Neutral Citation Number: [2022] EWCOP24

IMPORTANT NOTICE

These proceedings were conducted in private in accordance with the Vice-President's Guidance of 31st March 2020. This judgment may be published on condition that the anonymity of the incapacitated person and members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Case No: 13735866

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

Before: Her Honour Judge Hilder

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 21st June 2022

BOLTON COUNCIL

Applicant

and

(1) KL
(by his Litigation Friend, the Official Solicitor)

Respondent

Hearing: 27th July 2021
Written submissions: 6th September 2021

Ms. Arianna Kelly (instructed by Bolton Council) for the Applicant
Ms. Francesca Gardner (instructed by Simpson Miller) for the Respondent

The hearing was conducted in private in accordance with orders made on 5th April and 14th June 2021 in terms of the Vice-President's Guidance dated 31st March 2020. The judgment was handed down to the parties by e-mail on 22nd June 2022. It consists of 19 pages and has been signed and dated by the judge.

JUDGMENT

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1. Bolton Council made an application for authorisation of deprivation of liberty in the living arrangements of KL. The application was made under the streamlined procedure set out in Part 2 of Practice Direction 11A but the authorisation was granted, by consent, at an attended hearing.

2. This judgment addresses a COP9 application made by Bolton Council prior to the hearing, for reconsideration of the decision to take the application out of the streamlined procedure.

The factual background

3. KL was born in November 2003. He has been known to social services since birth. A Care Order was made in respect of him in 2006. He has lived with the same foster carers since he was 4 years old. He has had no contact with either of his birth parents since 2016, and he no longer has any contact with his siblings either.

4. KL has diagnoses of autistic spectrum disorder with severe learning difficulties. He is non-verbal. It is agreed by both parties and accepted by the Court that he lacks capacity to make the decisions in issue in these proceedings.

The proceedings

5. Bolton Council made an application under the streamlined procedure set out in Part 2 of Practice Direction 11A. The COPDOL11 application form is undated but Annex A is dated 25th March 2021.

6. On 5th April 2021 I made an order which took the application out of the streamlined procedure and invited the Official Solicitor to act as Litigation Friend for KL. The reasons given for this were that:

    a. KL is just 17 years old;
    b. he has been subject of a Care Order since 22nd March 2006;
    c. he has no family contact;
    d. there will be transition to adult services within 12 months;
    e. he should be independently represented.

7. A hearing listed on 16th June 2021 had to be vacated because the Official Solicitor's acceptance criteria had not yet been met. By order made on the papers on 14th June 2021, the matter was relisted for hearing on 27th July 2021.

8. Bolton Council then made a COP9 application dated 24th June 2021 seeking reconsideration of the decision to take the matter out of the streamlined procedure. The application was based on the assertion that, although the reasons (a) – (d) as set out above were factually accurate, they "do not necessarily lead to a conclusion that the matter was not suitable for the streamlined process…or that KL should be joined as a party and the Official Solicitor should be appointed to represent him."

9. By order made on 23rd July 2021, it was directed that the reconsideration application be heard at the hearing already listed on 27th July.

10. Meanwhile, the Official Solicitor had accepted the Court's invitation to act as Litigation Friend for KL. At the hearing on 27th July, both parties agreed that the COP9 application was now "otiose." I made an order which included authorisation of deprivation of liberty in KL's living arrangements for a period of 12 months.

11. Nonetheless, the Applicant expressed concern that, in other quarters, it had met with criticism for not using the streamlined procedure and sought clarification of the approach it should take. KL's representatives adopted a neutral position about the suitability of the streamlined procedure for this matter but expressed concern about the potential costs to KL of that procedure not being followed (although in fact the Applicant had met KL's costs so there was no loss to him.) I therefore agreed to set out in this written judgment as response to the COP9 application an explanation of the approach taken by the Court, to be published for wider consideration.

LAW AND PROCEDURE

The European Convention on Human Rights

12. Article 5 of the European Convention on Human Rights, to which the UK is signatory, accords to everyone the right to liberty and security of person. No one shall be deprived of his liberty save in the listed cases and in accordance with a procedure prescribed by the law.

13. It is clear from article 5(1)(d) that the provision applies to children, and from article 5(1)(e) that it applies to people who lack capacity to make decisions for themselves.

Jurisdiction of the Court of Protection in respect of deprivation of liberty

14. Pursuant to section 2(5), the Mental Capacity Act 2005 ("the Act") generally applies to a people who lack capacity and have reached the age of 16 (with additional application to younger persons in respect of their property and affairs if it is likely that their incapacity will continue past majority, as set out in section 18(3).) Pursuant to section 1(5) of the Act, a decision made under the Act for such persons must be made in their best interests.

15. The Court of Protection's powers in respect of welfare are set out in sections 16, 16A and 17 of the Act. Where a person over the age of 16 lacks capacity in relation to a matter or matters concerning their welfare, pursuant to section 16(2)(a) the Court may, by making an order, make the decision or decisions for them. Section 17(1) makes explicit that this power extends to a decision as to where the person lives. Section 4A(3) and (4) provides that any person ('D') may deprive another person ('P') of their liberty if, by doing so, D is giving effect to a decision of the Court in respect of P made under s16(2)(a).

16. So, as set out by Charles J, then Vice-President of the Court of Protection, in *Re NRA & Ors* [2015] EWCOP 59 at paragraph 41:

> "i. … the determinative test on an application for a welfare order to authorise a deprivation of liberty is a best interests test, namely is the care package the least restrictive available option,
>
> ii. this test applies to care packages whether or not there is a deprivation of liberty,
>
> iii. the Article 5 deprivation of liberty or detention arising on the implementation of such a care package is a necessary consequence of the least restrictive available option that best promotes P's best interests,
>
> iv. so the test is not whether or not P should be deprived of liberty or detained."

17. The usual way of making an application to the Court for an order under s16(2)(a) is by form COP1. For such applications (other than serious medical treatment cases), the Court of Protection has a regionalised structure. They may be issued at the 'hub' court for the appropriate one of eight regions: First Avenue House for the London region, Reading for the South East region, Bristol for the South West region, Birmingham for the Midland region, Manchester for the North West region, Leeds and Newcastle for the two North East regions, and Cardiff for Wales.

18. Rule 3.9(3) of the Court of Protection Rules 2017 provides for the allocation of cases on issue to one of three case management pathways, unless it is an application of an excepted class. Where what is sought is a decision on living arrangements including authorisation for deprivation of liberty, the Personal Welfare Pathway would apply. Standard directions for such an application include joinder of the subject as party, with arrangements for appropriate representation and directions initially to a Case Management Conference.

19. Paragraph 1.1(d) of Practice Direction 3B provides that one of the excepted classes of applications outside the three case management pathways is applications in form COPDOL11 - the 'streamlined procedure.'

<u>The streamlined procedure</u>

20. The streamlined procedure under Part 2 of Practice Direction 11A is sometimes referred to as the "*Re X* procedure" because it derives essentially from two judgments of Sir James Munby, then President of the Court of Protection, reported as *Re X & Ors (Deprivation of Liberty)* [2014] EWCOP 25 and *Re X & Ors (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37. The understanding of what constitutes "deprivation of liberty" had been significantly widened by the Supreme Court decision universally known as *Cheshire West,* reported at [2014] UKSC 19, with consequential increase in the numbers of applications needing to be made to the Court. The aim of the *Re X* litigation was to formulate an efficient and proportionate means of authorising non-contentious deprivations of liberty in the community in compliance with requirements of the European Convention on Human Rights.

21. The Court of Appeal in *Re X (Court of Protection Procedure)* [2015] EWCA Civ 599 subsequently determined that the approach of the *Re X* proceedings had not been appropriate

and went on to make observations about the conclusions reached. In particular, the Court of Appeal judges were unanimously agreed that principles of domestic law of the Convention *required* that P be joined as a party to proceedings for authorisation of deprivation of liberty. This conclusion was strictly obiter but it was forcefully expressed.

22. Subsequently Charles J, then Vice-President of the Court of Protection, reconsidered the streamlined process in *Re NRA* [2015] EWCOP 59. He identified (at paragraph 25) the "balancing exercise" between "Requirements" for Convention compliance and their "Effects." He determined that a revamped version of the streamlined procedure should be reintroduced, and it was not always necessary to join P as a party. A trusted family member could be formally appointed as P's representative or the Court itself could take on a more inquisitorial role through increased use of s49 reports.

23. The streamlined procedure is now set out in Part 2 of Practice Direction 11A. It provides essentially for judicial determination of non-contentions applications for authorisation of deprivation of liberty 'on the papers':

> Practice Direction 11A
> "28. To bring proceedings, the applicant must file an application using Form COPDOL11, verified by a statement of truth and accompanied by all attachments and evidence required by that form and its annexes.
>
> 29. The application form and accompanying annexes and attachments are specifically designed to ensure that the applicant provides the court with essential information and evidence as to the proposed measures, on the basis of which the court may adjudicate as to the appropriateness of authorising a deprivation of liberty, and in particular to identify whether a case is suitable for consideration without an oral hearing…."

24. Paragraph 33 of the Practice Direction sets out a duty of full and frank disclosure on the part of the applicant.

25. Paragraph 35 imposes on an applicant obligations to consult the subject person before the application is lodged with the court. It is specified at paragraph 35(e) that the subject person must be informed that he or she is "entitled to seek to take part in the proceedings by being joined as a party or otherwise, what that means, and that the person undertaking the consultation will ensure that any such request is communicated to the court."

26. Paragraphs 38 – 40 impose on an applicant obligations to consult specified others before the application is lodged with the court.

27. It is an aspect of the efficiency and proportionality considerations of the streamlined procedure that applications within it can **only** be issued at the central registry of the Court of Protection, and not at the regional hub courts. A designated staff team deals exclusively with these applications and, initially at least, a new cohort of judges drawn from the Tribunals judiciary was specifically nominated to determine the applications.

28. There is specific provision within Practice Direction 11A for consideration as to whether or not the streamlined procedure is appropriate for a particular matter:

> "**Applications suitable for the streamlined procedure**

> 44. As soon as practicable after receipt the court officers will consider the suitability of the application to be subject of paper determination, or to be considered at an oral hearing.
>
> 45. All applications considered suitable for the streamlined procedure will be referred to a judge for consideration without an oral hearing, as soon as practicable after receipt.
>
> **Applications not suitable for the streamlined procedure**
> 46. If the judge considers that the application is not suitable for the streamlined process, case management directions shall be given."

29. There is no specific provision within the Practice Direction as to criteria of suitability for consideration under the streamlined procedure. The court generally has wide discretion in relation to case management, and nothing in Part 2 of Practice Direction 11A limits that discretion.

30. If a matter is considered unsuitable for the streamlined procedure, usually an order is made which explains why that is. If the appropriate hearing centre is outside the London region, the order will usually provide for transfer of the matter to the appropriate hub court for further directions. It then progresses as any other s16 application according to the welfare pathway.

Mental Capacity Act but outside the Court of Protection

31. The Act presently includes at Schedule A1 a specific non-judicial regime for authorisation of deprivation of liberty in a care home or hospital. As set out at section 13 of that Schedule, this regime applies only to persons who have reached the age of **18**.

32. There has for some time now been a prospect of Schedule A1 being replaced by a new scheme – the 'Liberty Protection Safeguards' - introduced by the Mental Capacity (Amendment) Act 2019. There is presently no date published for implementation of the Liberty Protection Safeguards but if/when they do come into effect, they will apply to persons aged **16** or over; and they are not limited to living arrangements in a care home or hospital.

33. The streamlined procedure under Practice Direction 11A will become redundant if/when the Liberty Protection Safeguards are implemented. Non-contentious authorisations of deprivation of liberty will generally become a non-judicial administrative procedure. The court's role will be to determine challenges to the administrative authorisation. In respect of persons aged 16 and 17, it is not yet clear *which* court will consider such challenges. (There is a Working Group of the Court of Protection considering this and other issues of LPS implementation.)

Other jurisdictions

34. The Mental Health Act 1983 provides for compulsory admission to hospital or guardianship of persons with a "mental disorder." This jurisdiction deprives persons of their liberty where such deprivation is the purpose of the lawful authority. It is not directly relevant to the proceedings before me, so I refer to it only in passing for completeness.

35. More generally, the living arrangements of young people are considered in the Family Court under the framework of the Children Act 1989. It is helpful to recall the summary of powers

under the Children Act 1989 as set out in the Supreme Court decision in *Re D (A Child) (Deprivation of Liberty)* [2019] UKSC 42, at paragraph 26 of the judgment of Lady Hale:

> "(iv) Section 9(6) of the Children Act 1989 provides that no court may make a child arrangements, specific issue or prohibited steps order under section 8 of the Act which is to have effect after the child reaches 16 unless the circumstances are exceptional.
>
> (v) Section 31(3) of the Children Act 1989 provides that a care or supervision order may not be made in respect of a child of 17 (or of 16 who is married). However, an order made before this point can last until the child reaches 18 (section 92(12)).
>
> (vi) Section 20(11) of the Children Act 1989 provides that a child of 16 or 17 may agree to being accommodated by a local authority even if his parents object or wish to remove him."

36. The Children Act 1989 does not include provision for authorisation of deprivation of a young person's liberty save for pursuant s25, which relates to secure accommodation. In this scenario, the deprivation of liberty is essentially the purpose of order.

37. The central issue in *Re D* was how deprivations of liberty which are an incidental part of wider care arrangements could be lawful. It was a matter of agreement that *a local authority* which has parental responsibility for a child cannot deprive the child of his liberty without the authority of a court (paragraph 31); and the Supreme Court determined that it was not within the scope of parental responsibility for *parents* to consent to a placement of a child over the age of 16 which deprived him of his liberty either (paragraphs 49, 90, 116). Exercise of the inherent jurisdiction of the High Court is required.

38. In the matter of *A-F (Children)(No 2)* [2018] EWHC 2129 (Fam), Munby J sitting as a judge of the High Court observed that:

> *"*6. … the Court of Protection has jurisdiction in relation to children who have attained the age of sixteen years and who lack capacity within the meaning of the Mental Capacity Act 2005. So too, in relation to such children, the Family Court has jurisdiction in the context of care proceedings under Part IV of the Children Act 1989 and the Family Division of the High Court, subject to the requirements of section 100 of the 1989 Act, can exercise its inherent *parens patriae* jurisdiction."

39. So, the inherent jurisdiction of the High Court is available *concurrently* with the jurisdiction of the Court of Protection to authorise deprivation of liberty in the living arrangements of persons aged 16 or 17. Lady Black confirmed this overlap in *Re D* at paragraph 71, firmly rejecting the Official Solicitor's contention that the Mental Capacity Act 2005 Act constitutes a <u>complete</u> (*emphasis added)* decision-making framework for the care and treatment of those aged 16 and above who lack capacity. She did so

> "not least because there is an obvious overlap between the reach of the Children Act 1989 and that of the 2005 Act, and I can find nothing in the 2005 Act that could be said to indicate a general rule to the effect that, where it applies, it does so to the exclusion of other common law and statutory provisions."

40. The Supreme Court has revisited the use of the inherent jurisdiction to authorise deprivation of liberty of young persons in *Re T (A Child)(Appellant)* [2021] UKSC 35. Against a background of shortage of provision of secure children's homes in England and Wales, it was determined in that case that the inherent jurisdiction of the High Court *can* be used to authorise deprivation of liberty of a child who meets the s25 criteria in a place other than an approved secure children home where no secure accommodation is available, subject to safeguards. At paragraph 153 of the Supreme Court judgment, Lady Black specifically envisaged "appropriate procedural safeguards" including "provision for the child to be made a party to the process… and for the appointment of a guardian"; and at paragraph 155 she envisaged that the court would undertake "considerable exploration of the circumstances to ensure that the proposal is appropriate."

Transfer of proceedings

41. In circumstances of concurrent jurisdictions, a question arises as to *which* should be deployed.

42. There is provision in The Mental Capacity Act 2005 (Transfer Of Proceedings) Order 2007, SI 2007/1899, for the transfer of proceedings in relation to children aged 16 and 17 between the Court of Protection and a court having jurisdiction under the Children Act 1989.

43. Such transfer was considered by Hedley J in *B (A Local Authority) v RM, MM and AM* [2010] EWHC 3802 (Fam). An application for a care order had been made but there was no care order in place. The question for determination was whether the matter should be transferred to the Court of Protection rather than being dealt with under Part IV of the Children Act 1989. In the particular circumstances of the case, and for the reasons he set out (at paragraph 30 of the judgment) he transferred the proceedings to the Court of Protection.

44. By contrast, in *A-F (Children)(No 2)* [2018] EWHC 2129 (Fam), care orders had already been made. Two of the children in the proceedings subsequently reached the age of 16. Munby J sitting as a judge of the High Court agreed with Hedley's summary of the principles but determined that that the proceedings in respect of the two now 16 year children should stay where they had been issued, for the following reasons;

> "i) There can be no sensible basis for discharging any of the care orders which are already in place. The children require the continuing protection of such aspects of the care regime as LAC reviews and the support of an IRO.
>
> ii) While the care orders remain in place, the Family Court has a continuing, if much reduced, potential role in the lives of the children – for instance, if issues in relation to contact require to be determined in accordance with section 34 of the 1989 Act.
>
> iii) For the time being, at least until they are approaching their eighteenth birthdays, the children are the responsibility of the local authority's Children's Social Care (LAC) Teams, who are, in the nature of things, much more familiar with practice and procedure in the Family Court and the Family Division than with practice and procedure in the Court of Protection.

iv) The children's guardians will be able to continue exercising that role so long as the cases remain within the Family Court and the Family Division; it is, at the least, doubtful whether they would be able to act as litigation friends in the Court of Protection.

v) It *may* be easier to ensure judicial continuity if there is no transfer.

vi) Put shortly, the benefits weigh heavily in favour of maintaining the forensic status quo. There are, in contrast, so far as I can see, no reasons for thinking that, to adopt Hedley J's words, the children's welfare will be better safeguarded within the Court of Protection."

45. The trend of developments since these two differing decisions demonstrates that there is much still to be worked out. As observed by Lady Black in *Re D* after rejecting the Official Solicitor's proposition that the Court of Protection was a complete jurisdiction, "the deliberate choice of the legislature to include children of 16 to 18 years within the scope of the 2005 Act, and now (by virtue of the recent amendment to Act…) to extend a regime of administrative deprivation of liberty safeguards to them, indicates an appreciation of the different needs of this particular age group."

46. In reality, since December 2019 (just three months after the handing down of the decision in *Re D*) the Court of Protection has been receiving – and determining – applications for authorisation of deprivation of liberty in the living arrangements of 16 and 17 year olds with and without a care order in place (such applications not having previously been made a feature of the workload of the Court.) Anecdotally, it would appear that very few such applications are made by the standard COP1 application to regional hub courts. In contrast, a fairly steady stream of approximately 4 – 5 applications per week is now made using the streamlined procedure (to the central registry but from all across England and Wales.) In addition and frequently, applications in matters which began as proceedings under the inherent jurisdiction are transferred to – or directions are made that, when a 16th birthday is reached, review shall be by – the Court of Protection.

47. It is not possible for the Court of Protection to form a reliable view as to the opposite side of the coin ie to know how many applications which potentially fall within its jurisdiction are nonetheless issued or continued in the concurrent inherent jurisdiction of the High Court. The impression formed is 'relatively few.' Such is the pressure in the Family/High Court inherent jurisdiction that a 'National DOLs Court' is presently being trialled. The Court of Protection's jurisdiction is available to only a capacity-determined subset of young persons whose arrangements may be authorised under the inherent jurisdiction but it would appear that, where capacity issues indicate that a young person's living arrangements are likely to require court authorisation beyond the age of majority, applications are being made to the Court of Protection in preference, even in circumstances comparable to those before Munby J in *Re A-F*.

<u>Impact of covid-19 pandemic</u>

48. Within three months of the first streamlined applications relating to 16/17 year olds being filed, the covid-19 pandemic hit. Remote hearings immediately became an essential norm. Even where applications were not considered 'on the papers', there was then no disadvantage to the parties in keeping them at the central registry as opposed to transferring them to a

regional hearing centre. Invariably there was positive advantage, in that hearings could be listed more quickly.

49. As pandemic restrictions have been lifted, attended hearings have resumed. Where appropriate, matters which have been issued at the central registry but require an attended hearing are once again transferred, via regional hub courts, to local hearing centres. However the experience gained with remote hearings during the pandemic has increased the confidence in, and facilities for, remote hearings. It is often both efficient and proportionate for directions hearings, at which evidence is unlikely to be heard, still to be conducted remotely.

Accredited Legal Representatives

50. Accredited Legal Representatives were essentially an invention of the Court of Protection ad-hoc Rules Committee in response to unsustainable pressure on the Office of the Official Solicitor. Rule 1.2 of the Court of Protection Rules 2017 makes provision for participation of P in the proceedings which are about him or her. Rule 1.2(2)(b) provides that one of the options for securing participation is "the appointment of an accredited legal representative." According to Rule 2.1, accreditation is "pursuant to a scheme… approved by the President." The approved scheme is set out in a Law Society Practice Note of 5th December 2019 entitled "Accredited Legal Representatives in the Court of Protection".

51. The Law Society Practice Note is "the Law Society's view of good practice," It is not binding on the Court but it is helpful to note several particular provisions:

> "**3.2 How will ALRs fulfil their responsibilities?**
> ….
> On appointment, and once funding is secured… it is likely that you will take the sort of steps frequently taken by the solicitor retained by the Official Solicitor acting as litigation fiend for P, for example:
>
> - making arrangements to meet P and establish P's wishes and feelings about the decisions being considered by the court; deciding how to keep P informed as the litigation progresses
> - notifying the parties and other persons (eg care home staff) of the appointment; filing notices
> - obtaining and considering the papers; diarising key dates
> - obtaining and considering health and social care and other disclosure records
> - ongoing correspondence with the LAA where appropriate
> - deciding whether to instruct counsel
> - preparing for the next hearing including consideration of how P should take part.
>
> …..
>
> **7. Funding of P's legal costs**
> **…**
> **Legal aid for applications under the streamline procedure**
> ALRs may be asked to represent P in applications brought by statutory bodies under the streamlined procedure using COPDOL[11]. Legal Aid in these cases will be means tested.

10 Situations in which it may be inappropriate for an ALR to act
10.1 Representing P in CoP proceedings when P is between the ages of 16-18
Because of the complexity of the overlapping legislation, you should accept an appointment as ALR only if you are sufficiently experienced in all the relevant frameworks. The Law Society expects that it will generally be unlikely for the court to appoint an ALR in cases concerning 16 – 18 year olds and where P is joined as a party it will usually be more appropriate for a litigation friend to be appointed.

10.2 Other legal issues
Whilst representing P, an ALR should be able to identify other legal issues where P may require legal advice and assistance. This may include:

- a claim for breaches of convention rights
- family law matters (such as …. Children Act issues)
- housing….
- community care

52. When *Re NRA* was decided, ALRs were still only a theoretical possibility – no representatives had actually been accredited. The Law Society argued that appointment of an ALR would not be appropriate in a case concerning deprivation of liberty but (at paragraph 117) Charles J rejected that approach: "…particularly if it appeared to be non-contentious. Such a representative could easily do what has been done by the solicitors appointed by the Official Solicitor in the seven cases before me before me without any involvement by the Official Solicitor." The costs implications for P of appointing an ALR are likely to be the same as for appointing the Official Solicitor as Litigation Friend but of course the pressure on the limited resources of the Official Solicitor would be lessened.

THE PARTIES' POSITIONS

<u>The Applicant</u>

53. In respect of the reasons given for considering this matter unsuitable for determination under the streamlined procedure, the Applicant makes the following submissions:

    a. <u>Age</u>: Part 2 of PD 11A does not make any reference to the age of P being a barrier to use of the streamlined procedure. The guidance notes set out within form COPDOL11 state that proof is required that P is 16 years old or over, which suggests that the streamlined procedure is appropriate for persons aged 16 and over where the application is otherwise appropriate.

    b. <u>Care Order</u>: there is no reference in the *Re X* cases or in *Re NRA* [2015] EWCOP 59 or PD 11A to the streamlined procedure being inappropriate for consideration of living arrangements of those subject to a Care Order. KL's care and placement is regularly reviewed as part of the Council's looked-after child procedures by an Independent Reviewing Officer and therefore his living arrangements are under *greater* scrutiny than if he were not subject to a Care Order.

c. No contact with family members: the lack of contact reflects the particular circumstances of KL's birth family. It is not because the Applicant seeks orders to restrict such contact. The Council is willing to facilitate contact, "subject to a risk assessment/best interest decision", if KL, his parents or siblings express such a wish. KL's long-standing foster family and independent advocate have expressed their support for his living arrangements.

d. Transition to adult services within 12 months: work is currently underway to identify future options for KL but the plan before the Court is for his current foster carers to be registered as Shared Lives carers and for him to remain living with them. Were changes to be proposed, a further application to the Court would be required. An alternative approach would be for the Court to authorise the current deprivation of liberty for a short period of time than the 12 months sought and so expiring before KL's 18th birthday, with directions for the Council to make a further COPDOL11 application exhibiting evidence on transition to adult services.

e. Should be independently represented: in preparing the application, KL's independent advocate met with him and his foster parents. KL indicated that he did not wish to engage with the advocate but the involvement of a professional advocate acting independently from the Council sufficiently secures his participation in the proceedings. The advocate has confirmed in a COP24 statement his view that KL's living arrangements are appropriate.

The Respondent

54. As Litigation Friend, the Official Solicitor was "not seek[ing] to make representations as to the cases that should or should not be determined under the streamlined procedure" but sought to assist by providing information. She was keen to emphasise that KL being joined as party has financial implications for him. Public funding for representation is only available on a means tested basis. KL was not eligible for public funding so, but for the Applicant's agreement to meet his costs of representation up to and including the hearing, he would have had to pay for representation from his own funds. The Official Solicitor explicitly did not suggest that funding implications should determine the decision as to procedure.

55. The Official Solicitor also sought clarification as to whether appointment of an Accredited Legal Representative may have been an appropriate alternative to the Court's invitation to her to act as Litigation Friend for KL. She contends that the 'overlapping legislation' identified in the Law Society Practice Note is ordinarily the Children Act 1989 and the Mental Capacity Act 2005 but such overlap is unlikely to arise in circumstances such as KL's. If there is no such complexity, the court may consider it appropriate to appoint an ALR. Such an approach would ensure effective representation of the young person and alleviate some of the significant pressures on the Official Solicitor's office.

DISCUSSION

56. The streamlined application was devised to meet the *minimum* requirements for compliance with Convention and domestic law, by abbreviating the procedural requirements of the standard COP1 application process. The difference between the standard and the streamlined court procedures is the intensity of scrutiny. The COPDOL11 process is very definitely not a

'rubber-stamping' procedure but it relies on judicial antennae alone to identify from paperwork if/where further enquiry is required.

57. The application in relation to KL could have been made on form COP1 to the Manchester hub court. The availability of the streamlined application does not make it *inappropriate* to start proceedings seeking authorisation of deprivation of liberty by the standard COP1 procedures, even where there is no apparent dispute. Just as judicial antennae may pick up matters which require deeper consideration such that the application is taken out of the streamlined procedure, applicants themselves may form the view that, even without active opposition, arrangements need to be probed more actively than the paperwork procedure envisages. I would be slow to criticise an applicant for making the application by COP1 rather than under the streamlined procedure. In my judgment there is little danger that the workload of the Court will be significantly increased by this approach because the 'streamlined' nature of the COPDOL11 procedure, with the prospect of quicker conclusion and lower costs, will be attractive to over-stretched applicants wherever possible.

58. Conversely, where an application has been made by COPDOL11 but the judge considers that the streamlined procedure is not appropriate, unless there was an obvious disregard for the intentions of the streamlined procedure (for example, a clear dispute, or a failure to undertake the consultations required to identify whether or not there is dispute), I would be slow to criticise an applicant for having used it. The fact that a judge has identified concerns attests to the robustness of the procedure; it does not necessarily mean that the application was wrongly made.

Age

59. Minors are considered in law differently to those who have reached the age of majority in many ways. The streamlined procedure was not devised with 16/17 year olds in mind, for the simple reason that deprivation of their liberty was not a feature of the workload of the Court of Protection at the time. Approval of the streamlined procedure was a compromise taking account of legal requirements and practical workability. In my judgment the tilt of the compromise scales is likely to be different when the particular needs of a 16 or 17 year old are considered.

60. Applications concerning persons aged 16 or 17 are factually distinguishable from the other cases which pass through the streamlined procedure. The 16 and 17 year olds are at a critical stage of their development and at the unavoidable cusp of transition from children's services to adults' services. That transition is known to be difficult, too often poorly implemented, for young people who lack capacity to make relevant decisions for themselves even when there is no issue of deprivation of their liberty. Where the issue does arise, it is much more common than for other age groups that 'best interest' arrangements are said to require the use of restraint and/or sedation. Not all but many of the 16 and 17 year olds already have a lengthy history of family breakdown, challenging needs and broken placements.

61. The 16/17 year old cohort is also distinguishable from the other cases which pass through the streamlined procedure for the very reason of there being alternative provision for that age group elsewhere. Outside the Court of Protection, if a 16 or 17 year old is to be lawfully deprived of their liberty, authorisation from a judge of High Court level is required. (In practice, the heavy workload of such cases is usually dealt with by s9 nominated judges.) This would be Tier 3 in the Court of Protection. The obiter comments of the Court of Appeal in *Re X* and more recently the requirements for procedural safeguards set out by the Supreme

Court in *Re T* confirm my concern that adopting a paper-based approach for 16/17 year olds in the Court of Protection would be a disparity of approach very difficult to justify.

62. In so far as the guidance notes which accompany the COPDOL11 form refer to requiring proof that P is 16 years old, in my judgment this should clearly be understood as a reference to the basic jurisdiction of the Court of Protection. It does not bear any interpretation as to the suitability of the streamlined procedure for any given case.

Care order

63. Given that the streamlined procedure was not devised with 16/17 year olds specifically in mind, it is inevitable that neither the judgments nor the Practice Direction make specific reference to the existence of a care order as an indicator either for or against its suitability in a particular case. I do not regard the absence of specific exclusion as positively indicating suitability.

64. A care order is a clear indication of difficult life experience to date. Such orders are only made where the court is satisfied that the threshold of s31 of the Children Act (suffering or likely to suffer significant harm) is met. It means that parental responsibility has been assumed by the state and it means in respect of a 16/17 year old a complicated overlap of legislation. In accordance with the clear position in the Family Court as agreed in *Re D*, it does not follow from the review obligations on the local authority who holds a care order that the degree of scrutiny required in respect of deprivation of liberty is any way lessened. Authorisation from the court is never a 'rubber stamp' of local authority arrangements.

65. A care order is not the *only* indicator of difficulties to date and legislative overlap. The Court is receiving streamlined applications in respect of 16/17 year olds who are 'looked after children' pursuant to section s20 of the Children Act 1989. The factual background in such applications is often very similar to those in which a care order has actually been made, and the legislative overlap is as complicated.

66. The Court is also receiving streamlined applications in respect of 16/17 year olds who continue to live with their families. The nature of the challenges which lead to care arrangements amounting to deprivation of liberty may be different but the state is still involved in the arrangements. Absence of exercise of formal powers does not eliminate the complex statutory overlap. Often in such cases there is an additional layer of complexity in that care arrangements post-18 will be funded by health bodies instead of or jointly with the Local Authority.

67. In short, in my judgment, an extant care order *is* a marker of *un*suitability for authorisation of deprivation of liberty by the streamlined procedure. Conversely, *absence* of care order is *not* a marker of suitability of the streamlined procedure for applications concerning 16/17 year olds.

No contact with family members

68. Involvement of family members may be considered, as it was by Charles J in *Re NRA*, as a source of advocacy for P. Even in circumstances where family members are no longer primary carers of young people, continued contact provides an opportunity for hearing a different view, and its absence indicates total dependence on arrangements made by public bodies. Foster care is a form of local authority provision. An independent advocate would be

an outside voice but different in kind to that which family members may raise. In my judgment, when an application concerns a minor, absence of contact with family members *is* an indication of circumstances which require careful scrutiny and accordingly a marker of unsuitability for the streamlined procedure.

Transition to adult services

69. As already noted, transition from children's to adult's services is an unavoidable feature of age. It is often a confusing process with too little 'joined up' working and the risk of decision-making falling between the cracks. Often the process of identifying a post-18 placement is difficult and protracted. It would be unhelpful, ineffective and unnecessarily expensive in time and fees for the Court to authorise arrangements made by one service which do not have the commitment of the other, or to authorise such arrangements only for a very short period in the knowledge that another application will be required very quickly afterwards. In my judgment, the imminence of transition between services responsible for care arrangements *is* a marker of unsuitability for the streamlined service.

Independent representation

70. As already noted, the streamlined procedure was devised as a compromise. Charles J determined that P need not always be a party to proceedings but he did so by identifying other forms of representation which would be sufficient, namely representation by a "devoted family member" or via a s49 reports. It seems that he would also have accepted representation by an ALR had that been possible at the time of his decision. In my judgment there are particular difficulties in adopting any of these approaches in respect of a 16/17 year old.

71. The closest family members for a 16/17 year old are likely to be a parent or someone who has exercised a quasi-parental role. It is now clear from *Re D* that a parent cannot consent to deprivation of liberty as an exercise of parental responsibility. Where a young person is still living in the family home, parents are likely to be involved in the implementation of the measures which amount to deprivation of the young person's liberty. Where the young person is living elsewhere, it is likely (without necessarily implying any criticism of the parents) that care arrangements at the family home became unsustainable. Either way, it is difficult to see that the parent, however devoted, is sufficiently independent and free of other interests to be able to represent the young person in the proceedings, or that a parent should gain by representative means what they lack in the scope of parental responsibility. Rather, they should have the opportunity of being a party in their own right, or participating in proceedings less formally by permission to attend and be part of discussions, so that they can present their own views.

72. Foster parents, even long-term ones, are not in my view analogous to the "devoted family members" on which Charles J was willing to rely. From the nature of their involvement in a young person's life, and without criticism being implied, they have their own interests in arrangements. They should certainly be consulted but they cannot be considered wholly independent of the public body applicant in a case concerning deprivation of liberty of a young person for whom they care. They are unlikely to be able to address the wider welfare issues, such as transition arrangements.

73. Similarly, an advocate has an important role in articulating a young person's wishes and feelings but is not in a position to bring to bear any scrutiny of the arrangements beyond that

which he sees (which may not be very far where, like KL, the person for whom he advocates does not wish to engage.)

74. The resources available for s49 reports are limited, and as a result there is presently a long delay before a streamlined application requiring a s49 report reaches a point where that report can even be commissioned. Delay is particularly inimical where the subject of an application is at a critical stage of their development and at a point of transition between public services.

75. Accredited Legal Representatives are now an available resource, and much valued by the Court. The Law Society Practice Note at paragraph 7 explicitly adopts Charles J's positive view of ALR appointment in streamlined proceedings but at paragraph 10.1 it explicitly cautions against appointment in proceedings "when P is between the ages of 16-18." The reason given for this is "the complexity of the overlapping legislation". The eligibility criteria for accreditation understandably focus on experience of the Mental Capacity Act 2005, with no requirement for any expertise or familiarity with wider issues in respect of minors.

76. The appointment of an ALR is made by the Court from a database according to a 'turntaking' principle which aims to ensure that all ALRs are given an equal share of appointment opportunities. At the moment there is no way of knowing if the ALR at the top of the list for next invitation is "sufficiently experienced in all the relevant frameworks". It would delay matters and be administratively burdensome to request this information and, if necessary, repeat the invitation process with the next in line.

77. Experience since December 2019 has shown that, with the benefit of robust scrutiny by fully informed representatives of P, some of the applications relating to deprivation of liberty of 16/17 year olds throw up very worrying issues in transitional arrangements and in respect of restraint; but others can be finalised by consent quickly. The difficulty is in knowing on first consideration of the COPDOL11 application which route a particular case is likely to follow. (Perhaps most worrying is the fact that the applicant has not identified when making the application issues which subsequently concern the Court.)

78. Those applications which are finalised quickly usually relate to care arrangements which can, and are expected to, continue unchanged beyond the age of 18; and include a clear explanation of / timeline for arrangements for transition to adult services. If both of these aspects are clearly set out in the application papers (bearing in mind the applicant's duty of full and frank disclosure), then I would agree with the Official Solicitor that difficulties with overlapping legislation are unlikely to arise; and with Charles J that an ALR could easily do what solicitors appointed by the OS may do.

79. In the absence of such confirmed information in the application papers, the Law Society's Practice Note is, in my judgment, correct: it will generally be unlikely for the court to appoint an ALR in cases concerning 16/17 year olds.

80. I sympathise with the Official Solicitor's concerns about the "significant pressure" which the applications in respect of 16/17 year olds has laid at her door. I would like to record the Court's thanks for the manner in which her Office has coped with the pressure to date. Those persons for whom she has acted have benefited greatly from the expertise which her Office brings to bear, and the Court has been greatly assisted in managing this new stream of cases.

Further procedural observations

81. As a result of the procedural concerns discussed above, the staff of the streamlined procedure team have been (at my instruction) referring all applications relating to 16/17 year olds to me (or in my absence, to a resident judge nominated by me.) For the reasons discussed above, such applications have generally been taken out of the streamlined procedure and allocated to a Tier 2 judge.

82. There is presently only one resident Tier 2 judge at First Avenue House. It is neither sustainable nor desirable that all such applications are determined by me. Accordingly, there is now have in place an arrangement whereby three other Tier 2 judges (Judges Marin, Harris and Burrows) will be sitting at First Avenue House in rotation, for one week each, for one week per month. By this means, it is intended that apparently uncontentious applications made under the streamlined procedure in respect of 16/17 year old may continue to be judicially considered at the central registry and with judicial continuity in each case. Where an attended hearing is required, the judge will consider – as is usual – whether the matter should be transferred for such hearing to take place before a Tier 2 judge at a regional hearing centre.

83. The order taking the application out of the streamlined procedure generally follows the standard template for preliminary directions in a s16 welfare application, including in particular:

    a. joinder of P as party and provision for his representation by a Litigation Friend (commonly, but not always, the Official Solicitor);
    b. service/notification of the application on/to others (including key family members);
    c. the listing of a directions hearing by telephone (because it is not yet known whether the 'others' have access to video hearing facilities, and because of limits on availability of such facilities at First Avenue House).

84. The scope of matters to be addressed in further directions once P's representation is secured is now fairly settled (and accordingly, where they can be agreed in advance, a draft order may be submitted with a COP9 request that the hearing be vacated.) Any requirement for further capacity evidence should be addressed and third party orders may be made for disclosure to P's solicitor of records (for example from placement providers, GPs) for a proportionate period. Otherwise, those directions usually include:

    a. provision for joinder of any other parties or permission to discuss/share documents with specified others (eg parents);
    b. disclosure to P's solicitor of the applicant's social care records for a proportionate period;
    c. filing by the applicant of specified further plans relevant to the particular case (eg a transition plan, a restraint plan, a contingency plan, EHCP, etc);

    a. a statement from the applicant giving a narrative explanation of specified matters relevant to the particular case;

    b. a statement by any relevant others;

c. a statement by P's representatives (including an account of their wishes and feelings in so far as they can be ascertained);

d. the holding of a round table meeting, to reach agreement if possible or otherwise identify issues for determination by the Court;

e. the listing of a further hearing.

85. When the position is reached that the Court is willing to grant an authorisation and conclude proceedings, the format of order should follow closely the terms of a *Re X* final order. In particular, the Court will be unlikely to discharge P as a party or the appointment of the Litigation Friend unless there is an agreed person willing and suitable to be appointed as Rule 1.2 representative for P during the review period, to monitor the implementation of the authorised care arrangements, to make an earlier application if it is considered that the authorised care arrangements no longer meet the needs of P, and to provide information for the review.

CONCLUSIONS

86. In this matter, KL has been independently represented by the Official Solicitor as Litigation Friend and the proceedings concluded. The order taking the application out of the streamlined procedure was affirmed. In my judgment, KL's age at the time of the application, his being subject to a Care Order at the time of the application, his absence of family contact and the imminence of transition to adult services **were** all reasons which clearly led to the conclusion that he should be independently represented, by joinder as a party and appointment of a Litigation Friend for him. As Litigation Friend of last resort, the appointment of the Official Solicitor was required.

87. Whilst I am cautious of statements of 'general guidance', each 'best interests' determination falling to be considered on its own merits, I have endeavoured to explain how the Court is approaching a new stream of cases, with the hope of assisting all participants in proceedings before the Court. In short:

a. the Court is unlikely to consider that the streamlined procedure is appropriate for authorisation of deprivation of liberty in the living arrangements of 16/17 year olds;

b. the Court is unlikely to be critical of an applicant for bringing an application for authorisation of deprivation of liberty in the living arrangements of a 16/17 year old either by COP1 application to the appropriate hub court, or by streamlined application to the central registry at First Avenue House. It follows from (a) that the procedure adopted post-issue is likely to be substantially the same. If/when an in-person attended hearing is required, consideration will be given to transfer to a local hearing centre.

88. I am conscious of the complexities of overlapping jurisdictions and emphasise that nothing in this judgment is intended to interfere with procedures adopted outside the Court of Protection. I am aware that the Family Justice Observatory is considering deprivation of liberty of minors. An opportunity for Court of Protection engagement in that process has been

arranged, with the goal of ensuring that overlapping jurisdictions interact in the best possible way for the young people they both seek to protect.

HHJ Hilder
21st June 2022

Issued on 22nd June 2022