

## Case Law Update

### Re D (A Child; deprivation of liberty) [2015] EWHC 922 (Fam)

*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.*

#### **Case overview**

The recent judgment of the Supreme Court in the *Cheshire West* case<sup>1</sup> has clarified that many more disabled people than previously thought are being deprived of their liberty in health and social care placements – or indeed potentially in their own homes where there is state care provided.

This case involves the court working out the link between parental rights and responsibilities and the state's responsibilities for avoiding or approving deprivations of liberty under Article 5 of the European Convention on Human Rights.

The case concerned 'D', a boy then aged 15 who has ADHD, Asperger syndrome and Tourette's syndrome. D was informally admitted to 'Hospital B' as a result of his challenging behaviour. Although at the time of the judgment D was assessed as fit to be discharged, the local authority had not identified an appropriate residential placement for him. As a result D had remained confined in hospital for almost 18 months on the agreement of his parents

Importantly, D has been assessed as not being 'Gillick' competent to consent to his residence or care arrangement or to any deprivation of liberty. This is a reference to a well-known case<sup>2</sup> where the House of Lords held that children with sufficient understanding and intelligence to enable them to understand fully what is involved in a proposed medical intervention will also have the capacity to consent to that intervention.

The hospital's position was that it was depriving D of his liberty applying the approach adopted in *Cheshire West*, D's parents could not consent to the placement because it was outside the 'zone of parental responsibility' and the Court should therefore approve the placement.

The local authority submitted that there was no deprivation of liberty, and that if there was D's parents' consent meant that the second and third requirements of Article 5 ECHR were not satisfied.<sup>3</sup>

The family were not represented and did not make any submissions. Nor did D's guardian make any submissions on the legal issues.

#### **Decision**

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<sup>1</sup> *Surrey County Council v P and Q; Cheshire West and Chester Council v P* [2014] UKSC 19

<sup>2</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

<sup>3</sup> Being 'the subjective component of the lack of valid consent' and 'the attribution of responsibility to the state'.

The Judge concluded that D's parents were able to consent to his placement at the hospital so that there was no deprivation of liberty for the purposes of Article 5 ECHR.

The Judge said that he was 'wholly satisfied that D lives in conditions which amount to a deprivation of his liberty'. The 'acid test' from *Cheshire West* was satisfied; D was under constant supervision and control and was not free to leave.<sup>4</sup> The Judge emphasised that the fact that D was happy at the hospital and had been placed there in his best interests was irrelevant to the question of whether he was deprived of his liberty; as Lady Hale held in *Cheshire West*, 'a gilded cage is still a cage'.

The local authority's case that the *Cheshire West* did not apply to children was rejected; 'The protection of Article 5 of the Convention and the fundamental right to liberty applies to the whole of the human race; young or old and to those with disabilities just as much to those without'.

However the Judge described the 'essential issue' in the case as being 'whether D's parents can, in the proper exercise of parental responsibility, consent to his accommodation in Hospital B and thus render what would otherwise be a deprivation of liberty not a deprivation of liberty'.

The Judge held that the parents could so consent, rejecting the 11 reasons to the contrary advanced by the hospital. In considering whether this decision fell within the 'zone of parental responsibility' the Judge held it was 'inevitable and necessary' that he should take account of D's disabilities. Noting that the 'appropriate exercise of parental responsibility' will vary between 5 year old and 15 year old children, the Judge held that:

'The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities'.

As such the Judge concluded 'I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility', even though D was not being cared for in a home setting. The Judge said 'It would be wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility'.

The Judge's decision has proved controversial<sup>5</sup> and will be discussed in detail in the second edition of *Disabled Children: A Legal Handbook*, to be published later in 2015. It is unlikely however that the decision will be appealed because D will now be 16 and will come under the Mental Capacity Act 2005. As such his parents will no longer be able to consent on his behalf.

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<sup>4</sup> The hospital unit had a locked front door and D was not permitted to leave without supervision.

<sup>5</sup> See the critical commentary here from barristers Brigid Dolan and Sarah Simcock: [http://www.serjeantsinn.com/news\\_and\\_resources/488/commentary\\_re\\_d\\_a\\_child\\_deprivation\\_of\\_liberty](http://www.serjeantsinn.com/news_and_resources/488/commentary_re_d_a_child_deprivation_of_liberty)

### **What this means for children, young people and families**

The decision in *Re D* appears to expand the 'zone of parental responsibility' and makes clear that in many cases a parent will be able to consent to their child's placement in a residential setting where the child is under 16. Parental consent will avoid a 'deprivation of liberty' for the purposes of Article 5 ECHR which would otherwise need to be authorised by the Court.

It is important to note that the Judge stated that his decision might have been different if 'the parents were acting contrary to medical advice or...simply abandoned [D] or took no interest or involvement in his life thereafter'. As such it appears that for parents to consent to a placement like this it may be necessary for them to be acting in accordance with professional advice and remain involved in their child's care after the placement is made.

It is also important that the decision in *Re D* concerns parental responsibility for children aged under 16. The position changes significantly when a child reaches 16 in that the Mental Capacity Act 2005 applies and any deprivation of liberty would need to be authorised by the Court of Protection.

### **Implications for local authorities and other public bodies**

Given the pressures on local authorities after the *Cheshire West* decision, local authorities may be pleased to note that it will not be necessary to get court authorisation for many placements of disabled children which would otherwise amount to a deprivation of liberty if their parent(s) consent.

However local authorities and health bodies will need to exercise caution in relying on parental consent. Firstly, all involved must be satisfied that the child is not *Gillick* competent, as if they are it will be their own consent that matters. Secondly, reliance on parental consent would seem to require the local authority to be satisfied that the parents are following professional advice and are properly involved in their child's care. In cases of doubt specific legal advice should always be sought.

Local authorities and health bodies would also need to be cautious in relying on *Re D* in case a different Judge takes a different approach in a future case. It might be thought that allowing the extent of a child's disabilities to become a relevant factor in determining whether that child is deprived of his liberty is directly contrary to the approach of the Supreme Court in *Cheshire West*. Also, the Judge reliance on parental compliance with medical advice makes the 'zone of parental responsibility' uncertain. Where are the boundaries of the zone in cases where medical professionals disagree?

*It is likely that there will be further cases on deprivation of liberty for children where these issues will be further explored. CDC will aim to cover any such future cases in the [CDC Digest](#).*

You can read the full judgment available at:

<http://www.bailii.org/ew/cases/EWHC/Fam/2015/922.html>