

CDC case law update 23 – January 2018



This update is intended to provide general information about recent decisions of the courts and Upper Tribunal which are relevant to disabled children, young people, families and professionals. It cannot and does not provide advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

Re D (A Child) [2017] EWCA Civ 1695

The Court of Appeal held that a parent of a 16 or 17 year old can give consent to what would otherwise be a deprivation of liberty for that young person.

Case overview

The Court of Appeal allowed a local authority's appeal, holding that a young person was not deprived of his liberty in a residential placement because his parents had consented to this placement. As such there is no requirement to have placements of 16 or 17 year olds authorised by the Court of Protection if their parents are willing and able to give valid consent.

Decision

The decision of the High Court in this case was summarised in Case Law Update 6. It is important to note that the Court of Appeal has overturned the approach of the High Court, and so reference should now be made to this case law update for the current position.

The background to issues in relation to deprivation of liberty is set out in Case Law Update 3, which concerned the position of D while he was still a child. It is important to note that under Article 5 of the European Convention on Human Rights, one of the three elements of a 'deprivation of liberty' is that there is no valid consent to the arrangements.

The essential question in this case was whether D, a young person aged 16 at the time of the High Court judgment, was deprived of his liberty in a residential unit. In an earlier judgment when D was a child, the High Court had held that D's parents' consent to a hospital placement avoided any deprivation of liberty. However after D turned 16 the High Court held that D's parents could no longer give valid consent on his behalf. D lacked capacity to give consent himself. As such the local authority needed authorisation for the placement from the Court of Protection to avoid an unlawful deprivation of liberty under Article 5.

The Court of Appeal disagreed. Having reviewed the historic case law, Sir James Munby (President of the Court of Protection) held that the exercise of parental responsibility comes to an end not on the attaining of some fixed age (other than adulthood) but on the child attaining 'Gillick capacity' (see Case Law Update 3). As such parental responsibility is exercisable in relation to a 16 or 17 year old child who lacks Gillick capacity. Nothing in the UN Convention on the Rights of the Child or the UN Disability Convention compelled a different conclusion.

The Court of Appeal agreed with the judge that parental responsibility cannot justify the imposition of a regime equivalent to 'secure accommodation', no matter what age the child may be.

It should be noted that there was no dispute in this case that the 'objective' element of D's confinement was present. It was agreed that D was not free to leave his placement and was under continuous supervision and control, this being the test set down by the Supreme Court in *Cheshire West* (see further Case Law Update 3).

The Court of Appeal agreed with the judge in the High Court that D's placement was 'attributable to the state', this being the third element of the test for a deprivation of liberty under Article 5.

What this means for children, young people and families

The Court of Appeal's decision means that parents will be able to give consent to placements for young people aged 16 or 17, for example at a residential college, which would otherwise give rise to a deprivation of liberty. In cases where parents are willing and able to give consent there will be no need for any application to the Court of Protection. Parents should of course seek advice before giving consent if they have any concerns about so doing. If parental consent is given, young people will lose a safeguard available to disabled adults, whose placements must be authorised by the Court of Protection if they meet the objective element of the test for a deprivation of liberty and the adult cannot give valid consent themselves.

Implications for local authorities and other public bodies

Local authorities will be relieved of some of the pressure caused by the Supreme Court judgment in *Cheshire West*, in that cases involving 16 and 17 year olds will not now need to be referred to the Court of Protection if their parents are willing and able to give consent (unless other issues than deprivation of liberty arise). Local authorities will need to be careful to ensure that consent obtained from parents is valid, for example that the parent(s) have mental capacity to make this decision and have been provided with all the necessary information to give informed consent.