



The Law Society

# Identifying a deprivation of liberty: a practical guide

## *Deprivation of liberty at home*

This guidance does not constitute legal advice, which must be sought - if necessary - on the facts of any specific individual case. While care has been taken to ensure the guidance is accurate, up to date and useful, no legal liability will be accepted in relation to it.

### A: Introduction

- 8.1 This chapter considers how to identify deprivation of liberty in an individual's home. For the purposes of this chapter, we use 'home' to mean an individual's own home. This could be a home that they own or rent themselves, or a home owned or rented by a family member or members with whom they live. 'Home-like' arrangements made by the State to place individuals requiring accommodation because of their particular needs, which are usually referred to as "supported living", are addressed in Chapter 6.<sup>1</sup> The position of children is considered in Chapter 9.
- 8.2 This chapter comes with two "health warnings," one relating to the question of state responsibility, and the second stemming from the decision in *Rochdale MBC v KW*.<sup>2</sup> Both of these matters are discussed below.

### B: Health Warning 1: State responsibility

- 8.3 The first health warning is highlighted in Chapter 2 at paragraphs 2.50-2.55. It is not easy to identify a precise point at which the State ceases to be directly responsible for care or health packages delivered in the home environment and, instead, is required to take the (rather vaguer) steps which are required by Article 5 ECHR to provide effective protection to the individual concerned.
- 8.4 Until there is clarification from the courts, we suggest that there is likely to be sufficient State involvement to make the situation a 'State' deprivation of liberty falling within the scope of Article 5(1) ECHR – and therefore requiring steps to be taken by the relevant State body involved to seek authorisation from the Court of Protection – if:
- 8.4.1 Arrangements are made, whether by a local authority or NHS body, to commission and provide care in the individual's own home;
  - 8.4.2 Direct payments (including personal health budgets) are made (whether for social or health care) to a family member or professional carers to arrange and provide care to the individual in the individual's own home;
  - 8.4.3 The decision that the individual should remain in their own home and be cared for there has been taken on their behalf by the Court of Protection. In such a situation, one would expect that questions of deprivation of liberty would be considered by the judge making the decision, but the order may have been made before the Cheshire West judgment or arrangements may have changed since the order.
- 8.5 Where the decision that the individual should remain in their own home and be cared for there has been taken on their behalf by a best interests decision-making process involving the relevant local authority or NHS body, we suggest that the State will then be 'on notice' of any deprivation of liberty that may arise in consequence of that decision. The relevant local authority or NHS body may therefore have an obligation under the positive limb of Article 5 ECHR (discussed at paragraphs 2.50 - 2.55) to take steps to ensure that there is authority for that deprivation of liberty.

<sup>1</sup> We recognise that many of those in supported living are likely to consider the place that they are living to be their home. However, we draw the distinction here in particular so as to focus on situations where an individual is not placed by the State so as to meet their care needs, but arrangements are made for them in the place that they were living prior to those needs arising (or being identified).

<sup>2</sup> [2014] EWCOP 45.

- 8.6 We also note that a situation may arise where a health and welfare deputy or a financial deputy is making private arrangements for the care of an individual in their own home (e.g. through administering a damages award received following a personal injury claim) and considers that those arrangements amount to an objective deprivation of the individual's liberty to which they cannot consent. We suggest that the deputy should seek their own legal advice as to the steps that they should take. There are arguments to suggest that, as a minimum, a deputy in such a case should notify the relevant local authority for the area in which the individual lives. The deputy may invite the local authority to consider whether any steps need to be taken under the positive limb of Article 5(1) ECHR and in the meantime to consider whether the restrictions on the individual's liberty which may amount to a deprivation of liberty can be reasonably reduced.

### C: Health Warning 2: Can a person be deprived of liberty at home at all?

- 8.7 In a case decided in November 2014, *Rochdale MBC v KW*,<sup>3</sup> Mostyn J cast doubt as to whether it is possible for a person to be deprived of their liberty at home at all, at least where their own physical disabilities were such that they were house-bound. The case concerned a woman cared for in her own home<sup>4</sup> with a substantial package of care arranged jointly by the relevant local authority and CCG. Contrary to the agreed position of both the local authority and KW (acting by her litigation friend) – Mostyn J held that the woman was not deprived of her liberty. In doing so, he made a number of observations about the approach adopted by the Supreme Court in *Cheshire West*, and the proper construction of the acid test.<sup>5</sup> On the facts of the case, Mostyn J then accepted (it appears) that every element required to bring KW's situation within the scope of Article 5 was satisfied<sup>6</sup> except for the requirement that she was constrained from exercising freedom to leave.<sup>7</sup>
- 8.8 KW's appeal was allowed by consent in February 2015. In endorsing the consent order allowing the appeal, the Court of Appeal did not give a judgment explaining its reasons.<sup>8</sup> However, it seems to us clear that:
- 8.8.1 The conclusions that Mostyn J reached both upon the facts of KW's case and upon the broader position of those cared for in their own homes are clearly incompatible with the decision of the majority in *Cheshire West*. We consider that Mostyn J's approach conflates freedom to leave with ability to leave. This gives rise to a different concept of physical liberty for those who are unable to take advantage of it – contrary to the clear holding of Lady Hale (with whom the other members of the majority agreed) that “*the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled,*”<sup>9</sup> and also Lord Kerr's

3 [2014] EWCOP 45.

4 Rented from a Housing Association.

5 Some of which are discussed at paragraphs 3.4-3.22, in particular those relating to the question of when a person may be considered to be free to leave.

6 I.e. that she was under continuous/complete supervision and control (she required the presence of carers 24/7 (paragraph 6), that she lacked the capacity to consent to any deprivation of liberty (paragraph 4), and that any deprivation of liberty would be imputable to the State (paragraph 7).

7 At paragraph 25, he held that KW was “*not in any realistic way being constrained from exercising the freedom to leave, in the required sense, for the essential reason that she does not have the physical or mental ability to exercise that freedom.*”

8 A matter addressed by Mostyn J at [2015] EWCOP 13.

9 Paragraphs 33 and 36. We also note that the logic of Mostyn J's conclusion would extend to any other setting in which the person could have been placed by their family and which the individual regards as a home. This would mean, therefore, that many in care homes would not – on Mostyn J's analysis – be considered to be deprived of their liberty if they were unable to leave the home because of their physical or mental disabilities: this would drive a coach and horses through Schedule A1 to the MCA 2005 and further indicates, we suggest, that the approach adopted by Mostyn J was incorrect.



observation that “[liberty] does not depend on one’s disposition to exploit one’s freedom;”<sup>10</sup> such that

- 8.8.2 Mostyn J’s judgment did not provide a sound basis upon which to conclude that individuals with severe disabilities cared for at home with a package of care arranged by public authorities cannot be deprived of their liberty.
- 8.9 Bearing in mind Lady Hale’s warning in *Cheshire West* that we should in the case of the vulnerable err on the side of caution as regards deciding what constitutes a deprivation of liberty,<sup>11</sup> we consider that it is possible for an individual to be deprived of their liberty in their own home in the context of the delivery of care and treatment and for such deprivation of liberty to be imputable to the state.
- 8.10 We should note that, as this guidance was being finalised, we were notified of a decision in which a judge of the High Court (Mr Justice Bodey) held that a woman cared for in her own home, predominantly by her own family, was not deprived of their liberty. The transcript of the judgment was not available at the time of finalising the guidance but we understand that Bodey J placed significant weight both upon the limited nature of the involvement of the local authority and that the woman continued to reside in her own home, in which she had lived for many years before losing capacity. Those who are concerned with deprivations of liberty in the home environment should make sure that they keep abreast of developments, including the full report of this judgment, by making use of the resources identified in Chapter 11.

### D: The home environment: liberty restricting measures

- 8.11 Almost by definition, arrangements made at home will be more varied and more flexible than arrangements made in any institutional or quasi-institutional setting. It is also more likely that, because the arrangements are likely to be more tailored to the individual, they will less obviously be directed to the control of that individual in the interests of others within a placement (whether other service users or the staff).
- 8.12 However, it is important to remember that MIG was found to be deprived of her liberty in an adult foster placement – i.e. a home-like environment – in circumstances where the supervision and control to which she was subject was “*intensive support in most aspects of daily living*,”<sup>12</sup> even though she attended a further education college daily during term time and was taken on trips and holidays by her foster mother.
- 8.13 We therefore suggest that the following features may constitute liberty-restricting measures in the home environment:
- The prescription and administration of medication to control the individual’s behaviour, including on a PRN basis;
  - The provision of physical support with the majority of aspects of daily living, especially where that support is provided according to a timetable set not by the individual but by others;

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<sup>10</sup> Paragraph 76.

<sup>11</sup> Paragraph 57.

<sup>12</sup> *Cheshire West* at paragraph 13.



- The use of real-time monitoring within the home environment (for instance by use of CCTV or other assistive technology);<sup>13</sup>
- The regular use of restraint by family members or professional carers which should always be recorded in the individual's care plan;
- The door being locked, and where the individual does not have the key (or the number to a key pad) and is unable to come and go as they please, strongly suggests that they are not free to leave;
- The individual regularly being locked in their room (or in an area of the house) or otherwise prevented from moving freely about the house;<sup>14</sup>
- Use of medication to sedate or manage behaviour, including PRN.

### E: Care arrangements in the home that are imputable to the State

8.14 The scenarios below all describe arrangements made to provide care to a person lacking capacity to consent to them in their own home. In all the cases the State has been involved in some way in making the arrangements and so in the question of whether these are “imputable” to the state does not arise. This issue is likely to be considered by the courts however, and therefore it will be important to keep up to date on this issue, using the resources which we set out in Chapter 11.

#### Care arrangements in the home: a deprivation of liberty

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

Veronica is a widow of 75. She has a history of mental illness going back to her thirties. Her current diagnosis is of schizoaffective disorder. She has had a number of admissions to hospital under the MHA 1983. She has not been in hospital for some years but sees her psychiatrist fairly regularly and attends regular s.117 MHA 1983 after-care reviews. More recently Veronica has been showing signs of short term memory loss. Veronica lives alone in the home that she shared with her husband. She is very independent but recently her daughter Susan has become concerned that Veronica is leaving pans on the stove unattended, is becoming erratic in compliance with her medication and has visibly lost weight. Veronica's psychiatrist is also concerned and Veronica agrees to an informal admission to hospital to allow her psychiatrist to assess her. During her stay Veronica has an Activities of Daily Living assessment and is noted to be unsafe in the kitchen. An MRI scan suggests some damage. Veronica's psychiatrist assesses her capacity and reaches the conclusion that Veronica lacks capacity to make decisions about her care needs, mainly because she is unable to recognise that her ability to look after herself is impaired. The clinical team consider that Veronica needs 24 hour care. The question is where it should be provided.

13 Information for family members or carers considering use of surveillance has recently been provided by the [Care Quality Commission \(CQC\)](http://www.cqc.org.uk/content/using-hidden-cameras-monitor-care): see <http://www.cqc.org.uk/content/using-hidden-cameras-monitor-care>.

14 Munby LJ in *Re A and Re C* [2010] EWHC 978 (Fam) held that those two individuals (one a child, and one an adult) who were locked in their rooms overnight were not deprived of their liberty. Munby LJ expressly based much of his reasoning upon the judgment of Parker J in the first instance judgment in MIG and MEG; we therefore respectfully suggest that this aspect of his judgment is incorrect in light of the decision of the Supreme Court in *Cheshire West*.



A s.117 MHA 1983 meeting takes place. Veronica attends the meeting and pleads not to go to a care home. The CCG and local authority agree to fund 24 hour care in Veronica's home for a trial period. A care provider is sourced and Veronica goes home.

Veronica's care plan is that she will have one carer at home all the time. A spare room is made available for the carer, as it is not considered that waking nights are required. The carer agency will have access to a key safe and will be able to enter Veronica's home even if she does not want them to come in. Veronica will be supervised in the kitchen. She will be supported by the carer in arranging to go out when she wants to, which will include family visits, shopping and visits to galleries and museums which she likes, but the carer will dissuade her from leaving unaccompanied (and has a protocol to follow in the event that Veronica manages to leave whilst the carer is otherwise occupied). The psychiatrist specifies that Veronica must attend a day centre where she is well-known at least once a week to facilitate ongoing monitoring of her mental state.

*Key factors pointing to a deprivation:*

- *the continuous presence of the carer in the home*
- *the supervision of activities whilst in the home*
- *that Veronica is not able to come and go unaccompanied.*

### Care arrangements in the home: potential deprivation of liberty

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

Gordon is 80 years old with early onset dementia. He lives in his own home, and is believed to have now lost the mental capacity to make decisions as to residence and care. His care package provides for carers to attend four hours a day with personal care, cooking and cleaning tasks. He has door sensors to alert his family when he leaves the property (both and day and at night) and is required to wear an alarm device at all times for his safety. Carers check after each visit that he is wearing the pendant and put it on if he has taken it off. Once he left the home at midnight and his daughter who lives nearby was alerted by the sensor. She immediately went to look for her father and guided him back home.

*Key factors pointing to potential deprivation of liberty:*

- *the restrictions upon his freedom to leave his own home*
- *careful examination will be required as to extent to which the remote monitoring, together with the direct support of local authority arranged carers four hours a day, cumulatively amounts to sufficiently continuous/complete supervision and control to satisfy the acid test. The fact that, for example, carers gently enforce the requirement to wear the pendant is we suggest a relevant factor.*

### Care arrangements in the home: not a deprivation of liberty

8.17 The measures in the following scenario are unlikely to amount to a deprivation of liberty:

Susan and Jim are married. Both have significant histories of alcohol abuse and they met when they were both receiving treatment at a hostel. Although they have been together for a long time the relationship between them can be volatile. They have been homeless in the past but now have a joint tenancy of a housing association flat. Two years ago Susan walked in front of a car and was knocked over. She suffered a brain injury. She has made a reasonable recovery but has impaired cognitive abilities and clinical professionals consider that further improvement is unlikely. Susan's neuro-psychiatrist assesses her capacity. She is able to make decisions about whom she should see but not about her residence and care arrangements.

Jim and Susan were very keen for her to return home. Susan will need some support; for example it would not be safe for her to prepare a meal unsupervised. She is able to go out alone for short periods of time in the local area but she gets anxious about being alone and encourages Jim to accompany her as much as possible. Jim is willing to take on the majority of Susan's care. Staff feel that he will need some respite, and his own lifestyle can sometimes be chaotic. Susan's care plan provides for carers to visit for two hours daily, to supervise and support her in cooking and to ensure she maintains reasonable nutrition. The rest of the time, there is no involvement by local authority funded carers.

*Factors pointing away from a deprivation of liberty:*

- *the limited nature of the supervision and control exercised by the local authority arranged care as compared to the informal care delivered by Jim.*

### F: Considerations for front-line practitioners

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

- Is the person prescribed or administered medication to control their behaviour, including on a PRN basis;
- What level of support is provided with aspects of daily living? And is that support provided to a timetable set by the individual or by others?
- Is technology used to monitor the individual's location within the home or to monitor when they leave?
- Does the individual's care plan provide for the regular use of restraint? If so, under what circumstances and for how long?
- Is the door to the individual's home locked? If so, do they have the key (or the code to a key pad)?
- Are they free to come and go from their own home unaccompanied as they please?
- Are they regularly locked in their room (or an area of their home) or otherwise prevented from moving freely about their home?
- Are restrictions placed upon them by professionals as to who they can and cannot see?