

## Case Summary

### ***KD v A Borough Council & Ors*** [\[2015\] UKUT 0251 \(AAC\)](#)

#### Issue

Guardianship and DOLS

#### Facts

KD had Korsakov's Syndrome and, following his detention under the Mental Health Act 1983, had been subject to guardianship since 2012. He was required to reside in a care home with 24 hour supervision and support where he was not free to leave and not permitted to go out unless accompanied by a member of the care staff, with access to the community is limited by their non-availability. Before the First Tier Tribunal (Mental Health) ('the FTT'), he sought to be discharged from the guardianship order on the basis that it was not necessary because an authorisation under Schedule A1 to the Mental Capacity Act 2005 ('MCA 2005') was less restrictive and guardianship could not authorise his deprivation of liberty.

#### Decision

The court explained that the guardian's power to return the person to his place of residence has the effect of a requirement or an injunction preventing him from leaving. Such a power is a more readily available, effective and sensible means of enforcing the result that the person lives there than an injunction against that person from the Court of Protection.

The court decided that the FTT should not exercise its statutory power to discharge a guardianship if the consequence of doing so would be to bring about an unlawful deprivation of liberty. The FTT should not discharge the guardianship until a lawful alternative placement is put in place i.e. until either a standard authorisation or a court order authorising the deprivation of liberty is in place.

In this case, the guardianship order was not discharged. There was no firm proposal for where KD would live. The court decided that the prospect of an alternative placement being made available was not sufficient to found a discharge. However, it was open to KD to make a new application to the FTT supported by the appropriate evidence to have the guardianship order discharged.

#### Practice implications

This is a significant decision for those involved in guardianship cases. The court set out a useful checklist designed for cases involving guardianship and the MCA 2005. It is worth referring to the checklist in full (at paragraphs 67-73) but in summary, the relevant steps to consider are:

- (1) Is the proposed alternative actually available in practice? If not, when will it be available?
- (2) What are the advantages and disadvantages of the rival alternatives?
- (3) Have the parties provided sufficient evidence and argument on the above issues?
- (4) What issues should the FTT decide?
- (5) Should the FTT adjourn or discharge the guardianship?

The court emphasised that in the absence of a practically available alternative, the FTT should not order discharge. In this case, the relevant evidential base for the existence of alternative options, the steps that would be taken to obtain them and their prospects was not provided in sufficient detail. Although the FTT is an investigative tribunal, the parties have the primary obligation of providing the evidence and advancing the arguments.

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](#).