



Session 4: Children and Young People

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Who is a child?

- Any person under the age of 18 is a child in law.
- There are though important differences as between those 15 and under, and those who are 16 and 17.
- Those 15 and under fall within the jurisdiction of the family court or the inherent jurisdiction of the High Court
- Those aged 16 and 17 and lack capacity due to a mental disorder will fall within the MCA, if they would otherwise be *Gillick* competent

What decisions can parents make on behalf of their children? Parental responsibilities

- Parental responsibilities refers to a “bundle of rights” or a “bundle of powers” and include power to control:

“education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also, both the personal power physically to control the infant until the years of discretion and the right (originally only if some property was concerned) to apply to the courts to exercise the powers of the Crown as *parens patriae*.” (see LJ Sachs in *Hewer v Bryant* [1969] 3 All ER 578 at 585)

- Parental Responsibilities changes as a child matures and are extinguished when becomes and adult at age 18. As a child matures they become competent to make decisions for themselves – become “Gillick competent”:

“Parental control yielded to the child’s right to make his own decisions when he reached a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. Parental authority was, therefore, a dwindling right. The duration of parental rights could not be found by reference to the child attaining any particular age, but upon a judgment of what was best for the welfare of the particular child. Consequently, the parental right to determine whether or not a child under 16 would have medical treatment terminated if and when the child achieved a sufficient understanding and intelligence to enable him or her to understand fully what was proposed. But in the overwhelming majority of cases the best judges of a child’s welfare were his parents and normally any important medical treatment would only be carried out with the parents' approval....” (*Gillick V West Norfolk & Wisbech Area HA* [1986] 1 FLR 224)

Parental Rights: Children Act 1989

The Children Act 1989 codified these principles:

Section 3(1) Children Act 1989

“In this Act “parental responsibility” means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”

Section 2(7) Children Act 1989

“Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child.”

Children Act 1989

- **Section 2(8) Children Act 1989**

“The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act.”

- **Section 2(9) Children Act 1989**

“A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.”

Children: Deprivation of Liberty

- If a child's circumstances amount to a deprivation then it must be authorised either by way of a statutory scheme or by way of a court order.
- If the child is under 16 a deprivation can be authorised by:
 - (i) The consent of the parent who holds Parental Responsibility;
 - (ii) The consent of the *Gillick* competent child (but re *Re D*);
 - (iii) The Mental Health Act 1983 (if requirements met);
 - (iv) A secure accommodation order pursuant to section 25 Children Act 1989; or
 - (v) The inherent jurisdiction of the High Court.

Children: Deprivation of Liberty

- 16 or 17
 - (i) The Mental Health Act (if requirements are met);
 - (ii) The inherent jurisdiction of the High Court; or
 - (iii) the Mental Capacity Act 2005 (if lacks capacity due to mental disorder).
- Wardship: does not authorise a deprivation of liberty and can only be used where neither the Mental Capacity Act or Children Act apply/can be used.

Children aged 15 years and younger

- Parents can consent to a deprivation of liberty on behalf of their child (where they hold parental responsibility: see *RE D (A CHILD: DEPRIVATION OF LIBERTY)* [2017] EWCA Civ 1695)
- A *Gillick* Competent child can consent for him or herself.
(see *A Local Authority v D, E and C (a Child)* [2016] EWHC 3473 (Fam) [8.3.2017], see also MHA Code of Practice paragraphs 19.65 and 19.66 and A-F (Children) [2018] EWHC 138 (Fam))

Discharge from MHA detention

- If a child aged 16 or 17 is discharged from detention under the Mental Health Act 1989 to a placement where they will be deprived of their liberty and they lack capacity due to a mental disorder then that deprivation of liberty must be authorised under the MCA DoLs, or by the Court of Protection.
- If the child is 15 or under then any deprivation of liberty must be authorised by the High Court using its inherent jurisdiction (unless parents with PR).
- If the child is 16 or 17 and has mental capacity then any deprivation of liberty must be authorised by the High Court exercising its inherent jurisdiction (or if not *Gillick* competent by parents with PR).

Useful Cases:

Cheshire West [2014] UKSC 19

FACTS:

- MIG and MEG are sisters who first became subject to care proceedings under Children Act 1989 when they were 15 and 16.
- MIG has a learning disability, problems with her sight and hearing and communicates with difficulty.
- MEG has a learning disability, may also have autistic traits and exhibits challenging behavior
- Until 2007 they lived with their mother and (from 1997) their step father. They were removed from home due to alleged sexual offences committed against them by their step father and mother.

Cheshire West cont.

- MIG went to live with a foster mother
- MEG was placed in foster care initially but due to her challenging behaviour this broke down and she moved into residential care – NHS facility, not a care home.
- 2008 when MIG and MEG were 16 and 17 care proceedings were transferred to the Court of Protection. COP said care did not amount to deprivation of liberty and was in their best interests. Court of Appeal agreed.

Cheshire West Cont.

In the Supreme Court in the course of setting out what amounts to a deprivation of liberty Baroness Hale referred to *Ashingdane v United Kingdom* (1985) 7 EHRR 528 para 117, which made the distinction between objective element of confinement and subjective:

- Objective – confinement in a restricted place for not a negligible length
- Subjective – he had not validly consented to the confinement.

Cheshire West cont.

- The situation the Supreme Court was concerned with had not arisen in ECtHR directly. That is:
 - (i) Person lacks both legal and factual capacity to decide upon his/her placement but who has not evidenced dissatisfaction
 - (ii) Placement is not a hospital or social care home but a small group or domestic setting
 - (iii) The initial authorisation was by a court as being in the best interests of the person

Issue: whether authorisation can continue indefinitely or must there be periodic independent review?

Cheshire West

- Set out the 'acid test' – continuous supervision and control and lack of freedom to leave. But all cases will be fact specific.
- Found MIG and MEG were deprived of the liberty and there was a need for periodic independent check on whether the arrangements made are in their best interests. Need not be elaborate (para 57)

Cheshire West: Children

- See Lord Kerr at paras 76-79.
- Compare the extent of your actual freedom with someone of same age and station whose freedom is not limited
- For MIG and MEG a teenager of the same age and familial background is relevant comparator
- All children are subject to some level of constraint, this alters as they mature
- Very young children have a curtailment of their liberty but this is common to all very young children. Whilst very young therefore MIG and MEG's liberty was not restricted. But they must "now be compared to children of their own age and relative maturity who are free from disability and who have access to a range of freedoms which MIG and MEG cant have resort to." (para 79)



In the Matter of D (A child)[2017] EWCA Civ 1695

Facts:

- D born on 23 April 1999 and diagnosed with ADHD, Asperger's Syndrome and Tourett's Syndrome. On admission to hospital he was further diagnosed with a mild learning disability. He was cared for at home until he was admitted in October 2013 (aged 14) to hospital providing mental health services for children and young people (12-18).
- Hospital regime: external door locked, checked every half an hour, school was part of the unit, if D left unit he was accompanied 1:1.
- Not *Gillick* competent.

In the Matter of D (A Child)

- Keehan J in High Court reached view that D (then 15) was being deprived of his liberty but for his parents consent to his placement (so subjective element not met).
- Found that on the basis of the facts of the case that the consent of D's parents with all of the restrictions placed on him was within the "zone of parental responsibility". He was satisfied that they were able to consent on his behalf.
- D turned 16 and the local authority issued proceedings in the Court of Protection. Orders were made to move D from hospital to residential unit. He moved on 2 June 2015 prior to final determination of the Court of Protection proceedings.



Re D (A Child)

Final hearing November 2015.

- Agreed placement and regime = objective confinement
- Dispute: Could D's parents consent?

Did the fact that D resided at placement under s.20 Children Act 1989 with agreement of his parents mean confinement not imputed to the state but was at the request of and consent of his parents?

Re D (A child)

- Keehan J found:
 - D's parents could consent to his confinement when he was under 16
 - D's parents could not consent now he was 16
 - D's confinement was attributable to the state

Orders were made under s.16 MCA including authorisation for his deprivation of liberty.

Re D (A Child) Court of Appeal

- Court of Appeal
 - Upheld Keehan J re deprivation being imputable to the state notwithstanding involvement and agreement of parents to placement. So Article 5 engaged.
 - Upheld Keehan J that placement amounted to a deprivation of liberty
 - Parental responsibility: Held that for those aged 16 and 17 who are not *Gillick* competent PR is in principle exercisable.
 - **Overtaken** Keehan J's finding that a parent cannot consent to arrangements who has attained the age of 16 which would otherwise amount to a deprivation of liberty.

Re A-F (Children) [2018] EWHC 138 (Fam)

- Case concerned a number of test cases which raised various substantive and procedural questions in relation to the interface between care proceedings in the Family Court pursuant to Part IV Children Act and Article 5 ECHR. Judgment by Sir James Munby (President of the Family Division)
- Circumstances in which art.5 would be engaged
 - confinement in a restricted place for a more than negligible period;
 - lack of valid consent; and
 - state responsibility (Storck v Germany) ((2006) 43 E.H.R.R. 6).
- Where a child was subject to a care order, the critical question would be whether there was confinement. If there was, the state would be responsible, and neither the local authority nor a parent could exercise their parental responsibility so as to consent, AB (A Child)(Deprivation of Liberty: Consent), Re [2015] EWHC 3125 (Fam) (see paras 8-13 of judgment).

Re A-F (Children)

- Typically, a "young" child living with his parents would be living in circumstances amounting to confinement in the Storck sense, but would not be deprived of his liberty so as to engage art.5. Nor would a similar child living with foster carers
- The question in relation to the child in care was, at what point in his development, and by reference to what criteria, was it to be determined that the circumstances amounting to confinement engaged art.5?
- The answer depended more on supervision and control than freedom to leave. Lord Kerr's analysis in Cheshire West was crucial: the restrictions to which the child in care was subject had to be compared with those applicable to a child of the same age, station, familial background and relative maturity, whose freedom was not limited. Although each case had to be determined on its facts, as a rule of thumb, a 10-year-old under constant supervision was unlikely to be being deprived of his liberty, an 11-year-old might be, but the court would more readily conclude that a 12-year-old was (paras 21-25, paras 29-33, 41-44).

Re A-F (Children)

- Confinement would be lawful if necessary and proportionate and had been authorised by the High Court in the exercise of its inherent jurisdiction. An application to the court had to be made where the child's circumstances *arguably* constituted a deprivation of liberty.
- There had to be an oral hearing in the Family Division. The child had to be a party, had to have a guardian, and should be permitted to express their wishes and feelings if of an age to do so.
- The evidence had to address the nature of the regime in which the child was to be placed; the child's circumstances and prognosis; why the proposed regime was necessary and proportionate; the views of the parents and independent reviewing officer; and the most recent care plan, reviews and reports on the child's physical and mental health.
- An assertion that the child had the capacity to consent to the confinement would usually have to be supported by evidence from the child, a psychologist or a psychiatrist. Although "bulk" applications were unlawful, a number of separate cases could be heard together or in sequence before one judge if there was significant evidential overlap. The court did not have to specifically authorise each element of the circumstances constituting the confinement; it was sufficient for the order to authorise the child's deprivation of liberty at "placement X" as described in some cross-referenced document, and the use of medication and restraint if appropriate (paras 26-27, paras 47-52).

Re A-F (Children)

- Continuing review was crucial to the continued lawfulness of any confinement.
- There had to be regular reviews by the local authority and a review by a judge at least once a year, or sooner if there was a significant change in the child's condition or if a different placement was proposed.
- The child had to be a party to the review and had to have a guardian. If there had been no significant change of circumstances, the review could be conducted on the papers. Generally, it was preferable for the proceedings to be concluded, rather than being left open, upon the making of a final order and thereafter at end of each review (paras 55-56).