

## Case Summary

### ***A Local Health Board v AB*** [\[2015\] EWCOP 31](#)

#### Issue

Section 17 leave and DOLS

#### Facts

AB, a 34 year old woman, had a serious and life threatening cardiac condition, the recommended treatment for which was surgery. She was detained under s.3 Mental Health Act 1983 ('MHA 1983') at a low secure private hospital, her diagnoses including mild/borderline learning disability, a working diagnosis of autism, and a schizophrenic illness with prominent persecutory thinking. In consequence, she lacked the capacity to make decisions as to her medical treatment (and to conduct proceedings in relation to her medical treatment).

The local health board made an application to the Court of Protection for declarations and decisions in relation to AB's capacity and best interests as regards heart surgery, as well as (prior) dental surgery to remove her lower teeth. The intention was that AB would be granted leave under s.17 MHA 1983 by her Responsible Clinician to attend at the general hospital for purposes of undergoing both treatments. Both before and during the planned procedures, AB would be subject to restraints amounting to a deprivation of her liberty.

#### Decision

Recognising that AB was at risk of dying, the court decided that it was in AB's best interests to undergo both procedures for heart surgery and dental surgery.

However, the Court of Protection could not exercise its powers to as so authorise the deprivation of her liberty. AB was either within Case A or Case B of Schedule 1A to the Mental Capacity Act 2005 ('MCA 2005'). If AB would be detained at the general hospital 'under the mental health regime' with conditions attached to the s. 17 MHA 1983 leave requiring her to stay at the hospital then she would fall within Case A, and would be ineligible to be deprived of her liberty under the MCA. If there were no conditions attached to the s.17 MHA 1983 leave then she would fall within Case B. However, if AB was in Case B, the Court of Protection could still not make an order because of the wording of paragraph 3(2) of Schedule 1A, which provides that unless the proposed treatment is in accordance with the relevant regime (i.e. here the hospital treatment regime) imposes, the person will be ineligible.

It was therefore necessary for the court to authorise AB's deprivation of liberty at the general hospital under the inherent jurisdiction of the High Court.

#### Practice implications

The editors of the 39 Essex Chambers Mental Capacity Law Newsletter have considerable doubts as to whether this decision is correct for the reasons set out [here](#). If it is correct, the upshot of this case is that where a Responsible Clinician grants s.17 MHA 1983 leave from a psychiatric to a general hospital with conditions that amount to a deprivation of residual liberty, the MCA cannot be used to authorise it because the patient will be ineligible. Either the conditions must be relaxed so as to avoid the acid test for deprivation of liberty being satisfied or if, as is likely, that is not possible, an application to the High Court under the inherent jurisdiction will be required.

The full version of this case report can be found [here](#). Further reports, articles and guidance notes can be found on our dedicated Mental Capacity Law Resources Page by [clicking here](#).