

# Community Deprivation of Liberty (planning for the Liberty Protection Safeguards)



## March 2023

- In all of the cases below, the care provided to the person lacking mental capacity was found to be a deprivation of their liberty. The cases involve a variety of community settings. Currently these cases must go to the Court of Protection for authorisation as the DoLS procedure is limited to care homes and hospitals. When the Liberty Protection Safeguards come into force (*unlikely* to be before 2024) there will be no requirement to obtain a court order in the majority of cases and instead, frontline staff (local authority and ICB) will complete the assessments.
- LPS allows for the authorisation of a deprivation of liberty in any setting without a court order. The Department of Health and Social Care estimate there are 50,000 people deprived of their liberty in the community (domestic home, supported living, residential schools, extra care etc). In our view, this estimate is highly problematic and the number could prove to be far greater.
- Under LPS, depending on who is funding the care package in the community, front line staff from either a local authority, ICB or Welsh health board will need to complete a series of statutory assessments to authorise the deprivation of liberty. Even if the person and their family are happy with the care, it is delivered in a private home/domestic setting and there is no intention to change this, an LPS authorisation will still be legally necessary, if the person meets the criteria.
- The duty to identify if a community care package requires LPS falls on the local authority, ICB or Welsh health board funding the care package. This duty could be triggered by just a small part of the care package for example, respite care or transport to a specialist college. The state is responsible even if the funding is not arranged by the state, but professionals become aware (or should be aware) that a person is being deprived of their liberty for example, due to a safeguarding referral or Care Act assessment.
- This guide and a series of detailed independent information sheets on LPS are available from: <https://www.bookswise.org.uk/lps> or <http://www.edgetraining.org.uk/>
- A range of training courses on LPS are available from: <http://www.edgetraining.org.uk/>

### General Guidance

For the Liberty Protection Safeguards to apply, a person must be aged 16 or over, lack mental capacity to consent to their care, have a mental disorder (ie learning disability, dementia, brain injury, autistic spectrum disorder etc) and have restrictions in their care that mean they are under '*complete supervision and control and not free to leave*'. For example, if a person's care plan says they cannot go out alone (for whatever reason) and a local authority, ICB or Welsh health board is aware of this, it would be enough to trigger a duty to assess the person under LPS. They can be living anywhere and being cared for by anyone, so this includes younger (16 +) and older people living at home and being cared for by family members.

In some cases, a person might be deprived of their liberty even if they go outside alone (unescorted) because of the other restrictions in their care see the case of *AB* below, as an example. Once a person has reached the age of 16 their parents cannot give valid 'consent' to a deprivation of liberty and an LPS authorisation will be required.

### Case law examples

Listed below are examples of individuals with care plans in the community where the courts have found the person's circumstances meet the acid test and is deprived of their liberty. Click on any of the underlined case law references below for the full court judgment. These are just a few examples as many cases are not published. At present local authorities, ICBs and Welsh health boards must go to the Court of Protection for community cases to ensure any deprivation of liberty is legal. However, generally they are only applying for an authorisation in the most complex or disputed cases due to the costs and limited resources.

#### At home with foster carer

[P v Cheshire West & Chester Council and P & Q v Surrey CC \[2014\] UKSC 19](#)

An 18 year old woman with a severe learning disability and hearing, visual and speech impediments. Living at home with a former foster carer who provides '*intensive support*' with most aspects of daily living. Although the house is not locked she is not allowed out alone (escorted) as she cannot cross roads safely. Note: the location is not crucial. The outcome would have been the same if she had been in a shared lives placement or living with her own parents, with the same care plan.

<b>At home with husband</b>	<u><a href="#">A local authority in Yorkshire v SF [2020] EWCOP 15</a></u> A 45 year old woman with learning disabilities and frontal lobe dementia living at home with her husband. The judge stated: <i>'The fact that SF is deprived of her liberty in her own home has also been specifically raised and requires authorisation.'</i>
<b>At home with a parent as primary carer</b>	<u><a href="#">SCC v MSA, JA and SCCG [2017] EWCOP 18</a></u> A young man with profound learning disabilities living at home with his mother. The CCG make direct payments to his mother as his primary carer. His care includes being: <i>'...frequently strapped into his wheelchair, is kept for some of the time in a padded room at his home with a closed door that he cannot open, is highly resistive to personal care interventions so that physical restraint is required, and does not have external carers in the home.'</i>
<b>At home with parents as primary carers</b>	<u><a href="#">Harrow Clinical Commissioning Group v LPJ and Ors [2018] EWCOP 44</a></u> A 24 year old man with autism, learning disability living at home with his parents. His parents received direct payments from the CCG to pay for carers and themselves in providing care.
<b>At home with family as carers</b>	<u><a href="#">London Borough of Havering v AEL [2021] EWCOP 9</a></u> A 31 year old woman with a severe learning disability, visual impairment and profound deafness. Living at home with her parents who receive direct payments for themselves and carers. The family dispute the suggestion that her care is a deprivation of liberty. Her parents and two private carers provide 24 hour support such that she is 'never out of sight' of them to ensure her safety at all times. She is always escorted/supported outside. The judge finds that it is a deprivation of liberty and states: <i>'I do not regard that as in any way a criticism of JSL [father] or her other carers.'</i>
<b>Assistive technology</b>	<u><a href="#">Staffordshire CC v SRK, RK and Ors [2016] EWCOP 27</a></u> A man with severe injuries including brain injury living alone with 24 hour care provision. He is wheelchair-bound and requires assistance with all aspects of personal care and daily living. The judge stated: <i>'Pursuant to his care package he is constantly monitored either by support workers or by the use of assistive technology.'</i>
<b>Supported living</b>	<u><a href="#">London Borough of Barnet v JDO &amp; OD &amp; DD [2019] EWCOP 47</a></u> A 24 year old man with cerebral palsy, autism, learning disability, epilepsy and his behaviour can be challenging. In a supported living placement with a one bedroom flat. He has 8 hours a day of 1:1 support plus 8 additional hours per month of 2:1 support for family contact. He shares waking night staff with the residents of other flats in the block. He is always escorted outside.
<b>Supported living</b>	<u><a href="#">A Local Authority v H (No 2) [2019] EWCOP 51</a></u> A woman with a learning disability living in supported living. The judge noted: <i>'She lives now in her own flat inside a large house subdivided into flats, which indeed does have some Social Services oversight... she is able, effectively, to organise her own life within that flat. She is able to work two days a week and she is able to go out from time to time, but the reality is that there are still significant restrictions on her liberty.'</i>
<b>Supported living</b>	<u><a href="#">A local authority v AB [2020] EWCOP 39</a></u> A 36 year old woman with Asperger's syndrome in a supported living placement. She has little direct contact with staff and goes out alone every day. She is under a Guardianship order (Mental Health Act) which means she has to live in a named place. It is important to note that this is not definitive in finding she is deprived of her liberty. The judge stated: <i>'I have come to the conclusion that these arrangements do indeed amount to a deprivation of liberty. .. whilst she may be free to leave the property as she chooses, she is always subject to state control requiring her return should she be otherwise unwilling to do so. The fact that she generally willingly returns does not of itself negate this point. Again whilst the supervision of her coming and going is not intrusive, it is the fact that all her movements are known and noted. Moreover, while she is free to do as she pleases in the community, there will inevitably be some obligation to restrain or control those movements should they become seriously detrimental to her welfare.'</i>

<b>Supported living</b>	<u>Sunderland City Council v AS [2020] EWCOP 13</u> A 42 year old man with a mild learning disability, acquired brain injury, bipolar disorder and personality disorder living in supported living with two other residents. The judge stated: <i>'I have scrutinised the detailed care plan. The applicant imposes a high level of supervision on AS throughout the day and night, in the supported living accommodation and in the community.'</i> Note: the man was also subject to a Community Treatment Order under the Mental Health Act. This is only a supervisory power and cannot authorise a deprivation of liberty therefore, a court order was required.
<b>Supported living</b>	<u>A Local Authority v AW [2020] EWCOP 24</u> A 35 year old man with learning disability and autistic spectrum disorder living in supported living with 6 hours a day 1:1 support.
<b>Supported living</b>	<u>HD v A County Council [2021] EWCOP 15</u> A woman in her late twenties with a mild learning disability. About to move into a one bedroom flat with full-time support staff.
<b>Supported living</b>	<u>Liverpool City Council v CMW [2021] EWCOP 50</u> An 18 year old woman with ADHD, foetal alcohol spectrum disorder, some difficulties with cognition and her processing skills were assessed at those of a 7-9 year old child. She had 1:1 support.
<b>Supported living</b>	<u>Re R [2016] EWCOP 33</u> A 20 year old man in supported living with two other men and shared facilities. Whilst the arrangements were made by his family members, as his financial and personal welfare deputies, the deprivation of liberty was the responsibility of the local authority because: <i>'Haringey provided the financial support and specialist knowledge and commissioning ability to enable Robert to access the choice of providers and services that his parents have decided jointly with professional input are in his best interests.'</i> See para 58 for the list of reasons Robert's care arrangements are the responsibility (imputable) of the state.
<b>Unregistered children's home</b>	<u>Lancashire County Council v G (No 4) [2021] EWHC 244 (Fam)</u> A 16 year old girl living in an unregistered children's home. The judge stated: <i>'..I once again and wearily must authorise the continued deprivation of G in an unregulated placement that is not fully equipped to meet her complex needs by reason of the fact that I have no other option but to do so.'</i> She is under at least 1:1 supervision during the day and escorted when outside.
<b>Residential specialist college</b>	<u>In the matter of D (a child) [2019] UKSC 42</u> A 16 year old boy with attention deficit hyperactivity disorder, Asperger's syndrome, Tourette's syndrome and a mild learning disability. In a residential school funded by his council (note: although the case does not state the placement is a residential college the description given is indicative of this). He lives in one of 12 residential units in the grounds, each one with its own fenced garden. There are three other young people living with him. The external doors were locked. If he wanted to go out into the garden, he had to ask for the door to be unlocked. He was not allowed to leave the premises except for a planned activity, such as attending his school, which was also on the site, swimming and leisure activities. He received one to one support during waking hours and staff were in constant attendance overnight.
<b>Residential autism placement</b>	<u>Buckinghamshire County Council v RT [2018] EWCOP 12</u> A 17 year old boy with a mild learning disability and symptoms of either high functioning autism or antisocial personality disorder. Living in a residential specialist autism placement: <i>'He is provided with his own bedroom with an ensuite bathroom which has been adapted to ensure that he is unable to harm himself.... He is supported by 2:1 staff during the day whilst in placement and when out in the community, and 1:1 staff at night, with a further two members of staff to assist if required.'</i>