

BRIEFING SHEET FOR CARE HOMES AND HOSPITALS

Deprivation of Liberty after Cheshire West

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

There are still 6 requirements which need to be met

1. 18 and over
2. Suffering from a mental disorder
3. Lacking capacity for the decision to be accommodated in the hospital or care home
4. No decision previously made to refuse treatment or care, or conflict relating to this such as LPA
5. Not ineligible for DoLS
6. The person needs to be deprived of liberty, in their best interests.

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

The Supreme Court has now confirmed that here are two key questions to ask – the ‘acid test’:

- (1) Is the person subject to **continuous supervision** and **control**? (all three aspects are necessary)

AND

- (2) Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave).

So this now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

The following factors are no longer relevant to this:

- (1) the person’s compliance or lack of objection;
- (2) the relative normality of the placement and
- (3) the reason or purpose behind a particular placement.

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, domestic settings an application has 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 to enable him to leave the home frequently for activities and visits (Mr P).
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 (MEG).
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 (MIG).

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 *Cheshire West*.

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

The following is a guide to identify those potentially deprived of liberty.

Name:

DoLS CHECKLIST

First it must be established that the person lacks capacity for the decision about being accommodated in hospital for care/treatment

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 of the purpose of this is to enable them to have greater freedom, to move around more, 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 a possibility that the person is being deprived of liberty.

The next step is to review the person's care/treatment plan to determine whether this can be provided in a less restrictive way.

If this is not possible you will need to seek further advice about how to proceed to have the deprivation of liberty authorised.

If this is not possible you will need to seek further advice from:

DoLS Administrator, Nia Allen Tel: 01384 324542

DoLS Lead, Anne Harris Tel: 01384 815870