Articles

What do children lawyers need to know about the Court of Protection?

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Care proceedings in the Family Court and health and welfare proceedings in the Court of Protection share some common characteristics. Both operate a discretionary jurisdiction, with questions relating to the upbringing of a child being governed by the paramount welfare principle under the Children Act 1989 (the 1989 Act), and decisions made for or on behalf of those who lack capacity ('P') being subject to the 'best interests' principle under the Mental Capacity Act 2005 (the 2005 Act). The overriding objectives under r 1.1 of the Family Procedure Rules 2010 (FPR 2010) and r 3 of the Court of Protection Rules 2007 (COPR 2007) are almost identical, differing only in that r 3A of the COPR 2007 now includes extensive requirements for ensuring full consideration of P's participation, whereas the FPR addresses the participation of the child in separate provisions elsewhere. This similarity of approach is reflected in the appointment of the President and Vice-President of the Family Division to the same positions in the Court of Protection. It is also a product of the fact that the inherent jurisdiction, which was used to make decisions on behalf of vulnerable adults before the 2005 Act was implemented, was considered to be 'indistinguishable' (according to Munby J in *Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942, [2006] 1 FLR 867) from the use of the parens patriae or wardship jurisdictions in relation to children.

Perhaps unsurprisingly therefore, recent procedural developments in the Court of Protection have mirrored changes made in the Family Court: PD13B (Bundles) supplements Part 13 of the COPR 2007 and adopts many of the requirements of PD27A of the FPR 2010; a new r 5 introduces changes to further the transparency agenda, such as the duty to consider whether any hearing should be held in public; and an amended far-reaching r 9 enables the Court of Protection to import the FPR 2010 to fill the gap in any case not expressly provided for by the COPR 2007. Notably, however, there has still not yet been any amendment to r 121 of the COPR 2007 to bring it into line with s 13 of the Children and Families Act 2014 so that expert evidence can be obtained only where 'necessary to resolve the proceedings justly.'

There are however jurisprudential difficulties involved in taking this analogy between care proceedings and Court of Protection proceedings too far, not least the risk of infantilising 'P' who, under s 2(5) of the

2005 Act, can only come within the jurisdiction of the COP if he is at least 16. As Hedley J said in *A Local Authority v FG and Others (No 1)* [2011] EWHC 3932 (COP), [2012] COPLR 473 'it is not open to the court to say that because someone functions at a chronological age of 7 and because no one would dream of ascribing capacity to a seven-year-old, therefore you do not ascribe capacity to the person in question; it is a more subtle process than that'.

The purpose of this article is to assist the child care lawyer with navigating the COP issues which might arise where the local authority within care proceedings seeks to place a child, or young person without capacity, in a strictly controlled and heavily supervised residential setting. Where the young person has reached the age of 16 the Family Court will need in any event to consider whether to transfer the proceedings to the Court of Protection under s 21 of the MCA 2005, since under s 31(3) of the 1989 Act care orders cannot be made once he is 17. Practitioners should refer here to 2005 Act Transfer of Proceedings Order (SI 2007/1899) and to helpful guidance on the factors relevant to transfer set out in *B (A Local Authority) v RM MM and AM* [2010] EWHC 3802 (Fam), [2010] COPLR Con Vol 247.

Where the Family Court retains the proceedings the first issue will be whether the proposed arrangements amount to a deprivation of the child's liberty. If so, how should that be authorized? Is authorization needed if the parents consent to the placement? Can the parents provide the relevant consent if the child is aged 16–17 or is formal authorization still required?

The article does not, however, address the making of secure accommodation orders under s 25 of the 1989 Act. Whilst these orders involve a deprivation of liberty, they can only be used where the child is being looked after by the local authority; where the conditions under s 25(1)(a) or (b) are met (ie where the child is likely to abscond from any other type of accommodation, and to suffer significant harm or injure himself or others); and where the children's home has been registered under reg 3 of the Children's Secure Accommodation Regulations 1991. Not all circumstances where there is a need to deprive the child's liberty fall into this category.

Deprivation of Liberty

Article 5 of the ECHR accords to 'everyone', whether child or adult, the right not to be deprived of his liberty without legal authorisation. For an adult or young person aged at least 16, authorization can be granted by the Court of Protection under s 16(2)(a) of the 2005 Act, or, where an adult is living in a care home or hospital, by procedures under the Deprivation of Liberty Safeguards (DoLS) in Sch A1 to the Act. These provide for, amongst other things, an independent check or regular review of whether continued detention is warranted. For a child younger than 16, the deprivation of their liberty requires authorization by the court in the exercise of its inherent jurisdiction: the care order by itself does not suffice, nor do CLA reviews or the involvement of the IRO provide the required safeguards and checks sufficiently independently of the state.

Many will already be familiar with the Supreme Court's decision in *P (By His Litigation Friend the Official Solicitor) v Cheshire West and Chester Council and Another; P and Q (By Their Litigation Friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19, [2014] COPLR 313 ('*Cheshire West*') which affirmed a three-part test, derived from the ECtHR case of *Storck v Germany* (App No 61603/00) [2005] 43 EHRR 96, to determine whether a person is deprived of their liberty:

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

(b) the subjective component of a lack of valid consent; and

(c) the attribution of responsibility to the state.

The objective component of confinement

The focus of *Cheshire West* was on further defining the first, objective limb. The majority of their Lordships agreed with Baroness Hale who, acknowledging that the starting point was the 'concrete situation' of the person on the ground, and that 'account must be taken of whole range of criteria such as the type, duration, effects and manner of implementation of the measures in question', identified an 'acid test' at para [49], ie whether the person concerned was under 'continuous supervision and control and was not free to leave'.

By a majority, the Supreme Court also held that the following features are irrelevant to the objective limb: 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; or the fact that the regime is no more intrusive or confining than that required for the protection and welfare of the person concerned. As Baroness Hale stated at para [42], if the fact that the placement was designed to serve the best interests of the person concerned meant that it could not be a deprivation of liberty, then the deprivation of liberty safeguards would scarcely, if ever, be necessary.

Given its objective nature, the first limb of the test presents no specific difficulties for children lawyers: what amounts to an objective confinement of an adult will amount to a confinement for a child. However, it is important to appreciate the settings in which a confinement may arise in children cases. A secure accommodation order will amount to a deprivation of liberty under Art 5 (*Re K (Secure Accommodation Order: Right to Liberty)* [2001] Fam 377, [2001] 1 FLR 526). Other cases may be less obvious, eg:

- A 14 year old accommodated under an interim care order at a residential children's home. He is not able to leave the home unaccompanied, is under observation by staff every 15 minutes, is never to be left alone with another resident, takes sedative medication under supervision and is not able to contact his family independently. However, he is not under one-to-one supervision within the unit, is happy and settled at the home, and wants to remain living there. See *A Local Authority v D and Others* [2015] EWHC 3125 (Fam), [2016] 2 FLR 601 where all parties and the court agreed that there was an objective confinement in these circumstances.
- A 16 year old with moderate to severe learning disability and problems with her sight, hearing and communication, who requires assistance crossing the road because she is unaware of danger, and who lives with a foster mother whom she regards as 'mummy.' Her foster mother provides her with intensive support in most aspects of daily living. She has never attempted to leave the home by herself and shows no wish to do so, but if she did, her foster mother would restrain her. She attends a further education unit daily during term time and is taken on trips and holidays by her foster mother. She is not on any medication. These were the living arrangements for 'MIG' in *Cheshire West* who was 18 at the time of the first instance decision: the same would amount to an objective confinement for a younger teenager.

The subjective component – lack of valid consent

The second limb raises issues for children lawyers primarily due to the role played by parental responsibility. A parent of a child who lacks capacity may purport to consent on behalf of their child to what would otherwise amount, quite plainly, to a deprivation of liberty. Does that mean that limb (b) of the *Storck* test is not met, regardless of what the child might say? And does the age of the child make any difference?

Of course, a child may consent to his own confinement, thereby providing the valid consent under limb (b). For a child aged 16 or 17, his capacity to consent will be

measured against the two-stage test in the 2005 Act. If under 16 (in which case the 2005 Act does not apply) the child can consent if he is *Gillick* competent (see, for example, *Re C (A Child by his Guardian) (No 3)* [2016] EWHC 3473 (Fam), reported above at p 491, in particular paras [52]–[61]). Such a scenario will perhaps arise rarely in practice: a child with severe learning or behavioural difficulties facing a deprivation of liberty is unlikely to have the capacity to consent to it, or will not in fact be consenting.

In *RK (by her litigation friend, the Official Solicitor) v BCC* [2011] EWCA Civ 1305, [2011] All ER (D) 28 (Dec) the parents of a 16 year old who lacked the capacity to make her own welfare decisions had consented to her accommodation in a residential home. Mostyn J at first instance held that there was no deprivation of liberty. First, because in his view the provision of accommodation to a child under ss 20(1), (3), (4) or (5) of the Act would never give rise to a deprivation of liberty within the terms of Art 5 due to the ability of the parents to withdraw their consent at any time; and secondly, because the restrictions imposed on RK were 'understandably necessary to keep RK safe and to discharge the duty of care'. The Court of Appeal dismissed the mother's appeal, holding that even if the Judge had been wrong on the s 20 point, they agreed that 'the restrictions were no more than what was reasonably required to protect RK from harming herself or others within her range'. *RK* is however of little assistance today: not only was the s 20 point sidestepped by leaving it undecided, but the objective issue of confinement was considered by reference to the need for or purpose of the restrictions, both of which factors are, in the light of *Cheshire West*, no longer relevant.

In *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), [2016] 1 FLR 142 the issue of parental consent was tackled head-on. The case concerned a 15-year-old boy with ADHD, Tourette's and Asperger's Syndrome who had been informally admitted to a residential hospital for multi-disciplinary assessment and treatment since 2012 and who had remained there – with his parents' consent – since then. In the light of *Cheshire West* a declaration was sought by the NHS Trust that the deprivation of his liberty was lawful and in his best interests. Noting that an appropriate exercise of parental responsibility in respect of a 5 year old differs very considerably from an appropriate exercise of parental responsibility in respect of a 15 year old, and that the appropriate exercise of parental responsibility for a 15 year old with D's disabilities differs from the appropriate exercise of parental responsibility for a 15 year old without those disabilities, Keehan J found that the decision to keep D in this case under 'constant supervision and control' fell well within the zone of parental responsibility and that for the parents to do otherwise was neglectful. But for his parents' consent to the placement, the circumstances in which D was accommodated would amount to a deprivation of liberty.

However, while Keehan J found that the parents had a history of making informed decisions about their son's care on the basis of advice from treating clinicians and professionals, and that there was therefore no need for the state to intervene in this case, he did suggest at para [62] that the position might be different if they had been acting contrary to medical advice, or if they had simply abandoned their son and had showed no interest in his life thereafter. The difficulty with this part of the judgment is that it suggests that formal authorisation is required if the parents' co-operation cannot be guaranteed: a seemingly arbitrary basis on which to determine whether or not a child should have the protection of Art 5 and the safeguard of regular and independent reviews.

In *A Local Authority v D and Others* [2015] EWHC 3125 (Fam), [2016] 2 FLR 601 Keehan J expanded on this to provide two helpful examples to illustrate where the boundaries of parental responsibility might lie in the context of a s 20 agreement:

- 'An agreed reception into care of a child, that is beneficial and for a

short-lived period, where the parent and local authority are working together co-operatively in the best interests of the child, may be an appropriate exercise of parental responsibility. Thus it would be appropriate for that parent to consent to the child residing in a place (for example, a hospital) for a period, and in circumstances which amount to a deprivation of liberty.' (para [26])

- 'Where children have been removed from their parents' care pursuant to a s 20 agreement as a prelude to the issue of care proceedings and where the local authority contend the threshold criteria . . . 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.' (para [27])

Thus, s 20 agreements, which have at their heart the consent of the parents, do not avoid engaging Art 5 simply by virtue of that consent. As Keehan J clarified in *Birmingham City Council v D* [2016] EWCOP 8, [2016] All ER (D) 05 (Feb) the consent of the parents under s 20 is only for the local authority to provide accommodation, and not to the form which that accommodation might take, which is where the issue of deprivation of liberty will arise. Section 20 agreements must still fall within the 'zone of parental responsibility' to amount to valid consent under component (b).

Similar logic prevents the parents from being able to provide a valid consent where the arrangements are agreed under an interim care order or a full care order (*A Local Authority v D and Others* (above) at paras [28] and [38]). Nor can the local authority itself purport to provide a valid consent to a confinement it has put in place for a child under an interim care order or a care order: to allow it to consent to a deprivation of liberty attributable to itself could not possibly be compliant with the letter and spirit of Art 5 (*A Local Authority v D and Others* (above) at paras [29] and [38]).

16–17 year olds

In *Birmingham City Council v D* (above) Keehan J clarified that, while *Re D* remained correct for those under 16, the parents of a child aged 16 or older cannot give a valid consent to circumstances which would otherwise amount to a deprivation of liberty for that child. Briefly, the distinction was justified by reference to the legal status of 16–17 year olds in other contexts where there is a growing degree of respect for their autonomy, and by the fact that 16–17 year olds have been included alongside adults under the statutory framework of the 2005 Act.

Attribution of responsibility to the state

It might be supposed that limb (c) limits the scenarios where deprivations of liberty may arise in children cases to those actions and plans set out by local authorities. Private arrangements made by parents for their child would presumably lie outside the scope of Art 5. This was found not to be so in *Birmingham City Council v D*, where Keehan J applied the dicta of Munby P in *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363. In that case, the President held that the local authority owes a positive obligation to children under Art 5(1) where it knows, or ought to know, of a situation in which a deprivation of liberty may arise in respect of a vulnerable child. The duty is to investigate, determine whether a deprivation exists and, if so, either bring it to an end if possible or seek authorisation from the court (para [95]). Therefore, a local authority may not argue that purely private arrangements made by parents for children, which would otherwise amount to a deprivation of liberty, are not attributable to itself for the purposes of limb (c).

It is also now clear from Birmingham that s 20 accommodation satisfies limb (c). Although it was provided 'at the behest of the parents', Keehan J found that the role of the local authority in establishing and maintaining D's placement was 'central and

pivotal' (para [132]) and it was 'perverse' to suggest that such accommodation should not be attributable to the state.

The authors hope that the flowchart below will provide some further guidance in this complex area.

Flowchart for identifying a Deprivation of Liberty for a child or young person