PRACTICE UPDATES: EVIDENTIAL IMPORTANCE OF THE PERMANENCE REPORT AND THE RECORD OF DECISION.

A PARENT CAN CONSENT TO A RESTRICTION OF LIBERTY FOR A CHILD UNDER THE AGE OF 18.

Neil Owen-Casey

Barrister

St John's Buildings

EVIDENTIAL IMPORTANCE OF THE PERMANENCE REPORT AND THE RECORD OF DECISION

Re S-F (A Child) [2017] EWCA Civ 964

Court of Appeal - Ryder (P), Gloster VP and Burnett LJ

Many practitioners may have missed the relatively brief judgment given on 12th July 2017 that was a timely reminder of the need to ensure that any proposal for adoption should – if it is to have weight – be supported by social work opinion that is derived from a welfare analysis relating to the child. Rather than reiterating the *Re B-S* mantra the appeal highlights a point of good practise that can be easily missed.

The Appeal

The matter was heard in June 2017 and was concerned about whether the judge at first instance was wrong to prefer long term fostering instead of adoption. The local authority proposed that there be a time limit search of six months for an adoptive placement, with a contingency plan of long-term foster care. The parties were in agreement that there should be direct contact between the child and the parents, and the Children's Guardian recommended that an adoptive placement should be sought that could facilitate direct contact. The local authority appealed the Court's decision to refuse to make a placement order. No new issues of law or principle were raised and on that basis the issue on appeal was straightforward.

The Court of Appeal dismissed the appeal and held that, in the circumstances, it could not be said that the judge had been wrong in the balance in reaching the conclusion that he had arrived at. Further, it was highlighted that the evidence upon which the judge was asked to make a decision about the placement order application was limited.

Implications for Practitioners

The Court of Appeal made clear that "[T]he proportionality of interference in family life that an adoption represents must be justified by evidence not assumptions that read as stereotypical slogans. It added that whilst a conclusion that adoption would be better for a child as opposed to long-term fostering may well be correct, an assumption as to such a conclusion was not evidence "even if described by the legend as something that concerned identity, permanence, security and stability". (para.8)

Once again, the Court of Appeal reminds practitioners that the proposals must be properly supported by a social work opinion derived from a welfare analysis relating to the child and, if appropriate, the conclusion of empirically validated research material could be relied upon in support of the welfare analysis. However, caution is sounded about the often-used process of the citation of other cases to identify the benefits of adoption as against long-term foster care. The

Court reiterated that this is" no substitute for evidence and advice to the court on the facts of the particular case". (para.9)

As stated in the judgment (para.11), the permanence report and the Agency Decision Maker's record of decision contain the required analysis and reasoning that would be necessary to support an application for a placement order. However, many practitioners for all parties in care proceedings will no doubt relate to a situation in which 'Section P' of their bundle is characterised by the absence, rather than abundance, of documentation – these two documents being amongst the absent. Practitioners will no doubt be aware that the permanence report must contain, inter alia, an analysis of the options for future care of the child and why adoption is the preferred option, as per reg.17 of the Adoption Agencies Regulations 2005 (in England) and reg.17 of the Adoption Agencies (Wales) Regulations 2005 (in Wales).

Both the permanence report and ADM record of decision are disclosable documents and should be available to be scrutinised by the children's guardian and are susceptible to cross-examination. It was noted by the Court of Appeal that neither of those documents were available for the judge at first instance, thus good practice had not been adhered to. Little wonder, then, as to why the judge was placed in a difficult position of being asked by the local authority to grant a placement order when the evidence in support of such a draconian order had not been properly put before the judge. Any proper analysis of the available options was going to be impossible without the missing documents.

Local authorities should ensure that the necessary disclosable documents relating to the placement order application are filed and served prior to the Issues Resolution Hearing and the drafting of case management orders should take this into account. To do otherwise could give rise to the real risk that the Court will not grant a placement order, even if it would be correct to do so, without the supporting evidence being in place. It is not for the judge to search for the evidence that adoption is what is required for a child.

Neil Owen-Casey

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clerk@stjohnsbuildings.co.uk

A PARENT CAN CONSENT TO A RESTRICTION OF LIBERTY FOR A CHILD UNDER THE AGE OF 18

Re D (A child) [2017] EWCA Civ 1695

Court of Appeal – Munby P, David Richards and Irwin LJJ

The Court of Appeal has handed down its decision on the issue of whether a parent can give consent to arrangements for a child who has attained the age of 16 which would otherwise amount to a deprivation of liberty. Heard in February 2017, the lead judgement is given by Sir James Munby, President of the Court of Protection (the others being in agreement). The appeal overturns the 2016 decision of Keehan J that whilst a parent could consent to a foster care arrangement that involves a restriction of liberty for a child under 16, they cannot do so for a child age 16 and 17.

Background

The appeal concerned the judgment handed down by Keehan J in January 2016 sitting in the Court of Protection, and reported as *Birmingham City Council v D* [2016] EWCOP 8. The proceedings were brought in respect of D who was born in 1999 and was age 16 when the matter was heard at a final hearing before Keehan J in November 2015. Similar issues regarding the same child had been before Keehan J in the Family Division when D was age 15, reported as *Re D (A Child)(Deprivation of Liberty)* [2015] EWHC 922 (Fam). In each case, the central question was whether D was being deprived of his liberty within the meaning of and for the purposes of Article 5 of the European Convention on Human Rights.

The facts

D had been diagnosed with ADHD, Asperger's syndrome and Tourette's syndrome from an early age, and was later diagnosed with a mild learning disability. He was referred to a hospital for treatment and he lived within the grounds of the hospital and attended an on-site school on a full-time basis. The regime at the hospital was considered in 2015 when D was age 15 and Keehan J proceeded on the basis that D was not *Gillick* competent. The Court was satisfied on that occasion that the circumstances in which D was accommodated would amount to a deprivation of liberty but for the consent of his parents for him to be placed there. Further, the consent of the parents to D's placement at the hospital fell within the 'zone of parental responsibility'. Accordingly, the Court was satisfied that the parents had consented to the placement and that they were able to consent to the same. That decision was not appealed.

When D turned age 16 he was transferred to a residential unit from the hospital placement. Once more, the issue of whether D was being deprived of his liberty fell to be considered. The local authority sought declarations that D's detention did not amount to a deprivation of liberty, on the basis that: (i) D's parents could not consent to such confinement now that he was age 16; and (ii) the fact that D resided at the residential unit, under the auspices of section 20 Children Act 1989 to

which the parents had agreed, meant that D's placement and confinement were not imputable to the State, but were at the request of his parents. Keehan J refused to make the declaration and also concluded that D's parents could not consent now that D had attained age 16. It was determined that D's confinement was attributable to the State. Instead, the Court made an order pursuant to section 16 Mental Capacity Act 2005 authorising D's deprivation of liberty pursuant to the local authority's care plan. The local authority appealed.

The Appeal

The local authority advanced three grounds of appeal, in that Keehan J:

> Ground 1 – erred in law in finding that a parent cannot consent to arrangements for a child who has attained the age of 16 which would otherwise amount to a deprivation of liberty;
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> Ground 2 – erred in law in finding that the arrangements for D were attributable to the State; and
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> Ground 3 –was wrong to find that D was deprived of his liberty having regard to the procedures which ensure that the arrangements for 16- and 17-year old children, including those who lack capacity, are appropriately monitored.

As practitioners have come to expect from the President, this judgment sets out a comprehensive survey of the jurisprudence dealing with the issue of consent regarding children, as well as drawing together both the European and domestic jurisprudence on Article 5. There is a timely reminder of the principles that were set out by the Supreme Court in *Surrey County Council v P and others (Equality and Human Right Commission and others intervening), Cheshire West and Chester Council v P and another (Same intervening)* [2014] UKSC19 (*Cheshire West)*, and the references therein to the three components that define a deprivation of liberty, as set out in *Storck v Germany* (2005) 43 EHRR 96:

(a) The objective component of confinement in a particular restricted place for a not negligible length of time;
(b) The subjective component of lack of valid consent; and
(c) The attribution of responsibility to the State.

With regard to the jurisprudence on the issue of consent, the President describes and analyses the implications of the decision in the European case of *Nielsen v Denmark* (1998) 11 EHRR 175, and the domestic cases of *Hewer v Bryant* [1970] 1 QB357, and *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112. The President covers a huge amount of detail and practitioners may wish to look at some of the stated earlier case law to assist with an understanding of the nuances dealt with in the present case. The main debate of the appeal focused on Ground 1 and therefore on *Storck* component (b), but before determining Ground 1, the President first dealt with Grounds 2 & 3.

Ground 2 – Were the arrangements attributable to the State?
In relation to ground 2 (which relates to *Storck* component (c)), the Court of Appeal said it was correct for Keehan J to have found that (as quoted) the mere fact that D's parents could at any stage object to his continued accommodation and remove him from the residential unit had not provided a definitive answer to the test of imputability to the State. If that were to be the case, it would ignore the fact that the role of the local authority in establishing and maintaining D's placement was central and pivotal. Further, in no sense could the set of circumstances be considered a purely private arrangement with no state involvement. To reach a contrary conclusion would have been perverse (para.41).

The President agreed with Keenhan J, both in terms of his decision on the point and in his reasoning. He also stated that where the reasoning differed from that of Mostyn J in *Re RK (Minor: Deprivation of Liberty)* [2010] EWHC 3355 (COP), he preferred the analysis of Keehan J. The President did not agree with the local authority in the present case that Keehan J failed to take into account the extent of the informed involvement of D's parents in the arrangements regarding the residential placement. The President stated that, "…parental involvement sufficient to involve consent for the purposes of *Storck* component (b) is not in any way incompatible with a degree of State involvement sufficient to trigger *Storck* component (c). It merely means that, notwithstanding the State's involvement, Article 5 will not be engaged." Accordingly, the second ground of appeal was dismissed and therefore D's confinement was imputable to the State.

Ground 3 – Was D deprived of his liberty?
The Court of Appeal agreed that D had been deprived of his liberty. The local authority had contended that the monitoring procedures for children such as D meant that such a child was not deprived of his liberty. Further, the statutory regime contained a comprehensive set of obligations to ensure that the child was properly looked after and that the arrangements were monitored and scrutinised by the allocated social worker, by the Independent Reviewing Officer, and by regular LAC reviews.

The President stated that the local authority's contention was incompatible with the fundamental principles which underpinned Article 5, which stipulate the involvement of the court. Reference was made to what Keehan J had stated in *In re AB (A Child) (Deprivation of Liberty: Consent)* [2015] EWHC 3125 (Fam) (para. 36): "…the local authority child care review, chaired by an independent reviewing officer, would not, afford the required safeguards and checks, sufficiently independent of the state." Accordingly, the third ground of appeal was also dismissed.

Ground 1 - Can a parent consent to arrangements for a child who has attained the age of 16?
The President ruled that, in terms of ground 1, Keehan J was wrong in law for two reasons. Firstly, the judge's approach had not given effect to the fundamental principle established in *Gillick*: that the exercise of parental responsibility comes to an end not on the attaining of some fixed age but on attaining '*Gillick* capacity'. In other words, a child's chronological age is not determinative of their capacity. Secondly, the range of statutory provisions relied upon by Keehan J, that deal with Parliament's distinction between young people who are age 16 and 17 and those that are not, did

not bear either expressly or by implication upon the ambit and extent of parental responsibility (para.125).

The President had earlier in the judgment stated that there is no longer any 'magic' in the age of 16, given the principle that '*Gillick* capacity' is 'child-specific', and in any particular context, one child might have '*Gillick* capacity' at the age of 15, while another may not have acquired '*Gillick* capacity' at the age of 16 and another might not have acquired '*Gillick* capacity' even by the time they had reached the age of 18 (para.84).

In the present context, parental responsibility is, in principle, exercisable in relation to a 16-or 17-year old child who, for whatever reason, lack '*Gillick* capacity' (para.128).

In his judgment, the President said that the answer to the key question in this appeal was that provided by Keehan J in the relation to the 15-year-old D. Practitioners will recall that Keehan J's decision and reasoning in the earlier proceedings nestled within the principles enunciated in *Gillick*, and the analysis set out by Keehan J of the 'zone of parental responsibility' accords entirely with *Gillick*. The President points out (para.144) that there is no question of discrimination where a parent is acting in a manner compatible with the principles laid down in *Gillick*. Further, there is nothing in *Cheshire West* that casts any doubt upon the continuing validity of what was said in *Gillick*.

Article 5 is not said to have been engaged in a case such as the present because of the giving by parents of a consent which domestic law empowers them to give, and which *Nielsen* treats as being effective for the purposes of *Storck* component (b). Accordingly, the judge had erred in law on the point of consent and the appeal was therefore upheld in respect of Ground 1.

Finally, practitioners should note that the Court of Appeal was in agreement with Keehan J that "the mere fact that a child is being accommodated by a local authority pursuant to section 20 does not, of itself, constitute a parental consent for *Nielsen* purposes to the particular confinement in question." (para.150) In other words, what precisely does, or is, the parent consenting to? The President concludes that this is a matter of fact to be decided in light of all the circumstances of the particular case.

On a practical basis, if a local authority is relying on parental consent to authorise whatever placement it, from time to time, considers to be appropriate they would be ill-advised to simply rely upon a generic section 20 consent to authorise any such change.

Neil Owen-Casey

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clerk@stjohnsbuildings.co.uk