Neutral Citation Number: [2022] EWHC 2650 (Fam)

Case No: FD20P00366 & FD21P00757

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2022

Before :

MR R TODD KC
(Sitting as a Deputy High Court Judge)

- -

Re E (A Child)

Between :

Royal Borough of Greenwich	**Applicant**
- and –	
AMU (The Mother)	**First Respondent**
-and-	
AFU (The Father)	**Second Respondent**
-and-	
E (A Child, by his Guardian)	**Third Respondent**

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Ann Courtney (instructed by **the Royal Borough of Greenwich**) for the **Royal Borough of Greenwich**
AMU (The Mother) (acted in person).
AFU (The Father) (acted in person)
Jonathan Knowles instructed by Shannon Smart, the Guardian) for **E (A child**)

Hearing dates: 10th, 11th, 12th, and 13th October 2022

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Approved Judgment

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This judgment was handed down in private on 19 October 2022. The judge gives leave for it to be reported in this anonymised form as Re E (DOLs)**.**

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by his or her true name or actual location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Deputy High Court Judge Richard Todd KC:

1. These proceedings concern E who is 17 years of age. There are two applications before the Court:

   (i) The Local Authority's application to extend DOLs provisions.
   (ii) The parents' application to discharge the Care Order.

   (The parents' have also applied to discharge the DOLs provisions but if I do not extend the current order, it will end naturally. Thus, they did not need to make that application).

2. The Local authority has been represented by senior counsel, Ann Courtney, whose assistance has been invaluable. Similarly, the Guardian has been expertly represented by Jonathan Knowles. Unfortunately, the legal aid funding for the parents was withdrawn last week because, I am told, they exceeded the already very low threshold for legal aid, by £36.

3. I heard oral evidence from the Father, the Mother, the Guardian ((Shannon Smart), the Social Worker employed by the London Borough of Greenwich (Kakha Bashelei) and read the written evidence of the Independent Social Worker (Andrea Goddard). It was agreed between the parties that instead of Ms Goddard attending she would be sent some questions by the parents which she has then answered in writing. I have also read the statement of the witness on behalf of the parents, EB. I also read the bundle consisting of 738 pages plus the supplemental report (final analysis) of the Guardian. I have taken all these matters into account even if some of them are not expressly referred to in the Judgment. I have kept in mind, especially when considering the continuation of the care order, that the child's welfare is my paramount consideration and all those factors in the welfare checklist found in section 1 (3) of the Children Act 1989.

E (a person under 18)

4. E is a young person with complex health needs. E has multiple diagnoses including Autism Spectrum Disorder (ASD), Attention Deficit Hyperactivity Disorder (ADHD) and associated difficulties with speech, sleep, increased motor activity, impulsivity and difficulties with concentration and learning. E also has Vitamin D Deficiency, a history of Nocturnal Enuresis (bed wetting), recurrent stomach pains and poor sleeping and eating patterns. He has associated learning difficulties and is supported by an Education, Health, and Care Plan (EHCP). E can communicate his wishes and feelings verbally, although he requires time (sometimes up to 10 seconds) to process the information being asked.

5. E was first accommodated on 3 December 2019 by way of a section 20 arrangement. The local authority subsequently issued proceedings, and these concluded on 30 September 2020 with a final care order made in favour of the local authority. In support of that final care order, there was a document marked "Final Agreed Threshold". This was a consensual document and appears to have been appended to the care order of Her Honour Judge Hughes QC of the 30th September 2020. It found, amongst other things:

"6. There is a history of incidents of challenging behaviour by E at home, school and in the community. E's behaviour is beyond his parents' control and is at high risk of causing himself or others significant harm." Many examples were then given of the history which had led to the need for a care order. There was a reference to differences of opinion between the Local Authority and the parents as to medication and to care generally.

6. In the 27th January 2022 application by the parents to discharge the care order, the parents have said the following (this is only the briefest summary, but I have taken the totality of their views into account):

   (the original is summarised in italics and my comments follow in non-italicised font):

   1. "*Our son E has made remarkable progress in his challenged behaviours that warranted his being taken away from home and placed in a residential care home. He has grown up. He listens and takes instructions. When he does something wrong, he apologises when corrected.*"

      I have simply seen no evidence of this alleged progress. E seems to have very little insight into the seriousness of the situations which he often finds himself in. In turn, I am troubled by the parents' lack of insight into the seriousness of the incidents which E has created.

   2. "*The few times he exhibited behaviours that challenge was when the local authority did not play their own role in supporting him.*"

      This is not the case. There are many and not few examples of his challenging behaviour. This Court is not a Council of Perfection; the Local Authority have done – overall – all that is reasonable (and at considerable public expense) to support this troubled young man.

   3. "*My son is being treated like an orphan; his parents are not allowed to visit him in the Placement neither are we allowed to be involved in decisions affecting his life.*"

      Again, this is not true. The parents have been involved in many decisions but the friction which has resulted has not usually been in the best interests of E

   4. "*E has suffered severe harm during the Care Order*".
      This is said to have been due to specified examples of alleged mismanagement. I reject this. The Local Authority have been alive and responsive to all of E's needs.

   5. The parents have committed to training. This has included (per the Mother's position statement:

      (a) Training in understanding ASD
      (b) Challenged behaviour Management
      (c) NVR - redirection through Love etc.

(d) Training on sleep and Anxiety Management

(e) Skills for De-escalation

(f) Studies in Health and Social Care.

The above was mostly delivered through webinars organised by Harvard University's "Medicals". Despite this training I am firmly of the view that the parents do not see the need to engage with professionals (by (i) adopting their recommendations, (ii) not seeking out – as I find they do – potential bases for friction and (iii) by raising concerns early). They also have poor strategies in place for dealing with potential incidents which E is likely to cause.

6. *They were tricked into the care order by it being suggested that it was just for some temporary respite care.*

I have seen no evidence of this. I note that at that time the parents were represented, and no corroborative evidence has been led from the representatives as to how the parents are supposed to have been "tricked". On the evidence I have seen I can see no basis for setting aside the original consent order on the basis that it was procured by trickery. Moreover, I note that whilst the complaint is as to the effect of the order, there does not appear to be much of a complaint as to the factual matrix which was the subject of a consensual Threshold document appended to the order of Her Honour Judge Hughes QC. On the basis of the facts found in the Threshold document (those facts having not been contested), the Court would have made a care order irrespective of the parents' consent.

7. E now resides in a residential unit having moved into his current placement on 29th December 2021. E has exhibited aggressive behaviour towards staff including kicking, hitting, head-butting, and spitting. Individual incidents include E aggressively approaching other children, physical altercations, him writing on other people's walls and so on. I have had regard to all the very many incidents referred to in the various reports included in the bundle of papers. Of those many incidents, which I have been referred to, one serves to illustrate the problems which E can create. Alas, it is not untypical. This incident occurred on the 10th July 2022. The incident report states:

"E was supported to the park where E saw other children and started saying "*all my friends are dead*" the children became very upset about this and did not give E the response he was looking for. As the children moved away from him E began swearing at them he took his bottle of water and attempted to throw it over 2 boys [and] proceeded to swear obscenities at them. E was also trying to go towards the boys to physically hit them. [A female Local Authority worker, LX] stepped in front E ask him to turn around and go the other way whilst still talking to him and E then headbutted LX in the face and tried to continue to attack the young boy.

Staff then became firmer with E and another boy from the basketball cage came over to see what was going on. Staff member UX explained about E's [*incomplete*]. This young person then stated to talk to E also. This calmed E down as the boy was around his age. When E arrived back with staff he continued to display physical aggression towards staff by punch staff in the belly and on the arms."

8. I am told that E is approximately 6 feet tall. I understand he is as physically strong as one would expect a 17-year-old to be. His father is 58 and in a physical challenge is likely – from appearances only – to be bested. The same is true of the mother who is diminutive (she told me she is a Size 6). She is 51.

9. E is also known to have caused damage to property by breaking things including things that belong to other residents when he becomes distressed. E is prescribed PRN medication which can be provided when he is agitated. He has 1:1 staffing in the unit and 2:1 in the community. E has a DOL's order which has been deemed necessary to manage his behaviour and for when he has become aggressive. It protects both E and those around him.

10. The Local Authority issued a DOL's application to extend the previous provisions on 14th October 2021. The first hearing was on 3rd November 2021 where it became apparent the parents were not happy with E's previous placement. They made allegations against the unit which they had not previously shared with the Local Authority. The parents were given time to complete a statement and outline their concerns and also share the allegations with the Local Authority so proper enquiries could be made.

11. It would be right to say that the parents communication with the Local Authority has not been good. This appears to be born of a belief by the parents that their concerns are not taken seriously and that they are being shut out of E's life. One vignette which occurred during the trial illustrates this. I was told of an incident which appears to have taken place on or about the same 10th July as the incident referred to above. The father told me that E had sustained bite marks on his left chest. He demonstrated where the bite marks were by pointing to his left upper chest. He said there was a photograph, and I was shown a photograph which is taken of E's right upper chest (not left) which could be bite marks. Unfortunately, this was the first time that the Local Authority had heard of this complaint. When I asked the Father why he had not told them before the start of the proceedings he said it was because he felt that he could trust this court. The necessary implication of trusting the Court but not others, was that he felt that he could not trust the Local Authority.

12. After the 3 November 2021 hearing, a further hearing took place on 11th November 2021 where the parents agreed the placement should continue and they also agreed for a DOL's order to be granted. The order was made.

13. On 2nd December 2021 the Local Authority issued a Recovery Order as the parents had refused to return E to the unit after a weekend contact. The Recovery Order was granted on the basis the Local Authority would not involve the police. E was returned to the unit.

14. A further hearing took place on 7th December 2021. The parents at the hearing confirmed they wanted the care order to be discharged and for E to return to their care. Although the parents had not made a formal application to the Court for the care order to be discharged the Judge deemed such an application to have been made.

15. It was also confirmed by the Local Authority that a new placement for E had been identified and he would be moving imminently. E has now moved to his new placement. The Guardian saw E most recently on the 12th October (during the hearing) and reported that E was keen to leave the placement and return to his parents.

16. At the hearing on 28th January 2022, it was agreed for the parents (at the Guardian's urging) to engage with a parenting assessment which they did. The Guardian emphasises that this is a strong indicator that she was keen to facilitate the parents' involvement with E and ideally have E return to them if possible. I agree that the Guardian was supportive of this parenting assessment.

17. The parenting assessment was completed by Ms Andrea Goddard, Independent Social Worker ("ISW"). It is dated 13th May 2022. The assessment is comprehensive. The ISW was of the view that she could not make a final recommendation at the time of writing and suggests it is premature to rule the parents out at this time however it is also premature to send E back to his parents. It is noted that the parents engaged very well with the ISW.

18. The main reasons why the ISW did not feel able to make a final recommendation at the time of reporting are as follows:
    (a) The mental health re-assessment and medication review by SLAM remained outstanding. (It remains outstanding)
    (b) The transition to an education provider is at an early stage – and has the potential to form part of the care and support package.
    (c) Further information is required as to the likely care plan when E turns 18 and any support that may be available in the future from adult services.
    (d) The parents may need assistance with re-housing
    (e) There continues to be a very difficult working relationship between the parents and the Local Authority.

19. Ms Goddard goes on to express some other concerns which have troubled me (continuing the lettering referencing from above):

    (f) Neither parent believes that E requires 2:1 supervision. The various incidents involving a degree of physical restraint required suggest that this is unrealistic. During the assessment, the father indicated that he would cease working in order to help care for E, but Ms Goddard thought that there was the probability that he would in fact return to work once the spotlight of the court was not upon him. I believe that she is right; for the simple reason that the father does not believe that E requires ongoing 2:1 support.
    (g) The parents' current accommodation is not appropriate for E. It is too small, lacks space for him to move around, and lacks storage. There was some concern that it might only be relatively temporary. Additionally, the parents have expressed concern regarding their upstairs neighbours due to the noise that they create. The parents state that they would like to move, but they have not taken any steps towards making a change. If a move cannot be achieved within E's timescales, any rehabilitation home may be untenable [See para.6.13 of the ISW report];
    (h) Ms Goddard shares the Guardian's concerns that the parents have not been able to work in partnership with the local authority and be fully supportive of any

recommendations. Ms Goddard also shares the pessimism that this may not improve [at para.6.9];

(i) The parents minimised the concerns in relation to events that occurred when E was in their care [para.7.3];
(j) The parents do not agree and believe it is unethical to increase E's medication as a means to control and restrain E [para.7.21];
(k) The parents do not believe that a mobile phone should be withheld from E. [E45, para.7.22];
(l) The parents need to re-adjust their thinking and develop their insight into the realism of their families' situation. The parents will need to evidence that they can accept any practitioner's concerns and support care plans moving forward, rather than undermining them [para.8.3];
(m) In the event that there are no changes to the current care plan, and E continues to struggle to regulate his behaviours and emotions, then it is unlikely that the parents would be able to meet E's needs [para.9.1.3]

20. The assessment also highlights the Local Authority's failure to share information with the parents, such as a recent CAMHS meeting when it was left to the ISW to provide this information back to the parents. Whilst regrettable, I do not take this as a systemic failing which has undermined the placement. The ISW also identified that the parents would struggle to manage E without a change to the support plan if he was to return home.

21. The social worker tells me that the Maudsley Hospital *'has allocated care coordinators who are working on E's functional analysis and positive behavioural support. They will also complete a cognitive assessment of E to better understand his level of functioning. E's medication will be also reviewed as per parent's request. They visited E at Zone central on 24/06/2022 and started their assessment. They also met with staff members on 07/07/2022 and parents on 13/07/2022.'*

22. In respect of the transition plan for E, the following is reported in the Social Worker's statement,

> "*The Local Authority is in the process of restructuring its provision of support for children with additional needs moving into adulthood. The Moving to Adulthood team will now be within Children's Services working with young people with SEND with an EHCP who are likely to require support from adult social care. The focus is very much on ensuring timely consideration of transition needs and a streamlined processes to ensure the right plan is in place at the right time for the young person and their family. This is a multi-agency approach which includes education and social care, as well as health when needed. I will therefore continue to support E post his 18th birthday. I am currently completing his pathway plan. I will complete an assessment of needs in the coming months to determine whether he requires provision under the Care Act and what his wishes and feelings are around his adult life. E's parents will be included in this process as well. This will consider E's mental capacity to make decisions around his care, treatment, and residences. These assessments will inform where E should live post 18 and how best he can be supported to achieve maximum independence. It is premature to say whether this will include more time in his family home however, it is most likely*

that E will need an adult residential placement when he is 18. However, his needs might change by then and be able to live with less support."

23. Regarding E's education, he is now attending a specialist school and he is attending full time. The parents would prefer for E to be placed in a mainstream school however accepted this placement as it was the only one available. I am of the view a mainstream school would not be an appropriate educational facility for E due to his difficulties and staff would not have the necessary resources to meet his needs.

The "pray it out" incident.

24. The "pray it out" incident. The Local Authority assert that one of their workers (who was not called to give evidence) overheard a friend of the parents, EB, say to E, "we will be praying this out of you". EB denies that and has made a statement to that effect. I accept EB's statement and believe that the Local Authority worker was mistaken as to what was overheard. This is a relatively minor matter and does not alter my view that the care and DOLs orders should continue.

The Law

A. Deprivation of Liberty Orders.

25. Art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention) is designed to prevent arbitrary or unjustified deprivations of liberty. The relevant parts provide:

> 1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *…….*
>
> *(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;*
>
> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
>
> *…….*
>
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

26. In *Storck v Germany* (Application No 61603/00) (2005) 43 EHRR 6, at paras 74 and 89 (confirmed by the Grand Chamber in *Stanev v Bulgaria* (Application No 36760/06) (2012) 55 EHRR 22, at paras 117 and 120) and adopted by the Supreme Court in *Surrey County Council v P and Others (Equality and Human Rights Commission and Others Intervening); Cheshire West and Chester Council v P and Another (Same Intervening)* [2014] UKSC 19; [2014] AC 896 (commonly known as *Cheshire West*), at para 37, the European Court of Human Rights (the ECHR) held that there were three components in a deprivation of liberty for the purpose of Art 5 of the European Convention:

    (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.

27. (I would add parenthetically that Section 25 of the Children Act 1989 was not intended to be widely interpreted so as to catch all children whose care needs were being met in accommodation and where there was a degree of restriction of their liberty, even amounting to a deprivation of liberty. That would not therefore give me a basis for depriving E of his liberty.)

28. It is not within the scope of parental responsibility for the parents of E (who is aged 17) to consent (which they do not do) to a placement which deprived him of his liberty. It would follow that a Local Authority which has parental responsibility due to the care order, would similarly not have the power to consent on a 17 (or 16) year old's behalf. Deprivation of liberty may only be ordered by a Court. (See *Re D* [2019] UKSC 42). In *Re D,* Lady Black was plainly right in holding that as a matter of common law, parental responsibility for a child of 16 or 17 years of age did not extend to authorising the confinement of a child in circumstances which would otherwise amount to a deprivation of liberty.

29. But what of the situation where the child's immediate needs require a deprivation of liberty? An example is given by Lady Arden in *Re* D:

> "[120] It follows that there will be cases where a person loses their liberty but the acid test in *Cheshire West*, as Lady Hale describes it, does not apply.

> That conclusion is shown by observing that D's case is about living arrangements. It is not about a child, or anyone else, needing life-saving emergency medical treatment. For the reasons which the Court of Appeal (McFarlane LJ, Sir Ross Cranston and myself) gave in *R (Ferreira) v Inner South London Senior Coroner (Intensive Care Society and Others Intervening)* [2017] EWCA Civ 31, [2018] QB 487, the situation where a person is taken into (in that case) an intensive care unit for the purpose of life-saving treatment and is unable to give their consent to their consequent loss of liberty, does not result in a deprivation of liberty for Art 5 purposes so long as the loss of liberty is due to the need to provide care for them on an urgent basis because of their serious medical condition, is necessary and unavoidable, and results from circumstances beyond the State's control (para [89])."

30. It might be said that E's predicament is akin to that of a person needing urgent medical care and his lack of *Gillick* competence renders him unable to consent. But this is not urgent like a life-saving operation. Similarly, this case is as much about living arrangements as it is about urgent care. Third, I agree with Lady Black's concern (see paragraph [89] of *Re D*) that if a lack of *Gillick* competence for a 17-year-old thereby gifted those with the "child's" parental responsibility with an unfettered right to deprive the child of their liberty then this would be potentially never ending.

31. I think the answer is found in Lady Hale's speech at paragraph [40] of *Re D* where she adopts the "illuminating discussion" by Lord Kerr in *Surrey County Council v P and Others (Equality and Human Rights Commission and Others Intervening); Cheshire West and Chester Council v P and Another (Same Intervening)* [2014] UKSC 19, [2014] AC 896:

> "[40] [*Quotes from 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.**' [*my emphasis*]

> [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 Art 5 of the European Convention, 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 Art 5 of the European Convention. Limb (a) of the three *Storck* criteria for a deprivation of liberty (see para [1] above) has been met".

32. Here the three *Storck* criteria are met. The confinement is primarily about living arrangements, there is no valid consent, and the engine of the confinement is the State. The extension of the current orders would amount to a deprivation of liberty. As such, following the speech of Lady Hale in *Re D* (at paragraph [49]) I have regard to the safeguards which would apply in respect of such a person facing deprivation of their liberty under the Mental Capacity Act 2005 (as amended by the Mental Capacity (Amendment) Act 2019). I adopt the same reasoning as the principal safeguards (the Liberty Protection Safeguards) and my commentary on them, are:

    (a) Whether the child has capacity. I am satisfied by all the foregoing and the papers which I have read (which I do not repeat here but are within the bundle of papers) that E lacks the necessary capacity.

    (b) Are the measures proposed, "necessary and proportionate"? For the reasons I shall return to, the measures are necessary and proportionate for securing the best interests of E with his welfare being the first and paramount consideration[1].

    (c) Has E's family through the parents been consulted and been able to raise concerns? Yes.

    (d) Do I believe that it is reasonable to suppose that E would not wish to reside or receive care in his current placement? He has certainly said this is the case, but he is not *Gillick* competent. The Local Authority who have care of E have advanced a compelling case that *objectively* E is best placed in his current placement; it would be reasonable to assume that if E was of full capacity he would see the manifest advantages of this and agree to the same.

B Burden and standard of proof

[1] A principle which traces back to before the Children Act 1989 and is first articulated in the Guardianship of Infants Act 1925.

33. **Burden of proof.** Upon whom does the burden of proof lie? "*He who asserts, proves*" is a useful legal shorthand. It applies here. The parents wish to discharge an existing care order – the burden is on them. But the DOLs is naturally coming to an end, and the Local Authority as applicant must establish that it should be extended; the burden is on the Local Authority.

34. **Standard of Proof**. There is no dispute before me that the standard of proof in respect of care proceedings (which are not, without more, tantamount to an Article 5 deprivation of liberty) is the usual civil standard of a balance of probabilities.

35. Much more difficult is the issue of the standard to be applied where there is to be deprivation of liberty. The usual principle is that where something as important as the deprivation of liberty is concerned then the case must be proved beyond a reasonable doubt. I have not been taken to any authority which resolves this difficult question in respect of a DOLs order. I have therefore had to go back to very basic principles.

36. It is a defining feature of a free society that the rights of the individual are protected by the law of the country. In England and Wales, there have been numerous examples of attempts to protect the rights of individuals. These attempts include the *Magna Carta* (1215), the Statute of Government of 1653, the Bill of Rights 1688, the Acts of Union 1706/7, the various Reform and Parliament Acts of the Nineteenth and Twentieth centuries and most recently the Human Rights Act 1998. That historical progression also reveals something else – an evolution towards an ever-greater constituency whose rights are protected. It begins with the rights of the Barons in 1215, through those of Protestant white men in the Bill of Rights to the modern universal human rights.

37. When there is conflict between the individual and the state (or two individuals) there must be an arbiter. In England & Wales the ultimate arbiter is an independent and impartial judiciary. The standard of proof is commensurate with the seriousness of the allegation not the outcome. Thus, there is no fundamental reason as to why the standard of proof would be different if an individual is to be deprived of, say property or wealth rather than of their liberty. It is the process which is important – criminal or civil; not the outcome (loss of liberty, property, or wealth).

38. The common law protected the liberty of individual through the machinery of *habeas corpus*. The statutory form comes with Article 5 of the ECHR incorporated into English law under the Human Rights Act 1998. It is a trite proposition of law that criminal culpability which could result in incarceration must be proved beyond reasonable doubt[2]. Similarly, a civil committal must be shown to have been proved to the criminal standard of beyond a reasonable doubt[3]. In both cases there must be both an *actus reus* (criminal act) and a *mens rea* (guilty mind); not so in civil cases. In both cases the justification is that the wrong complained of is criminal or quasi-criminal in nature. That is not the case with E; he is not accused of a crime in these proceedings.

39. Moreover, I am fortified in the view that the civil standard of proof applies by the decision of the House of Lords in *Re H (Minors)* [1996] AC 563 which held that in civil proceedings an event had to be proved on the balance of probabilities not that an event

[2] See Archbold Criminal Pleading and Evidence Practice (2023); for example, at **17-77**
[3] See *Dean v Dean* [1987] 1 FLR 517.

should certainly have occurred. Second. In both *Re B (Children)* [2008] UKHL 35 and *Re Doherty* [2008] UKHL 33 it was held that there is only one civil standard of proof and that is the civil standard of proof. In *Re B, "*neither the seriousness of the offence nor the seriousness of the consequences should make any difference to the standard of proof to be applied." (per Lady Hale at paragraph [71]). It is the process not the consequences which are important.

40. Thus, it is the nature of the action which determines the standard of proof. If a woman stands to lose a sum of money because she might be fined in criminal proceedings, the standard is the criminal one; if she might lose the same sum of money in civil proceedings, the standard of proof is the civil one. There are no principled reasons for a difference in approach to deprivation of liberty; if someone is to be confined as a term of imprisonment then the standard is the criminal one but if someone is to be confined, say because their own welfare requires this then it is a civil matter to be satisfied on a civil standard of proof.

41. I am therefore satisfied that the burden is on the Local Authority to prove this case, They must prove it to the civil standard of a balance of probabilities. If I am wrong about this, then I am satisfied that they have proved the need for a Deprivation of Liberty order beyond a reasonable doubt so that I am sure the order should be made.

C Discharge of the Care Order

42. The legal considerations on an application for discharge of a care order were recently considered by Lord Justice Peter Jackson in *TT (Children: Discharge of Care Order)* [2021] EWCA Civ 742. I have been guided by paragraph 31:

"In summary, when a court is considering an application to discharge a care order the legal principles are clear:

(1) The decision must be made in accordance with s. 1 of the Act, by which the child's welfare is the court's paramount consideration. The welfare evaluation is at large and the relevant factors in the welfare checklist must be considered and given appropriate weight.

(2) Once the welfare evaluation has been carried out, the court will cross-check the outcome to ensure that it will be exercising its powers in such a way that any interference with Convention rights is necessary and proportionate.

(3) The applicant must make out a case for the discharge of the care order by bringing forward evidence to show that this would be in the interests of the child. The findings of fact that underpinned the making of the care order will be relevant to the court's assessment but the weight to be given to them will vary from case to case.

(4) The welfare evaluation is made at the time of the decision. The s. 31(2) threshold, applicable to the making of a care order, is of no relevance to an application for its discharge. The local authority does not have to re-prove the threshold and the

applicant does not have to prove that it no longer applies. Any questions of harm and risk of harm form part of the overall welfare evaluation."

43. In respect of each of these:
    a. I have considered the welfare checklist and this decision is made on the basis that the order will be in E's best interests; throughout his welfare has been my paramount consideration.
    b. Interference with Convention rights is necessary and proportionate.
    c. The parents have failed to bring forward a case for the discharge of the care order which demonstrates that the discharge is in the best interests of E. I have found as a fact that E's behaviour continues to be challenging and that E's parents are unlikely to be able to meet those challenges.
    d. As is well-known to any practitioner in this field, the local authority does not have to re-establish the threshold on an application to discharge. But I do note that there has been no real improvement in E's situation since when the threshold criteria were met. Plainly E (and those about him) are at risk of harm from his ongoing difficulties.

D Right to choose the religion.

44. The common law and equity have long recognised the authority of parents over their minor children. It is now encapsulated in the concept of 'parental responsibility' in the Children Act 1989 (the 1989 Act). Likewise, Art 8 of the European Convention begins '*Everyone has the right to respect for his private and family life, his home and his correspondence*'; and, as the Supreme Court recognised in *The Christian Institute v The Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29, [2016] ELR 474, at paras [71]–[74], the responsibility of parents to bring up their children as they see fit, within limits, is an essential part of respect for family life in a western democracy.

45. Article 9 of the European Convention goes on to provide:

"*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance*".

46. The parents and E are practising Christians in the Pentecostal faith. They are entitled to have their faith respected as a basic human right. Happily, the Local Authority are of the same view and are seeking to ensure that E is able to engage with his Church. The sacerdotal ordinances of the Pentecostal faith require attendance in person and the Local Authority is attempting to facilitate this in so far as possible. (Unfortunately, some of the incidents have taken place in Church and E needs to be monitored closely). Whilst far less satisfactory, the Local Authority is also looking to see whether engagement with E's religion may be made online; the provision of such spiritual guidance may be made available as it was during Covid and, presumably, is made to those unable to attend the Ordinances (services) of the Pentecostal faith.

47. The provision in the attached order meets E's spiritual welfare needs and his, and his parents' Human Rights in respect of religious observance.

E Legal Aid

48. Ordinarily children are best brought up by their parents (as the parents here, rightly say). If the children are to be deprived of the primary care of their parents then it must only be after a carefully conducted judicial process. In a complex case such as this, legal representation is more than just desirable, it can represent the difference between a fair hearing and an unfair one. Here, the parents are sufficiently intelligent and articulate that with some support from the Court they have been able to put their cases fully and addressed me in a way which was both respectful and very helpful.

49. I have not investigated the position with the Legal Aid Agency fully and am simply making this observation on the basis of what I have been told. The factual position appears to be this – the Local Authority (rightly) retained very senior counsel. The cost of that was a proper burden on the State's finances. I have been immensely assisted by Ms Courtney's input. The guardian, on behalf of E, had to apply for legal aid. E's finances had to be considered. The guardian has been very ably represented by Mr Knowles. Again, the cost comes from the public purse. The Local Authority and the guardian both support the continuation of the care order and the making of the DOLs order.

50. By contrast, the parents had their legal aid removed last week for being £36 over one of the limits. I understand that the Legal Aid Agency sets the limits so that (a) the gross monthly income should be less than £2,657. Then, (b) if the gross income is less than the *disposable income limit* is calculated. Fixed allowances are made for partners (£191.41 per month), dependants and employment expenses. Other deductions can be made for: tax; national insurance; maintenance paid; housing costs; childcare costs incurred because of remunerative work or a course of study outside of the home (where the individual receives study-related income). If the resulting disposable income is above £733 per month then legal aid is refused. Also, applicants must not have more than £8,000 of capital. Certain groups – such as those with only income support - are "passported" through to legal aid.

51. Even though DOLs proceedings often involve almost the same subject matter as care proceedings (and often, more severe consequences) the Legal Aid regime is different. Once care proceedings are issued, a respondent with parental responsibility (which would include these parents) are automatically entitled to non-means assessed legal aid. They receive this regardless of their income. In such a serious matter as the taking of someone's children and the child's corresponding loss of a parent, this is plainly right. It is wholly inexplicable why this is not applied to DOLs proceedings.

52. Moreover, the denial of legal aid is a false economy. The evidence in this case proceeded over 4 days. This was primarily due to the parents' labouring over difficult legal constructs and asking very wordy questions. Had they been represented, then I have no doubt this case would have concluded within 2 days. That would have been a huge saving to the public purse; 2 days' paid time saved of the High Court, senior

counsel, solicitor, all the officials from the Local Authority and the Guardian – every single one of whom was paid from the public purse.

53. There is a widely held suspicion that legal aid has been so cut back over the past few decades because it is "low hanging fruit". The beneficiaries of legal aid tended to be the "voiceless" ones; people, like these parents, who are conscientious, hard-working and in employment, but not that well paid. They have become the dispossessed. Dispossessed of legal representation, by virtue of being neither poor nor rich enough. Legal aid was originally one of the pillars of the welfare state. But for these people that prop is removed. The net result is that in DOLs proceedings they are at a real disadvantage against an organ of the State (the Local Authority) who are publicly funded. There is no logical reason for them (and the Guardian) to be treated differently from respondents in care proceedings. Instead, there is a compelling case for them to be treated the same – on grounds of fairness, equality of arms and the simple economic consideration that overall, it should prove cheaper for them to be represented than not.

Risk of Significant Harm

54. E's parents are very involved in his life and wish for him to be home in their care. It is not condescension to say that they are decent hard-working people who are utterly devoted to the welfare of their only son. They are regular church-goers attending their local Pentecostal Church. Religion is immensely important to them. Religion also appears to play a significant part in E's life. The father has a full-time job in a lower-managerial role. He has undertaken training in restraint techniques which might be helpful in restraining E should that be necessary. They recognise that he is challenging and have been asked to be supported for 8 hours per day when he is with them.

55. The parents currently have video calls during the week and supervised contact on the weekends. E can become agitated if there is a disruption in the contact routine. (This contact represents a diminution from the original provision due to the need for E to settle down in his placement).

56. E loves his parents and enjoys the time he spends with them. He has consistently asked to return to the care of his parents. The parents wish for this, too.

57. The parents have sought for his return for a long time. The Guardian's view is that it is unlikely a placement for E will ever meet their standards. I agree with the Guardian's view. It seems to me that because the parents downplay the risks which E presents to himself and others, they also wrongly judge the measures which need to be in place. I return to this in the context of their strategies for dealing with any future incidents.

58. The parents say they do not intend to undermine E's placements. However, placements have been terminated due to their behaviour. The parents do not seem to understand that by encouraging E to return home and assure him there is place for him there that they are weakening E's own commitment to his placement.

59. The parents have said they would agree for there to be a 12-month Supervision Order in place. The Local Authority and the Guardian have indicated that they do not believe such an arrangement would be successful; indeed, it would expose E to an unacceptable risk of significant harm.

60. M is of the view that E is being emotionally, psychologically, and physically abused within his placement. She referred to incident reports that the parties have received. I have carefully read all those reports which were included in the bundle. Although I have not set out all the incidents in this judgment, I have taken all of them into account. Overall, they do not show the evidence of the abuse alleged. I am compelled to reject the parents' case in respect of this.

61. The Mother has also said that the current school is inadequate. She wishes for E to be in a mainstream school where he can make friends. She says that at his current school there are issues such as nonverbal and verbal conflict with the other children. She went on to say that he used to be in mainstream school and does not understand why with support services in place this could not still be the case. She said she was upset that it has been said E has a severe learning disability. In view of the fact that some of the incidents take place with people of his own age (and usually end in a violent exchange only resolved by the input of Local Authority workers) I found the Mother's position to be unrealistic. If E went to a mainstream school and exhibited the behaviours already evidenced, the schooling would quickly break down. I agree with the Guardian that any such arrangement would be very short lived.

62. The Mother has stated that E cries and says to her "*to get me out I don't want to die*". She said E does not want to leave them when they have contact and he is constantly saying he wants to live with them. E's attitude is corroborated by the Guardian who has reported that on her recent meeting with E he said that whilst the teachers at his school were "nice" and that his placement was "good" he added, "I don't really like it here", "I want to live with mum and dad again", his parents had said, "you will come home".

63. The Mother has said she would work with the Local Authority if E was placed with the parents. She said she does cooperate and does not struggle to work with professionals. This is not supported by the chronology of this matter which has included several occasions of friction with the local authority including complaints which were not subsequently made out. She presented a picture of being placed in the impossible position of whereby if she disagrees with something the Local Authority says then she is said to be not cooperating with professionals when that is not the case.

64. The Mother is of the view the Local Authority are the reason why E lashes out and that she is easily able to calm him when he becomes upset. She says one of E's old units used to call her to calm him and it worked every time. There are significant issues with the parents and professionals being able to work together and focus on E's needs. This has led to some relatively small issues becoming significant areas of disagreement which in my view has taken the focus from the needs of E.

65. The parents have been proactive in attending courses in respect of children with autism and ADHD and are consistent in seeing their son.

66. There are significant disputes between the Local Authority and the parents in respect of each other's treatment towards the other. It is unlikely that this will improve despite the parents indicating they will work better together in future. The upper chest bite mark is a good example of the parents failure to engage with the local authority. Having reviewed the papers I have formed the firm conclusion that the Local Authority are

doing their very best for E, but the parents are resentful of having "lost" their child to the Local Authority. They naturally but unhelpfully see the Local Authority as the enemy; blocking E's desire to be with them rather than as they should see them – as an organisation prioritising his welfare.

67. Following the hearing on 11 November 2021 the Guardian attended a meeting with the parents, the Local Authority, and the previous placement with a view to improving working relationships. But that seems to have come to nothing.

68. The parents have expressed their frustration that they are not always informed of what is happening for E including meets or appointments. The Local Authority dispute this and are of the view the parents are involved with all decision making. I have seen no good examples of the parents' complaints. The parents complain of such matters as E trying to escape and this not being recorded; yet I have seen those records – they are at, for example, pages F279 and F291 of the bundle. Another such area of dispute is in respect of E's medication. This is regularly reviewed however the parents continue to argue that he is over medicated, and this is impacting on him meeting his potential. They draw support from the fact that the dosages for E have changed over time; but that is not vindication of their position – it is a clinical decision taken as E's condition responds differently.

69. I take the view that the parents and the Local Authority would struggle to work in a collaborative manner. It is one of the reasons that a Supervision Order would not work.

70. I should add that the Father was also concerned that the Guardian had not seen E for the nine months prior to the mid-hearing visit already referred to. The Guardian was not unduly troubled by this. She described how her role was not to be his supervisor or mentor but to analyse all the information that was being produced by those with primary responsibility for his care. I find her role was to analyse and not investigate. She does not have a statutory duty to visit E. If E was competent then she would have a duty to consider his instructions, but I find that he is not *Gillick* competent to give instructions.

71. My concerns if E was to return to his parents can be summarised as concerns about each of the following:

    a. The parent's ability to work openly with professionals, including providing him with his medication regularly as prescribed, and informing professionals when there have been issues with his behaviour or running away. This has led to placements breakdown in the past after serious allegations have been made with all allegations leading to no further action to date.
    b. The parent's ability to stimulate E and keep him safe in the community and at home.
    c. The parents understanding and insight into E's needs and what he can be able to achieve going into adulthood.
    d. The likelihood of E returning home and the arrangements breaking down and him losing his current placement.
    e. The strategies which they say they would adopt in the event of one of the incidents referred to above taking place. I asked them, at some length, how they would have dealt with the head-butting incident against LX referred to above. They collectively referred to saying that first, it would not happen (they said the

same in respect of a possible repeat of an incident which occurred in a supermarket). They said it would not happen because they would properly prepare E with relevant strip-cartoons and aromatherapy. But in the fact of my insistence that on this example it would happen, I was told that their response would be matters such as distracting E by calling him an Igbo name and ultimately calling the police. I found their answers to be wholly unsatisfactory and very unlikely to defuse or contain any of the incidents which have been referred to.

f. The parents telling things to E, such as he is going home, that they are buying him new things, he can have a mobile telephone without consultation with the social worker etc. which causes E's behaviour to deteriorate undermining the placement. Again, this shows poor insight into E's needs.

g. The strong probability that the parents are encouraging E to say or write certain things which undermine his placement. This includes making allegations against staff which are not then made out, saying he wants to stay at home and references to the mainstream school he wishes to attend. These are all ideas of E's which are inimical to his best interests, but the germ of the idea was placed in his mind by his parents. What E says very much echoes his parents' position.

72. I am satisfied that the current level of care provided for E is the best that can be provided for him. If it was reduced or undermined then he (and those around him) will be at risk of physical harm when he is "triggered". Similarly, his psychological welfare and personal development would be damaged if he was taken out of his current controlled but nurturing environment and replaced by the more relaxed regime which I find the parents would put in place.

73. E has a large professional network around him, including his Social Worker, placement staff. He needs robust health professionals who collectively meet his needs. It is best that he remains in care. If E returned to his parents, I believe that they would not fully engage with the professionals. I find that they lack insight into the seriousness of his difficulties; they lack the ability to embrace professional opinions when they conflict with their own; they have not adopted strategies which will meet with the enormity of the challenges which they might face.

74. If E's placement was moved to him living with his parents or spending substantial time with them, it would break down. It would not be very long before E will suffer significant harm. Others around him will also be at risk of significant harm. I note and accept the Social Worker's (Mr Bashelei's) oral evidence, "There are times when [E's] behaviour escalates very quickly, and he needs intervention. He can hurt himself or others. He would be very difficult to manage." I have grave doubts that the parents would manage; if they had 8 hours assistance there would still be a risk on the other 16.

E's pattern of behaviour and challenges requires systems in place which is met by his current placement and would not be met by the parents. The parents currently cope for short periods and with their limited contact, but if this was extended as per their proposal I have little doubt the arrangement would fail and by then E's current placement will have been lost. The present regime of supervised contact is an arrangement which is in E's best interests.

Conclusion

75. E's welfare is my paramount consideration. In deciding this matter, I am in no doubt that I should dismiss the parents' application for the discharge of the care order. The Deprivation of Liberty Order best meets his best interests. It shall be extended until his 18th birthday. I make an order in the following terms:

The Deputy High Court Judge heard oral evidence from the Father, the Mother, the Guardian ((Shannon Smart), the Social Worker employed by the London Borough of Greenwich (Kakha Bashelei) and reading the written evidence of the Independent Social Worker (Andrea Goddard) and the witness on behalf of the parents, EB. The Deputy High Court judge also read the bundle consisting of 738 pages plus the supplemental report (final analysis) of the Guardian.

Confidentiality warning
The names of the family and the child are not to be disclosed in public without the court's permission.

AND UPON the court recording for the avoidance of doubt that it continues to be lawful and in the child's, E (d.o.b. XXXX), best interests to be deprived of his liberty by Royal Borough of Greenwich at his current accommodation, [address] and accordingly such deprivation of liberty continues to be authorised

RECITALS

AND UPON the Local Authority agreeing to consider the issue of E attending church either accompanied by carers or meeting his parents in church.

AND UPON the Local Authority agreeing to hold a contact review meeting within 2 weeks and that the next LAC Review being the 14th December 2022.

FAS RECITAL

AND UPON the Court recording that the parties are entitled to make the following claims for the purpose of the advocates' Attendance:

a) Attendance at a final hearing on 10th-13th October 2022 (4 days)
b) Type of hearing: Final Hearing
c) Pages: 738
d) Public Law (other) – DOLs and discharge of a Care Order

e) Court type: High Court
f) Advocates Meeting on 6th October 2022

THE COURT ORDERS

Jurisdiction

2. The Court declares it is satisfied it has jurisdiction in relation to the child based on his habitual residence, being England and Wales.

Deprivation of Liberty order

Pursuant to the Inherent Jurisdiction of the High Court it is declared that:

3. The local authority has permission to invoke the inherent jurisdiction of the High Court pursuant to section 100(4) of the Children Act 1989.

4. The Deprivation of Liberty order of Mr Justice Keehan dated 7th June 2022 at paragraph 3 is extended to 23.59 on 14 September 2023 in the same terms and the same basis as approved by the Court on 28th January 2022

4. For the avoidance of doubt, it is lawful and in the child's, E's, best interests to be deprived of his liberty by Royal Borough of Greenwich, at *[Address]*, and accordingly such continued deprivation of liberty is authorised until 23:59pm 21.10.2022 unless the order is suspended, varied, or extended in the meantime.

5. The Royal Borough of Greenwich and its agents are authorised to restrict E's liberty in the following manner:
    a. To compel him to reside at [*Address; anonymised]* thereafter until 12:59pm on 14th September 2023.
    b. To provide him with 2:1 support and adult supervision when taken out by staff in the community;
    c. To provide him with 1:1 support and adult supervision at *Address - Anonymised*;
    d. To provide him with 1:1 support in classroom settings;
    e. To prevent E from leaving the placement unsupervised;
    f. Locking the front doors of the placement at all times;
    g. To supervise E's use of the computer and mobile phone in situations where it is considered necessary to safeguard E;
    h. The use of physical restraint, utilising Team Teach techniques, in situations when there is no alternative, to safely manage any challenging behaviours by E.

6. In depriving E of his liberty, the local authority is directed to use the minimum degree of force or restraint required. The use of such force/restraint is lawful and in his best interests provided always that the measures are:
    a. The least restrictive of the child's rights and freedoms;

b. Proportionate to the anticipated harm;
c. The least required to ensure the child's safety and that of others; and
d. Respectful of the child's dignity.

7. The application by the parents to discharge the care order in favour of the Royal Borough of Greenwich is dismissed.

8. The judgment of the Court shall be handed down electronically and the Local Authority shall forward the same to the parents. No attendance of the parties or their legal representatives is required. Permission is given to report this Judgment in its anonymised form.

9. The cost of the ISW further questions shall be borne in equal shares by the local authority and the child and is a necessary disbursement on the public funding certificate of the child.

10. No order for costs save detailed assessment of the publicly funded party's costs.