

Family Team



Teenagers : Secure accommodation, deprivation of liberty & the inherent jurisdiction

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Family Team



S25 CA 1989: Secure Accommodation

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The starting point : Article 5



- Any deprivation of liberty is an infringement of Article 5 ECHR rights.
- In order to be lawful it must be necessary and proportionate and authorised by a court :
 - Statutory route (s25)
 - Inherent jurisdiction
 - (OR up to 72h w/o court authorisation)
- Article 5 may bite even where s25 does not apply or can't be used

Not a means to sidestep s.25



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- If s25 applies it must be used. The exercise of the prerogative is ousted by any relevant statutory scheme. (Re X; Re Y [2016] EWHC 2271 (Fam) at [37])
- But s25 doesn't cover everything. Where it does not apply, door opened to the inherent jurisdiction (Re X; Re Y [2016] EWHC 2271 (Fam) at [45])

When Secure Accommodation



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- Not for convenience
- Proper thought must be given to properly supported less restrictive solutions (even if still some DoL)
- Promotion of welfare - usually through physical safety
- Short term containment may be necessary as gateway to therapeutic treatment

Secure Accommodation under s25



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- Section 25 - When can it be used?
 - Which children?
 - Which placements?
- The statutory test
- What it authorises
- When is a DoL declaration application necessary /appropriate?
- What if there is no placement?

S25 Boxes to tick



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- > Looked after
- > Age
- > Approved accommodation
- > Purpose of accommodation
- > Stat test met
- > Child MUST be represented (unless child has refused / failed to apply for Legal Aid) (s25(6))

Looked after



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- > Child must be 'looked after' –
 - For a minimum of 24 hrs
 - Under a care order or s20
 - If s20 **parents** must implicitly consent – NOT the child (W (A Child) [2016] EWCA Civ 804)
 - BUT...

Age



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- > Child must be over 13 unless prior approval of Sec. State (Reg 4)
- > or 12 if detained by police under s38 PACE – arrested juveniles

Over 16s



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- > OK if care order
- > OK if s20(3): **Duty** to accommodate where **welfare likely to be seriously prejudiced** if not provided.
- > but NOT if s20(5): **Power** to accommodate in any community home to **safeguard or promote his welfare** (Reg 5)
- > **BUT** an order made before a child reaches 16 may extend after (Re G SA) [2000] 2 FLR 259)

Basis of accommodation under s20?



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- > Has the LA kept a clear record of the legal basis of its accommodation upon entry into accommodation? It matters because :
 - If the accommodation is to stop the YP's welfare being seriously prejudiced, s25 is available.
 - If the accommodation was just to safeguard or promote welfare, it's not.

Purpose / extent of the DoL



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- > S25 secure : Where accommodation is designed for, or has as its primary purpose, the restriction of the YP's liberty (*Re C (Detention: Medical Treatment)* [1997] 2 FLR 180)
- > Where DoL is *incidental* > use IJ
- > Whether provision is secure is a Q of fact for court (But the accommodation must still be 'approved' and comply with the regs).

Approved accommodation



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- > England : Accommodation must be approved by Sec. of State (Reg 3, Children (Secure Accom.) Regs 1991)
- > Placement in Scotland is now lawful if placement is approved by Scottish ministers under equivalent provisions (Ch&SWA 2017)
- > Wales has equivalent to s25 at s119 SSWB(W) Act 2014, but more detailed regs

Types of accommodation



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- > "Accommodation *in a children's home* shall not be used as secure accommodation unless...approved for that us by Sec of state" (Reg 3)
 - A children's home = 'a registered children's home, community home / voluntary home' (Reg 2(1)).
 - s25 therefore cannot be used to approve placement in an unapproved children's home
 - Regs are silent re placements other than 'childrens homes' - so no restriction on use of s25? (Make IJ app incase?)

The statutory test



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- > (i)YP has a history of absconding and is likely to abscond from any other description of accommodation; and
- > (ii)if he absconds, he is likely to suffer significant harm; or
- > (b)that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

Absence not necessarily='absconding'



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- See W (A Child) [2016] EWCA Civ 804:
- W was a victim of CSE - deliberately 'absenting herself for limited periods in breach of rules'
- Held on these facts NOT to be absconding
- She had not 'escaped indefinitely from an imposed regime'
- BUT 'abscond' is a Q of fact - CoA said no need to define 'abscond' beyond everyday meaning

CSE cases and absconding



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- Many CSE victims are likely to exhibit similar patterns of leaving but returning after a few hours / days
- Short periods of absence, particularly if a YP returns of their own volition may not satisfy the absconding criteria.
- Consider use of 2nd limb: likely to injure self or others
- W had not absconded but the second limb was met
- CoA unimpressed with suggestion injunctive orders against third parties would be an effective alternative given the highly promiscuous behaviour of W

The Court's task



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- Welfare relevant but not paramount (Re M (SAO) [1995] 3 All ER 407 [1995] 1 FLR 418)
- Task is to control exercise of LA's power under Pt III, where LA can detain to prevent harm *to others* rather than the YP
- S25(3): duty to determine if criteria met
- S25(4): If criteria met it is MANDATORY to make an order and specify maximum period

The Court's task



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- BUT must still be necessary and proportionate
- So all other options must have been exhausted including creative care packages (Hayden J, Re SS (SAC) [2014] EWHC 4436 (Fam) [2015] 2 FLR 1358)
- In practice this will be articulated through finding the criteria not met :
- E.g. An alternative placement / package may render absconsion / resulting significant harm or injury to YP or others 'unlikely'?

What does s25 authorise?



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- Max period :
 - up to 3 mths on 1st appn,
 - up to 6 mths on subsequent applications
 - (OR for the period of any remand)
 - (from date of *order*, ignore the 72hrs)
- LA must release if criteria no longer met – review duties are set out in Regs
- No power to set aside/discharge so habeus corpus if there is dispute (LM v Essex [1999] 1 FLR 988)
- In s20 cases PR holder may remove subject to s20(9) (eg SG or holder of CAO consents)

Procedural matters



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- Appt may be LA / LEA, Health Auth / NHS Trust – and any body accommodating a YP securely will need court authorisation to do so lawfully (Reg 7)
- But where YP *detained* under MHA s2 s25 not applicable
- Since LASPO Criminal courts may remand YP to LA Accommodation - s25 then will bite

Procedural matters



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- S25 proceedings are family proceedings (S92(2) CA 1989), so
 - Family court rules (eg hearsay) apply
 - Family court powers available
- YP is an automatic party, must be represented (unless declines) and is entitled to attend (unless not in interests) (not automatic in IJ cases)
- Power to make interim secure order on adjournment for further enquiries

What if no placement can be found?



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- IJ cannot be invoked unless no other order would meet the need (ie s25 unavailable)
- Applications may need to be made in tandem where placement search ongoing
- If using IJ invite court to replicate statutory safeguards eg representation / appointment of G / presence of YP (see Holman J)
- Consider listing / allocation implications

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Deprivations of Liberty & The Inherent Jurisdiction

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Contents



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- > 1. Identifying a Deprivation of Liberty
- > 2. Applying under the inherent jurisdiction
- > 3. Jurisdictional issues – COP or Family Court?

1. Identifying a Deprivation of Liberty



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- > **1. Identifying a Deprivation of Liberty**

Identifying Deprivations of Liberty



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The Storck criteria (confirmed in *Cheshire West*)

1. **Confinement** in a particular restricted place for a not negligible length of time (the objective component)
2. Lack of valid **consent** (the subjective component)
3. Attribution of responsibility to the **state**

NB: The importance of terminology: '**confinement**' vs '**deprivation of liberty**' (See *Re D* [2017] EWCA 1695 at [3])

Identifying DOL: 1. confinement



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- Relevant factors (*Cheshire West*)
 - Is the person under 'continuous supervision and control and not free to leave' [49]
 - The 'concrete situation' of the person on the ground [80]
 - Comparison with children of a similar age and understanding [77-9]
 - 'the whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question' [80]

Identifying DOL: 1. confinement



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- Irrelevant factors (*Cheshire West*)
 - the person's lack of objection to the confinement and apparent wish to continue living there;
 - the relative normality of the placement when compared to the lifestyle of someone else with the same disabilities;
 - the fact that the regime is no more intrusive or confining than that required for the protection and welfare of the person concerned
"A gilded cage is still a cage" [46]

Identifying DOL: 1. confinement



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- Possible indicators:
 - Freedom to leave? Consequences of attempting to do so?
 - Use of restraint? Locking of doors?
 - Supervision arrangements? Frequency of observation? CCTV?
 - Contact arrangements? Access to phone/internet? Off-site visits?
 - Arrangements re other residents?

Identifying DOL: 2. lack of consent



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> Possible sources of consent:

- 1. Parents
- 2. Child / young person

Identifying DOL: 2. lack of consent



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1. Parental consent – Birmingham cases

- > 1. *Re D* [2015] EWHC 922
 - D aged 15. Held: parents *may* consent to a DOL for child under 16
- > 2. *Birmingham CC v D* [2016] EWCOP 8
 - Same child, aged 16. Held: parents *cannot* consent for children aged 16-17

Identifying DOL: 2. lack of consent



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1. Parental consent – Birmingham cases

- > 3. **Appeal:** *Re D* [2017] EWCA 1695 (Munby P)
 - parents *may* consent for a child of any age
 - as long as the decision falls within the 'zone of parental responsibility' AND
 - as long as the child is **not** *Gillick* competent

Episode IV: The Supreme Court?

Identifying DOL: 2. lack of consent



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Zone of parental responsibility?

Munby P (*Re D*): a reformulation of *Gillick* and case law on limits of PR [*Re D*, 78, 108]:

- > Ascertained by reference to general community standards in contemporary Britain in 2017
- > Is it within the ordinary acceptable parental restrictions upon the movements of a child?

Identifying DOL: 2. lack of consent



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Q: Can a parent consent under s.20?

A: It depends (*In Re AB* [2015] EWHC 3125 at [26-27])

- > **Compare:** 'an agreed reception into care of a child, that is beneficial and for a short-lived period, where the parent and the local authority are working together co-operatively in the best interests of the child, may be an appropriate exercise of parental responsibility.'

Identifying DOL: 2. lack of consent



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- > **Versus:** 'there will be cases where children have been removed from their parents' care pursuant to a section 20 agreement as a prelude to the issue of care proceedings and where the local authority contend the threshold criteria of section 31(2) of the Children Act 1989 are satisfied. **In such an event, I find it difficult to conceive of a set of circumstances where it could properly be said that a parent's consent to what, otherwise, would amount to a deprivation of liberty, would fall within the zone of parental responsibility of that parent. This parent's past exercise of parental responsibility will, perforce of circumstances, have been seriously called into question...**'

Identifying DOL: 2. lack of consent



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Can LA give consent under an ICO?

- 'An emphatic no' – *In Re AB* [2015] EWHC 3125 [29]
 - Lack of safeguards. LA as organ of state consenting to its own incursion of Art 5 rights.
- And very unlikely that parents can consent:
 - "Where a child or young person is [subject to an ICO], the reasoning in **para [27] applies with even greater force**, especially when one considers the effect of an interim care order, which includes the power of the local authority to restrict 'the extent to which a parent may meet his parental responsibility for the child'" [28]

Identifying DOL: 2. lack of consent



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2. Child's own consent

- *A Local Authority v D* [2016] EWHC 3473
 - **Gillick competence**: a sufficient understanding and intelligence to enable him or her to understand fully what is proposed [54]
 - Notwithstanding there may be a risk of future withdrawal of consent [58-9]...
 - ...or that the child may occasionally have broken / continue to break the rules of the accommodation [61]
 - The obvious question, following *Re D (CA)* – what is the test for children 16 and over. *Gillick competence*, as for parental consent? Or MCA 2005, as one would expect?

Identifying DOL: 3. attribution to the state



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- Wider than might be thought:
 - Likely to include **s.20 arrangements** (*Birmingham CC v D* [2016] EWCOP 8 at [130-2])
 - Just because parents consent and could object doesn't prevent the arrangement being imputable to the state
 - LA are likely to have identified placement, assessed the child and care regime, produced and approved the care plan, and paid the costs

Identifying DOL: 3. attribution to the state



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- *Even* wider than might be thought:
 - Includes **private arrangements** of which the LA are aware or ought to be aware.
 - **LA under positive duty to**
 - (i) investigate,
 - (ii) determine whether a deprivation exists
 - (iii) if so, either bring it to an end (e.g. by providing additional support) or refer the matter to court.
 - LA may have to continue to monitor in appropriate cases. *Re A & C* [2010] EWHC 978 [95-6]



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➤ 2. Applying under the inherent jurisdiction

The inherent jurisdiction



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s.100 Children Act 1989:

- (3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the **leave of the court.**
- (4) The court may only grant leave if it is satisfied that—
 - (a) the result which the authority wish to achieve **could not be achieved through the making of any order** of a kind to which subsection (5) applies [another order open to LA which does not require use of IJ]; and
 - (b) there is reasonable cause to believe that **if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.**

The inherent jurisdiction



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Re C [1997] 2 FLR 180; approved in Re X; Re Y [2016] EWHC 2271

1. The **child's parents should be involved** in the decision-making process and must be given a fair hearing by the court.
2. Any order the court makes must be based upon and justified by **convincing evidence** from appropriate experts that the treatment regime proposed **accords with expert medical opinion**, and is **therapeutically necessary**.

The inherent jurisdiction



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3. Any order the court makes should direct or authorise the **minimum degree of force or restraint**, and in the case of an order directing or authorising the detention of the child the **minimum period of detention**, consistent with the welfare principle.

The inherent jurisdiction



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4. Any order directing or authorising the detention of the child should
 - (a) **specify the place** where the child is to be detained,
 - (b) specify (i) the **maximum period** for which the detention is authorised and, if thought appropriate, (ii) a **date on which the matter is to be reviewed** by the court, and
 - (c) specify, so far as possible, a place whose **location imposes the minimum impediments on easy and regular access between parents and child**.

The inherent jurisdiction



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5. Any order directing or authorising the detention of the child should contain an **express liberty to any party (including the child) to apply to the court for further directions** on the shortest reasonable notice.

6. Any order directing or authorising the detention of the child should, so far as practicable, contain supplementary directions designed

(a) to facilitate easy and regular access between parents and child, and

(b) to **provide the same safeguards for the child and the parents as they would have if the child were detained in accordance with some analogous statutory regime ...**

The inherent jurisdiction



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> Relevance of the safeguards/criteria in s.25?

- *Re C* [1997] 2 FLR 180 at 197: 'Although I have found that the clinic is not secure accommodation within s 25 of the Children Act 1989 and the attendant regulations, **it seems to me that I should pay careful regard to the scheme which Parliament has laid down under s 25** and that I should not make an order **on the facts of this case** for C's detention for the purposes of treatment unless I am satisfied that the s 25 criteria are, by analogy to the facts of this case, met.

The inherent jurisdiction



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> Getting it wrong...

- Resources arguments – unlikely to be successful as justification for circumventing Art 5 safeguards (*Re D* [2017] EWCA 1695 [14])
- A DOL without authorisation is unlawful.
- Breach of Art 5 -> possibility of HRA claim
- False imprisonment -> tortious claim
- Habeas corpus claim by/on behalf of child
- Need to review existing cases for latent DOLs?

COP or Family Court?



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> 3. Jurisdictional issues – COP or Family Court?

COP or Family Court?



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Overlap

- > Family Court - if under 18;
- > COP if 16 or over **and** lacking capacity under s.2 MCA (i.e. not due to age alone)

COP or Family Court?



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Transfer

- > MCA 2005 s.21; The Mental Capacity Act 2005 (Transfer Of Proceedings) Order 2007
- > Art 3 – ct must have regard to:
 - (a) whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection,

COP or Family Court?



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(b) whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings,

(c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18 and,

d) any other matters that the Court considers relevant.

COP or Family Court?



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Transfer

> *B v RM MM AM* [2010] EWHC 3802 [28] Hedley J

1. Is the child over 16? Otherwise of course, there is no power.
2. Does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings?
3. Are the disabilities which give rise to lack of capacity lifelong or at least long-term?

COP or Family Court?



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4. Can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority?
5. Does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act?
6. Can the child's welfare needs be fully met by the exercise of Court of Protection powers?

Essential reading – DOL cases



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- > *Re C* [1997] 2 FLR 180
- > *Cheshire West* 2014 UKSC 19
- > *Re D* [2015] EWHC 922
- > *In Re AB* [2015] EWHC 3125
- > *Birmingham CC v D* [2016] EWCOP 8
- > *A LA v D* [2016] EWHC 3473
- > *Re D* [2017] EWCA 1695
- > Wall P - use of inherent jurisdiction
- > SC - 'Confinement' (*Storck (a)*)
- > *Keehan J* - consent of parents of <16
- > *Keehan J* - consent under s.20/CO
- > *Keehan J* - consent of parents of 16+
- > *Keehan J* - consent of the child
- > CA (*Munby P*) - consent of parents
