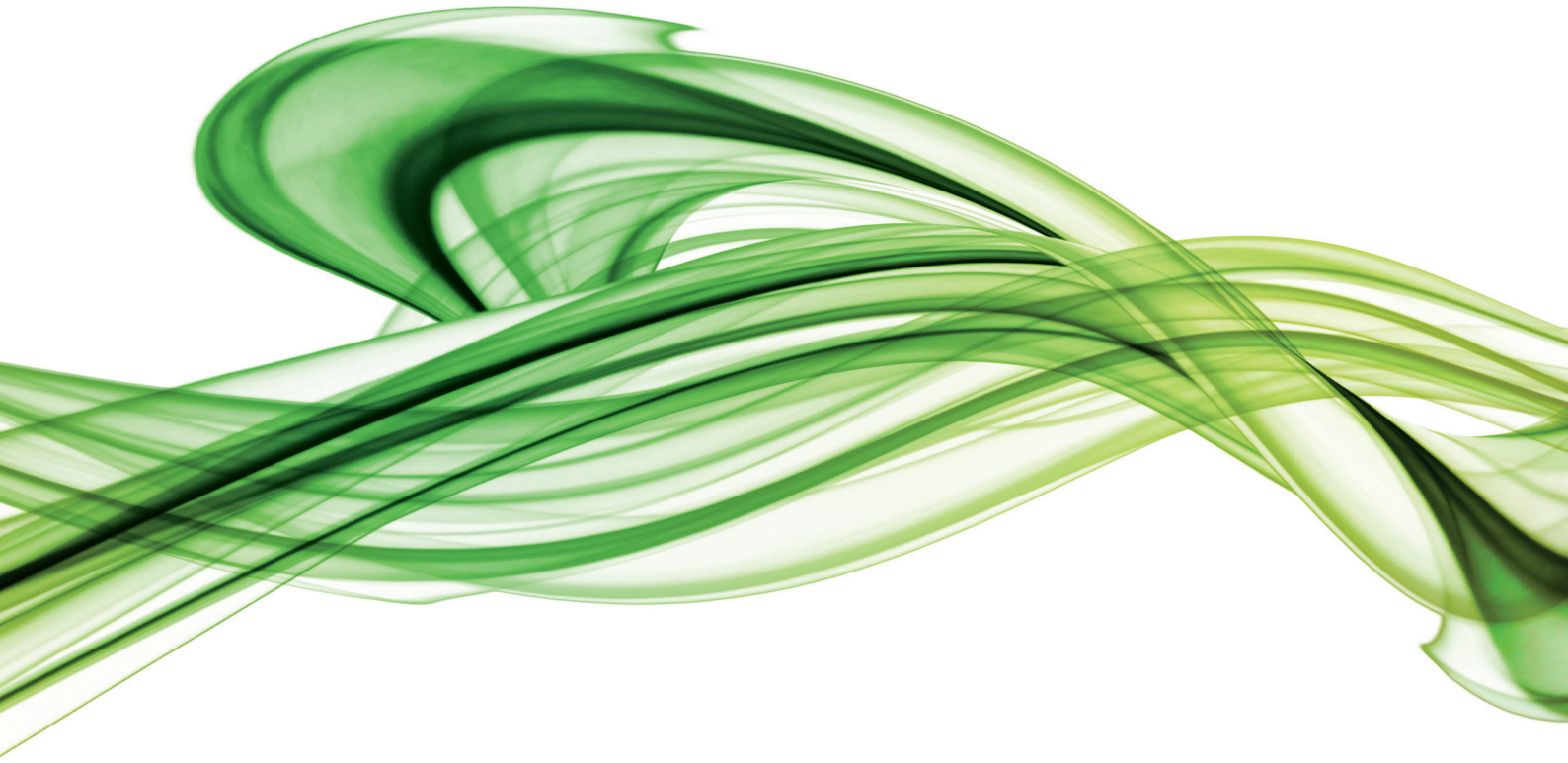
The Law Society

Identifying a deprivation of liberty: a practical guide

The care home setting



A: Introduction

6.1 By far the highest number of applications for authorisations under the Deprivation of Liberty Safeguards ("DOLS") are made by care homes[1]. Care homes are defined by s.3 Care Standards Act 2000 as follows:

Care homes.

(1) *For the purposes of this Act, an establishment is a care home if it provides accommodation, together with nursing or personal care, for any of the following persons.*

(2) *They are—*

(a) persons who are or have been ill;

(b) persons who have or have had a mental disorder;

(c) persons who are disabled or infirm;

(d) persons who are or have been dependent on alcohol or drugs.

6.2 All care homes in England must be registered with and inspected by the Care Quality Commission ('CQC'). Care homes in Wales are inspected by the Care and Social Services Inspectorate Wales (CSSIW). There are two types of care home: residential care homes and care homes with nursing, but there is of course a wide variety within these types.

6.3 The CQC explains on its website[2] that residential care homes range in size from very small homes with few beds to large-scale facilities. They offer care and support throughout the day and night. Staff may help with washing, dressing, at meal times and with using the toilet. Care homes with nursing will normally offer the same type of care but with the addition of 24-hour medical care from a qualified nurse. Within these two however there will be a wide variety of provision, because care homes may have different specialisms. These will include dementia, alcohol or drug dependency, mental health or learning disability. This chapter looks at the type of liberty-restricting measures which could be present in the following settings which come within the definition of a care home:

6.3.1 A residential care home for older adults;

6.3.2 A care home with nursing;

6.3.3 A care home for people with severe and enduring mental health problems, including mentally
disordered offenders;

6.3.4 A care home for adults with physical and learning disabilities.

6.3.5 An arrangement for respite.

6.4 This chapter will summarise the legal frameworks which may apply to care home residents. It will then consider the settings listed above and provide scenarios which describe a regime in each setting which amounts to a deprivation of liberty; and, where appropriate, regimes which may be a deprivation of liberty or which we do not consider will amount to a deprivation of

1 Around 70% of all applications in 2013-14: see *Care Quality Commission's report "Monitoring the Use of the Mental Capacity Act 2005 Deprivation of Liberty Safeguards at http://www.cqc.org.uk/content/deprivation-liberty-safeguards-201314*.

2 http://www.cqc.org.uk/content/care-homes

liberty. Following the scenarios we set out are questions which can usefully be asked by front-line staff attempting to ascertain where on the spectrum a particular care arrangement may fall. An appendix deals with specific issues that arise in relation to the use of care homes for respite.

B: The Legal Framework

6.5 In very general terms, people live in care homes so that their care and support needs can be met. This may be on a short term basis, such as for respite, or for long periods, in some cases for the rest of the resident's life. Residents may or may not contribute financially to the costs of their care. Statutory bodies have various duties under legislation such as the Care Act 2014 (in force as of 1 April 2015) to provide care and support. It is important to keep in mind that the provision of care and support does not, itself, compel the adult concerned to accept it or provide authority to deprive the adult of their liberty in order to receive it. As Munby LJ noted in *Re A* and *Re C*[3] (in relation to the various community care obligations then imposed upon local authorities): "[t]*he essential point for present purposes is that none of these sources of local authority engagement with someone like C confers on the local authority any power to regulate, control, compel, restrain, confine or coerce. They are concerned with the provision of services and support.*"

6.6 Some care home residents will have full capacity to consent to their care and support arrangements, including restrictions that follow on from these arrangements, and will have consented to them. As explained at paragraph 2.12, case law provides that the question of whether a person is deprived of their liberty requiring an authorisation only arises in the case of those who have not consented or cannot consent to such restrictions.

6.7 Some care home residents may be subject to one or more of a range of legal measures which have different effects. These are summarised briefly below:

6.7.1 A DOLS authorisation under Schedule A1 to the MCA 2005. If the requirements are met, an authorisation granted by the relevant supervisory body permits the care home ('the managing authority') to deprive the resident of his or her liberty in the care home for the purpose of being given care or treatment.[4] This framework cannot be used to resolve a dispute about whether the resident should be in the care home in the first place. One reason for this is that decisions about where a person should live will engage their right under Article 8 of the European Convention on Human Rights to respect for private and family life. See London Borough of Hillingdon v Neary,[5] and also Re AJ (Deprivation of Liberty Safeguards.[6] If in fact it becomes clear that Schedule A1 has been used in this way, legal advice should be sought as soon as possible as to whether an application to the Court of Protection is required;

6.7.2 A welfare order made by the Court of Protection under s.16(2)(a) MCA 2005. Such an order can only be made where: (1) a Court of Protection judge has concluded that the resident lacks capacity to decide where to live and to make decisions in relation to their care arrangements; (2) that the resident is of 'unsound mind' for purposes of Article

3 *[2010] EWHC 978 (Fam)*.
4 Schedule A1 to the MCA 2005, Paragaphs 1(2) and 2.
5 *[2011] EWCOP 1377*.
6 *[2015] EWCOP 5.*

5(1)(e);[7] (3) that it is in the resident's best interests to live and receive care at the care home; and (4) that deprivation of the person's liberty is necessary and proportionate to the risk that they would face otherwise. The order may include other provisions, for example, limits on contact with family members. When such orders are made the court nearly always directs that a copy is retained on the resident's file at the care home. The order may, itself, authorise deprivation of liberty or the Court may direct that a DOLS authorisation should be used in addition to the welfare order;

6.7.3 Leave granted to a mental health patient under s.17 MHA 1983, probably for a limited trial period to see how he or she settles into the home. The resident is liable to recall back to hospital whilst on leave. A DOLS authorisation can be used alongside s.17 leave if certain conditions are met: see Schedule 1A to the MCA 2005. Section 17 MHA 1983 does not, itself, give authority to deprive the patient of their liberty at the care home;

6.7.4 A guardianship order under s.7 MHA 1983. This gives the guardian (usually an Approved Mental Health Professional ('AMHP') acting on behalf of the local authority) the following powers:[8]

i the power to require the patient to reside at a place specified by the guardian

ii the power to require the patient to attend at specified places and times for medical treatment, occupation, education or training

iii the power to require access to the patient to be given, at any place where they are residing, to any registered medical practitioner, AMHP or any other specified person

iv if certain conditions are met, guardianship can be used alongside DOLS: see Schedule 1A to the MCA 2005. Our view, based on case law, is that guardianship alone does not authorise deprivation of liberty, but also that the mere exercise of the power of the guardian to require a patient to live at a specific place does not itself give rise to a deprivation of liberty;[9]

6.7.5 A Community Treatment Order ('CTO') under s.17A MHA 1983. This will only arise in the cases of residents who have previously been detained in hospital under ss.3 or 37 MHA 1983. A CTO must always contain conditions which require the resident to make themselves available for examination to the patient's Responsible Clinician ('RC') to assess if the order should be renewed and to a doctor appointed by the CQC to give a second opinion on treatment. If the resident does not comply with either of these conditions, the RC may recall the resident. Other conditions may be imposed by the RC but a resident on a CTO cannot be recalled simply because they have breached one of these conditions so this does not itself mean that the person is not free to leave.[10] A CTO does not provide authority to deprive people of their liberty but a DOLS authorisation may be used together with a CTO: see Schedule 1A to the MCA 2005;

7 This is clear, we suggest, from *Re X (No 1)* [2014] EWCOP 25 at paragraph 14. In *G v E* [2010] EWCA Civ 822, the Court of Appeal suggested that medical evidence would not always be required. However, we suggest that – as with applications for authorisations under Schedule A1 – medical evidence of unsoundness of mind must always be obtained. It may be that there are cases where the person is unsound in mind but does not have a mental disorder for purposes of the Mental Health Act 1983 (the requirement under Schedule A1), in which case the Court of Protection would be able to make an order even if an authorisation under Schedule A1 cannot be granted.

8 Section 8(1)(a) MHA 1983.

9 See *NL v Hampshire County Council* [2014] UKUT 475 (AAC).

10 By analogy also with the NL case discussed immediately above.

6.7.6 A Conditional Discharge. Offender patients who have been detained under "restricted" sections of the MHA 1983 (for example ss.37 and 41) may be discharged by the Secretary of State for Justice or the Mental Health Tribunal subject to conditions with which they must comply. Such patients will remain liable to recall by their RC or the Secretary of State. A conditional discharge does not authorise deprivation of liberty (see Secretary of State for Justice v RB)[11] but where the person lacks capacity to consent to admission to a care home, a conditional discharge order can be used together with a DOLS authorisation when certain conditions are met: see Schedule 1A to the MCA 2005;

6.7.7 An order made under the inherent jurisdiction of the High Court. These cases are so rare that they are not discussed further in this chapter.

C: A residential care home for older adults: liberty restricting measures

6.8 As with all care settings, there is a huge variety in the way in which each establishment will seek to provide safe and appropriate care for its residents. What follows is not an attempt to stereotype this kind of provision, but recognition of the challenges that can arise in providing such care in the least restrictive environment. These challenges include:

6.8.1 how to promote choice: for example if a resident does not want to eat the meal offered on a particular day how easy is it for them to go out to eat?

6.8.2 the physical environment and the impact of a structured timetable: in many care homes of this type residents may be expected to spend at least part of the day seated in a lounge, perhaps with a television or music. How can residents be given as much autonomy as possible in how they spend their time and where?

6.8.3 promoting family and private life: how can care settings promote important intimate (which may include sexual) relations between residents?

6.9 The following are examples of potentially liberty-restricting measures that apply in a residential care home for older adults:

- A keypad entry system;
- Assistive technology such as sensors or surveillance;[12]
- Observation and monitoring;
- An expectation that all residents will spend most of their days in the same way and in the same place;
- A care plan providing that the person will only access the community with an escort;
- Restricted opportunities for access to fresh air and activities (including as a result of staff shortages);
- Set times for access to refreshment or activities;

11 *[2011] EWCA Civ 1608.*

12 The CQC consider this to be a relevant factor in their document "*Using Surveillance*," December 2014, http://www.cqc.org.uk/content/using-surveillance-information-service-providers.

- Limited choice of meals and where to eat them (including restrictions on residents' ability to go out for meals).
- Set times for visits;
- Use of restraint in the event of objections or resistance to personal care. (In *Re AJ*,[13] Baker J agreed that in any case where physical restraint is used in the care of an incapacitated adult, all physical intervention should be recorded in the care plan and documented in any DOLS process);
- Mechanical restraints such as lapstraps on wheelchairs;
- Restricted ability to form or express intimate relationships;
- Assessments of risk that are not based on the specific individual; for example, assumptions that all elderly residents are at a high risk of falls, leading to restrictions in their access to the community

Care home for older adults: a deprivation of liberty

6.10 The measures in the following scenario are likely to amount to a deprivation of liberty:

Peter is 78. He had a stroke last year, which left him blind and with significant short-term memory impairment. He can get disorientated needs assistance with all the activities of daily living. He needs a guide when walking. He is married but his wife Jackie has struggled to care for Peter and with her agreement Peter has been admitted into a residential care home. Peter has his own room at the home. He can summon staff by bell if he needs help. He tends to prefer to spend time in his room rather than with other residents in the communal areas. He can leave his room unaccompanied at any time he wishes. Due to his visual and cognitive impairments, he does not feel safe doing this. He has access to the communal garden, the dining room, the lounge area and any other resident's room. He is able to use the telephone when he wants. It is in a communal area of the home. He is unable to remember a number and dial it himself. He rarely asks to make phone calls. He is visited regularly by Jackie. She has asked to be allowed to stay overnight with Peter in his room but this request has been refused. The home has a key pad entry system, so service users would need to be able to use the key pad to open the doors to get out into the local area. Peter has been taken out by staff after prompting and does not ask to go out. He would not be allowed to go out unaccompanied. Most of the time Peter is content but on occasions he becomes distressed saying that he wishes to leave. Members of staff reassure and distract Peter when this happens.

Key factors pointing to a deprivation of liberty:

- *the extent to which Peter requires assistance with all activities of daily living and the consequent degree of supervision and control this entails.*
- *Peter is not free to leave either permanently or temporarily.*

13 *[2015] EWCOP 5.*

Care home for older adults: potential deprivation of liberty

6.11 The measures in the following scenario may give rise to a deprivation of liberty:

Mr Ghauri is 88. His wife of 60 years died last year and he has lived alone since then. He has no children. He is generally in good physical health but is in the early stages of dementia. After a fall he decided to move into a local residential care home. At the time he had capacity to make the decision to move. However, his dementia has progressed, and staff consider he may be less able to make more complex decisions. He has his own room. He enjoys the meals at the home in the dining room but otherwise spends most of his time in his room where he listens to music and reads. He has a regular routine whereby he leaves the home for a walk after breakfast. He normally buys a paper and returns before lunch but sometimes eats in a local café and returns in the early afternoon. If he did not return from the café the staff would contact the police to take steps to locate and return him.

Key factors pointing towards a potential deprivation of liberty:

- the potential degree of supervision and control within the home – although more information would be required in order to assess whether this satisfied the acid test;
- Mr Ghauri is not free to leave the home. However, it is not clear from the information available whether he has or lacks the capacity to consent to these care arrangements, which would have to be examined carefully.

Care home for older adults: not a deprivation of liberty

6.12 The following scenario is unlikely to amount to a deprivation of liberty:

Mrs Banotti is a widow and is also an alcoholic. She does not have the capacity to decide where to live. She lives in rented social housing unit for older adults, which has a warden. She was found collapsed on the street a few weeks ago and was admitted to hospital. She was persuaded to go into respite from hospital to give Environmental Health staff from the local District Council time to clean up and renovate her flat. She leaves the respite residential care unit every day after breakfast to see friends. In fact she sees a male friend who also has a drink problem. Staff report to the social worker that they are worried whether her male friend is financially exploiting her and whether she is having a proper lunch or whether she is drinking. She comes back every evening about 7pm when meals are finished for the evening and does not have a smell of drink on her. Mrs Banotti has made clear that once her flat is fixed up, she will return to live there but that she is willing to stay in respite in the interim provided that she is allowed to continue to stay out all day every day. Staff are unhappy about the risks to her of her drinking. However, their policies do not allow for physical restraint so the staff have not attempted to stop her leaving and have not followed her or asked her to return. Mrs Banotti has made clear that if staff try to insist on her staying in all day, or only going out with staff, she will stop the respite and go and stay with her male friend. The staff would not take any steps to prevent her doing so if she did do so.

Key factors pointing away from a deprivation of liberty:

- *Mrs Banotti is free to leave, whatever the level of supervision and control to which she may be subjected.*

D: A care home with nursing

6.13 The challenges to providing care in the least restrictive way identified in paragraph 6.8 will be present here. The liberty-restricting measures described in paragraph 6.9 above are also likely to be present in a care home with nursing: the following features may also be present:

- Use of medication for mental health problems
- The need for restraint in the event of objections to personal care (which must be recorded in the resident's care plan: see note in 6.9).
- The need for interventions to protect staff: for example, removal of residents' false teeth to prevent biting.

It is difficult to identify scenarios in this setting that would not give rise to a real risk of deprivation of liberty (where the individual in question lacks the material capacity to consent to the restrictions imposed upon them).

Care home with nursing: a deprivation of liberty

6.14 The measures in the following scenarios are likely to amount to a deprivation of liberty:

Mr Lopez is an older man with dementia, who lacks capacity to take decisions relating to his residence and care arrangements. He had previously been estranged from his older son as he had disliked his son's wife. The son is now divorced and has visited Mr Lopez once a week at the care home where he resides for the last month. Due to Mr Lopez co-existing physical and other mental health difficulties, including schizo-affective disorder, he has a fully funded continuing healthcare package. Mr Lopez has been quite paranoid and threatening and abusive to staff, and very demanding and engaged in what they call challenging behaviours. There are not enough staff to take Mr Lopez out every day as he has requested and the care package does not include any one to one care. Mr Lopez used to be a long distance walker and loses his temper and expresses frustration at not being allowed out on his own. As the home is near a main road, the manager has taken the view that concern for his health and safety demand that he should not be allowed out without one to one care.

Key factors pointing to a deprivation of liberty:

- *the extent to which staff are required to monitor, control and supervise Mr Lopez to control his 'challenging behaviour;*
- *his lack of freedom to leave the care home whenever he wishes.*

Mrs Neville is eighty-five. She lives in a care home with nursing and has Alzheimer's dementia which is now advanced. She is very confused and disorientated, and can now only manage very simple conversations. She is physically fit and mobile. She spends much of the day wandering in the corridors of the nursing home. The doors are locked and there is a sensor on the doormat at each entry to the home. On one occasion Mrs Neville found her way out of the back door of the home, which had been left open in warm weather. She was spotted walking towards the main road and immediately escorted back. Mrs Neville frequently shouts and screams and is gently escorted from the communal areas when she is

making a noise, to reduce disturbance to other residents. Mrs Neville is resistant to personal care and can lash out at staff. All her personal care is delivered by two members of staff.

Key factors pointing towards a deprivation of liberty:

- *Mrs Neville is plainly not free to leave.*
- *The nature of her care needs and the interventions required make it clear that she is under continuous supervision and control.*

Care home with nursing: potential deprivation of liberty

6.15 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Mr Alexander is in his 70s and has a long history of mental health problems going back to his twenties. He has lived for the last thirty years in a housing association flat where he has a tenancy support worker. He is subject to a guardianship order and the local authority is his guardian. He also has a CPN. Last year he began to disengage from his CPN and tenancy support worker. He started to neglect himself and would not allow the district nurses to visit to dress an ulcer on his leg. Eventually he allowed access to the district nurses who were concerned about his physical health and he was admitted to the general hospital where he spent a few days. Professionals at the hospital considered he needed a period of convalescence and the guardianship order was then varied to require him to reside at a local nursing home. He has been assessed as lacking capacity to decide where to live, but he has expressed willingness to remain in the nursing home for a few weeks until he feels stronger. In the meantime plans are being made to reinstate a home care package. Mr Alexander is not allowed to visit his home during this period as there is concern that he may not return to the nursing home.

Key factors pointing to a potential deprivation of liberty:

- *That Mr Alexander is not free to leave (N.B. this lack of freedom to leave does not derive from the guardianship order per se – see paragraph 6.7.4). Whether he will be deprived of his liberty will depend upon the extent to which he is under a sufficient degree of supervision and control at the care home, which requires more investigation on the facts available, but which would appear likely given the nature of the placement.*

E: Care homes for those with severe and enduring mental health problems

6.16 Residents in care homes with this specialism may have lower needs for personal care but there will be restrictions in place, some of which may be geared towards managing risk to the public. These will need to be factored into the consideration of whether a resident is deprived of his liberty or not. In addition to some of the measures set out at paragraph 6.9 above, specific liberty-restricting measures may include:

- Having to take part in specified programmes (e.g. sex offender treatments) as a condition of a conditional discharge or CTO;

- Being required to comply with medication as a term of a conditional discharge or CTO;
- Having to avoid certain settings (such as playgrounds);
- Being required to live in the care home as a term of a conditional discharge;
- A requirement to be escorted when going out (whatever the risk being guarded against);
- A curfew;
- Having to observe an exclusion zone;
- Restrictions on contact with victims or other persons.

Care home for those with mental health problems: a deprivation of liberty

6.17 The measures in the following scenario are likely to amount to a deprivation of liberty:

Mr Harry Hall is subject to a conditional discharge order made under ss. 37/41 MHA 1983 made 5 years ago for sex offences against female children. He has a delusional disorder and more recently has been diagnosed with vascular dementia. He has lived in a care home since his conditional discharge with conditions which include:

i to reside at the care home;

ii to take treatment as prescribed by his RC;

iii to maintain contact with his social supervisor.

Harry's dementia is getting worse and he is now talking about returning home to London. He has no home in London and last lived there 5 years ago. He has left the care home several times recently heading for the train station but was brought back by staff. The care plan provides for monitoring within the home so that he does not place vulnerable women at risk. He is only allowed community contact accompanied by a worker which includes going to the local pub two nights a week.

Key factors pointing to a deprivation of liberty:

- *the specific monitoring of Harry required within the home*
- *the controls placed upon his ability to leave the home when he wishes.*

Care home for those with mental health problems: potential deprivation of liberty

6.18 We suggest that measures in the following scenario may give rise to a deprivation of liberty:

Milon is twenty-five years old. He has a diagnosis of schizophrenia which is complicated by his use of illicit drugs. He has accumulated a number of criminal convictions, mainly for shoplifting. He has become estranged from his parents and does not have his own accommodation. He has been detained under the MHA 1983 twice in the past. His most recent admission under s.3 MHA 1983 has been the longest lasting and for the first time he was able to remain abstinent from drugs throughout the admission. Staff attribute this to careful and structured use of leave. Milon made good progress and was placed onto a CTO, with a requirement that he live at a care home for those with mental health problems. All went well for the first month but Milon has been showing signs of relapse and staff believe he

has started to use drugs again and have noted that his dosset box suggests that he has not been complying with medication. He appears thought-disordered but is generally co-operative. In an attempt to avoid recall to hospital and with the agreement of Milon's responsible clinician, staff ask Milon to agree to an arrangement where he does not leave the care home unescorted for a few days and where he is supervised when taking medication. If there is no improvement the responsible clinician intends to recall Milon.

Key factors pointing to a potential deprivation of liberty:

- *The provisions made in Milon's care arrangements to secure his return to the care home in the event that he leaves it (NB, that the CTO contains a residence condition does not, itself, mean that he lacks the freedom to leave: see paragraph 6.7.5.)*
- *Any assessment of whether Milon is deprived of his liberty would also have to consider whether he can consent to the arrangements and whether that consent is freely given.*
- *Care home for those with mental health problems: not a deprivation of liberty:*

6.19 The following scenario is unlikely to amount to a deprivation of liberty:

Jim is 60. He has a longstanding diagnosis of schizophrenia. In his 20s he committed two serious assaults against women. He was sentenced to ten years imprisonment. Both offences were pre-planned and had similarities. During the course of serving his sentence he was transferred to hospital and responded to treatment and was returned to prison where he completed his sentence. Since then he has continued to receive anti-psychotic medication by means of a depot. He is in regular contact with his CPN and Consultant who have known him for many years. He shares a flat with his parents who are elderly and rely on him to a significant degree. Last year he appeared to be showing signs of relapse. He was arrested on suspicion of a high-profile offence which had some similarities to the offences he committed in his youth but no charges are brought. At the request of his psychiatrist and CPN, Jim agreed to a voluntary admission to hospital but was detained under the MHA 1983 when he sought to discharge himself. He was then placed on a CTO. The conditions are:

i To reside in a care home for people with mental health problems;

ii To attend a day centre 3 times a week;

iii Attendance at the depot clinic for medication.

Jim is able to spend time with his family during the day (although it is quite a long journey to reach them) but has to tell staff where he is going before leaving. There is a curfew of 11pm. Jim would like to move back in with his parents and has asked his psychiatrist to vary the conditions of the CTO. The psychiatrist has refused to do so. Jim is unhappy but fearful of the consequences if he moves without the approval of the clinical team.

Key factors pointing away from a deprivation of liberty:

- *Jim is, in fact, free to leave the home because the CTO does not itself prevent him from doing so:*
  see paragraph 6.7.5.

F: Care homes for adults with learning disabilities: liberty restricting measures

6.20 These homes may involve a range of restrictive measures, especially those catering for residents who present challenging behaviour. This can include hitting out, destructive behaviour, eating inedible objects ('PICA'), and self-injurious behaviour such as head-banging, hand-biting or scratching. A structure may be an important part of a behaviour support plan for residents and may be an important tool in helping a resident to feel safe but entails taking a degree of control over the resident. Liberty-restricting measures may include:

- A perimeter fence with a locked gate;
- Keypads on doors which residents cannot unlock;
- A structured routine;
- Monitoring and observation;
- Use of medication, including PRN;
- Use of physical interventions of any type in response to challenging behaviours (see note at 6.9);
- Use of sanctions such as "time out";
- Residents being told to spend time in a "quiet room" as part of de-escalation;
- A care plan which provides that a resident must be escorted outside the care home (including where this results from physical needs e.g. a resident who needs someone to push their wheelchair);
- Restrictions on developing sexual relations;
- Mechanical restraints, e.g. lapstraps;
- Decisions about contact with friends and family taken by others.

Care home for adults with learning disabilities: a deprivation of liberty

6.21 The measures in the following scenario are likely to amount to a deprivation of liberty:

John Jones is 18. He was the subject of a care order 6 years ago on the grounds of severe neglect. John has a learning disability, a diagnosis of ADHD, and presents with challenging behaviour. He had been in foster care but that broke down when the foster parents' son returned home from boarding school. John was placed by the local authority in a specialist learning disability residential care home. This home is regulated by the Care Quality Commission to take young people below 18, and they can stay on there after 18. John's medication for ADHD seems to wear off in the evenings and he is harder to manage then, but there are fewer staff on at night. The staff have frequently restrained him due to his behaviour towards staff and residents. Contact with parents is once a week in the communal lounge but there has been no contact with siblings who are in care out of county. John's parents' request to take him back home for afternoon tea has been refused. The social worker has been told that when there are incidents, John is told to go to the quiet room, not his bedroom, and if he tries to leave, he is told to go back into that room. Staff remain outside the door and every 15 minutes check on him.

Key factors pointing to a deprivation of liberty:

- *the extent of the restriction on John's movements within the home and his contact with his parents*
- *the use of restraint within the home*
- *the controls on his ability to leave the home temporarily or permanently.*

Care home for adults with learning disabilities: potential deprivation of liberty

6.22 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Max Herner has a learning disability. He is 19. He had been placed in a specialist learning disability care home when he was 16 as his mother could no longer cope with his challenging behaviours. His mother, Greta, is divorced and cares for her younger son Trutz and has remarried. The brothers do not get along. Max has weekend contact from Saturday morning to Sunday afternoon at his mother's home. Max would like to live with his mother full time, although Greta will not admit to Max that she is quite afraid of him when he gets very agitated. Max has low impulse control and needs constant supervision to ensure that he does not assault other male residents and he is diverted when he shows signs of getting agitated. He is on medication to try to calm down his agitation. Max works 5 days a week in a local gardening project. Occasionally when he has had an argument with care staff, he has threatened that when he stays with his mother, he may not return to the placement on Sunday afternoons. When Max is with his mother, she allows him to go out and meet with his male cousins at the local pub.

Key factors pointing to a potential deprivation of liberty:

- *the extent of the supervision and control maintained over Max within the home and the use of medication.*
- *The key question for the assessment of whether this is a deprivation of liberty will be the extent to which Max is free to leave the home: this will require assessment of what exactly the care home staff will do if he carries through his threat not to return to the home.*

Care home for adults with learning disabilities: not a deprivation of liberty

6.23 The following scenario is unlikely to amount to a deprivation of liberty:

Rina is 35 and has a mild learning disability consequent to Down's syndrome. Both her parents are dead and she has no other family. For the last fifteen years she has lived in a small group home with 4 other women of similar age, one of whom she has known since childhood when they attended the same school. Staff are present twenty four hours a day. Rina's capacity to make decisions about where she lives and about her care needs has not been formally assessed since she moved into the care home on the death of her mother, at which time she was considered to lack capacity to make these decisions. Rina has her own room. She goes to college 3 days a week. She is able to travel independently. She has a key worker with whom she plans her week. When she is not at college she may visit friends from

college. She sometimes socialises with her housemates in the evening but sometimes prefers to stay in her room where she enjoys watching television and knitting. Recently there has been some concern about her relationship with Dan, a man she has met at college. He has a learning disability as well and lives with his father who has a known alcohol and drug problem. At Rina's last annual review her care manager assessed Rina's capacity to make decisions about contact with her friend and his father and also her capacity to consent to sexual relations. Rina had capacity to make decisions in all these areas. She told her care manager she never wanted to move away from her friends and she wanted to go on seeing Dan but preferred not to visit him at home as she did not like his father. Rina's care manager did not consider any intervention was needed.

Key factors pointing away from a deprivation of liberty:

- *Rina may now have capacity to decide whether to reside at the care home.*
- *There is nothing in the scenario to suggest that Rina is not free to leave the care home permanently or temporarily.*
- *She is not under continuous supervision and control and is able to exercise her autonomy.*

G: Questions for frontline staff

6.24 These questions may help establish whether an individual is deprived of their liberty in this context:

- Are any of the liberty-restricting measures described above applied to the resident concerned? If so which and for what reason?
- Are there any restrictions on the person's contact with others? If so do they restrict contact beyond the home's usual visiting arrangements?
- Is the person's access to the community restricted in anyway? For example must they be escorted? What would staff do if they left the home alone or sought to do so?
- Is the person required to be at the care home at specified times?
- Must the person be escorted either within or outside the care home?
- Is the person required to say where they are going when leaving the care home?
- Is the person required to take part in a programme of treatment? What happens if they do not?
- Is the person required to take medication? What are the arrangements for this? What happens if they do not take it?
- Is the person required to remain abstinent from alcohol or drugs?
- Are there drugs tests?
- Is any legal framework currently being used e.g. conditional discharge, CTO or guardianship? If so, what are the precise terms?
- Is the person required to observe an exclusion zone? If so how large is it and what implications does it have for (e.g.) visits to family members?

- Is the person required to avoid specific settings?
- Are decisions about contact with friends and family taken by others?
- Is choice extremely limited even in terms of everyday activities?
- Is restraint used to deliver personal care?
- Are the person's wishes often overridden, in their best interests?
- Could any of the liberty-restricting measures be dispensed with?

Appendix: Respite placements

6.25 Care homes can provide places of respite which can be invaluable in allowing a carer to take a break from their role. Respite plays a vital role in promoting the sustainability of arrangements where a vulnerable adult is supported at home by a carer. All the liberty-restricting measures which may apply to a permanent resident of a care home may equally apply to a resident who moves to a care home for the purpose of respite for a short period. In addition, the resident may be unfamiliar with the setting, and where the purpose of the respite is to allow a carer to go on holiday, the lack of contact with a family member will be a further liberty-restricting factor.

6.26 In Chapter 3 we discuss the question of how long an arrangement must be in place before it is likely to be considered a "non-negligible period of time" and may require authorisation. Paragraphs 3.29-3.32 deal with this important point.

6.27 In particular you should note paragraph 3.32, which is repeated here:

*"Because the period will vary from setting to setting, we have deliberately avoided giving a period of time that can be considered 'safe.' Our clear view is that it is unlikely under any circumstances to extend beyond a few (2-3) days and is likely to be substantially less in settings in which particularly intense measures of control are imposed. We would **strongly** suggest that it is not safe to use the rule of thumb that some public bodies have adopted that a deprivation of liberty is unlikely to arise where a person is confined for less than 7 days. We understand that this may have been taken from a reading of certain paragraphs of the DOLS Code as to the circumstances under which it is appropriate to grant an urgent authorisation.[14] However, this is to conflate the question of **whether** there is a deprivation of liberty with the quite separate question of **how** such deprivation of liberty may be authorised."*

6.28 Attention is also drawn to the comments of Baker J in *Re AJ*[15] when he commented that *"professionals need to be on their guard to look out for cases where vulnerable people are admitted to residential care ostensibly for respite when the underlying plan is for a permanent placement without proper consideration as to their Article 5 rights."*

6.29 This suggests that exactly the same questions would need to be asked by frontline staff considering whether a respite placement might constitute a deprivation of liberty. In addition staff should consider:

14 Most obviously paragraphs 6.3 and 6.4.

15 *[2015] EWCOP 5.*

- The impact of being in an unfamiliar setting on the resident and how his or her care plan provides for a response to unsettled behaviour.
- The impact of reduced contact with a primary carer.
- The underlying intention of the placement: is there any prospect that it will be extended or made permanent?

6.30 To highlight the specific factors relating to respite, we revisit below some of the scenarios described above and change some of the facts to indicate how the considerations may apply in the context of respite. Note that the scenarios below do not consider the question of whether any of the individuals may in fact also be deprived of their liberty while receiving care in their own home. Questions of when such a deprivation of liberty may arise are considered in detail in Chapter 8. However, we would suggest that in reality the care arrangements at home for "Peter" and "Max" in particular would require scrutiny, addressing the factors in Chapter 8.

Peter, the care home resident with dementia described in paragraph 6.10, normally lives with his wife Jackie who provides the majority of his care with some help from her daughter. They are both going on holiday for a week, for a break. During this time Peter will be admitted to a care home for respite. Everyone who knows him considers he is unlikely to remember that this is a temporary arrangement and that he will be quite disorientated. His son who lives 300 miles away has agreed to stay locally while Jackie and her daughter are away. He will visit Peter daily. Peter is still likely to be deprived of his liberty.

Key factors pointing to a deprivation of liberty:

- *Peter will not be free to leave.*
- *Peter's needs are such that he will be under continuous supervision and control.*

Max, who is described in paragraph 6.22, in fact lives with Greta full-time, with some help from the local authority. Greta wants to go away for a long weekend. She arranges for Max to spend from Thursday evening to Sunday evening in a care home. He has not stayed there before. Greta takes him to visit before her break so that he can meet staff and residents. Max is excited about staying at the placement because he knows that the residents go out for a meal together every Friday evening. However, the care home staff and Greta think it is likely that at some point over the weekend Max will become anxious and agitated. He will need to be supervised closely and may need physical intervention. It would not be safe for him to be at home on his own. Max will be deprived of his liberty over the weekend.

Key factors pointing towards a deprivation of liberty:

- *Max will not be free to leave the home temporarily or permanently*
- *Although the period of time at the care home will be short, Max will be under continuous supervision and control and may require intrusive intervention.*
  Rina, who is described at paragraph 6.23, has exactly the same needs but is in fact living with her sister and brother-in-law in their home where she has her own room. They want to go on holiday together for a fortnight. Rina, and her sister and her care manager have arranged that Rina will stay in a care home while they are away. Rina has been there before and is familiar with the staff and residents there. Rina's routine of going to college will be no different as the care home is very close to her home. If she wishes to go home during this period she has keys to the family home and can return there, although she has never chosen to do this. Rina will not be deprived of her liberty.

Key factors pointing away from deprivation of liberty:

- *Rina may have capacity to consent to this arrangement*
- *If Rina lacks such capacity, she will be free to leave the care home temporarily while her family are away.*
- *She is not under continuous supervision and control.*