Deprivation of liberty in private supported living care arrangements

Deprivation of liberty of service users who lack mental capacity to consent to care arrangements can be problematic for care providers and local authorities.

In care homes and hospitals, managers must apply to the local authority for authorisation under the Deprivation of Liberty Safeguards. In supported living settings, local authorities must apply to the Court of Protection to authorise a deprivation of liberty in relation to care packages they arrange. However, it has been less clear whether local authorities are responsible for ensuring authorisation in relation to care packages they have not arranged, such as supported living settings or domiciliary care services that are entirely privately funded, e.g. through court awarded damages following a catastrophic accident.

The recent Court of Protection case of *Staffordshire County Council v SKR* has now provided some clarity on this issue. The court stated that where the State i.e. a local authority *knows, or ought to know*, that a vulnerable adult, privately funded e.g. by damages awarded by court order in respect of a catastrophic accident, is possibly subject to a deprivation of liberty, then it must take action. First it should investigate to determine whether there is a deprivation of liberty and, if there is, it must apply to the Court of Protection to authorise the situation. The judge said that, in such cases, authorisation is necessary in order to protect the service user from "arbitrary detention".

The local authority is only under these obligations if it knows, or ought to know, of the deprivation of liberty. In other words, knowledge can be imputed to the local authority even though it may not have actual knowledge. The court said that such implied knowledge could arise as a result of a number of factors, including the court awarding damages, the Court of Protection appointing a deputy, or the trustees administering court awarded damages being aware of a service user's care arrangements. The court recommended that in such cases the court awarding damages, the Court of Protection appointing a property and affairs deputy or the trustees to whom damages are paid to look after the mentally incapacitated person should all inform the local safeguarding authority to enable that authority to make the necessary application to the Court of Protection seeking authorisation.

It is implicit in the judgement that if a care provider is concerned that a private fee paying service user without mental capacity is being deprived of his liberty as a result of the care being provided in a supported living setting, it would be sensible for him to notify the local authority by raising a safeguarding alert. This should prompt the local authority to investigate and seek authorisation from the Court of Protection if it considers that

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the resident is being deprived of his liberty.

Alternatively, providers are free to make their own application to the Court of Protection to authorise a deprivation of liberty. There is no legal obligation to do so, but it may protect a provider from potential liability in respect of the criminal offence of false imprisonment and also the risk of a civil award for damages. However, it should be said that in most cases where appropriate care is being provided with the least restrictive regime, it would be extremely unlikely that a criminal offence would be committed and an award of more than nominal damages would also be unlikely. This is a highly complex area and specialist legal advice should be obtained by providers at an early stage.

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