Client Update

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COMMUNITY CARE LAW UPDATE

SPECIAL EDITION: MCA DEVELOPMENTS:

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Deprivation of liberty - the goalposts have moved

The long awaited judgment from the Supreme Court in relation to the conjoined appeals of Cheshire West and P&Q (MIG & MEG) has arrived at last, and has reversed the decision of the Court of Appeal in November 2011.

There is much to be considered and debated arising from this judgment, but for now here are some of the key points:

- A person is deprived of their liberty if they are (1) not free to leave and (2) under continuous supervision and control.
- The person's objection to, or compliance with, their living arrangements is irrelevant to the assessment.
- The purpose behind the placement is irrelevant. "*The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference*" – Lady Hale.
- The "relative normality" of the placement is irrelevant. This particular concept was a significant cause of concern for many - morally, it felt at best uncomfortable; practically, what is normal and who is the relative comparator? The Supreme Court has unequivocally rejected this concept and reaffirmed the universality of human rights, and the fact that physical liberty is the same for everyone.
- A deprivation of liberty can occur in a domestic or quasi-domestic setting.
- Three of the Lords (in the minority) considered that the degree of intrusion is relevant, and that MIG & MEG's care regime was no more intrusive or confining than necessary for their protection and well-being.
- Incapacitated 16/17 year olds in accommodation under s20 Children Act 1989 may be being deprived of their liberty. Authorisation in this situation would need to be sought from the Court of Protection.

Whilst the clarity is to be welcomed, a significant implication for local authorities is that, what was not a deprivation of liberty up to 19th March 2014 (the date of the judgment), may well be now. In addition, local authorities will need to review the circumstances of young people (16+) who are accommodated and incapacitated.

The full judgment can be accessed here: http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

Mental Capacity Act 2005 – implementation has not met expectation

The House of Lords Select Committee on the Mental Capacity Act 2005 has spent nearly a year scrutinising the implementation of the Act. Having considered evidence amounting to almost 2000 pages, the Committee has produced a 143 page report which is, in many respects, damning. Whilst acknowledging the Act as visionary legislation, the Committee found that the rights it confers are not widely realised and the duties it imposes are not widely followed.

The report sets out no less than 39 recommendations, the headlines being:

- The Deprivation of Liberty Safeguards to be reviewed and re-written.
- An independent body to be established to oversee, monitor and progress implementation of the Act.
- Local Authorities to more frequently use their power to appoint Independent Mental Capacity Advocates.
- Increase staff resources at the Court of Protection, and reconsider the provision of non-means tested legal aid.

The report can be accessed here: http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf

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