

BRIEFING SHEET FOR CARE HOMES AND HOSPITALS

Changes to Deprivation of Liberty after Cheshire West Court Case

How to decide whether it is likely that a deprivation of liberty is occurring and when to make a referral to the DoLS Team.

The requirement for the Deprivation of Liberty Safeguards remain the same

The following 6 requirements still need to be met:

1. Person is aged 18 or over
2. They are suffering from a mental disorder
3. They lack the mental capacity to decide to be accommodated in the hospital or care home
4. They have not made a valid decision previously to refuse treatment or care, or their health and welfare LPA has not made such a decision
5. They are not eligible to be detained under the Mental Health Act
6. It is in the person best interests to be deprived of their liberty

The difficulty comes in working out whether a situation in a hospital or care home amounts to a deprivation of liberty.

The Supreme Court introduced the 'acid test'

1. Is the person subject to **continuous supervision and control**

AND

2. Is the person free to leave? (The person may not be asking to leave or making any attempt to leave but the question to ask is if they did would they be allowed to leave)

Therefore if a person is subject to continuous supervision and control and not free to leave they are being deprived of their liberty.

Each case needs to be decided on its own merits but equality means that the threshold for a DoLS has been widened, it must be the same for everyone regardless of their disability. Therefore if the arrangements for an individual with capacity, who is not disabled, amount to a DoLS then it would also amount to a DoLS for a person who lacks capacity.

The following factors are no longer relevant to determining whether a person is being deprived of their liberty:

1. The person's compliance or lack of objection
2. The relative normality of the placement
3. The reason or purpose behind a particular placement
4. The nature of the individual's disability
5. The individual's awareness that they are or likely to be subject to a DoLS

REMEMBER

The Deprivation of Liberty Safeguards apply in hospitals and care homes but this criteria to decide what a deprivation of liberty is applies in any setting.

Settings other than hospitals or care homes

In any other setting such as supported living, adult placement, small group homes and domestic settings an application must to be made to the Court of Protection.

Legal advice should be sought as soon as possible, but seeking this should not stand in the way of providing any immediate care and attention to the person.

EXAMPLES OF DEPRIVATION AS CONSIDERED BY THE SUPREME COURT

1. An adult with a learning disability living in a bungalow with two other residents, with two members of staff on duty during the day and one 'waking' member of staff overnight. The adult requires prompting and help with all the activities of daily living, getting about, eating, personal hygiene and continence. He sometimes requires further intervention when he exhibits challenging behaviour, but is not prescribed any tranquilising medication. He is unable to go anywhere or do anything without one to one support; he gets 98 hours a week support to enable him to leave the home frequently for activities and visits.
2. A 17 year old with mild learning disabilities living with three others in an NHS residential home for learning disabled adolescents with complex needs. She has occasional outbursts of challenging behaviour towards the other three residents and sometimes requires physical restraint. She is prescribed (and administered) tranquilising medication. She has one to one and sometimes two to one support. Continuous supervision and control is exercised so as to meet her care needs. She is accompanied by staff whenever she leaves. She attends a further education unit daily during term time and has a full social life. She shows no wish to go out on her own and so there is no need to prevent her from doing so.

3. An 18 year old with a moderate to severe learning disability and problems with her sight and hearing, who require assistance crossing the road because she is unaware of danger, living with a foster mother whom she regards as 'mummy.' Her foster mother provides her with intensive support in most aspects of daily living. She is not on any medication. She has never attempted to leave the home by herself and showed 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.

In addition Hempsons (health and social enterprise lawyers) advise:

- If P is in hospital for treatment of a physical condition and would not be allowed to leave if P wanted to and objection would be made if relatives tried to remove P.
- More widely (and controversially), patients who are PVS or minimally conscious or sedated on ITU might be deprived of liberty, those patients may well not qualify for the Deprivation of Liberty Safeguards in the Mental Capacity Act 2005 because they do not have a mental disorder (within the meaning of the Mental Health Act 1983), an application to Court would then be necessary.

The DoLS Code of Practice and previous training you may have attended lists the factors which may indicate a deprivation of liberty these must now be read in the light of the decision of the Supreme Court in the Cheshire West case.

*This is a short guide to assist Managing Authorities and not a full statement of the law. It is derived from the **Mental Capacity Law Guidance** issued by 39 Essex St in March 2014*

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