BRIEFING SHEET FOR CARE HOME MANAGERS

Changes to Deprivation of Liberty after Cheshire West Court Case

The test of deprivation of liberty has now been revised into a so-called “acid test” by the Supreme Court as follows

The person is under continuous supervision and control AND is not free to leave and they lack the capacity to consent to these arrangements then they are being deprived of their liberty

Every element of this must be satisfied i.e.

- Continuous
- Supervision
- Control
- Not free to leave

It is no longer relevant whether the person is compliant or whether there is a lack of objection. The focus is not on the person’s ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave. The purpose of the placement is not relevant and the person should no longer be compared only with another person who has the same level of disability. The concept of “relative normality” as expressed by the Court of Appeal in the Cheshire West case was determined by the Supreme Court as not relevant when deciding whether an individual is being deprived of their liberty;-

The test is an objective one and the Supreme Court stated that “a gilded cage is still a cage”.

One of the cases heard by the Court involved someone living in a foster placement and one in a small group home. This decision has widened the approach to deprivation of liberty in these settings and a cautious approach is urged erring towards deprivation. If the care arrangements giving rise to the deprivation of liberty are being made by the state (whether LA or NHS) then the actual location (care home, hospital, supported living or in the adult’s own home) are irrelevant.

Care Home Managers must:

- In accordance with the MCA there is the presumption of capacity. Prior to requests for either urgent or standard DoLS authorisation, an assessment of the individuals capacity regarding their ability to make the decision to be cared for and accommodated in the care home or hospital must be provided by the managing authority.

- Ensure they are familiar with the MCA particularly the less restrictive principle. Even if factors from the DoLs Code of Practice (paras 2.1 to 2.6) need to be used cautiously in determining whether a deprivation of liberty exists in any particular case, they may still be helpful in identifying whether the package of care or treatment is the least restrictive option.

- When developing and implementing new care plans for people where there may be impaired capacity be alert for restrictions which may now amount to a deprivation of liberty

- Review existing care plans for those people who are known to lack capacity for decisions about care to ensure the less restrictive principle is being followed

- Where a potential deprivation of liberty is identified, a full exploration of all alternative ways of providing care and/or treatment should be undertaken, in order to identify any less restrictive ways of providing such care which will avoid a deprivation

- Where the care/treatment plan for an individual lacking capacity will unavoidably result in a deprivation of liberty judged to be in that person's best interest, this MUST be authorised.

DOLS CHECKLIST

The following is a guide to identify those potentially deprived of their liberty. This can be used in developing new care plans, reviewing existing care plans or as a simple guide for individuals.

First it must be established that the person lacks capacity for the decision about where they live.

If they have capacity for this decision then they do not meet the test for deprivation of liberty

There must be a formal written decision to this effect to rebut the presumption of capacity.

QUESTION ONE: In your opinion is the person free to leave YES/NO

Remember this does not mean that they must be trying to leave or even expressing a view about leaving; it is more a test of what staff would do if the person tried to leave.

If the answer is YES they do not meet the test for deprivation of liberty

QUESTION TWO: Is the person subject to both supervision and control YES/NO

Remember it is no longer relevant that the purpose of this is to enable them to go out or to take part in activities or if the high level of supervision and control is to meet a high level of care needs

QUESTION THREE: Is the level of supervision and control continuous YES/NO

In any case where the answers are **NO, YES, YES** then it is likely that the person is being deprived of liberty. The next step is to review the persons care plan to determine whether care can be provided in a less restrictive way.

If this is not possible you will need to seek further advice, in the first instance contact:

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