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REFORMING DEPRIVATION OF LIBERTY

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On 13th March 2017 the Law Commission published its report *Mental Capacity and Deprivation of Liberty*. This note covers some of the key points to come out from that report. More detailed analysis of the report, with a particular focus on its implications for property and affairs deputies and attorneys will be included in a forthcoming 5 Stone Buildings Court of Protection Spring Seminar, the details of which will be announced shortly.

Deprivation of Liberty - The Problems

Article 5 of the European Convention of Human Rights ("ECHR") guarantees the right to personal liberty and provides that no one should be deprived of their liberty in an arbitrary fashion. Where a deprivation of liberty exists, then certain safeguards must be provided and these must include a right to bring legal proceedings to challenge the deprivation of liberty. For the purposes of engaging Article 5 there are three elements to a deprivation of liberty. These are:

(1) An objective component of confinement in a particular restricted place for a non-negligible length of time;

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(2) A subjective component of lack of consent; and

(3) The attribution of responsibility for the deprivation of liberty to the state.

What these elements mean in practice has not been easy to define. However, a number of decisions over the past few years have dramatically expanded the number of cases where a person is now understood to be deprived of their liberty. Perhaps the most well known of these is the decision of the Supreme Court in *P v Cheshire West and Chester Council* [2014] UKSC 19 which gave a significantly wider interpretation of arrangements capable of amounting to a deprivation of liberty than had previously been understood. Other decisions have further expanded the arrangements which may amount to a deprivation of liberty for the purposes of Article 5. In *Staffordshire County Council v SRK* [2016] EWCOP 27 Charles J held that private care arrangements which meet the objective criterion of confinement in a restricted place for a non-negligible length of time that are put in place by a deputy or an attorney administering a personal injury award amount are imputable to the state (by virtue of the involvement of the court appointing the deputy or making the damages award), and as thus engage Article 5 ECHR rights. This decision was recently upheld by the Court of Appeal (reported under the name *Secretary of State for Justice v Staffordshire County Council* [2016 EWCA Civ 1317).

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As matters stand there are currently two regimes under which a deprivation of liberty can be authorised. Where the person in question is being detained in a care home or hospital, a primarily administrative arrangement under the Deprivation of Liberty Safeguards ("DoLS") regime set up under Mental Capacity Act 2005 ("MCA 2005") Sch A1 exists whereby standard or urgent authorisations are granted by the relevant supervisory body. These can be subject to review and can be challenged in the Court of Protection, although the legislative drafting is extremely complex. Where the person in question is not in a hospital or care home (for example an elderly person living at home with a care package funded by the local authority, or a person living in a supported environment) any deprivation of liberty must be directly authorised by the Court of Protection under MCA 2005 ss 16(2)(a) and 4A. The decision in the *Cheshire West* case led to a significant increase in the number of DoLs authorisations sought, and in the number of applications made to the Court of Protection. Such applications lead to further difficulties in ensuring that the person in question is properly represented within the proceedings. The decision in *Staffordshire County Council v SRK*, bringing large numbers of essentially private care arrangements within the ambit of Article 5 ECHR will doubtless exacerbate the problem further.

The Law Commission's Proposals

The Law Commission report sets out a new scheme ("the Liberty Protection Scheme" or "LPS") intended to replace the DoLS. However the new scheme would extend beyond hospitals and care homes and thereby remove the need for applications to the Court of Protection in cases falling outside the current DoLs regime.

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The main features of the new Scheme are as follows:

(1) To fall within the LPS a person must:-

(a) be aged 16 or over;

(b) lack capacity to consent to the arrangements that are proposed or in place; and

(c) be of "unsound mind" within the meaning of Article 5 ECHR.

(2) The LPS would apply to "arrangements which are proposed or in place to enable the care of treatment of a person and which would give rise to a deprivation of that person's liberty" and would include:

(a) arrangements that a person is to reside in one or more particular places,

(b) arrangements that a person is to receive care or treatment at one or more particular places, and

(c) arrangements about the means by which and the manner in which a person can be transported to a particular place or between particular places.

As with the current DoLS regime, matters falling within the scope of the mental health legislation are outside the LPS regime.

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(3) Arrangements are to be authorised by the "responsible body". In broad terms this will be the relevant NHS body where the person is in hospital or in receipt of NHS continuing healthcare. Otherwise it will be the local authority.

(4) In essence an arrangement that leads to a deprivation of liberty can be authorised if:

(a) The person in question lacks capacity (within the meaning of MCA 2005, s2) to consent to the arrangements;

(b) The person is of "unsound mind" within the meaning of Article 5 ECHR;

(c) The arrangements are necessary and proportionate;

(d) Certain required consultations have been carried out;

(e) An independent review has been carried out; and

(f) In certain cases the approval of an Approved Mental Capacity Professional has been obtained.

However it is not possible to authorise an arrangement that conflicts with a valid decision of an attorney under an LPA or of a deputy.

The LPS works as follows.

(1) At the outset of the process the responsible body must consider whether there is an appropriate person to represent and support the person to whom the potential deprivation of liberty relates ("the cared-for person"). This cannot be a person who is being paid to

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provide care or treatment for the cared- for person. If no appropriate person exists, then the responsible body must appoint someone to carry out this role.

(2) The responsible body is then responsible for arranging three assessments: a capacity assessment (to confirm that the person lacks capacity to consent to the arrangement), a medical assessment (to confirm whether the person is suffering from "unsoundness of mind" within the meaning of Article 5 ECHR) and an assessment to consider whether the arrangements are necessary and proportionate.

(3) The responsible body is also responsible for consulting a number of defined classes of people including anyone engaged in caring for the cared-for person or interested in their welfare.

(4) It is not possible to authorise a deprivation of liberty under the LPS if this would conflict with a valid decision made by a deputy of an LPA or a court appointed deputy.

(5) There must then be an independent review by a person who is not involved in the care or treatment of the cared-for person to consider whether the conditions set out at (2) have been met and whether the appropriate consultations have taken place.

(6) In certain circumstances the independent reviewer is required to refer the case to an "Approved Mental Capacity Professional" for their approval. Again the role of the Approved Mental Capacity Professional is to consider whether the conditions set out at (2) have been met and whether the appropriate consultations have taken place.

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(7) Once the case has been considered by the independent reviewer and / or the Approved Mental Capacity Professional and the necessary confirmation / approval given the responsible body can make the authorisation.

(8) An authorisation made under the LPS will last for an initial period of up to 12 months but could be extended (initially for 12 months and thereafter for an indefinite number of periods of up to three years) where there has been no material change in circumstances.

(9) The LPS places the responsible body under a general duty to review authorisations, and it must do so *inter alia* if requested to do so by a person with an interest in the arrangements in question.

(10) Any challenge to an assessment is made to the Court of Protection. In its consultation paper the Law Commission had suggested that this might be dealt with by the First Tier Tribunal. A final decision whether to transfer these issues to a tribunal jurisdiction has been left to be dealt with as part of wider review of the courts and tribunals system.

Clearly the Law Commission's proposals represent a significant change from the current regime. Whilst elements of the LPS bears resemblance in places to the DoLS, the draft legislation is easier to understand than the current MCA 2005 Sch A1, and the Law Commission consider that their proposals have removed a number of features of the DoLS which are inherently inefficient and actively detrimental to the interests of persons deprived of their liberty. Doubtless there will be expense and complications involved in implementing a new scheme. Nonetheless, the proposals offer an opportunity to put in place a more coherent scheme for authorising deprivations of liberty

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than the current arrangements. One of the key changes is that the scheme is no longer confined to cases where a person is in a care home or hospital and as such many cases which at present fall to be dealt with by the Court of Protection (and thus require the preparation of a court application and the payment of a £400 application fee) can be dealt with through the LPS. In practice the suspicion is that at present many arrangements that involve a deprivation of liberty are not brought to court with the result that they remain unauthorised and that the person's rights under Article 5 ECHR are breached. It is to be hoped that the Law Commission's proposals, if enacted, will lead to far fewer such cases.

What is not yet clear is the extent of the political will to implement the Law Commission's proposals within a realistic time frame. It is to be hoped that Parliamentary time to enact these measures is made available in the near future.

Best Interests

It should be noted that some of the Law Commission's recommendations go beyond issues of deprivations of liberty and touch upon other wider aspects of the Mental Capacity Act 2005 and the role of the Court of Protection. Perhaps the most fundamental of these changes is the proposed reform of the best interests test under MCA 2005 s4. At present a decision maker (such as a deputy, attorney or the Court of Protection itself) is directed by section 4 to consider "all the relevant circumstances". This direction is supplemented by a specific list of factors to consider, including the past and present wishes and feelings of the person in question although the section does not impose any hierarchy between these various factors. The current position, as set out by

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Munby J (as he then was) in the case of *Re M, ITW v Z* [2009] EWHC 2525 (Fam) is that the weight to be attached to P's wishes and feelings will be case-specific and fact-specific. In some cases those wishes and feelings may be preponderant; whereas in others they will carry little weight. The Law Commission propose to change this and to elevate the status of P's wishes and feelings above other factors. The draft Bill proposes to amend section 4 of the MCA to impose a positive duty on the decision maker to ascertain, so far as is reasonably practicable, (a) the person's past and present wishes and feelings, (b) the beliefs and values which would be likely to influence his decision if he had capacity and (c) any other factors that he would be likely to consider if her were able to do so. It would also require the decision maker, when weighing up best interests to give particular weight to any wishes or feelings ascertained. If enacted this will mark an important shift in the way that best interests are to be determined. Whilst it does not prevent the decision maker from making a best interests decision contrary to the person's wishes and feelings, it clearly places wishes and feelings centre stage and will require the decision maker to justify any best interests decision to depart therefrom. This change, if enacted, may have implications for the approach of the Court of Protection in property and affairs matters such as statutory wills.

David Rees QC is well known for his experience in wills, trusts, estates and mental capacity matters. He took Silk in February 2017. He is ranked as a Star Individual in Court of Protection in Chambers UK Bar Guide 2017 where he is described as "one of the leading lights in the field" and as a Band 1 junior for Traditional Chancery in Chambers UK Bar Guide 2017 and Chambers High Net Worth 2016. He is regularly instructed by the Official Solicitor in England and Wales and appears before all levels of judge in the Court of Protection. He has appeared in many leading cases under the Mental Capacity Act 2005 and has particular expertise in cross-

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border mental capacity disputes. David is the General Editor of Heywood & Massey's Court of Protection Practice *and is a member of the Court of Protection Rules Committee and Court of Protection Users Group.*