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Case No: LN22C00063

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/08/2022

Before :

MRS JUSTICE LIEVEN

Between :

LINCOLNSHIRE COUNTY COUNCIL

Applicant

and

TGA

First Respondent

and

TGB

Second Respondent

and

TGC

Third Respondent

and

K

Fourth Respondent

Mr Brett Davies (instructed by **Charlotte Worthy of A & N Care Solicitors**) for the
Applicant

The First, Second and Third Respondents were in attendance

Ms Alison Hunt (instructed by **Bridge McFarland LLP**) for the **Fourth Respondent**

Hearing dates: **1 April 2022**

Approved Judgment
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MRS JUSTICE LIEVEN

This judgment is being handed down in private on 17 August 2022. It consists of 58 paragraphs.

The Judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates, the solicitors instructing them, or persons (other than the parties, members of their extended families and their children) identified by name in the judgment itself, may be identified by name or location. In particular the anonymity of the children and the adult members of their family must be strictly preserved. If reported, it shall be the duty of the Law Reporters to anonymise this judgment.

Mrs Justice Lieven DBE :

1. This case concerns a just 14 year old boy K. K suffers from epilepsy, autism, Attention Deficit Disorder and global developmental delay. He is accommodated by Lincolnshire County Council, the Local Authority ('LA'), under s.20 of the Children Act 1989, and has been for some years.
2. Sadly both K's parents are deceased. By operation of his mother's will, the First, Second and Third Respondents are his testamentary guardians. It is accepted by all parties that their appointment is legally effective.
3. It is common ground between the Guardians and the LA that K is appropriately placed by the LA at the Wakefield Children's Centre.
4. The issue in the case is whether K is deprived of his liberty at the Wakefield Centre within the terms of Article 5 European Convention on Human Rights ('ECHR') and whether the testamentary guardians can consent to such a deprivation. Although the facts of the case concern testamentary guardians rather than natural parents, it has become clear as the case progressed that it would make no difference to the arguments if K's parents were alive and themselves exercising parental responsibility.
5. The case is in essence about whether Mr Justice Keehan was correct in *Trust A v X and A Local Authority*, (also reported as *Re D (Deprivation of Liberty)* [2015] EWHC 922 (Fam)), in deciding that a parent acting within the "zone of parental responsibility" could consent to the deprivation of liberty of their 15 year old son, who suffered from Attention Deficit Hyperactivity Disorder and Asperger's Syndrome, in a psychiatric unit; or whether that decision has been overtaken by the Supreme Court decision in *Re D (A Child)* [2019] UKSC 42, and in particular the obiter comments of Lady Hale and Lady Black in that case.
6. The judicial consideration of whether a parent can consent to the deprivation of liberty of their child has been a difficult and highly contentious one. I will set out the history of the litigation concerning D and then consider the key authorities that bear upon the issue.

Child D

7. In *Trust A* Keehan J found that D's detention in a hospital when 15 years old did amount to a deprivation of liberty, but the decision of his parents to place him there fell within the exercise of their parental responsibility taking into account D's autism and other diagnosed conditions. Keehan J considered the argument, advanced on behalf of the Trust, that D's parents could not consent to the deprivation of liberty at [49]. At [55] onwards the Judge took into account D's condition in determining what decisions would fall within the zone of parental responsibility:

"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.*

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.*

...

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."*

8. At [66] he concluded:

"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."

9. The matter returned to Keehan J sitting this time in the Court of Protection in *Birmingham City Council v D (by his litigation friend, the Official Solicitor)* [2016] EWCOP 8, when D had reached the age of 16. The Judge held that the parents could no longer consent to the deprivation of his liberty once D had become 16. Keehan J held that once a child reached the age of 16 Parliament had afforded them a special legal status to those who had not yet attained the age of 16, see [103] to [115] of the judgment.

10. That decision was appealed to the Court of Appeal. Sir James Munby P, in a comprehensive and closely reasoned judgment on behalf of the Court, overturned

Keehan J's decision. The Court of Appeal held that a parent could in principle consent to the deprivation of liberty of a child under the age of 18 if they had not attained *Gillick* competence, see [125]. The Court of Appeal held that Keehan J had not properly applied the principle in *Gillick v West Norfolk Health Authority* [1986] AC 112 that the exercise of parental responsibility continued until the child attained *Gillick* competence. Although subsequently overruled by the Supreme Court, the Court of Appeal's judgment remains highly relevant to the issues before me concerning under 16 year olds. I will refer to some of the detail of that judgment below.

11. The case was then appealed to the Supreme Court. The appeal therefore concerned the position of a 16 or 17 year old and the scope of parental responsibility for children of that age. There is no dispute that the comments of Lady Hale and Lady Black in respect of the position for children aged under 16 are obiter.
12. Lady Hale at [22] referred to *Hewer v Bryant* [1970] 1 QB 357 and the acceptance by the Court of Appeal that a parent's right to custody of a child was a diminishing right as the child became older.
13. At [27] Lady Hale acknowledged the significance of the age of 16, although did not consider it be determinative of the issue. She then went on to consider the decision of the Grand Chamber of the European Court of Human Rights ('ECtHR') in *Nielsen v Denmark* [1988] 11 EHRR 175. In that case a 12 year old boy was detained in a psychiatric hospital, even though he had no mental illness. The majority held that "*the hospitalisation of the applicant [the child] did not amount to a deprivation of liberty within the meaning of Article 5 but was a responsible exercise by his mother of her custodial rights in the interest of the child*" [73].
14. At [39] to [42] Lady Hale considered the ratio of Nielsen and the role of parental consent in determining whether *Storck* limb (b) (the subjective component of lack of consent) was met:

"39. That, as it seems to me, is the crux of the matter. Do the restrictions fall within normal parental control for a child of this age or do they not? If they do, they will not fall within the scope of article 5 ; but if they go beyond the normal parental control, article 5 will apply (subject to the question of whether parental consent negates limb (b) of the Storck criteria, see para 42 below). Quite clearly, the degree of supervision and control to which D was subject while in Placement B and Placement C was not normal for a child of 16 or 17 years old. It would have amounted to a deprivation of liberty in the case of a child of that age who did not lack capacity. The question then arises what difference, if any, does D's mental disability make?"

40. The answer to that question lies in the illuminating discussion by Lord Kerr in Cheshire West :

"77. The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of your actual freedom with someone of your age and station whose freedom is not limited. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for

them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of the constraint but, objectively, limitations on their freedom are in place.

78. All children are (or should be) subject to some level of restraint. This adjusts with their maturation and change in circumstances. If MIG and MEG had the same freedom from constraint as would any child or young person of similar age, their liberty would not be restricted, whatever their level of disability. As a matter of objective fact, however, constraints beyond those which apply to young people of full ability are - and have to be - applied to them. There is therefore a restriction of liberty in their cases. Because the restriction of liberty is - and must remain - a constant feature of their lives, the restriction amounts to a deprivation of liberty."

41. Indeed, the principal point of Cheshire West was that the living arrangements of the mentally disabled people concerned had to be compared with those of people who did not have the disabilities which they had. They were entitled to the same human rights, including the right to liberty, as any other human being. The fact that the arrangements might be made in their best interests, for the most benign of motives, did not mean that they were not deprived of their liberty. They were entitled to the protection of article 5 , precisely so that it could be independently ascertained whether the arrangements were indeed in their best interests.

42. It follows that a mentally disabled child who is subject to a level of control beyond that which is normal for a child of his age has been confined within the meaning of article 5 . Limb (a) of the three Storck criteria for a deprivation of liberty (see para 1 above) has been met. There was, however, an argument that the consent of D's parents supplied a substitute for the consent of the person confined, so that limb (b) was not met. It suited counsel in Cheshire West (as recorded in the last sentence of para 41) to argue that Nielsen should be regarded as a case of substituted consent, because no person has the right to give such consent on behalf of a mentally incapacitated adult. But, as also pointed out in Cheshire West , it is striking that the European Court of Human Rights has consistently held that limb (b) can be satisfied despite the consent of a person with the legal right to make decisions on behalf of the person concerned: see Stanev v Bulgaria (2012) 55 EHRR 696 , DD v Lithuania [2012] MHLR 209 , Kedzior v Poland [2013] MHLR 115 , Mihailovs v Latvia , unreported, and now Stankov v Bulgaria [2015] 42 ECtHR 276 . In Stanev , the court did observe, in passing, that "there are situations where the wishes of a person with impaired mental facilities may be validly replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned" (para 130). However, as Keehan J observed in the Court of Protection (para 118) that is very far from adopting a general principle of substituted consent. The consent of a

legal guardian may have been sufficient to make the confinement lawful in the domestic law of the country concerned, but that did not prevent its being a deprivation of liberty, or guarantee that it fulfilled the Convention requirement of legality. In the cases where limb (b) has been held to be satisfied, it is because the evidence showed that the person concerned was willing to stay where he or she was and was capable of expressing that view. Parental consent, therefore, cannot substitute for the subjective element in limb (b) of Storck.”

15. She then set out her analysis of parental responsibility and the ability of parents to detain or authorise the detention of their child:

“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, section 25 of the Children Act 1989 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 article 5. 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 Mental Capacity Act 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 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. It follows that I agree with what Lady Black says about those last two points in para 90 of her judgment.”

16. Lady Black agreed with Lady Hale in her analysis and, like her, expressly declined to reach a definite view on whether the same analysis would apply to a child under 16:

*“88. As I have explained (see above at para 69 et seq), I do not share the President's confidence that the Gillick test extends to the aspect of parental responsibility with which the present case is concerned, or that the Gillick decision can, without more, be treated as regulating the situation where the objective is not to contract the boundaries of parental responsibility, but to extend them. In my view, as I said above, it is of real significance that in Gillick, the House of Lords were dealing with a materially different issue. The respondent recognises that the focus of Gillick was specific to the issue of consent to medical treatment of children under 16, but invites this court to conclude that the test laid down there applies beyond that scope and up to the age of majority. I accept that certain things that were said in Gillick were capable of being interpreted as applying to a situation such as the present, but it would not, in my view, be appropriate to interpret them in that way, so as to draw into the Gillick net a situation which is diametrically opposed to that with which the House was concerned (not the tempering of parental responsibility in relation to the under 16 age group, but its expansion in relation to those aged 16 and 17 so as to give it a role which would not otherwise be afforded by the common law). My unwillingness to adopt this interpretation is reinforced by what I perceive to be the distinct, and rather special, features of the field of deprivation of liberty with which we are here concerned. It follows that the rights of a parent in relation to restricting the liberty of a child remain, at common law, as described in *Hewer v Bryant*. The inescapable result of that is, I think, that it is not within the scope of parental responsibility for parents to give authority for their 16 year old child to be confined in a way which would, absent consent, amount to a deprivation of liberty. In so saying, I do not intend in any way to water down the important changes brought about by Gillick or to alter the way in which it has been applied in many spheres of family law. I have only been concerned to consider its application in the very specific context of confinement of children of the ages of 16 to 18.*

89. *The position in relation to the confinement of children who are under 16 might be different for a variety of reasons. It could be argued, for example, that the Gillick decision is more readily applicable to under 16s than to over 16s, given that this was the age group with which the House was concerned. It would then be arguable that the position in relation to that group was as the President set out at para 85 of his judgment (quoted above) ie that the parental ability to restrict a child's liberty continues to be as described by Sachs LJ in *Hewer v Bryant* , but with a Gillick test rather than the previous fixed ages. But the effect of this, applied to a child who lacked capacity, would not be to leave a gap in the parent's powers to cater for the particular needs of a child with disability. On the contrary, the child not having attained Gillick capacity, there would be nothing to bring to an end the parent's common law power to confine the child as required in the child's interests. To put it in the terms used in this appeal, it would remain within the ambit or zone of the parent's parental responsibility. However, there would, no doubt, be other arguments to be aired on the point, and I have not formed even a preliminary view about it.*

90. *In summary, therefore, I would hold that as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty. For me, this reinforces the conclusion to which Lady Hale has come by the route she sets out in paras 42 to 49 of her judgment. She concludes, in para 50, by saying that logically her conclusion would also apply for a younger child, but I would prefer to leave this separate question entirely open, to be decided in a case where it arises. I should also stress, before moving on to the discrete issue in relation to section 25 of the Children Act 1989 and its potential application to living arrangements such as D's, that I have been looking specifically at the common law power of a parent in relation to a child's liberty. I have not intended to cast doubt on any existing understanding about the operation of parental responsibility in different spheres of a child's life. And nothing that I have said is intended to cast any doubt on the powers of the courts, recognised in the early cases to which I have referred, and still available today in both the *parens patriae* jurisdiction and under statute, notably the Children Act 1989 , to make orders in the best interests of children up to the age of majority, with due regard to their wishes and those of their parents, but not dictated by them."*

17. Lord Carnwath, with whom Lord Lloyd-Jones agreed, dissented from the decision that parents could not consent to the deprivation of liberty of a 16 year old who lacked capacity. Lord Carnwath's analysis is important in the present context because, although in the minority in respect of the decision on 16 year olds and over, his analysis may continue to apply for under 16 year olds. He adopted the approach of Sir James Munby in the Court of Appeal that relying on the decision in *Gillick* and the scope of parental responsibility where a child is not *Gillick* competent, see [125]. He considered that Nielsen was in effect a decision about *Storck* limb (b) (the power of the parent to consent on behalf of the child) and that *Nielsen* had been consistently followed for 30 years [155].

The caselaw

18. The analysis of the caselaw starts with *Hewer v Bryant* [1970] 1 QB 357 and the Court of Appeal's analysis of the scope of parental rights. I note that there is a very detailed analysis of the caselaw in the judgment of Munby LJ in *Re D*, and I do not repeat the entirety of that.
19. The issue in *Hewer v Bryant* was whether the plaintiff in a personal injury action, who had been 15 $\frac{3}{4}$ when injured, was at the material time within the "custody" of a parent for the purposes of the s.2(2)(b) of the Law Reform (Limitation of Actions) Act 1954. At p.370:

"...among the various meanings of the word 'custody' there are two in common use in relation to infants which are relevant and need to be carefully distinguished. One is wide—the word being used in practice as almost the equivalent of guardianship: the other is limited and refers to the power physically to control the infant's movements.

In its limited meaning it has that connotation of an ability to restrict the liberty of the person concerned to which Donaldson J referred in [Duncan v Lambeth London Borough Council [1968] 1 QB 747 , 762]. This power of physical control over an infant by a father in his own right qua guardian by nature ... was and is recognised at common law; but that strict power (which may be termed his 'personal power') in practice ceases upon the infant reaching the years of discretion. When that age is reached, habeas corpus will not normally issue against the wishes of the infant. Although children are thought to have matured far less quickly in the era when the common law first developed, that age of discretion which limits the father's practical authority (see the discussion and judgment in R v Howes (1860) 3 EB & E 332) was originally fixed at 14 for boys and 16 for girls (see per Lindley LJ in Thomasset v Thomasset [1894] P 295 , 298).

In its wider meaning the word 'custody' is used as if it were almost the equivalent of 'guardianship' in the fullest sense—whether the guardianship is by nature, by nurture, by testamentary disposition, or by order of a court ... Adapting the convenient phraseology of counsel, such guardianship embraces a 'bundle of rights', or to be more exact, a 'bundle of powers', which continue until a male infant attains 21, or a female infant marries. These include power to control education, the choice of religion, and the administration of the infant's property. They include entitlement to veto the issue of a passport and to withhold consent to marriage. They include, also ... the personal power physically to control the infant until the years of discretion ... It is thus clear that somewhat confusingly one of the powers conferred by custody in its wide meaning is custody in its limited meaning, namely, such personal power of physical control as a parent or guardian may have."

20. Lord Denning MR said at p.369:

“... the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.”

21. Lord Denning’s language is particularly important because it closely correlates to the language subsequently used by the House of Lords in Gillick v West Norfolk Health Authority [1986] AC 112.

22. The issue in Gillick was whether a girl under the age of 16 had the capacity to consent to decisions about contraception or whether the decision on contraception fell within the ambit of parental responsibility and parental consent, and therefore the parent had the right of decision making. The House of Lords, by a majority, held that parental rights ceded to those of the child at the point the child gained competence or capacity.

23. Munby LJ in Re D divided the decision in Gillick into three parts. Firstly, that parental rights only exist for the benefit of the child, see Lord Fraser at p.170 and Lord Scarman at p.183-5. This is important in the present context because it provides a safeguard for a decision by a parent to deprive the child of their liberty where any argument is raised that it is not in child’s best interests to be so deprived.

24. Secondly, the child is a person with capacities and rights recognised by law and the courts can interfere to protect those interests, see Lord Scarman at p.184.

25. Thirdly, that the age of discretion was not fixed and the age of what has become known as Gillick competence will vary depending on the characteristics of the particular child. Lord Fraser at p.171-2 said:

“It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. Moreover, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance ... It is a question of fact for the judge (or jury) to decide whether a particular child can give effective consent to contraceptive treatment.”

26. Lord Fraser expressed his agreement with Lord Denning's analysis of the parent having a "dwindling right" in *Hewer v Bryant*. Lord Scarman said at p 186:

"The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change ... Unless and until Parliament should think fit to intervene, the courts should establish a principle flexible enough to enable justice to be achieved by its application to the particular circumstances proved by the evidence placed before them.

The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."

27. It is important to note at this stage that the analysis of *Gillick* competence does not involve a comparison with a hypothetical child of the same age, but rather is entirely focused on the characteristics of the particular child. That is for the obvious reason that with a child as opposed to an adult there is no hypothetical norm with which to compare. It would undermine the very reasoning of Lords Scarman and Fraser to hold up a theoretical "standard" child because children mature at different rates and in different ways depending on their personalities and their experiences. The ratio of *Gillick* is that the Court, or clinician, must consider the particular, individual child.

28. Munby LJ summarised the point neatly at [84] of *Re D*:

"This has an important corollary. Given that there is no longer any "magic" in the age of 16, given the principle that " Gillick capacity" is "child-specific", the reality is that, in any particular context, one child may have " Gillick capacity" at the age of 15, while another may not have acquired " Gillick capacity" at the age of 16 and another may not have acquired " Gillick capacity" even by the time he or she reaches the age of 18: cf In re R (A Minor) (Wardship: Consent to Treatment) [1992] Fam 11, 24, 26."

29. Chronologically, the next important decision is that of the ECtHR in *Nielsen v Denmark* [1988] 11 EHRR 175. A 12 year old boy had been placed in a children's psychiatric unit by his mother, who had sole parental responsibility for him. The Court held that there was no breach of Article 5. The most relevant passages are as follows:

"61. It should be observed at the outset that family life in the contracting states encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty. Thus the children in a school or other educational or recreational institution must

abide by certain rules which limit their freedom of movement and their liberty in other respects. Likewise a child may have to be hospitalised for medical treatment. Family life in this sense, and especially the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognised and protected by the Convention, in particular by article 8 . Indeed the exercise of parental rights constitutes a fundamental element of family life.

...

*72. The court accepts, with the Government, that the rights of the holder of parental authority cannot be unlimited and that it is incumbent on the state to provide safeguards against abuse. However, it does not follow that the present case falls within the ambit of article 5 . The restrictions imposed on the applicant were not of a nature or degree *1801 similar to the cases of deprivation of liberty specified in paragraph 1 of article 5 ... Indeed, the restrictions to which the applicant was subject were no more than the normal requirements for the care of a child of 12 years of age receiving treatment in hospital. The conditions in which the applicant stayed thus did not, in principle, differ from those obtaining in many hospital wards where children with physical disorders are treated. Regarding the weight which should be given to the applicant's views as to his hospitalisation, the court considers that he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child. There is no evidence of bad faith on the part of the mother. Hospitalisation was decided upon by her in accordance with expert medical advice. It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of article 5 ...*

73. The court concludes that the hospitalisation of the applicant did not amount to a deprivation of liberty within the meaning of article 5 , but was a responsible exercise by his mother of her custodial rights in the interest of the child. Accordingly, article 5 is not applicable in the case.”

30. In Storck v Germany (2005) 43 EHRR 96 the ECtHR held that there were three essential components to a deprivation of liberty under Article 5; (a) the objective component of confinement in a particular restricted place for a not negligible period of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the state.
31. There are two Court of Appeal decisions that might suggest that a parent cannot deprive their child of her/his liberty. Re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377 the issue was whether s.25 Children Act 1989 (to order a child is placed in secure accommodation) was compatible with Article 5. One of the questions was whether the placement of the child in secure accommodation was a “confinement” within the meaning of Storck component (a). As Munby LJ pointed out in Re D, oddly neither Hewer v Bryant nor Gillick were referred to. Dame Elizabeth Butler-Sloss P at [27] to [29] said:

“27. It is clear that not every deprivation of liberty comes within the ambit of article 5 . Parents are given a wide measure of discretion in the upbringing of their children. This was recognised by the European Court in Nielsen v Denmark 11 EHRR 175 ...

28. I recognise the force of the principles set out in ... [Nielsen] ... There is a point, however, at which one has to stand back and say: is this within ordinary acceptable parental restrictions upon the movements of a child or does it require justification? ...

29. ... it is clear that the purpose of section 25 of the 1989 Act, as set out in the interpretation in the regulations dependent upon it, is to restrict the liberty of the child ... If a parent exercised those powers by detaining a child in a similar restrictive fashion and was challenged to justify such detention, for my part I doubt whether the general rights and responsibilities of a parent would cover such an exercise of parental authority. It might be permissible for a few days but not for nearly two years. A court under our domestic law would be likely to intervene.”

32. The reasoning in this passage, and that of Judge LJ (as he then was) at [100] turned on the nature of secure accommodation being outside normal family life, and therefore outside what I would describe as the zone of parental responsibility. At [101] Judge LJ said:

“By definition, the making of the order means that if accommodation less than adequate for the purpose of restricting liberty is provided, the child is likely to suffer significant harm because there is a history and continuing risk of absconding with a likelihood of significant harm or injury to himself or others. This means that he requires far more supervision and attention than any normal parent could reasonably provide or be expected to provide, and in accommodation which none of them have, that is accommodation provided for the very purpose of restricting a child’s freedom. This is miles away from ‘grounding’ a teenager, or ensuring that a group of teenagers at a boarding school are all back within school bounds by a certain time each evening, or any other manifestation of normal parental control. If the restrictions necessarily imposed on K for his own safety and that of others were imposed on an ordinary boy of 15, who did not pose the problems requiring a secure accommodation order, in my view, there would be a strong case that his parents were ill-treating him.”

33. One way of analysing this passage, although certainly not the only way, is that Judge LJ was saying that there was a genuine issue as to whether the deprivation of liberty in question was in K’s best interests, and the matter appropriately needed to be before the court. Another, is that the very nature of secure accommodation is so outside the bounds of normal parenting that the decision to place a child there is not one that falls within the zone of parental responsibility. Certainly, Judge LJ was relying on the very particular nature of secure accommodation.

34. Thorpe LJ dissented and accepted the Secretary of State's submission that there was no deprivation of liberty because the decision fell within the zone of parental responsibility, relying upon *Nielsen*, see [53] to [54].
35. In *RK v Birmingham City Council* [2011] EWCA Civ 1305 the Court of Appeal was concerned with a mentally disabled 17 year old with the mental age of a young child. She was being accommodated under s.20 Children Act 1989, by the local authority, with her parents' agreement. The Court, reversing the decision of Mostyn J said:

“14. The consensus [which emerged at the Bar] is to this effect: The decisions of the European Court of Human Rights in Nielsen v Denmark (1988) 11 EHRR 175 and of this court in In re K (A Child) (Secure Accommodation Order: Right to Liberty) [2001] Fam 377 demonstrate that an adult in the exercise of parental responsibility may impose, or may authorise others to impose, restrictions on the liberty of the child. However, restrictions so imposed must not in their totality amount to deprivation of liberty. Deprivation of liberty engages the article 5 rights of the child and a parent may not lawfully detain or authorise the deprivation of liberty of a child.

15. This consensus was supported and accepted by the court.”

36. Like Munby LJ in *Re D* I find this passage very difficult to understand as being compatible with *Nielsen* or the later authority of *Cheshire West*. The conditions of the child in *Nielsen* were undoubtedly a physical restriction of his liberty within *Storck* component (a). Being placed in a locked ward of a psychiatric hospital is plainly not a normal course for a 12 year old. It may be that considering the analysis in *Cheshire West* and the subsequent Supreme Court decision in *Re D*, that *Re K* is best seen as a case only concerning over 16 year olds, which was the actual facts of the case.
37. In *Cheshire West v P* [2014] AC 896 (*Cheshire West*) the Supreme Court were considering whether the living arrangements made for a mentally incapacitated person amounted to a deprivation of liberty, see Lady Hale at [1]. The three Ps in that case were by the time of the hearing at first instance, 17, 18 and 37. The case did not address the issue of parental consent, the two young Ps (MIG and MEG) being subject to care orders.
38. Lord Kerr said:
- “79. Very young children, of course, because of their youth and dependence on others, have—an objectively ascertainable—curtailment of their liberty but this is a condition common to all children of tender age. There is no question, therefore, of suggesting that infant children are deprived of their liberty in the normal family setting. A comparator for a young child is not a fully matured adult, or even a partly mature adolescent. While they were very young, therefore, MIG and MEG's liberty was not restricted. It is because they can—and must—now be compared to children of their own age and relative maturity who are free from disability and who have access (whether they have recourse to that or not) to a range of freedoms which MIG and MEG cannot have resort to that MIG and MEG are deprived of liberty.”*

39. Lord Kerr's analysis therefore turns on comparing the child in question with a hypothetical child of the same age. It can immediately be seen that there is considerable tension between this approach and that of the majority in *Gillick*.

Submissions

40. Mr Davies, on behalf of the LA, made two alternative submissions, both of which led to the conclusion that the placement of K at the Wakefield Centre was lawful and there was no requirement for a Court authorisation of any deprivation of liberty. He said that the Court should not follow the judgment of Keehan J in *Trust A* because that had been overtaken by the judgments of Lady Hale and Lady Black in *Re D*.
41. His first submission was that there was no deprivation of liberty within the meaning of Article 5 because limb (a) of *Storck* was not met. Limb (a) is "the objective component of confinement in a particular restricted place for a not negligible length of time". He argued that K is only 13 years old, and the question of whether he is deprived of his liberty should be established by comparing him with another child of the same age and competence and by considering whether any restrictions are imposed by a lawful and appropriate exercise of parental responsibility. He relies on Lady Hale in *Cheshire West and Chester Council v P* [2014] AC 896 (Cheshire West) at [54].
42. He argues that parents, and by extension here the testamentary guardians, exercising parental responsibility can arrange for complete supervision and control in the exercise of their ordinary parental responsibilities. In these circumstances there is no deprivation of liberty because K's actual freedom is not restricted more than would be the case of another 13 year old who was of similar competence.
43. As I understand this submission, it is that the parents cannot consent to a deprivation of liberty, but that if the child is sufficiently young, and lacks *Gillick* competence, then there is a no deprivation of liberty within the meaning of *Storck* limb (a).
44. Mr Davies' alternative argument, set out in his Addendum Submissions, was that although a parent could not consent to a deprivation of liberty of their child because of *Re D*, they could "authorise" the deprivation of liberty. He based this argument on the analogy of the Court authorising the deprivation of liberty as explained by the President in *A Mother v Derby City Council* [2021] EWCA Civ 1867:
- "3. The context within which the question considered by MacDonald J arose was the, sadly, now familiar one of a young person whose behaviour or other circumstances are such that the welfare of the young person requires that their liberty is restricted to an extent that would otherwise infringe their ordinary right to freedom which is enshrined within European Convention on Human Rights, Art 5 ('ECHR'). In such cases the High Court has assumed jurisdiction to authorise the "deprivation of liberty" ("DOL") of the young person to the extent that to do so is necessary, proportionate and in their overall welfare interests."*
45. Mr Davies argues that the exercise of parental responsibility extends to authorising the deprivation of liberty. This power rests on the common law principle in *Hewer v Bryant*. He points out that both Lady Hale at [48] and Lady Black at [88] in *Re D* refer to the

possibility of the parents authorising the State to detain the child, although both reject that power in respect of a 16 year old child.

46. Ms Hunt, on behalf of the Guardian, takes what might be perceived to be a more straightforward approach. She submits that the Court should follow Keehan J in *Trust A* and the analysis of Sir James Munby in the court of Appeal and hold that a parent may exercise parental responsibility to consent on behalf of a child to care and support arrangements which amount to complete supervision and control until a child is 16. She points to the fact that there are strong similarities between the present case and that of Child D at the time of Keehan J's first decision.

Conclusions

47. The conclusion I have reached is 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. As I have explained above, none of the previous domestic cases are binding upon me in respect of the role of parental consent for under 16 year olds. On the other hand, *Nielsen* expressly dealt with the point and the ECtHR found the deprivation of liberty in that case did fall within the parental power to deprive a child of his/her liberty.
48. I agree with Munby P that, using the language of the subsequent case of *Storck*, the ECtHR in *Nielsen* at [73] was finding that the mother could consent to the child being deprived of his liberty in the hospital. It is possible to analyse the case as finding that the mother was able to "authorise" the State, through the hospital, to deprive the child of his liberty. However, in my view, that introduces an extra and unnecessary level of complication into the analysis. It is simpler, and more in keeping with the domestic caselaw, to see *Nielsen* as being about the child's deprivation of liberty falling within the scope of parental responsibility.
49. The power of parents to exercise custody over their children, or in modern parlance, to deprive children of their liberty, has long been accepted by the common law, see *Hewer v Bryant*. That power in respect of under 16 year olds has not been removed by statute. There can be no doubt that in respect of very young children, as Lord Kerr phrased it, they can be restrained to a point where *Storck* (a) is met, whether in the family setting or in school or any other setting.
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.

52. At the heart of the issue in this case is whether the Court should take the approach of Lord Scarman and Lord Fraser in *Gillick* and consider the scope of parental responsibility (and the powers inherent within it) as depending on the specific characteristics of the individual child. Alternatively, whether the Court should take the approach of Lord Kerr in *Cheshire West* and compare the child to a hypothetical child of the same age in deciding the extent of parental responsibility.
53. Lady Hale distinguished *Gillick* at [24] in *Re D* on the grounds that it concerned medical treatment and not deprivation of liberty, which as a matter of fact is undoubtedly correct. However, I am not convinced that for under 16 year olds that distinction is critical to the principles that should apply in this case. In terms of the importance of the decision in question, the decision on medical treatment can be fundamental to the child's life. In the most extreme cases it can determine whether the child lives or dies. If a parent consents to the treatment, then in the case of a non-*Gillick* competent child, that can lead directly to their death or to life changing medical treatment, simply on the basis of parental consent. The decision as to medical treatment can therefore be just as important, and just as much an intrusion into the child's human rights, as any decision relating to Article 5.
54. Lady Hale said at [48] that the parent could not licence the State to intervene in the child's fundamental human rights. However, the parent can consent in medical cases to such an intervention, so long as the clinical view is the intervention is in the child's best interests. However, it is noteworthy that there is no requirement in every case, even the most serious medical treatment cases, for that decision to be approved by the Court. It is one for the parents falling within the zone of their parental responsibility, so long as the clinicians involved are satisfied it is in the child's best interests.
55. In determining whether the decision is one for the parent or the child, in medical treatment cases it is established that the Court or clinicians must consider the maturity and intelligence of the particular child. It is irrelevant whether an equivalent hypothetical child of the same age would or would not be competent to make the decision.
56. It is not clear to me why a different approach should be taken to parental decisions about deprivation of liberty. Both Lady Hale and Lady Black relied on the fact that *Gillick* involved contracting the boundaries of parental responsibility, whereas *Re D* might have been said to be extending them. However, as explained above, *Hewer v Bryant* establishes the extent of such powers for parents, therefore this is not a case of expanding parental rights. In any event, it is clear, as I have set out above, that any exercise of such responsibility can only be undertaken in the child's best interests.
57. More fundamentally, when dealing with children, whose ability to understand the issues will vary greatly depending not simply on their age, but on their psychological and emotional maturity, their family support and their life experiences, in my view it is more appropriate to consider the characteristics of the individual child than try to compare them with a hypothetical child of the same age. Whereas it is appropriate to assume that someone over the age of 16 will have capacity, and therefore there is a benchmark to compare the non-capacitous adult with, that is a much more difficult and arguably less possible exercise for children under 16. For that reason, I prefer the approach of *Gillick* to consider the characteristics of the particular child.

58. For these reasons, if a child under 16, such as K, plainly does not have Gillick competence to make the decision as to his liberty, and his parents (or in this case his testamentary guardians) decide to deprive him of his liberty, and no third party (such as the local authority or an NHS body) consider such deprivation to be contrary to his best interest, then the parents can lawfully deprive him of his liberty.