The Law Society

Identifying a deprivation of liberty: a practical guide

Supported living

A: Introduction

7.1 This chapter focuses upon the intensity of care regimes provided to those lacking the capacity to consent to care arrangements in supported living services, shared lives schemes (formerly known as adult placements) and extra care housing. The deprivation of liberty safeguards are not available, therefore any deprivation of liberty will require authorisation by the Court of Protection.

B: What is a supported living service?

7.2 The generic term, 'supported living', describes a form of domiciliary care whereby a local authority arranges a package of care and accommodation to be provided to a disabled, elderly or ill person. The individual lives in their own (often rented) home and typically receives social care and/or support to enable them to be as autonomous and independent as possible. The provision of accommodation is thereby separated from the delivery of care at an organisational level. There is usually some form of tenancy or licence arrangement with a landlord attracting housing benefit, with means-tested tailored support being provided by a distinct care provider with activities of daily living, education, training, employment and social interaction. The care setting is therefore not likely to constitute a "care home" for registration purposes.

7.3 Supported living services need only be registered with the Care Quality Commission ("CQC") if they carry on a regulated activity, that is nursing or personal care. If, for example, the individual is supported with cleaning, cooking and shopping, or is supervised to take prescribed medicine, the service does not require registration. If personal care is being provided but not in the place where they are living, for example at day services, registration of the service is not required. However, where nursing or personal care is provided to those, for example, with more complex needs, such care will be a regulated activity requiring CQC registration. The Care Act 2014 adopts the definition of nursing and personal care presently provided for in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010:

"nursing care" means any services provided by a nurse and involving—

(a) *the provision of care; or*

(b) *the planning, supervision or delegation of the provision of care, other than any services which, having regard to their nature and the circumstances in which they are provided, do not need to be provided by a nurse;*

"personal care" means—

(a) *physical assistance given to a person in connection with—*

(i) eating or drinking (including the administration of parenteral nutrition),

(ii) toileting (including in relation to the process of menstruation),

(iii) washing or bathing,

(iv) dressing,

(v) oral care, or

(vi) the care of skin, hair and nails (with the exception of nail care provided by a chiropodist or podiatrist); or

(b) *the prompting, together with supervision, of a person, in relation to the performance of any of the activities listed in paragraph (a), where that person is unable to make a decision for themselves in relation to performing such an activity without such prompting and supervision."*

7.4 Such regulated activities do not apply to the provision of accommodation to someone by a carer under a shared lives scheme (see below), school, or a further education institution.

Supported living: liberty-restricting measures

7.5 The following are measures which may be found in the specific features of this care setting:

- Decision on where to live being taken by others;
- Decision on contact with others not being taken by the individual;
- Doors of the property locked, and/or chained, and/or bolted for security reasons or to prevent residents leaving;
- Access to the community being limited by staff availability;
- A member or members of staff accompanying a resident to access the community to support and meet their care needs;
- Mechanical restraint, such as wheelchairs with a lapstrap or harness (e.g. Crelling), reinforced glass in mobility vehicles, protective helmets;
- Varying levels of staffing and frequency of observation by staff;
- Restricted access to finances, with money being controlled by staff or welfare benefits appointee;
- Restricted access to personal items to prevent harm;
- Restricted access to parts of the property, such as the kitchen or certain cupboards therein, to minimise health and safety risks;
- Chemical restraint, such as medication with a sedative or tranquilising effect;
- Physical restraint/intervention, such as with personal care tasks, breakaway or block techniques, distraction methods, staff withdrawing, physical touches or holds;
- Restricted access to modes of social communication, such as internet, landline or mobile telephone, correspondence;
- Positive behavioural reward systems, to reward "good" behaviour;
- Restricted access to family, depending on level of risk and availability of staff and resources;
- Lack of flexibility, in terms of having activities timetabled, set meal times, expected sleep times.

Supported living: a deprivation of liberty

7.6 The measures in the following scenario are likely to amount to a deprivation of liberty:

Gordon is 30 years old and has autism, cerebral palsy, hearing and visual impairments and a learning disability. He resides in a one-bedroom flat with 1:1 staffing at all times. He requires a second member of staff to access the community who is available 35 hours per week. The front door is locked for his safety. He cannot weight bear and pulls himself around inside, and requires a wheelchair outside. Due to a history of attempting to grab members of the public, a harness is used to strap his torso to the wheelchair, allowing free movement of his arms.

Key factors pointing to a deprivation of liberty:

- *Gordon is under continuous supervision and control on a 1:1 basis at all times*

Supported living: potential deprivation of liberty

7.7 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Max is 24 years old, has a mild learning disability and lives with two other residents who receive 24-hour shared staff support. Owing to his agitation and anxiety, Max is prescribed medication with a calming effect. He is employed from 9am to 4pm, five days per week in the local garden centre which he is able to get to and from independently. He has a tenancy for his bedroom and can call upon staff members for assistance in the morning and evening if he requires it. If he wishes to see his family at weekends, a member of staff will take him and be there throughout the contact session owing to previous incidents of aggression from his brother.

Key factors pointing to a potential deprivation of liberty:

- *the extent of the supervision and control inherent in the support provided to Max at the placement. A careful assessment will be required of whether he is free to leave in circumstances where he can come and go to the garden centre;*
- *focus will also be required upon the steps that would be taken if he did not return.*

Supported living: not a deprivation of liberty

7.8 The following scenario is unlikely to amount to a deprivation of liberty:

John, aged 42, was badly assaulted during a night out and sustained an acquired brain injury. The frontal lobe damage makes processing information difficult and he has some left sided weakness and mobility issues. He lives in a flat and, twice a day, receives two-hour visits from support workers. He can dress and wash himself. But they prompt him with medication, take him shopping, and support him to pay his bills. He chooses how to spend the remainder of the day. Often he attends day services without the need for support. Sometimes he meets with friends in the local pub.

Key factors pointing away from deprivation of liberty:

- *the limited nature of the control and supervision to which John is subject*
- *the limited nature of the restrictions placed upon John's ability to come and go from his flat as he pleases.*

C: What are Shared Lives schemes?

7.9 These schemes, formerly known as adult placements, differ from supported living arrangements as they involve the individual being placed in a family setting. They are likened to adult fostering arrangements and are available to those aged 16 and over. Usually a local authority arranges for the person to receive day support, short breaks or respite, or long term care in the family home of a Shared Lives carer so as to enable them to share the family life, social life and community activities. The schemes are designed for those wanting to live independently but not on their own.

7.10 The majority of those receiving such care have learning disabilities, although the scheme extends to those with physical disabilities, mental health issues or drug or alcohol problems. Shared Lives carers are self-employed, with rates of payment set by the local authority or the scheme itself according to the location and the person's level of need. Carers receive payments to cover some of their time, rent and a contribution towards the household running costs.

7.11 In 2012-13 in England there were 121 schemes with 6720 carers supporting over 9660 people, around half of which on a long term basis. In Wales that year there were 1420 people in Shared Lives arrangements.

7.12 Although accommodation is provided often together with personal care, it is not required to be registered as a "care home". But Shared Lives schemes are regulated under the Health and Social Care Act 2008. The schemes approve and train the carer, receive referrals (typically from the local authority), match the needs of the person with the carer, and monitor the arrangements. A maximum of three people (two in Wales) can be supported by the carer at any one time and carers do not employ staff.

Shared Lives schemes: liberty-restricting measures

7.13 The following are measures which may be found in the specific features of this care setting:

- Varying levels of supervision and guidance with activities of daily living;
- Encouraging participation in family and community activities;
- Preventing the person from leaving unaccompanied for their immediate safety;
- Ensuring behavioural boundaries;
- Conveying the person to health and other appointments;
- Addressing challenging behaviour;
- Assist with medication, including sedative effect.

Shared Lives schemes: a deprivation of liberty

7.14 The measures in the following scenario are likely to amount to a deprivation of liberty:

Nora is 18 years old with moderate to severe learning disability. She lives in a stable and secure foster placement in which she is dependent on others as she cannot not live independently. She cannot go out on her own and shows no wish to do so. She can communicate her wants and wishes in a limited manner. She lives in an ordinary domestic environment which she regards as home. She is not restrained or not locked in the house. If she tries to leave she would be prevented for her immediate safety. Continuous supervision and control is exercised over her to meet her care needs. Her limitations on movement are generally dictated by her inability and lack of awareness of danger. There are no restrictions on social contacts except by court declaration. She goes to college where she is not under the control of her carer or the local authority. Her mother accepts that Nora should remain where she is and has no objections to the care provided. Nor does she regard Nora as being confined or retained. Nora's sister supports the shared lives placement.

Key factors pointing to a deprivation of liberty:

- *the continuous and complete nature of the control and supervision exercised over her (for beneficent reasons)*
- *the steps that would be taken to prevent her leaving.*[1]

Shared Lives schemes: potential deprivation of liberty

7.15 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Matthew is 33 years old and has autism, a moderate learning disability, and little communication skills. He has lived with Mr and Mrs Morgan for four years with their daughter. He requires frequent daily support and someone with or near him all day. For example, he cannot judge water temperature so his carers run him a bath or shower. He cannot dress according to weather conditions so his carers choose his clothing and dress him. He cannot attend to personal care so his carers clean him and brush his teeth and hair. He is able to walk independently but gets anxious with loud noises so one of the family will accompany him outside, when he wears head phones to muffle the noise. The family do the weekly shop and he will only eat a limited range of food. He is able to make a simple sandwich with verbal prompts.

Key factors pointing to a deprivation of liberty:

- *Matthew requires a significant and continuous degree of support throughout the day, and the limitations upon his freedom to leave.*
- *A careful assessment would be required as to the extent to which he is under continuous/ complete supervision and control, and what would happen were he to try to leave without a family member accompanying him.*

1 Based upon the case of MIG in the Supreme Court.

Shared Lives schemes: no deprivation of liberty

7.16 The following scenario is unlikely to amount to a deprivation of liberty:

Jane is 38 years old and resides with Mr and Mrs Baker in their 4 bedroomed home. One day per week she mucks out the local farm with a job coach. She has no health concerns and she sleeps well. It is not safe for Jane to go out alone as she has no sense of road danger so every Sunday she goes to church and every Tuesday goes shopping with Mrs Baker. The family go out together on regular excursions and holiday twice a year.

Key factors pointing to a deprivation of liberty:

- *there is no evidence that Jane is under any form of continuous/complete supervision and control.*

D: What is extra care housing?

7.17 Extra care housing represents a hybrid between living at home and living in residential care. Usually purpose built, self-contained properties on a single site, schemes provide access to 24-hour domiciliary care and support and community resources. Their models differ from assistive technology in someone's own home to retirement and care villages to, for example, specialist dedicated schemes for those with dementia. Unlike residential care, those in extra care housing usually rent, purchase, or share ownership of typically a one or two-bedroomed apartment or bungalow in the housing scheme or care village and do not receive one-to-one care. Unlike living in one's own home, those in extra care housing will have 24-hour access to personal care with progressive degrees of privacy, dependent upon their level of need.

7.18 Some individuals will have a domiciliary carer. A warden is also usually on site to check on the welfare of residents. For the larger schemes, there are also on-site facilities and social care services usually available for those requiring daily support. These can include on-site care teams, rehabilitation services, day centre activities, restaurants, laundrettes, hairdressing and beauty suites, and possibly shops, cinemas, gyms, even the garden shed.

7.19 Moving into extra care housing may be a lifestyle choice. Or it may be necessary due to an individual's level of social and/or health care need. The decision to move in may or may not be made at a time when the individual had mental capacity, or their mental functioning may deteriorate subsequently, with it no longer being safe for them to go out unaccompanied. It is therefore a common occurrence for those in extra care housing to not be free to access the community but the intensity of care measures varies enormously.

Extra care housing: liberty-restricting measures

7.20 The following are measures which may be found in the specific features of this care setting:

- Location devices;
- Door sensors to raise to alert staff to the person's exit from their property;
- Movement sensors to raise alert staff to the person's movements within their property;
- Verbal or physical distraction techniques used, for example, to dissuade the person from going out unaccompanied;

- Fobs to go in and out of the scheme which the person may not know how to use;
- Doors within the property with handles at the top to prevent the individual leaving;
- Prior consent of the resident may enable staff to access their property;
- Physical intervention/restraint, such as with personal care tasks;
- Access to the community restricted due to staff levels, with residents able to go out in groups only with staff with little or no choice regarding where and when to do so;
- CCTV in entrance areas to schemes; or
- Aspects of the property restricted due to safety concerns, such as disabling a cooker.

Extra care housing: deprivation of liberty

7.21 The measures in the following scenario are likely to amount to a deprivation of liberty:

Cyril is 70 years old with Alzheimer's dementia and severe mobility difficulties. He was assessed by a social worker as lacking capacity to decide where to live in order to receive care. In consultation with Cyril and family members, it was considered to be in his best interests to move out of his home into a housing with care setting. He now resides in a one-bed apartment as part of a specialist dementia scheme of extra care housing which was purchased by his financial deputy. From 9am to 8pm he has a carer with him to assist him into and out of bed as well as to attend to his everyday needs. During the night he has pressure sensors around the bed to alert staff to a fall. Occasionally he is aggressive to staff which requires them to withdraw. Staff have unrestricted access to the apartment by means of a safe key. Cyril is able to leave the property but only with the carer.

Key factors pointing to a deprivation of liberty:

- the extent of the supervision and control exercised over Cyril whilst he is awake (and at night).
- Cyril is not free to leave save with a carer.

Extra care housing: potential deprivation of liberty

7.22 We suggest that the measures in the following scenario may give rise to a deprivation of liberty:

Charles is 80 years old with early onset dementia. He has been residing in a rented one-bedroomed bungalow in a care village for three years and is believed to have now lost the mental capacity to make decisions as to residence and care. Four hours per day he is helped by a member of staff with personal care, cooking and cleaning tasks. He has door sensors to alert staff to when he leaves the property and is required to wear an alarm device at all times for his safety. He is not allowed to leave the complex without a staff member.

Key factors pointing to potential deprivation of liberty:

- *Charles is not free to leave unaccompanied.*
- *careful examination will be required as to extent to which the remote monitoring, together with the direct support of staff four hours a day, cumulatively amounts to sufficiently continuous/complete supervision and control to satisfy the acid test.*

Extra care housing: not a deprivation of liberty

7.23 We suggest that the following scenario is unlikely to amount to a deprivation of liberty:

Mabel is 75 years old and decided with capacity to sell her home and to purchase an apartment in a local housing with care scheme as she was becoming forgetful and worried about her own safety. There are 35 apartments on the site which is accessed with a key fob or code. A warden is available 24-hours a day. She is advised not to go out without a friend, family member or staff member. If she wished to go out alone, she must ensure that a member of staff knows so that if she does not return they can follow the missing persons protocol. Mabel is otherwise left to her own devices without interference from the housing scheme.

Key factors pointing to potential deprivation of liberty:

- *Mabel is not under continuous or complete supervision or control*

E: Questions for front-line practitioners

7.24 These questions may help establish whether an individual is deprived of their liberty in this context:

- To what extent is the person's ability to access the community by themselves limited by others and in what circumstances?
- Within their place of residence, to what extent is the person (a) actively supervised, (b) liable to be supervised, (c) not even liable to be supervised by others when risks may arise?
- Is physical intervention used? If so, how often? What type? For how long? And what effect does it have on the person?
- Do others control their finances?
- How would the care regime respond to the corresponding risks if the person attempted to leave either to access the community or to simply not return?
- Are there regular private times, where the person has no direct carer supervision?
- Is their contact with the outside world restricted? If so, how often? How? For how long? And what effect does this have on the person?
- To what extent is the person able to decline assistance when it is available?