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Case Number: FD22P04100

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE SENIOR COURTS ACT 1981

Leeds Family Court
1 Westgate
Leeds LS1 3AP

Heard on 20-23 September 2022
Judgment given on 29 September 2022

Re RN (Deprivation of Liberty and Parental Consent)

Before

His Honour Judge Hayes KC
Sitting as a Section 9 Deputy High Court Judge

Between

XY COUNCIL

Applicant

and

MN

First Respondent

and

FB

Second Respondent

and

RN
(A Child acting by her Children's Guardian, SH)

Third Respondent

Representation:

For the Applicant: Alex Taylor, Counsel
For the 1st Respondent: James Yearsley, Counsel
For the 2nd Respondent: Chloe Lee, Counsel
For the 3rd Respondent: Jane Aldred, Solicitor.

JUDGMENT OF HIS HONOUR JUDGE HAYES KC
SITTING AS A SECTION 9 DEPUTY HIGH COURT JUDGE AT LEEDS
ON 29 SEPTEMBER 2022

HIS HONOUR JUDGE HAYES QC:

Introduction

1. These proceedings, in which I am invited to make declarations under the inherent jurisdiction of the High Court authorising deprivation of liberty, relate to a 12 year old girl, RN.

2. This Judgment is given following the conclusion of care proceedings concerning the same child. I handed down a Judgment in those proceedings earlier today.

3. Both sets of proceedings were issued by the Applicant, XY Council. I shall refer to the council throughout this Judgment as "the LA".

4. RN's parents are MN (whom I shall refer to as "the Mother") and FB (whom I shall refer to as "the Father"). The parents are separated.

5. The Children's Guardian is SH.

6. The parties have been represented as follows::
   (i) The LA by Alex Taylor of Counsel
   (ii) The Mother by James Yearsley of Counsel
   (iii) The Father by Chloe Lee of Counsel
   (iv) The Child's Solicitor is Jane Aldred.

7. At a relatively late stage in the care proceedings, the LA issued an application for permission to apply to the court to exercise its inherent jurisdiction in relation to RN and for declarations authorising care arrangements for RN (who was then placed under an interim care order with her father and his wife) which the LA contended amounted to a deprivation of her liberty.

8. That application first became His Honour Judge Milne QC sitting at a s.9 Deputy High Court Judge on 29 July 2022. He gave permission under s.100 and made declarations that it was lawful and in RN's best interests to be deprived of her liberty when residing at her Father's address subject to the arrangements for oversight and monitoring as described in the statement of the social worker dated 7 July 2022. Specifically to:

    (i) keep all external doors locked to prevent RN leaving the home;
    (ii) insist that RN can only leave the home if she is escorted by one to two carers;
    (iii) keep RN under constant supervision at all times when she is awake (with particular care being taken when she is in the bathroom and/or kitchen), and;
    (iv) to restrict her access to modes of social communication and favoured activities.

9. The ongoing care proceedings were transferred to me, also sitting as a s.9 Deputy High Court Judge, when the LA issued the inherent jurisdiction application. An issues resolution hearing in the care proceedings had been put in my list for 10 August 2022 and the inherent jurisdiction application was therefore listed for review on the same date.. At that hearing, I fixed a final hearing for both applications in the week commencing 19 September 2022 and I renewed the deprivation of liberty declarations until the conclusion of the proceedings. However, I raised with all advocates that I would wish to be addressed at that final hearing on whether, in fact, such declarations were necessary in the case of a 12 year old disabled child where the measures in place were not being presented as anything other than rooted in her safety and wellbeing. I also noted that, whilst RN was then the subject of an Interim Care Order, the final Care Plan proposed that she should be made the subject of a 12 month Supervision Order, remaining at home with her father.

10. The final hearing of the care proceedings has needed to address a range of threshold and welfare issues. Put shortly, the Court found the s.31 threshold established, although no findings adverse to the Father were made (and no party invited the Court to do so). The case on threshold centred primarily on the Mother's long-standing misuse of illegal drugs, namely amphetamines and cannabis, together with other prescription medication and the adverse impact on her care of RN. As to welfare/outcome, all parties accepted the making of a final Supervision Order for 12 months. The Mother advanced a case for shared care between the parents. However, drug testing during the proceedings revealed ongoing misuse of drugs by her and dishonesty on her part about this during LA assessment work. I determined that it was in RN's best interests to remain in her Father's care under a Child Arrangements Order with the Mother having contact twice per week. The LA committed to supervising such contact for at least 3 months whilst working to identify an alternative supervisor. This short summary does not, of course, convey the full range of issues that the court had to determine and the evidence and analysis which founded my Judgment in those proceedings. But it does, I hope, capture the essence of the case.

The Issue

11. In relation to this inherent jurisdiction application, the ultimate issue that I am asked to resolve is the manner in which RN's care arrangements are rendered lawful. There are two routes by which that outcome might be achieved:
    (i) I am asked to consider whether the care arrangements are rendered lawful through RN's parents having consented to the same; or
    (ii) Alternatively, if I were to determine parental consent cannot, as a matter of law, render the care arrangements lawful, then I am invited to authorise those arrangements through declarations under the inherent jurisdiction of the High Court.

The Legal Position

12. The Court's attention has been drawn to the following authorities:
    (i) *Re D (A Child) (Deprivation of Liberty)* [2016] 1 FLR 142 (Keehan J);
    (ii) *A Local Authority -v- D and Others* [2016] 2 FLR 601 (Keehan J);
    (iii) *Re D (A Child)* [2019] UKSC 42 (Supreme Court);
    (iv) *Lincolnshire CC -v- TGA and others* [2022] EWHC 2323 (Fam) (Lieven J); and
    (v) *Lancashire CC -v- PX and others* [2022] EWHC 2379 (HHJ Burrows sitting s.9).

13. I should note that the first and third of these cases involved the same child (D). He was 15 years old at the time of the hearing before Keehan J but he had reached adulthood by the time the Supreme Court ruling was handed down.

14. The child in *Re D* had ADHD, Tourette's Syndrome and Asperger's Syndrome. He engaged in challenging behaviours at home leading to mental health service involvement. He was informally admitted to hospital for multi-disciplinary assessment and treatment and had remained there since. His treating psychiatrist was of the opinion that he was fit to be discharged and the local authority were in the process of identifying a suitable residential placement. In light of the ruling by the Supreme Court in the *Cheshire West and Chester Council -v- P* [2014] UKSC 19, the NHS Trust issued an application under the inherent jurisdiction of the High Court seeking a declaration that the deprivation of D's liberty was lawful and in his best interests. The issues to be determined by Keehan J were:
    (i) whether the placement satisfied the first limb of the test set out in *Cheshire West*;
    (ii) if so, whether the parents' consent to his placement came within the exercise of parental responsibility in respect of a 15-year-old young person;
    (iii) if not, should the court exercise its powers under the inherent jurisdiction and declare that the deprivation of liberty of D was lawful and in his best interests.

15. Keehan J was satisfied that the 1st limb of the 3 stage test in *Cheshire West* was established, namely D lived in conditions which amounted to a deprivation of his liberty

16. Keehan J crystalised the 2nd issue he had to determine in this way at paragraph [46] of his Judgment:

> "The essential issue in this case is whether D's parents can, in the proper exercise of parental responsibility, consent to his accommodation in Hospital B and thus render what would otherwise be a deprivation of liberty not a deprivation of liberty (i.e. the second limb of the test in *Cheshire West* is not satisfied)".

17. Keehan J determined that the decision of D's parents to place him at the hospital fell well within the zone of parental responsibility and the parents were able to consent to what would otherwise be a deprivation of liberty.

18. To elaborate on how Keehan J reached the conclusion, I quote from [55] to [68] of his Judgment:

> "[55] When considering the exercise of parental responsibility in this case and whether a decision falls within the zone of parental responsibility, it is inevitable and necessary that I take into account D's autism and his other diagnosed conditions. I do so because they are important and fundamental factors to take into account when considering his maturity and his ability to make decisions about his day-to-day life.
>
> [56] An appropriate exercise of parental responsibility in respect of a 5-year-old child will differ very considerably from what is or is not an appropriate exercise of parental responsibility in respect of a 15-year-old young person.
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> [57] The decisions which might be said to come within the zone of parental responsibility for a 15-year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15-year-old son suffers with D's disabilities. Thus a decision to keep such a 15-year-old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill-treatment. The decision to keep an autistic 15-year-old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.
>
> [58] The parents of this young man are making decisions, of which he is incapable, in the welfare best interests of their son. It is necessary for them to do so to protect him and to provide him with the help and support he needs.

[59] I acknowledge that D is not now cared for at home nor 'in a home setting'. His regime of care and treatment was advised by his treating clinicians and supported by his parents. They wanted to secure the best treatment support and help for their son. They have done so. It has proved extremely beneficial for D who is now ready to move to a new residential home out of a hospital setting. What other loving and caring parent would have done otherwise?

[60] Those arrangements are and were made on the advice of the treating clinicians. All professionals involved in his life and in reviewing his care and treatment are agreed that these arrangements are overwhelmingly in D's best interests. On the facts of this case, why on public policy or human rights grounds should these parents be denied the ability to secure the best medical treatment and care for their son? Why should the state interfere in these parents' role to make informed decisions about their son's care and living arrangements?

[61] I can see no reasons or justifications for denying the parents that role or permitting the state to interfere in D's life or that of his family.

[62] I accept the position might well be very different if the parents were acting contrary to medical advice or having consented to his placement at Hospital B, they simply abandoned him or took no interest or involvement in his life thereafter.

[63] The position could not be more different here. D's parents have regular phone calls with him. They regularly visit him at the unit. Every weekend D has supported visits to the family home. He greatly enjoys spending time at home with his parents and his younger brother.

[64] In my judgment, on the facts of this case, it would be wholly disproportionate, and fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility.

Conclusions

[65] I am satisfied that the circumstances in which D is accommodated would amount to a deprivation of liberty but for his parents' consent to his placement there.

[66] I am satisfied that, on the particular facts of this case, the consent of D's parents to his placement at Hospital B, with all of the restrictions placed upon his life there, falls within the 'zone of parental responsibility'. In the exercise of their parental responsibility for D, I am satisfied they have and are able to consent to his placement.

> [67] In the case of a young person under the age of 16, the court may, in the exercise of the inherent jurisdiction, authorise a deprivation of liberty.
>
> [68] I do not propose to give wider guidance in respect of the approach taken by hospital trusts or local authorities in the cases of young people under the age of 16 who are or may be subject to a deprivation of liberty. These cases are invariably fact-specific and require a close examination of the 'concrete' situation on the ground".

19. Accordingly, Keehan J did not need to make any declaration under the inherent jurisdiction authorising D's living arrangements.

20. In the case of *A Local Authority -v- D and Others* [2016] 2 FLR 601, Keehan J cited his reasoning above but took a different route on the facts of that case. It involved a 14 year old boy with a learning disability and ADHD who was placed in a children's home under an interim care order. Keehan J repeated that it was possible for parents in the exercise of their parental responsibility to consent to a set of circumstances which would otherwise amount to a deprivation of liberty of their child, but it would depend on the particular facts of the case. Where a child was in the care of the local authority under an interim or full care order and the parents' past exercise of parental responsibility had been seriously called into question, Keehan J expressed the view that it would not be right or within the spirit of *Cheshire West* to permit such a parent to so consent (see paragraphs [25]–[27] of his Judgment).

21. At paragraph [38], Keehan J set out a series of "observations". He prefaced all of them by noting that the issue of whether a child or young person is deprived of his or her liberty is "highly fact specific". Within the list (at sub-paragraph 5) he highlighted:

> "Where a child is not looked after, then an apparent deprivation of liberty may not in fact be a deprivation at all if it falls within the zone of parental responsibility exercised by his parents (see *Re D*). The exercise of parental responsibility may amount to a valid consent, with the consequence that the second limb of *Cheshire West* is not met. In those circumstances, the court will not need to make any declaration as to the lawfulness of the child's deprivation of liberty".

22. In the Supreme Court ruling in *Re D*, the focus turned to the legal position once D had reached 16 years of age. By that time, D had been discharged from hospital to a residential placement where he was accommodated under s.20 of the Children Act 1989. D was therefore a looked after child. He was under constant supervision. On his 16th birthday, the local authority issued proceedings in the Court of Protection for a declaration that the consent of the parents meant that he was not deprived of his liberty at the new placement. At 1st instance, Keehan J held that the parents could no longer consent to what would otherwise be a deprivation of liberty once D had reached the age of 16 and that the provisions of the Mental Capacity Act 2005 then applied. He

authorised the placement, and a subsequent transfer to another similar placement, as being in D's best interests.

23. The LA appealed the decision and the Court of Appeal allowed the appeal, on the ground Keehan J had been wrong to hold that a parent could not consent to what would otherwise be the deprivation of liberty of a 16 or 17-year-old child who lacked the capacity to decide for himself. The Court of Appeal held that the judge had not given effect to the fundamental principle that the exercise of parental responsibility came to an end, not on the child's attaining a fixed age, but on his attaining '*Gillick* capacity'.

24. The Official Solicitor then appealed to the Supreme Court on D's behalf. By a 3 to 2 majority, the appeal was allowed. The Supreme Court ruled that it was not within the scope of parental responsibility for the parents of a child aged 16 or 17 to consent to a placement which deprived the child of their liberty. Although all those concerned had D's best interests at heart, the possibility that that would not necessarily be the case in relation to other children could not be ignored. Without the safeguards provided by Article 5, there was no way to ensure that those with parental responsibility exercised it in the best interests of the child.

25. However, the Supreme Court explicitly confined its decision to the position in relation to 16 and 17 year olds. At paragraph [3] Lady Hale stated, "The principal issue can be simply stated: Is it within the scope of parental responsibility to consent to living arrangements for a 16 or 17-year-old child which would otherwise amount to a deprivation of liberty within the meaning of Art 5?" However, she added that, "…similar issues would arise in a case concerning a child under 16".

26. Later, at paragraphs [46] to [50] (under the heading "Parental responsibility and Human Rights"), Lady Hale stated:

> "[46] But what is the relationship between holding that the placement did deprive D of his liberty within the meaning of Art 5 of the European Convention and the view that it might otherwise have been within the scope of parental responsibility? Parental responsibility is about the relationship between parent and child and between parents and third parties: it is essentially a private law relationship, although a public authority may also hold parental responsibility. As Irwin LJ correctly pointed out (*Re D* (Parental Responsibility: Consent to 16-year-old Child's Deprivation of Liberty [2017] EWCA Civ 1695, [2018] 2 FLR 13, at para [157]) human rights, on the other hand, are about the relationship between individuals (or other private persons) and the State. It is, however, now agreed that any deprivation of liberty in Placement B or Placement C was attributable to the State. So is there any scope for the operation of parental responsibility to authorise what would otherwise be a deprivation of liberty?

[47] There are two contexts in which a parent might attempt to use parental responsibility in this way. One is where the parent is the detainer or uses some other private person to detain the child. However, in both Nielsen and Storck it was recognised that the State has a positive obligation to protect individuals from being deprived of their liberty by private persons, which would be engaged in such circumstances.

[48] The other context is that a parent might seek to authorise the State to do the detaining. But it would be a startling proposition that it lies within the scope of parental responsibility for a parent to license the State to violate the most fundamental human rights of a child: a parent could not, for example, authorise the State to inflict what would otherwise be torture or inhuman or degrading treatment or punishment upon his child. Likewise, s 25 of the 1989 Act recognises that a parent cannot authorise the State to deprive a child of his liberty by placing him in secure accommodation. While this proposition may not hold good for all the Convention rights, in particular the qualified rights which may be restricted in certain circumstances, it must hold good for the most fundamental rights – to life, to be free from torture or ill-treatment, and to liberty. In any event, the State could not do that which it is under a positive obligation to prevent others from doing.

[49] In conclusion, therefore, it was not within the scope of parental responsibility for D's parents to consent to a placement which deprived him of his liberty. Although there is no doubt that they, and indeed everyone else involved, had D's best interests at heart, we cannot ignore the possibility, nay even the probability, that this will not always be the case. That is why there are safeguards required by Art 5 of the European Convention. Without such safeguards, there is no way of ensuring that those with parental responsibility exercise it in the best interests of the child, as the Secretaries of State acknowledge that they must. In this case, D enjoyed the safeguard of the proceedings in the Court of Protection. In future, the deprivation of liberty safeguards contained in the MCA 2005 (as amended by the Mental Capacity (Amendment) Act 2019) will apply to children of 16 and 17. I would therefore allow this appeal and invite the parties' submissions on how best to incorporate this conclusion in a declaration.

[50] Logically, this conclusion would also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age, but that question does not arise in this case. The common law may draw a sharp distinction, in relation to the deprivation of liberty, between those who have reached the age of 16 and those who have not, but the extent to which that affects the analysis under the Human Rights Act 1998 is not clear to me and we have heard no argument upon it. I therefore prefer to express no view upon the question. Nor would I express any view on the extent of parental responsibility in relation to other matters, such as serious and irreversible medical treatment, which do not entail a deprivation of liberty. Some

reference to this was made in the course of argument, but it does not arise in this case, which is solely concerned with depriving 16 and 17-year-olds of their liberty…"

27. Lord Carnworth gave a dissenting Judgment on the issue before the Court. He preferred the reasoning of the Court of Appeal on the issue of parental consent in the context of a 16 or 17 year old. He also noted the (obiter) remarks of Lady Hale above and responded thus at paragraphs [124] TO [125]:

"[124] As [Lady Hale] also explains (para [1]), and as is common ground, the application of Art 5 of the European Convention is to be tested by reference to three components: (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 … It is further common ground that on the facts of this case, components (a) and (c) are satisfied. The area of debate is about component (b): whether on the facts of this case the exercise of parental responsibility could make up for the lack of consent by D himself.

[125] That it could do so while he was under the age of 16 was not in dispute in the courts below. That was supported by reference to the decision of the ECHR in *Nielsen v Denmark (Application No 10929/84)* (1988) 11 EHRR 175 (see Lady Hale, para [34]). It is worth stating at the outset the reasons for this view, as stated by Keehan J, and adopted by Sir James Munby P giving the leading judgment in the Court of Appeal (para [108])…"

28. Lord Carnworth then quoted the passages that I have set out at paragraph 18 above and observed at paragraph [126]:

"The good sense of that appraisal has not, as I understand it, been challenged by any of the parties to this court…"

29. Commenting on paragraph [48] of Lady Hale Judgment, where she equated deprivation of liberty with other fundamental human rights such as the right to life or freedom from torture, Lord Carnworth responded at paragraph [151]:

"… I say at once, with respect, that I am not persuaded that such comparisons are fair or helpful. D's parents were not authorising the state to commit torture or anything comparable to it. They were doing what they could, and what any conscientious parent would do, to advance his best interests by authorising the treatment on which all the authorities were agreed. That this involved a degree of confinement was an incidental but necessary part of that treatment, and no more than that".

30. Lord Carnworth later addressed the position of children under the age of 16, again in response to what Lady Hale had said. He stated:

> "[159] I note with some concern that Lady Hale (para [50]) has raised a question as to the logic of the differential treatment of those under 16, at least in the context of Art 5 of the European Convention taken on its own. That does not reflect any issue between the parties. Keehan J's application of parental responsibility to those under 16 has not been questioned by any of the parties in the Court of Appeal or in this court. Nor does Lady Hale, as I understand it, suggest that there is anything in the Strasbourg law as it stands which invalidates that aspect of Keehan J's judgment. For the time being his reasoning remains the law, and as such appears to fit well with the new legislative scheme".

31. The conclusion that Keehan J's reasoning remains the law is supported by the ruling of Lieven J in *Lincolnshire CC -v- TGA* and others [2022] EWHC 2323 (Fam).

32. Following a detailed review of the case-law, Lieven J concluded that a parent can consent to a deprivation of liberty within *Storck* component (b) for a child under 16, who lacks *Gillick* competence, where there is no dispute that such a deprivation is in the child's best interests. At paragraphs [50] and [51] she stated:

> "[50] The contrast with the statutory position of children aged 16 and over is set out by Lady Hale in *Re D* at [26]. There are a host of statutory provisions which mark the legal importance of attaining the age of 16, and the legal separation that gives between a child's rights and those of his/her parents.
>
> [51] However, the position is different for a child under 16 years old, both in common law and under the ECHR. It follows that the very nature of "family life" and therefore the protections under Article 8 for the parents' rights, will be different for a younger child. It is however critical to have in mind that the exercise of any parental rights in respect of a child must be for the benefit of the child. If the parent was exercising parental rights, including consenting to the deprivation of liberty, in a way which was said to be contrary to the child's best interests then such a decision would no longer fall within the zone of parental responsibility".

33. Lieven's J's approach was followed and applied by the Court in *Lancashire CC -v- PX and others* [2022] EWHC 2379.

Analysis and Conclusion

34. I have set out the case law in some detail above as it is clearly material to the issue that I must determine in relation to RN. There is an established line of authority that supports the proposition that parents, in the exercise of their parental responsibility, may consent

to care arrangements which would otherwise amount to a deprivation of liberty of child under the age of 16, provided that they are acting in the best interests of the child. If I am satisfied that this is the position for RN, is there any reason for me to depart from that approach?

35. Addressing the Court on behalf of the LA, Mr Taylor told me, somewhat cryptically, that he was "not instructed to withdraw" the application under the inherent jurisdiction. He invited this Court's attention to Lady Hale's observation (quoted at paragraph 26 above) that "Logically, this conclusion would also apply to a younger child whose liberty was restricted to an extent which was not normal for a child of his age" and referred back to Lady Hale's legal analysis in the paragraphs of her Judgment which preceded that remark. As to this, I observe that Lady Hale went on in paragraph [50] of her Judgment to qualify what she said, adding, "but that question does not arise in this case", she had heard no argument about it and therefore preferred "to express no view about it". The Supreme Court decision was, she made clear, "*solely concerned with depriving 16 and 17-year-olds of their liberty"*. The point that Mr Taylor makes is that the present case is not. It involves a 12 year old. Therefore, he submits, this court *is* faced with the question whether a parent can consent to the state depriving a 12 year old of her liberty or whether that can only be made lawful by seeking the authority of the High Court.

36. On behalf of the Mother, Mr Yearsley invited the Court to take the route of High Court authorisation. That position was driven primarily by the Mother's wish to have ongoing Court reviews.

37. On behalf of the Father, Ms Lee took the opposite stance. In her written and oral submissions, she highlighted the approach taken by Keehan J at 1st instance in *Re D* and Lord Carnworth's observation that Keehan J's reasoning remains the law. She emphasised that all parties accepted that the restrictive care arrangements for RN were in her best interests and no one was suggesting that the Father (who was now her primary carer) would not continue to act in her best interests. Nor was it suggested that he would act contrary to the advice of professionals. In such circumstances, she contended that the parental consent operated to render RN's care arrangements lawful.

38. Ms Aldred, on behalf of the Children's Guardian, did not advance a position either way, whilst adding that, whichever legal route this Court adopts, CAFCASS wish to ensure that the care arrangements for RN continue to be implemented in a lawful manner.

39. In oral submissions, Mr Taylor cited a "hypothetical" case which, he contended, supported the need to extend the principles that apply to 16/17 year olds to those under the age of 16. He postulated parents taking a 13 year old child who had misbehaved to the police station and asking them to lock to the child up for the night and the police agreeing to do so as this was regarded by them as the parents' lawful exercise of parental

responsibility. But, Mr Taylor went on, if the child had been 16 or 17, this could not happen. Any such step would require the sanction of the High Court.

40. As I told Mr Taylor when that hypothetical example was introduced in submissions, I did not find it helpful addressing the issue I must resolve. Nor, I suggested, did it help the parents to have to listen to it. Mr Taylor used it to make the point that there should be no different approach to children of different ages. But the choice of the hypothetical scenario illustrates just how far removed that is from what this Court is in fact being asked to address. Given RN's complex needs and the care she requires to keep her safe, I ask, rhetorically, what these parents must think when listening to that example. The two situations are not remotely comparable. As Lord Carnworth rightly cautioned in Re D, the parents in that case were not acting in an abusive or harmful manner towards their child. They "…were doing what they could, and what any conscientious parent would do, to advance their child's best interests. They did so by authorising the treatment on which all the authorities were agreed. That this involved a degree of confinement was an incidental but necessary part of that treatment, and no more than that".

41. Lord Carnworth's essential point is irrefutable. If the law is to ensure respect for the private and family life of those who meet the day-to-day challenges of caring for disabled children, a distinction must be drawn between parenting which is abusive and parenting which is anything but. Caring parents of children with a disability do not want those children to be subjected to restrictions on their liberty. It is the child's disability which is the root cause of the restrictive care arrangements, not the conduct of the parents. Far from acting in a manner that is harmful to the child, the restrictions that are in place are vital for their protection. Where the decisions that such parents make are driven by that objective, why should such parents be the subject of state intervention in their lives (in the form of High Court litigation)? This is the point made clearly and persuasively by Keehan J in his first instance ruling in Re D: "… Why on public policy or human rights grounds should these parents be denied the ability to secure the best medical treatment and care for their son? Why should the state interfere in these parents' role to make informed decisions about their son's care and living arrangements? I can see no reasons or justifications for denying the parents that role or permitting the state to interfere in D's life or that of his family" (paragraph [60] and [61])..

42. I consider that there is no good reason for me to take a different approach in the current case. Indeed, I consider that those words apply with equal force to RN's situation. I am fortified in this conclusion by the ruling of Lieven J in the case of Lincolnshire CC -v- TGA and others. To take a different approach would also require me to ignore the observations of Lord Carnworth in Re D that for children under 16, "… his [Keehan J's] reasoning remains the law". RN is only 12 years old. That law therefore applies to her.

43. The concern that *some* parents might exercise their parental responsibility in a manner that improperly deprives a child of their liberty does not, in my view, means that *all* cases

involving children under 16 must be brought before the High Court. If that were the law, it would open the floodgates to a large number of court applications. The increased burden on overstretched local authority resources and the court system would be sizeable. More fundamentally, it means that many more families would find themselves caught up in the court process. The emotional and financial toll on such families of being thrust into the legal spotlight cannot be ignored. This is a very real issue when one contemplates the disadvantages of adding to the day-to-day pressures and challenges that they find themselves under.

44. I do not accept that children under 16 will be left unprotected unless they are the subject of High Court litigation overseeing and reviewing their living arrangements. If, in any given case, a local authority is concerned that the parents of a child under the age of 16 are depriving that child of their liberty in a manner that is causing them actual or likely significant harm attributable to a lack a reasonable parental care, it can and should issue care proceedings to protect that child. If granted a care order (or interim care order), the local authority can then exercise its powers under s.33(3) and (4) of the Children Act 1989. Section 33(3) empowers a local authority to determine how a parent (or other person holding parental responsibility) may meet that parental responsibility. Section 33(4) qualifies that by stipulating that a local authority cannot do so "unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare".

45. What is notable in the present case is that the LA has not sought a final Care Order in relation to RN. The LA does not say that it could meet the test in s.33(4) in relation to the care arrangements that are in place for RN in her father's home. Indeed, the LA says the opposite. It accepts that those measures *are* necessary to safeguard and promote her welfare.

46. I also heed the discipline that any given case is fact-specific. Here, when I focus on the actual facts relating to RN, my conclusions are reinforced. RN has very limited vocabulary. She is unable to communicate her wishes and feelings in the same way that a child without her level of disability would. Plainly, RN is incapable of giving consent to the arrangements that are in place for her. But her parents are able to do so on her behalf. And, when they do, they make a decision in the context of her particular needs and characteristics. All those who have given evidence before me have spoken of RN having complex needs and the demands of meeting those needs. She has a significant learning disability and a diagnosis of ADHD. RN is hyperactive, impulsive and she has poor attention skills. At times, her behaviour has been challenging, including outbursts when she has thrown items. She attends a specialist school and there is an extensive care support package in place throughout the week, and at weekends. She requires a high level of support and supervision, due to her complex needs, her young age and her vulnerability. She is dependent upon adult care to meet all of her care needs. In contrast with other children of her age, RN will not develop the same independent living skills as she progresses through her teenage years and into adulthood. As the Children's Guardian

observes, she is highly likely to need care and safety planning around her into adulthood and beyond.

47. The restrictions that are placed on RN must be viewed in that context. They are rooted in securing her safety and wellbeing. The parents' consent is therefore given with that objective in mind. No one has suggested otherwise in the written and oral evidence before the court, nor during submissions. RN's parents do not *wish* to place unduly restrictive care arrangements on their daughter. If it were possible, they would like her to be cared for and live her life without such measures. The Father spoke movingly in his oral evidence about that very topic. But RN's complex needs are such that that cannot be achieved for her. The restrictions are the price that must be paid to ensure her safety and wellbeing. Without them, RN would be exposed to unacceptable risks of harm. That is why the restrictive aspects of those care arrangements have the full support of the LA professionals and the Children's Guardian.

48. It follows from all that I have said that the restrictive care arrangements in place for RN are a proper and lawful exercise of parental responsibility. This amounts to a valid consent, with the consequence that the second limb of the established three stage test for what amounts to a deprivation of liberty is not met. In such circumstances, this Court need not make any High Court declaration authorising them. They are rendered lawful by the parental consent.

HHJ Hayes KC, sitting as a s.9 Deputy High Court Judge
29 September 2022