 is confined for Article 5 purposes will turn on a nuanced comparison – 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.

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CONSENT

A *Gillick* competent child can provide a valid consent to the deprivation of liberty, but the court may still need to conduct an evaluation of how secure that consent is.

For a child under 16, the parents can provide consent if that is an appropriate exercise of parental responsibility (see e.g. *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam)).

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CONSENT

For a young person aged 16 or 17, if they do not consent to the confinement or cannot consent then no person can provide consent on their behalf (*Re D* [2019] UKSC 42).

The safeguards provided by Article 5 cannot be satisfied by parental consent because there is no way of ensuring those with PR will exercise it in the best interests of the child.

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STATE RESPONSIBILITY

There is a low threshold for holding the state responsible for a deprivation of liberty. The state will be involved if any public authority, such as an NHS Trust or a local authority is either:

- Directly involved in the care arrangements by providing the care or funding or arranging this or
- Indirectly involved because they know or ought to know of the deprivation of liberty.

Indirect involvement would cover a situation where a social worker becomes aware that a family member is confining a young person at home.

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AUTHORISING THE DEPRIVATION

There are two possible basis for the authorisation of a deprivation of liberty under Article 5:

- Article 5(1)(d) which provides that someone under 18 can be deprived of their liberty for the purposes of educational supervision and

- Article 5(1)(e) which provides that it is lawful to deprive a person of their liberty if they are of unsound mind.

Both under common law and s.4 MCA 2005 the test for authorisation is whether the deprivation of liberty is in the person's best interests.

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AUTHORISING THE DEPRIVATION

There is an acute shortage of registered secure accommodation placements.

Under s.11 Care Standards Act 2000 those who carry on or manage an unregistered children's home commit a criminal offence if a child is placed there.

In *Re T (A Child)* [2021] UKSC 35, the Supreme Court held that this does not prevent the court authorising such a placement.

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AUTHORISING THE DEPRIVATION

The focus of the authorisation is on the young person's welfare and safety and not on the potential commission of a criminal offence.

The court is authorising the placement but is not requiring the local authority to place the young person there.

The court is not determining whether a criminal offence has been committed, or authorising this or granting any immunity from prosecution.

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AUTHORISING THE DEPRIVATION

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

https://www.judiciary.uk/wp-content/uploads/2019/11/PG-Placements-in-unregistered-childrens-homes-in-Eng-or-unregistered-care-home-services-in-Wales-NOV-2019.pdf

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PROCEDURE

An application should be made where the circumstances in which the person is, or will be, living constitute, at least arguably, a deprivation of liberty (*Re A-F* [2021] EWHC 709 (Admin)).

The procedure to be adopted in the Court of Protection was set out in *Re X* [2014] EWCOP and *Re A-F (No. 2)* [2018] EWHC 2129.

The COPDOL11 form should be used to make the application. See also PD11A.

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PROCEDURE

Professional medical opinion will be necessary to establish that P is of unsound mind.

The court will need to be satisfied as to the basis upon which it is said that the care arrangements are necessary in P's best interests and why the care package advanced is the appropriate one. This will include an analysis of why there is no less restrictive option.

The court will want to know the views of P and any other relevant person.

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PROCEDURE

The court will need information as to whether any family member or friend is willing to be P's litigation friend or a Rule 1.2 representative and whether they are suitable for that role.

Funding difficulties may prevent P being joined as a party.

Where no suitable Rule 1.2 representative can be identified then the court may appoint a General Visitor to prepare a Section 49 report, as a last resort and to ensure the procedure is ECHR compliant (*Re KT* [2018] EWCOP 1).

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PROCEDURE

The interplay between the roles of the Family Division and the Court of Protection for young people aged 16 and 17 was considered in *Re A-F (No.2).*

The MCA 2005 (Transfer of Proceedings) Order 2007 concerns transfers to and from the COP

Relevant considerations include:

- Whether it is just and convenient that proceedings are heard together with Children Act proceedings

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PROCEDURE

- Whether any order made by a court under the Children Act is likely to be a more appropriate way of dealing with the proceedings.
- The need to meet any requirements for proceedings under the Children Act
- Any other matter the court considers relevant.

Where there are no pre-existing care proceedings and where impairment is likely to be lifelong, the COP is likely to be the more appropriate venue particularly where court oversight is likely beyond 18

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THE FUTURE

The administrative Liberty Safeguards Scheme was introduced in the Mental Capacity (Amendments) Act 2019.

Originally due to come into force towards the end of 2020. Then a planned implementation date of April 2022 was announced.

Current consultation on the draft code of practice was launched on 17 March 2022 and runs to 7 July 2022. The government has simply announced that the April 2022 date ”cannot be met”.

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THE FUTURE

Once introduced the scheme will cover 16 and 17 year olds and also those deprived of their liberty in domestic settings.

Decisions will lie with local authorities and NHS bodies as to whether to provide authorisation.

Right of challenge to the COP under s.21ZA Mental Capacity Act 2004.

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TIPS / TRAPS

- The Court is not adjudicating (directly at least) on the suitability of the placement, it is simply considering whether the proposed deprivations are necessary and proportionate.

- The Court is not directing the young person or the adult to be deprived of their liberty, it is providing authorisation to the local authority or other person or body.

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TIPS / TRAPS

- It is very important in these cases to consider the detail of the proposed deprivations and to ask whether each is necessary and proportionate to the risk.

- The Court will need to stand back and consider the ‘acid test’ and, where the young person is 17 or 18, consider the nuanced comparator test.

- The voice of P is important and needs to be heard. It is essential that the full range of views is gathered and put before the court.

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TIPS / TRAPS

- The Court will be astute to avoid making prospective orders. Authorisation will only be given to what is necessary now or in the very immediate future. Contingency planning is not a reason to make an order – if necessary a fresh authorisation can be sought.

- Review of any order is essential – within 12 months, but often sooner.

- There is a duty on the person or body who obtains authorisation to restore the matter to court if circumstances change – e.g. the authorisation is no longer required.