Deprivation of liberty: a practical reflection on where we are now

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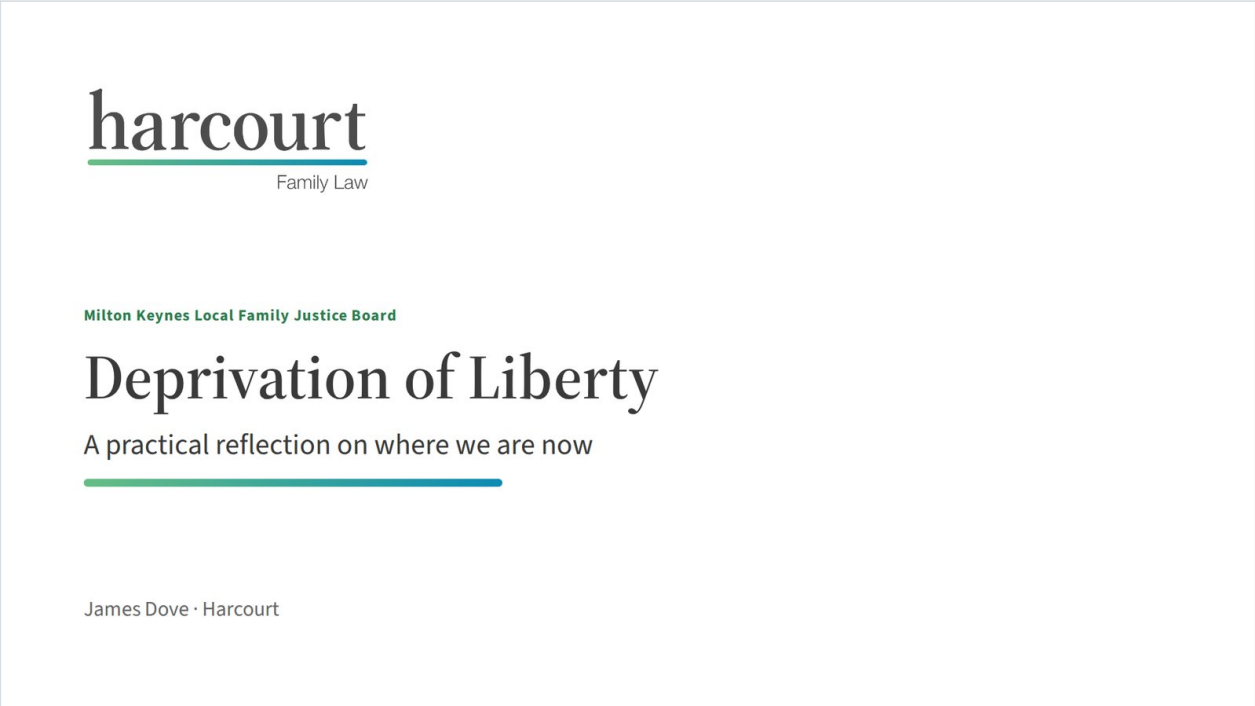
A talk to the Milton Keynes Local Family Justice Board, 14 October 2026

These notes follow the talk as given, with case references added, and set each slide beside what was said about it. The law is stated as at 14 October 2026, and nothing here is legal advice.

Opening and the numbers (slides 1–3)

SLIDE 1

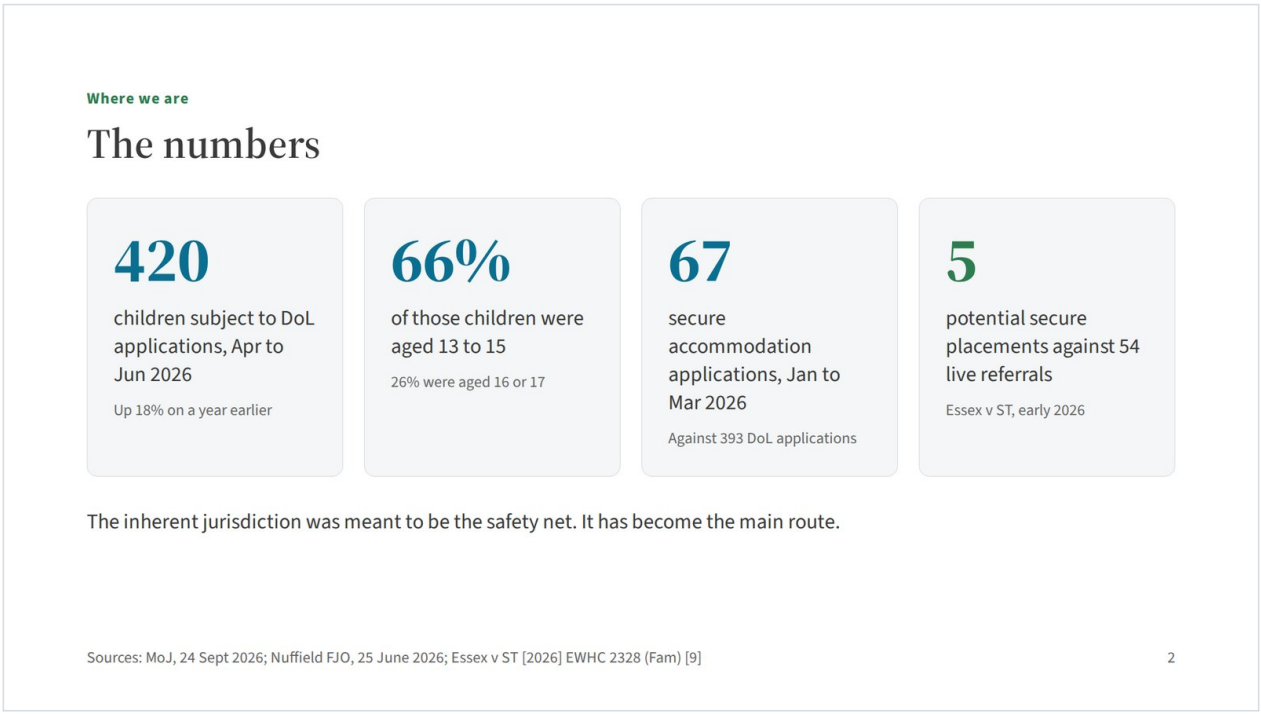


Thank you for inviting me, and thank you all for coming. You all know the three elements of a deprivation of liberty from Storck, so I am not going to take you through them. What has changed is how the courts decide whether a child is confined and whether she consents, and much of that is very recent.

My plan is to work through six situations that come up in practice, and for each one to look at the recent cases and what they mean for the court, the local authority, the Guardian and the parents. By the end I hope you will leave with six questions to ask at every hearing.

Why now? Because the law changed on 2 June this year, when the Supreme Court gave judgment in a case known as AGNI (A Reference by the Attorney General for Northern Ireland [2026] UKSC 16), and the first children's cases applying the new approach were decided in August and September. Much of what we thought we knew about when a child is deprived of liberty has to be looked at again.

SLIDE 2

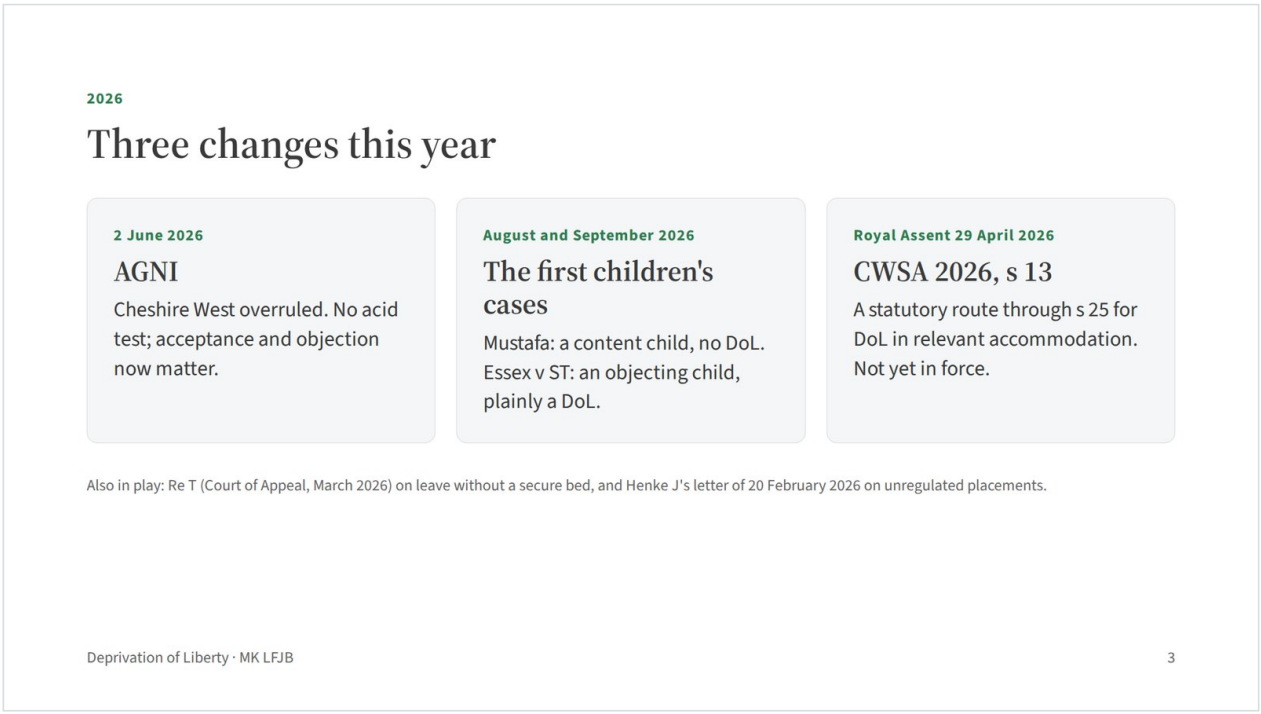


First, the scale of it. At the end of September the Ministry of Justice published its figures for April to June (Family Court Statistics Quarterly, 24 September 2026). In those three months, 420 children were the subject of applications to the High Court to deprive them of their liberty. That is 18% more than in the same quarter last year. Two-thirds were aged 13 to 15, and about a quarter were 16 or 17.

For the comparison with secure accommodation, the latest figures are for January to March: 393 deprivation of liberty applications against just 67 applications for secure accommodation orders. The difference reflects the shortage of secure beds. When Mrs Justice Theis decided Essex County Council v ST [2026] EWHC 2328 (Fam) in September, the evidence before her was 54 live referrals for secure accommodation against five potential placements (at [9]). So the inherent jurisdiction, which was meant to be a safety net, has become the main route. The children concerned usually have several needs at once: mental health difficulties, self-harm, disability, exploitation and long histories of trauma. Many are placed a long way from home.

One more figure, because it matters later. In the same quarter 215 orders were issued, about a third fewer than a year before. That quarter straddles the AGNI judgment, so it is too early to say why, but it is one to watch.

SLIDE 3

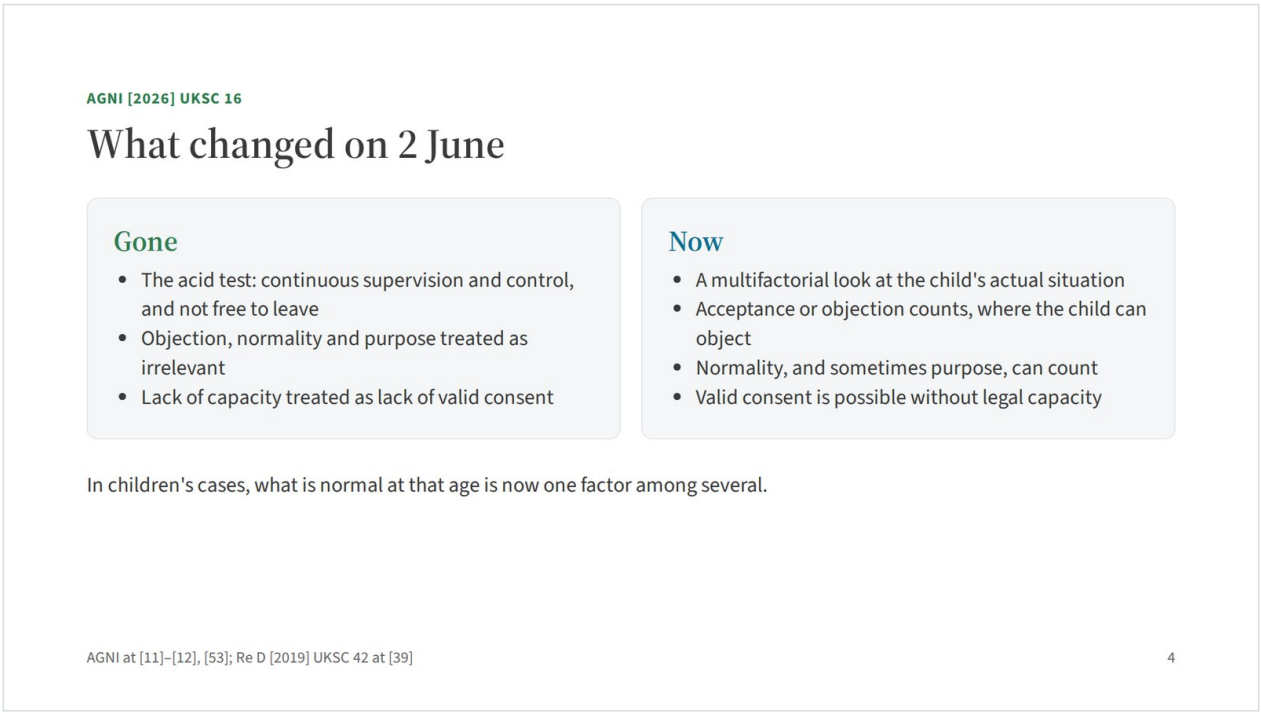


Three things have changed this year, and they frame the rest of the hour. In June, AGNI overruled Cheshire West. In August and September came the first two children's cases applying it: Re Mustafa (A Child) [2026] EWHC 2159 (Fam), where a content 15-year-old was held not to be deprived of his liberty despite regular restraint, and Essex v ST, where a 15-year-old who objected to everything plainly was. Waiting in the wings is section 13 of the Children's Wellbeing and Schools Act 2026, which received Royal Assent in April and, once it is in force, will bring many of these cases into section 25 of the Children Act 1989.

Two other developments will come up along the way: the Court of Appeal's decision in Re T (Inherent Jurisdiction: Deprivation of Liberty) [2026] EWCA Civ 307 in March, a different Re T from the Supreme Court's in 2021 (Re T (A Child) [2021] UKSC 35), on what happens when there is no secure bed, and Ms Justice Henke's letter of 20 February 2026 about unregulated placements. I will also come back, in the fourth scenario, to an article I wrote in Family Law in March about 16- and 17-year-olds, because there is a case I should have dealt with in it.

AGNI applied, and who can consent (slides 4–6)

SLIDE 4



AGNI first. You will know the headline. On a reference from Northern Ireland, a unanimous Supreme Court overruled Cheshire West. The acid test has gone, and lack of capacity no longer means lack of valid consent. What matters for us is what that means in children's cases.

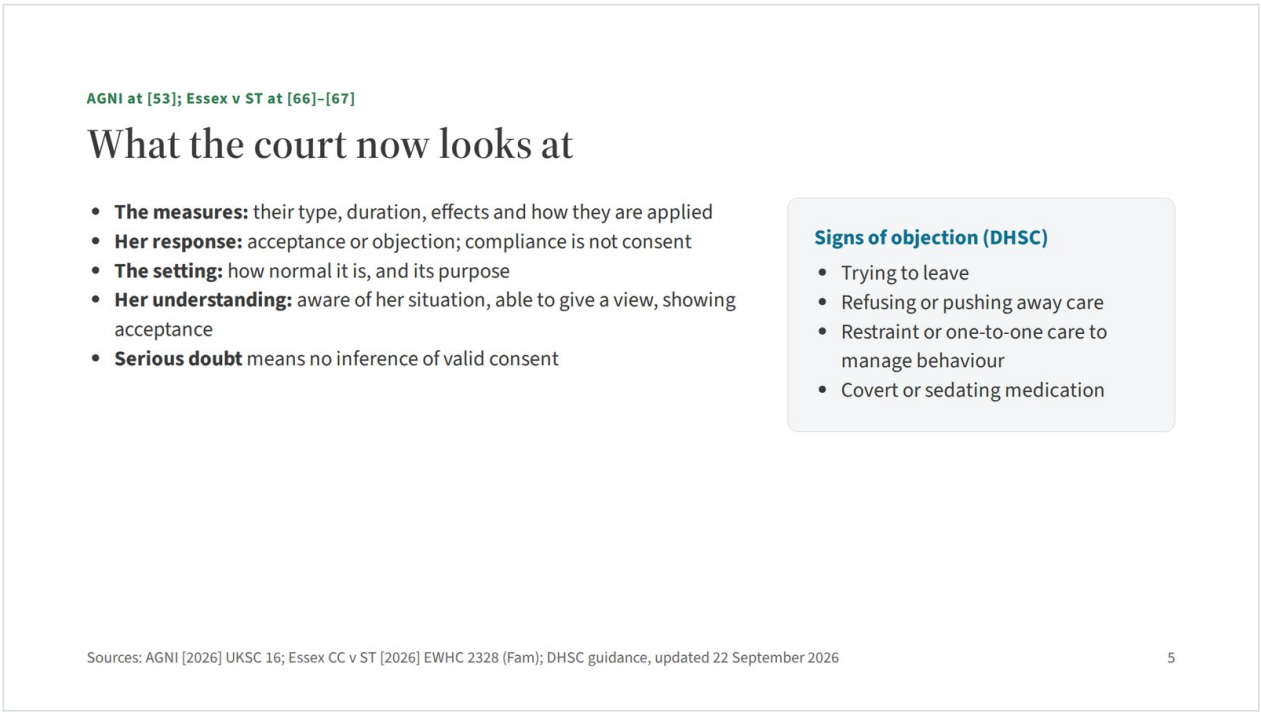
Four things follow. First, the comparison with a child of the same age no longer decides the question. Our cases asked whether a child's supervision and control went beyond what is normal at that age, and in Re D (A Child) [2019] UKSC 42 the Supreme Court held that D's restrictions were not normal for a 16- or 17-year-old. After AGNI, how normal the arrangements are is still relevant, but it is one factor among several (AGNI at [53]).

Second, acceptance now has to be proved. A child's acceptance can take the case outside Article 5 even if the child is not Gillick competent, which is what happened in Mustafa. We will look at what good evidence of acceptance looks like in the first scenario.

Third, objection becomes pivotal, and restraint and medication bear on it. The Department of Health and Social Care's guidance helps here, provided we are clear about what it is. It is interim, non-statutory guidance, issued in June and updated in September, written mainly for health and social care staff and for local authorities working under the Mental Capacity Act. It does not bind the court, and how AGNI applies to children is for the courts. As a checklist, though, it is useful. It treats trying to leave, refusing care, restraint or one-to-one care to manage behaviour, and covert or sedating medication as signs that a person may be objecting, and it reminds us that compliance is not consent.

Fourth, borderline cases stay in court. The Supreme Court said that where there is serious doubt, no consent should be inferred (AGNI at [53]). Where an order is not renewed because a child accepts her arrangements, it is worth borrowing the safeguard in the Northern Ireland proposal, that a change in her wishes is a change of circumstances that brings the case back (AGNI at [16]).

SLIDE 5



The Supreme Court's own summary is at paragraph 53, and in the Essex case Mrs Justice Theis set out a working list drawn from it: the degree of control, the restriction of movement, relationships, ordinary life, duration, purpose and necessity, less restrictive alternatives, and the child's own experience, including any sign of objection (Essex v ST at [66]–[67]). Its most practical use is as the structure for the social worker's statement. If the authority's evidence takes each point in turn, the court has what it needs. For the decision as a whole, the five steps used in EBY, which I come to shortly, are a better running order.

As for children under 16, AGNI is formally about those aged 16 and over, but the Supreme Court said its reasoning potentially affects every setting, children's homes included (AGNI at [55]). The Department of Health and Social Care applies it to children under court authorisation, and Mustafa applied it to a 15-year-old. So whatever the child's age, the evidence should now deal with the child's response to the arrangements as well as the arrangements themselves.

SLIDE 6

Consent. The settled points you know. The local authority cannot consent, even when it holds parental responsibility under a care order, because, as the Court of Appeal said in J v Bath and North East Somerset Council [2025] EWCA Civ 478, Article 5 requires an independent check on the state's power to detain (at [57]). Parents cannot consent for a 16- or 17-year-old; that is the Supreme Court's decision in Re D. The live questions are about the parents of younger children.

In February Ms Justice Henke decided two cases, East Riding of Yorkshire Council v The Mother (Re L) [2026] EWHC 181 (Fam) and Medway Council v The Father & O [2026] EWHC 236 (Fam), holding that parents can consent for an under-16 who lacks competence, where the decision falls within the zone of parental responsibility. That zone depends on the particular child rather than a hypothetical child of the same age. It is wide where the child is not Gillick competent and narrows as she matures, it is bounded by community standards, and the consent works only if it does not leave the child without safeguards. In Medway a profoundly disabled 15-year-old lived with her father, with school and respite care in regulated settings, and the application was dismissed as unnecessary. In Re L a 12-year-old was accommodated under section 20 in a registered children's home, and her parents' consent was held to cover two-to-one supervision, locked doors and restraint, so she was not deprived of her liberty either. Earlier first instance decisions had gone the same way, and in one of them last year the judge cautioned that where parents may be overwhelmed, the authority should still bring the case to court (Re QX [2025] EWHC 745 (Fam) at [67]).

The harder question is what happens when the authority places the child in an unregistered setting. Re L concerned a registered home, and the regulation of that home was part of what made the parents' consent safe. No court has decided the unregistered case. My view is that the court should continue to authorise there, for three reasons. First, the safeguards. In Re L the parents' oversight and the regulation of the home together supplied them, and an unregistered placement lacks the inspection, staffing assurance and rules on restraint and incident reporting that regulation provides. Second, Ms Justice Henke's own letter asks judges to require further evidence and safeguards before authorising an unregulated placement. Third, the zone of parental responsibility narrows as a child matures. L was 12.

The restrictions these placements involve, imposed on an older teenager who objects to them, are harder to fit within it. Until there is authority, the safer course is to apply.

Finally, the child herself. A Gillick competent child can consent, subject to close scrutiny of whether the consent is real and will last (Re T [2021] UKSC 35 at [161]–[162]), and after AGNI a child who is not Gillick competent may be able to as well. Whatever the age, serious doubt means no consent.

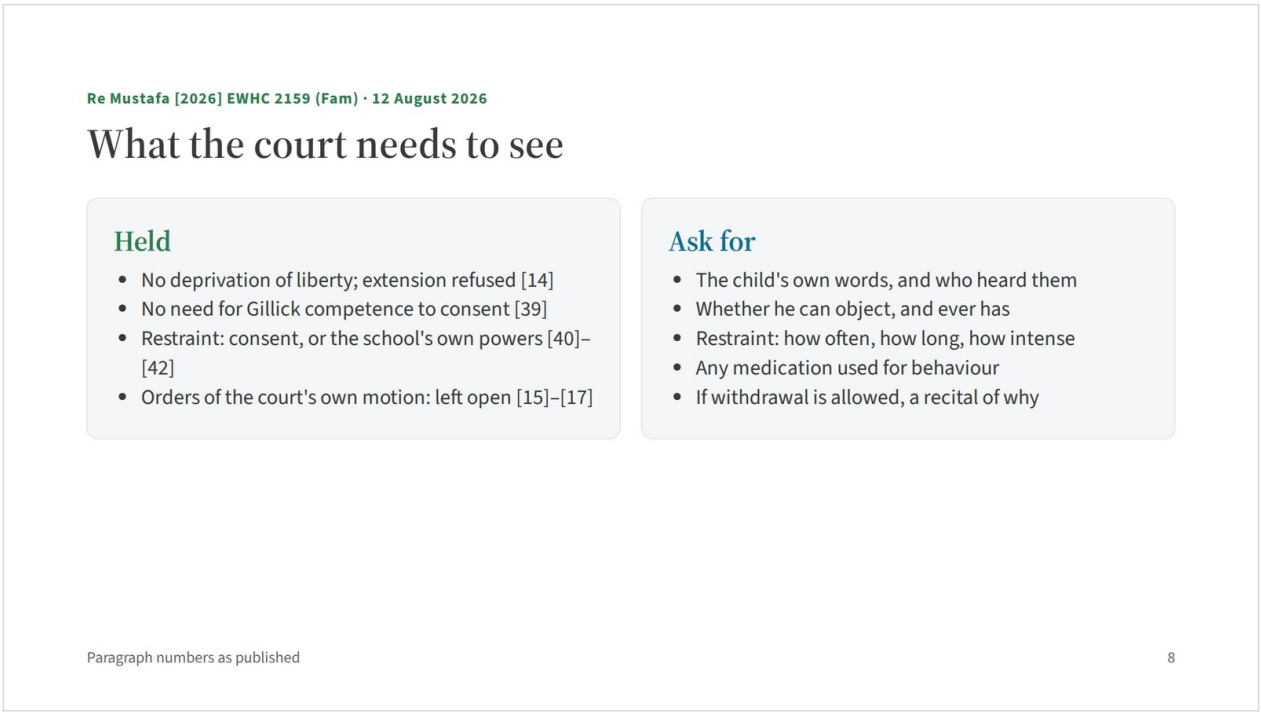
Scenario 1: no deprivation of liberty any more (slides 7–8)

SLIDE 7

The first scenario. A 15-year-old boy with a learning disability has lived at a registered residential school for two years under a care order. Last year the court authorised locked external doors, one-to-one support and restraint as a last resort. Since AGNI the authority has reviewed the case. It says he is happy, he accepts the arrangements and he is no longer deprived of his liberty, so it asks to withdraw its renewal application. The Guardian objects, because staff are restraining him every week or so.

What evidence should the court have before concluding that he genuinely accepts his arrangements?

SLIDE 8



Those are close to the facts of Re Mustafa, decided by Mr Recorder Adrian Jack in August. Brent applied to extend the order two days after AGNI, then reviewed the case and asked to withdraw. The Guardian pointed to 48 recorded incidents in a year, with physical intervention roughly every nine or ten days.

The judge found there was no deprivation of liberty and refused to extend the order. Three things drove that. First, the evidence that Mustafa was content was strong and came from several directions. He said consistently that he liked living there. He had never tried to leave or asked to move. He asked for more overnight stays with his family, and he argued and negotiated with the adults around him, so he was not simply going along with things. Second, the judge held that a child who is not Gillick competent can still have enough understanding for his views to count on consent (at [39]). Third, on restraint, the judge relied on a recent Court of Appeal decision about a special school, FXS v Mulberry Bush Organisation Ltd [2026] EWCA Civ 415, and on the power of school staff to use reasonable force under section 93 of the Education and Inspections Act 2006. Where the school restrained Mustafa, it either had his consent or was using its own powers, and either way Article 5 was not breached (at [40]–[42], [13]–[14]).

The judge also raised a question he did not decide. Can the court make or extend an order of its own motion when the authority no longer wants one? Brent's solicitor pointed out that the Supreme Court has said in passing that the inherent jurisdiction can be exercised without an application (In the matter of NY (A Child) [2019] UKSC 49 at [54]), that an older decision went the other way, and that the proceedings stay alive until the court gives permission to withdraw. The judge called those submissions cogent and left the point open (at [15]–[17]).

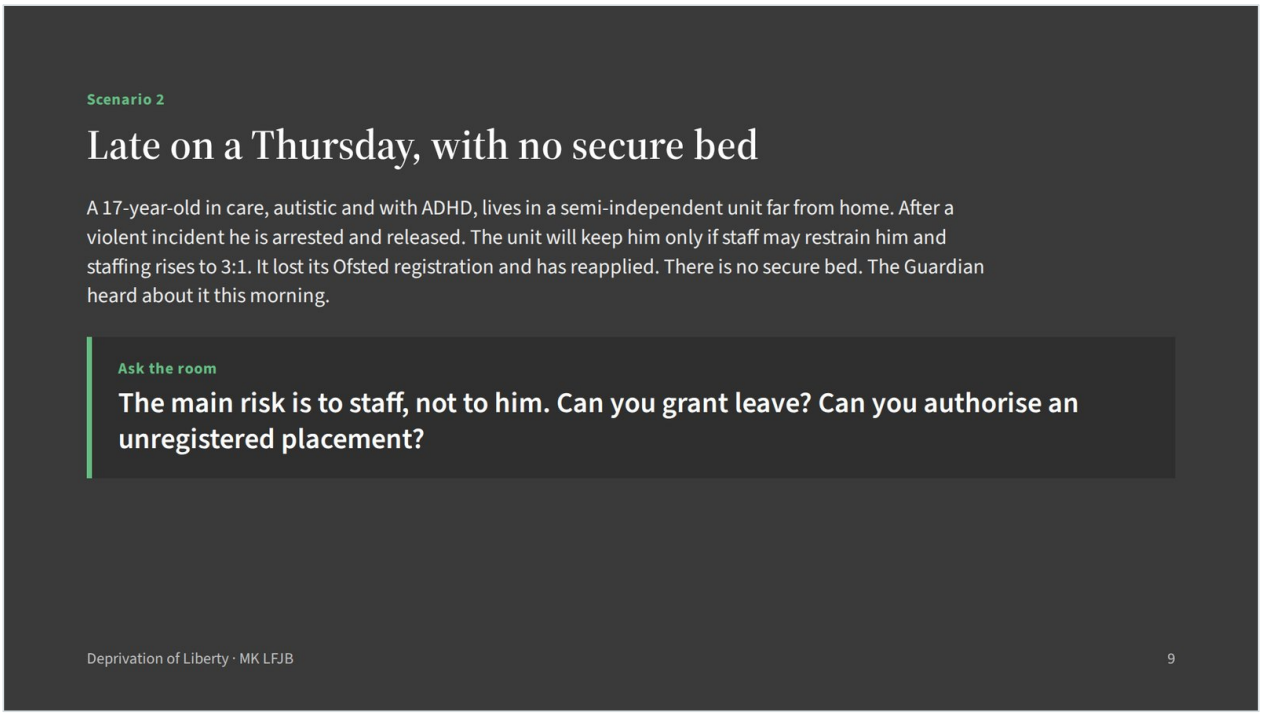
So how should each of us approach a case like this? If you are the authority and you want to withdraw, file evidence of acceptance from more than one source: the child's own words, recorded by someone who saw him away from staff; the restraint and incident logs, with their trend; and any medication used to manage behaviour. Propose a recital recording the basis, and a trigger for review if he starts to object or the restraint changes. If you are the Guardian and you oppose, test whether this child can object and ever has, whether his agreement is really compliance, and whether the restraint is rising. For the court,

permission to withdraw is a decision about Article 5 on the evidence, not a formality. The authority's review starts the inquiry rather than ending it.

A word of caution about the restraint reasoning. FXS was a damages claim about a school, and the statutory power is a power for school staff. Ms Justice Henke took a different route in Medway. The child's special school there also had a restraint policy and locked doors, and she held that they were a confinement imputable to the state. What took them outside Article 5 was the father's consent, within the zone of his parental responsibility. The school's power to use reasonable force was something he took into account in consenting, and of the regulated respite home she said that its statutory scheme provided safeguards but did not authorise a deprivation of liberty (Medway at [33]–[34]). On that approach, a school's power to restrain makes restraint lawful for its staff, but something else has to authorise any deprivation of liberty: a valid consent, from a parent within the zone or from the child, or the court. Mustafa was under a care order, so the authority could not consent for him, and the case turned on his own acceptance. Had that been in doubt, Medway suggests the school's powers alone would not have filled the gap. None of this has been tested above first instance, it does not obviously carry over to a children's home that is not a school, and it sits awkwardly with the Department of Health and Social Care's view of restraint as a possible sign of objection. The judgment records that the Guardian was considering an appeal.

Scenario 2: the late application with no secure bed (slides 9–11)

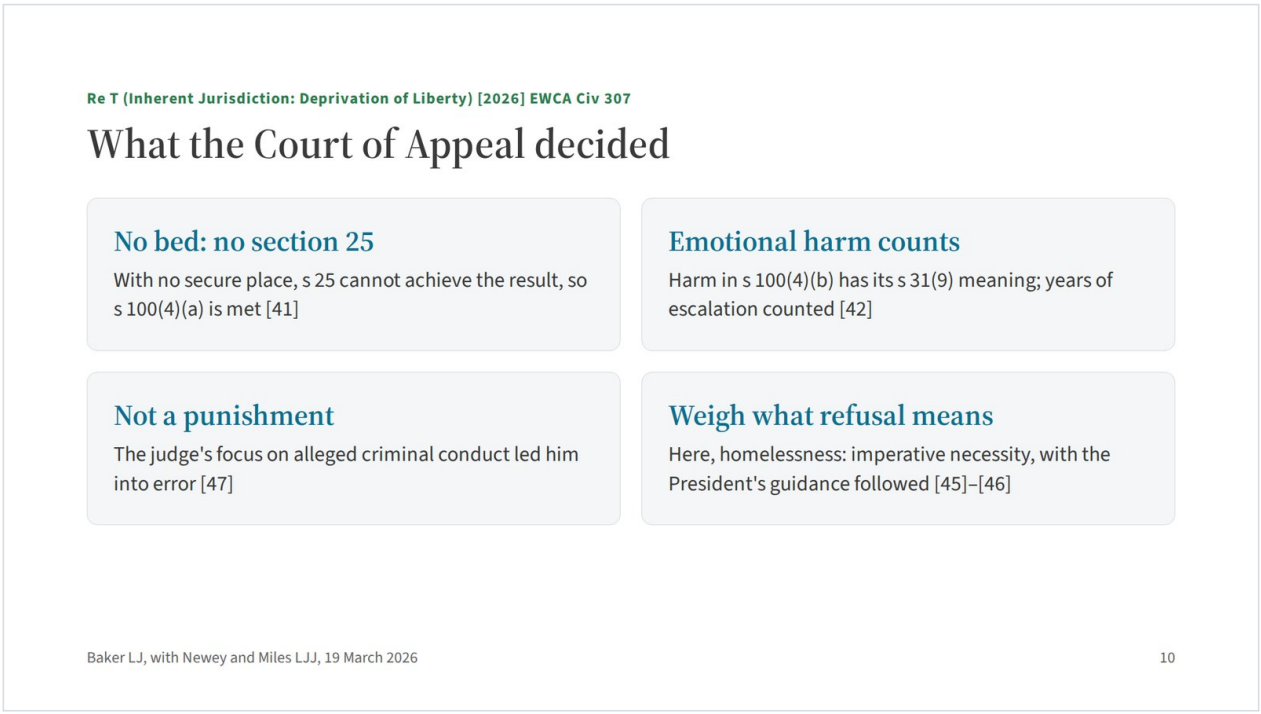
SLIDE 9



The second scenario. It is late on a Thursday. A 17-year-old in care, autistic and with ADHD, lives in a semi-independent unit a long way from home. After a violent incident he is arrested and released. The unit will keep him only if staff may restrain him and staffing goes up to three to one. The unit lost its Ofsted registration last year and has reapplied. There is no secure bed anywhere. The Guardian heard about the application this morning and has filed nothing. The main risk is to staff rather than to him.

What would the court need in front of it to grant leave, and to authorise an unregistered placement?

SLIDE 10

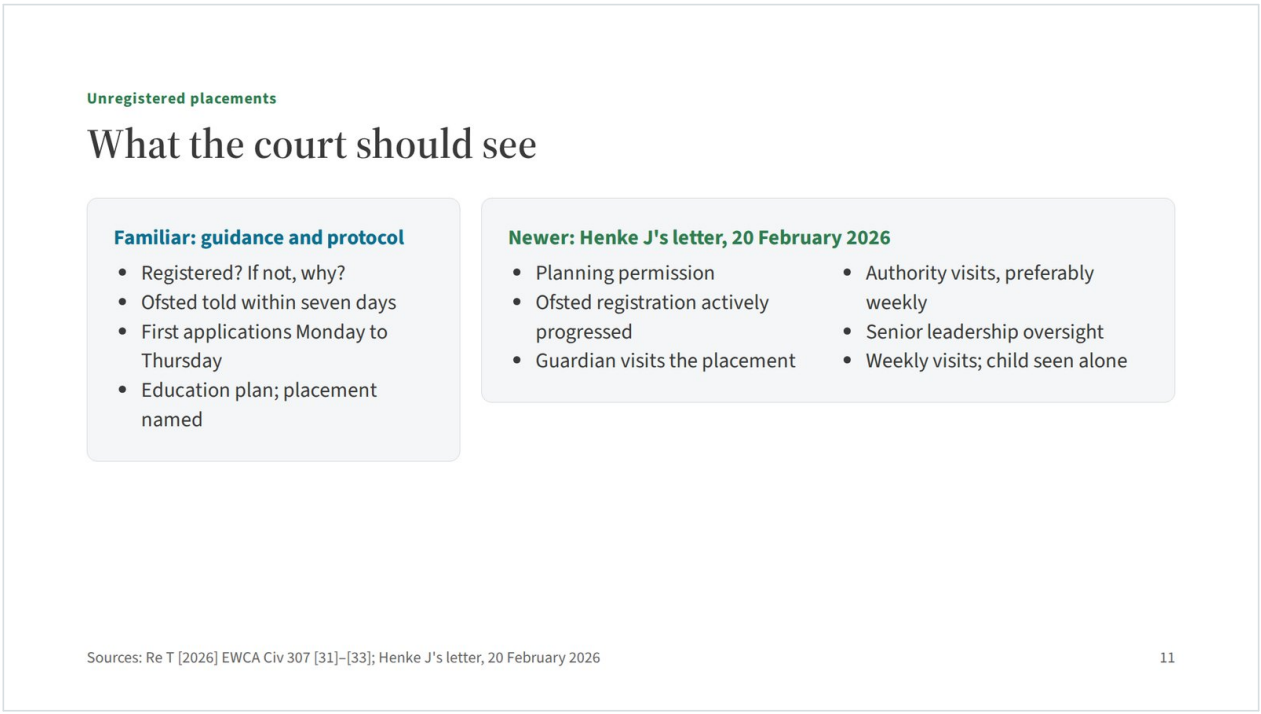


These are the facts of Re T, decided by the Court of Appeal in March. The judge below, sitting in the High Court, refused leave. He thought a secure accommodation order was available, that the risk was to others rather than to T, that he could not authorise a deprivation of liberty on the strength of alleged crime, and that the placement was unsuitable. The Court of Appeal, in a judgment of Lord Justice Baker, allowed the appeal.

Four points come out of it. First, if there is no secure bed, section 25 cannot achieve the result the authority needs, so the first condition for leave in section 100(4) is met (at [27], [41]). Second, harm has the same meaning as in section 31, so it includes emotional harm, and years of escalating behaviour gave reasonable cause to believe T was likely to suffer significant harm (at [42]). Third, an order is not a punishment, and the judge's focus on possible criminality led him into error (at [47]). Fourth, the court has to weigh what refusal would mean. The staff would not keep T without authority to restrain him, there was nowhere else, and he faced homelessness four months before his eighteenth birthday. That was imperative necessity, the test the Supreme Court laid down in its own Re T in 2021 ([2021] UKSC 35 at [145]), and the Court of Appeal authorised the unregistered placement, provided the President's guidance was followed (at [45]–[46]).

There is a human side to the judgment. The judge below said frankly that the case came on at the end of a list, the Guardian had little notice and no position statement, and he had to give judgment that evening (at [35]). The Court of Appeal had real sympathy for him. Many of you will recognise that afternoon.

SLIDE 11



When the placement is unregistered, what should the court expect to see? You will know the President's Revised Practice Guidance of September 2023 and the Revised National Listing Protocol of October 2023. The newer layer is Ms Justice Henke's letter of February to judges taking these cases. It asks the court to look for evidence that planning permission has been obtained for the premises to operate as a children's home, and that the provider is actively progressing Ofsted registration. It also asks the court to require the Guardian to visit the placement and to consider what the Guardian saw there; to require the authority to set up a regular scheme of visits, preferably weekly; to require a senior member of the authority's leadership team to oversee the placement; and to require the authority to keep in regular touch with the child and visit at least weekly, in person or virtually, seeing the child alone without staff present.

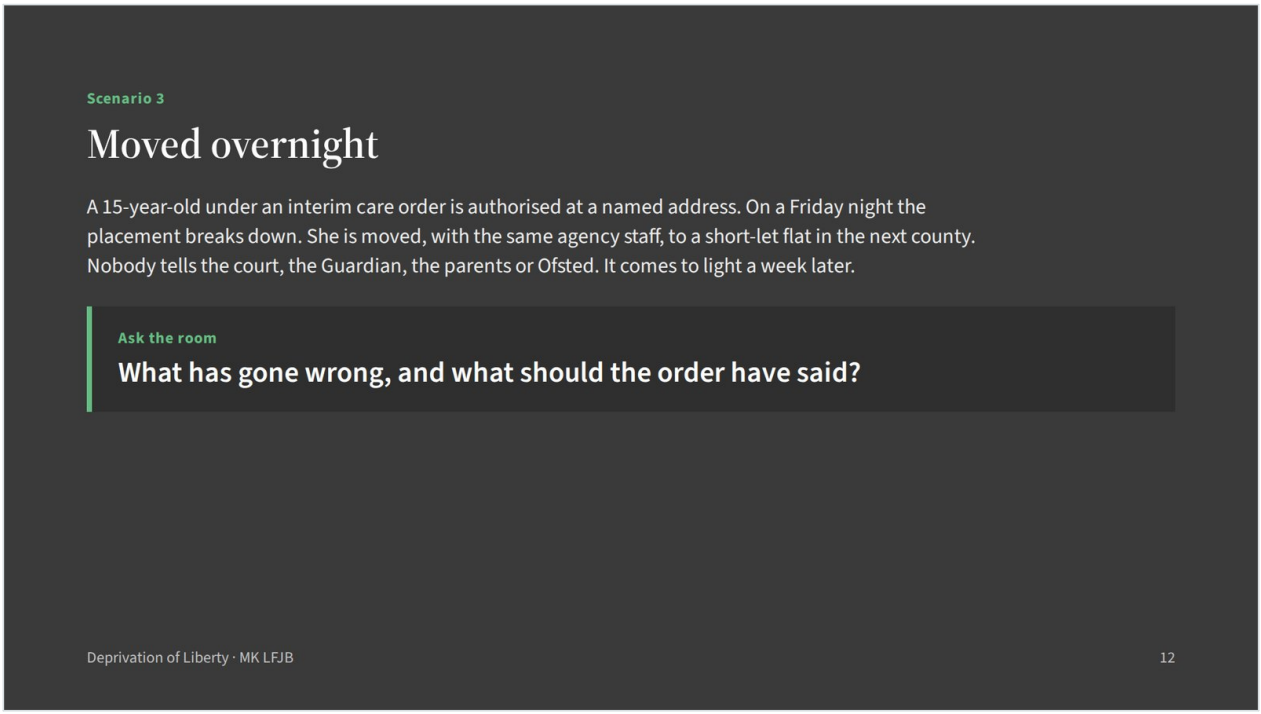
Registration matters because an unregistered placement sits outside the regime that would otherwise provide inspection, assurance about staff, and rules on restraint and incident reporting. The court's own scrutiny has to do more of that work.

Two practical points. Some arrangements can never be registered, for example a house rented by the authority and staffed by an agency. If that is the position, the court should be told plainly, so that it knows whether progressing registration means anything. If notice has been a matter of hours, a short order with a prompt review protects the child and keeps open the chance to test the evidence properly.

It also helps to have a running order for the decision. The judge in Re EBY (A Child) [2023] EWHC 2494 (Fam); [2024] Fam 123 used five steps: leave under section 100; best interests, with real weight on an older child's wishes; Article 5, including whether the restrictions are necessary and proportionate; the extra requirements for an unregistered placement; and whether Articles 2 and 3 oblige the court to act (at [5]).

Scenario 3: the child moved overnight (slides 12–13)

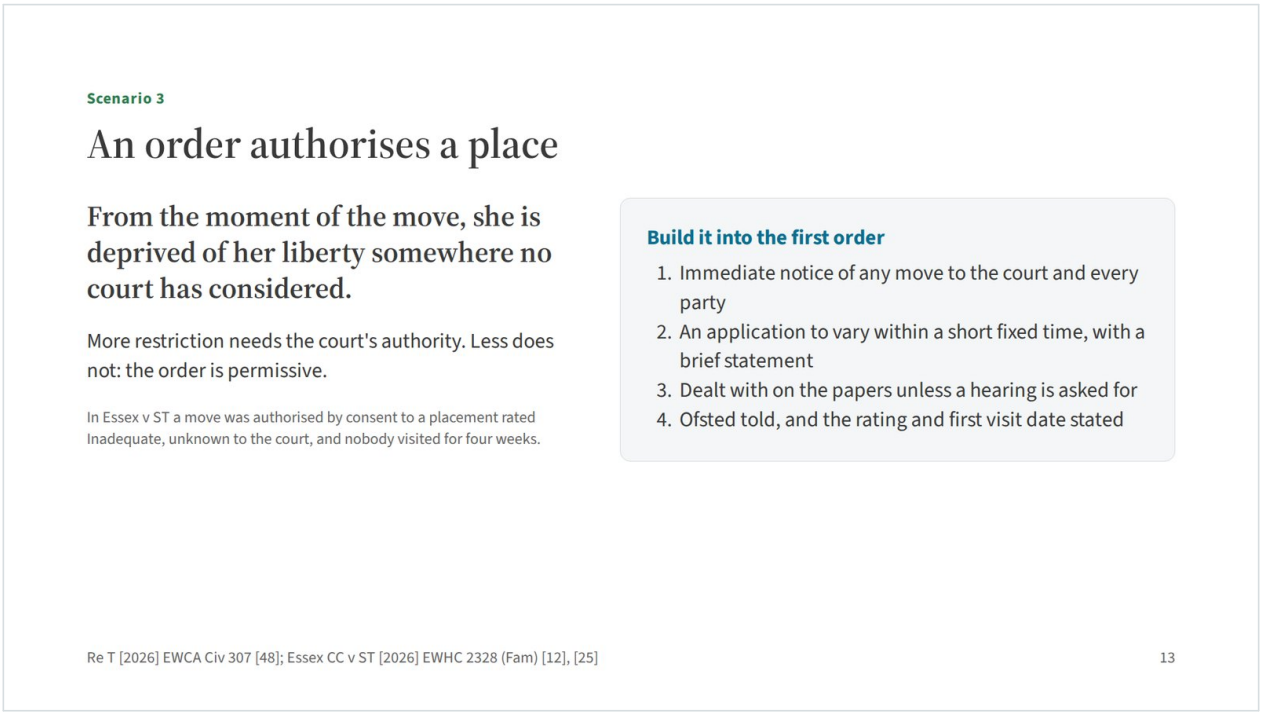
SLIDE 12



Scenario three is shorter. A 15-year-old under an interim care order is subject to an order authorising her deprivation of liberty at a named address. On a Friday night the placement breaks down, and she is moved, with the same agency staff, to a short-let flat in the next county. Nobody tells the court, the Guardian, the parents or Ofsted. It comes to light a week later, when the authority files its statement for the review.

What has gone wrong, and what could the order have said?

SLIDE 13



The order authorised her deprivation of liberty at a named address, just as the Court of Appeal's declaration in Re T named T's unit. From the moment of the move, she has been deprived of her liberty somewhere no court has considered, and the authority is exposed to a claim for false imprisonment.

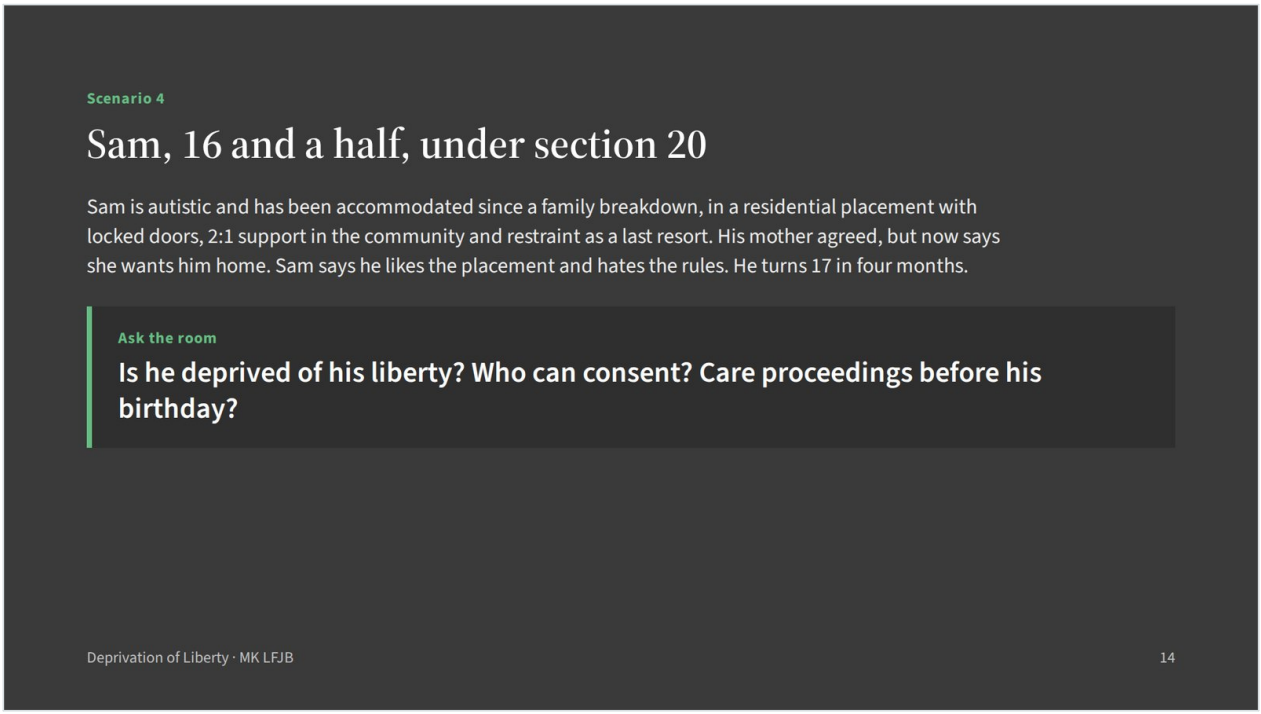
The Essex case shows the related risk when a move is approved in a hurry. The court varied the order by consent on the day of a move, without being told that the new placement was rated Inadequate (Essex v ST at [25]), and nobody from the authority visited for four weeks.

My suggestion is to build a mechanism into the first order. The authority tells the court and every party immediately of any move. It applies to vary within a short fixed period, with a brief statement covering the reasons, the new address, staffing, registration, the Ofsted rating and how each restriction will work there. The application is dealt with on the papers unless someone asks for a hearing. That saves a hearing and keeps the authorisation lawful.

One related point. The order is permissive, so the placement can step the restrictions down as the child settles, but any increase needs the court.

Scenario 4: the 16- or 17-year-old, and the March article (slides 14–17)

SLIDE 14



The fourth scenario is about the age boundary. Sam is 16 and a half and autistic. He has been accommodated under section 20 since a family breakdown last year, in a residential placement with locked doors, two-to-one support in the community and restraint as a last resort. His mother agreed to the accommodation, but she now says she wants him home. Sam tells his social worker that he likes the placement and hates the rules, sometimes in the same breath. He turns 17 in four months.

Is he deprived of his liberty? Who can consent? Should the authority issue care proceedings before his birthday?

SLIDE 15

Scenario 4

The cliff edges

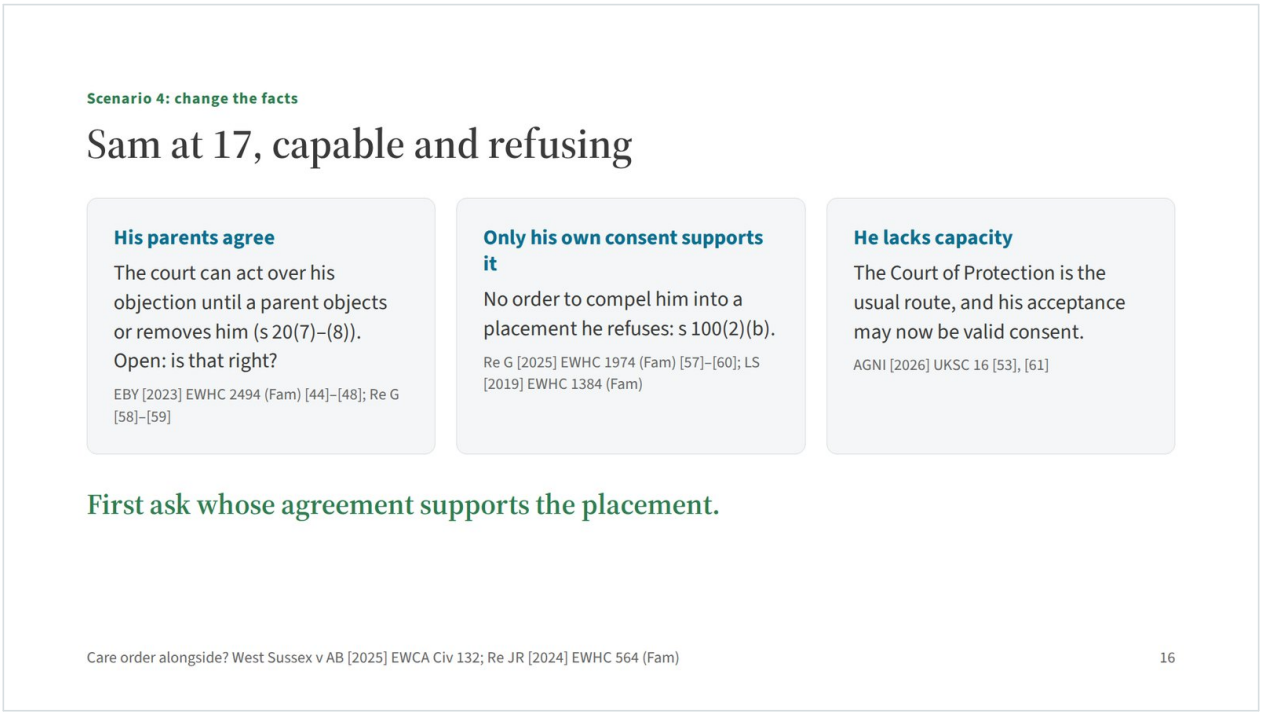
Point	What it means for Sam
Age 16 and over	AGNI applies directly: his own acceptance can be valid consent (AGNI at [1])
His parents	Cannot consent to his confinement (Re D [2019] UKSC 42)
Section 20	With capacity, his agreement holds (s 20(11)); without it, anyone with parental responsibility can remove him (s 20(8))
Age 17	No care order or interim care order can be made (s 31(3))
No capacity	The Court of Protection is the usual route (AGNI at [61])

Children Act 1989, ss 20 and 31(3) 15

Let me take the cliff edges in turn. AGNI applies to Sam directly, because he is over 16. If he understands his situation, can express a view and accepts the arrangements, there may be no deprivation of liberty at all. His views are mixed, and where there is serious doubt the court should not infer consent. His parents cannot consent to his confinement; that is Re D in the Supreme Court. Under section 20 it matters who agrees and who objects. If Sam has capacity and agrees to being accommodated, his mother cannot remove him. If he lacks capacity, the accommodation rests on his mother's agreement, and she can remove him at any time. Once he turns 17, no care order can be made. If he lacks capacity, the usual route at 16 and 17 is the Court of Protection.

So should the authority issue care proceedings before his birthday? Not by reflex. The Court of Appeal in Re S (A Child) and Re W (A Child) (s 20 Accommodation) [2023] EWCA Civ 1 held that section 20 can be a long-term arrangement where the parents support the plan, and that a care order must be necessary and proportionate even where the threshold is crossed. West Sussex County Council v AB [2025] EWCA Civ 132 adds that a care order is not needed simply to keep the court involved or to make the authority deliver its plan, because the deprivation of liberty reviews already do that, and that later disputes can be dealt with in those proceedings or in the Court of Protection. The cliff edge at 17 still matters, but how much depends on Sam. If he lacks capacity and the Court of Protection is available, it matters less. If he is capable but does not agree, so that the accommodation rests on his mother's agreement, it matters a great deal, as the next slide shows. Either way, the decision should be made now, while every option is still open.

SLIDE 16



Now change the facts. Make Sam 17, with capacity, groomed and exploited by a gang, and refusing the placement. Can the court help? The answer depends on whose agreement supports the accommodation.

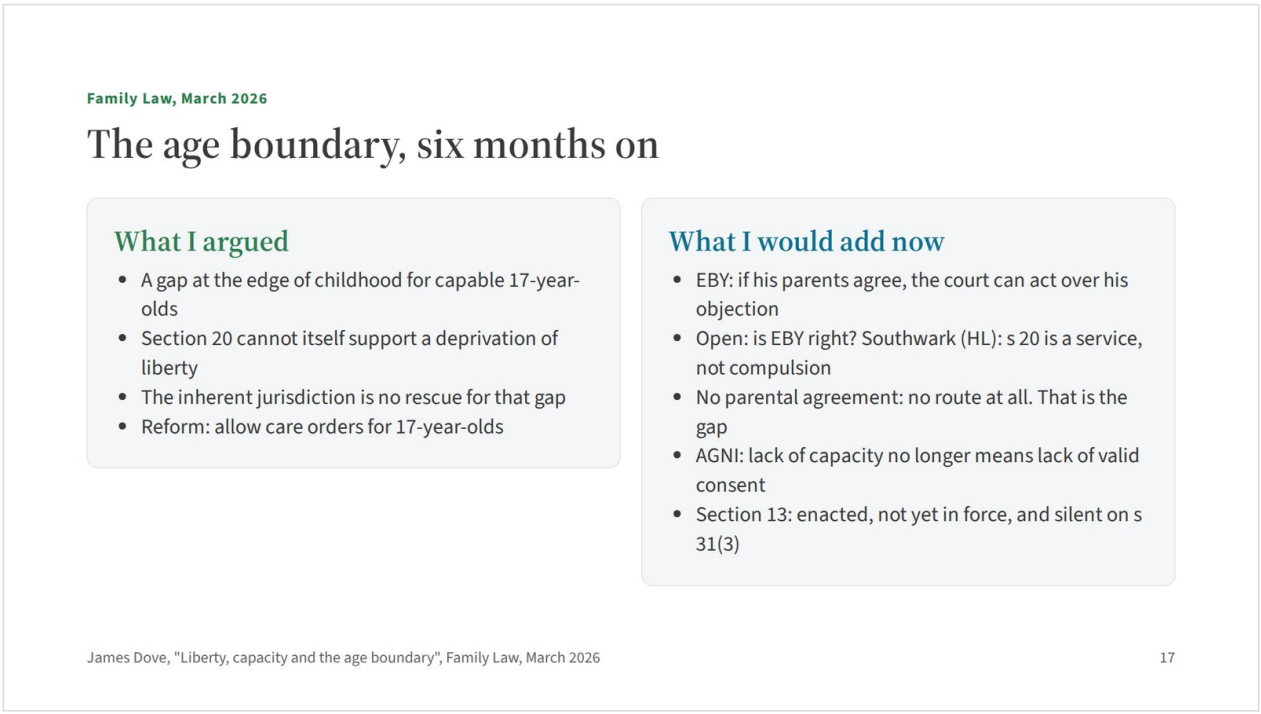
If his parents agree, EBY says the court can act, even over his objection, until a parent objects or removes him. Whether that is right is a question I come to in a moment.

If the accommodation rests only on his own consent, the court cannot use an order to force him into a placement he refuses. That is Re G (A Child) [2025] EWHC 1974 (Fam), decided by Ms Justice Henke last year. G was 17 and had been accommodated on his own consent since he was 16. He was a voluntary patient on a hospital ward, medically fit, and the authority wanted to move him by force to a placement he did not want. His mother's consent was not informed and his father objected. The judge held that the application was really an attempt to compel accommodation, which section 100 forbids, and that the restrictions were not in his best interests in any event. The same bar applied in an earlier case, A City Council v LS [2019] EWHC 1384 (Fam), where the mother objected and the young person was not accommodated at all.

If he lacks capacity, the Court of Protection is the usual route, and after AGNI his acceptance may itself be valid consent.

So the first question to ask at 16 and 17 is whose agreement supports the accommodation, whether it is informed, and how secure it is.

SLIDE 17



Some of you will have read my article in Family Law in March on this boundary ("Liberty, capacity and the age boundary: section 20 and deprivation of liberty for 16- and 17-year-olds"), so let me say briefly where I think it now stands. The article argued that there is a gap at the edge of childhood. A capable 17-year-old who is not under a care order can only be accommodated under section 20, which depends on agreement. Section 20 cannot itself support a deprivation of liberty, and the inherent jurisdiction is no rescue. I argued that the answer is to allow care orders for 17-year-olds.

I want to come back to EBY, because it is the case I should have dealt with in the article, and because I am not sure it is right.

EBY was 17 and competent, and she opposed the order. Her parents agreed to her accommodation. The judge held that the inherent jurisdiction was available, because it was section 20, not the order, that required the authority to accommodate her. Her objection mattered a great deal, but it went to whether the court should act, not whether it could (EBY at [44]–[48]). In Re G, Ms Justice Henke distinguished EBY because both parents had agreed there, and said in passing that an order could be made where both parents validly consent (Re G at [46], [58]–[59]). Re G did not need to decide the point.

The difficulty lies in how section 20 is built. Anyone with parental responsibility who is willing and able to accommodate the child can object, and anyone with parental responsibility can remove the child (section 20(7) and (8)). Subsection (11) then says that neither applies where a young person of 16 or 17 agrees to be accommodated. So a 16-year-old's yes beats a parent's no. The Act says nothing about the young person's no. Her wishes must be given due consideration under subsection (6), and that is all.

EBY reads that silence as letting the parents' yes stand, and there is support for it. In In re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam 64, the Court of Appeal said, although the point did not arise, that a competent 16- or 17-year-old cannot by refusing treatment override a parent's consent (at 84A–B). Even on that approach, the court starts with a strong predilection for the young person's wishes. It overrides them only where there is a risk of death or of grave and irreversible harm (at 88E–F and 94C–D).

There is another way to read the silence. In R (G) v London Borough of Southwark [2009] UKHL 26, Lady Hale, with whom the rest of the House agreed, said it is unlikely that Parliament meant a local authority to be able to oblige a competent 16- or 17-year-old to accept a service he does not want. Section 20 is a service, not a coercive intervention, and nothing in it allows an authority to force its services on an older, competent child (at [28]). On that reading there is nothing for the young person to override. The parents' agreement removes their own objection, but it cannot make her stay. That was said in passing, in a homelessness case, and Southwark was not cited in EBY or in Re G.

Two other decisions point the same way. In Re D (A Child) [2017] EWCA Civ 1695, the Court of Appeal said that a parent's power to control a child's movements comes to an end when the child has Gillick capacity, not at a fixed age (at [125]); the Supreme Court reversed the result on other grounds. In the Supreme Court in 2019, Lady Hale described whether a parent's consent survives a capable child's refusal as the more controversial question, and left it open (at [26]). She also pointed to the Mental Health Act 1983, where Parliament has provided that a capable 16- or 17-year-old's refusal of informal admission to hospital cannot be overridden by a parent's consent.

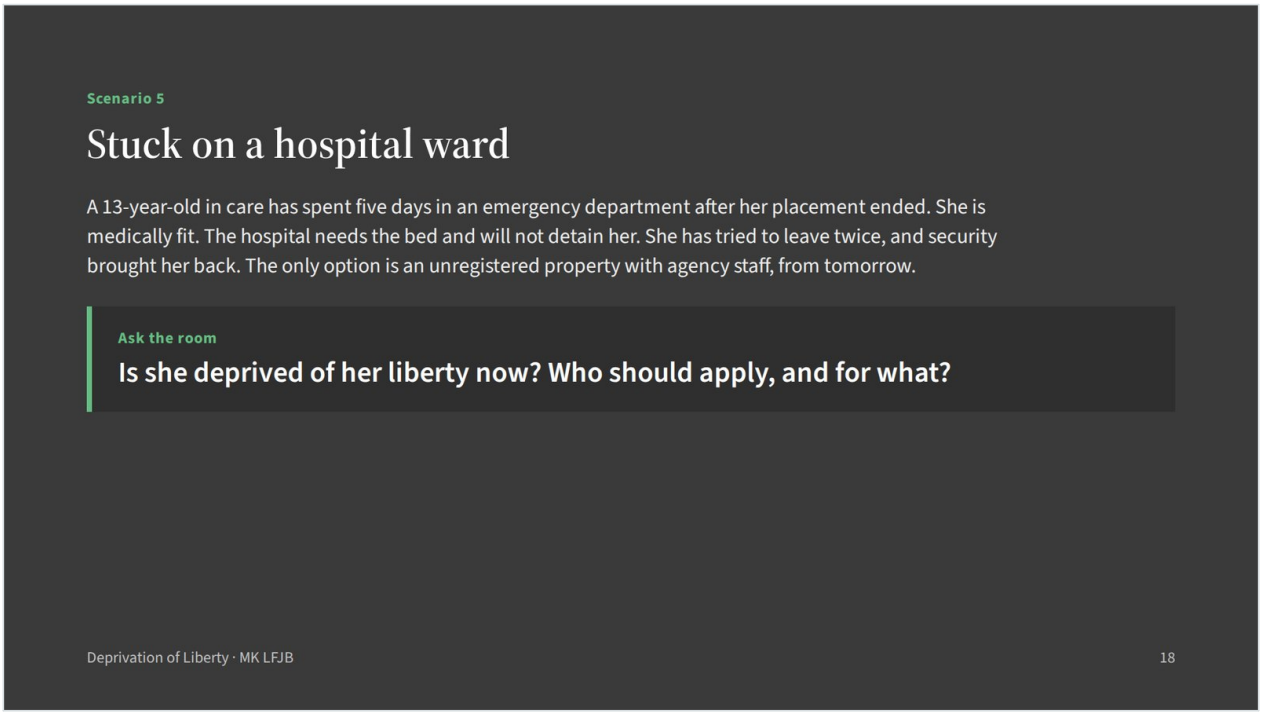
So where does that leave EBY? On its own, the gap in section 20 does very little, because a competent 17-year-old who refuses can simply walk out. It matters when the parents' agreement is paired with a court order, because then the order is what keeps her there. Section 100(2)(b) stops the court using the inherent jurisdiction to require a child to be accommodated by a local authority. In LS, Mr Justice MacDonald said that provision is concerned with the effect of an order (at [49]). If the order is what keeps a capable young person somewhere she refuses to be, it seems to me to have that effect.

None of this has been decided above first instance, and until it is, EBY is the authority. An authority relying on it should expect the young person's representatives to argue that it is wrong. Where no parent agrees, or the agreement was never properly given, there is no route at all, and that is where the case for reform remains.

AGNI has also moved things on. I treated capacity as the gateway, and after AGNI a lack of capacity no longer means a lack of valid consent. The Bill I wrote about is now an Act, but section 13 is not yet in force and does nothing about the age limit in section 31(3).

Scenario 5: the child stuck on a hospital ward (slides 18–19)

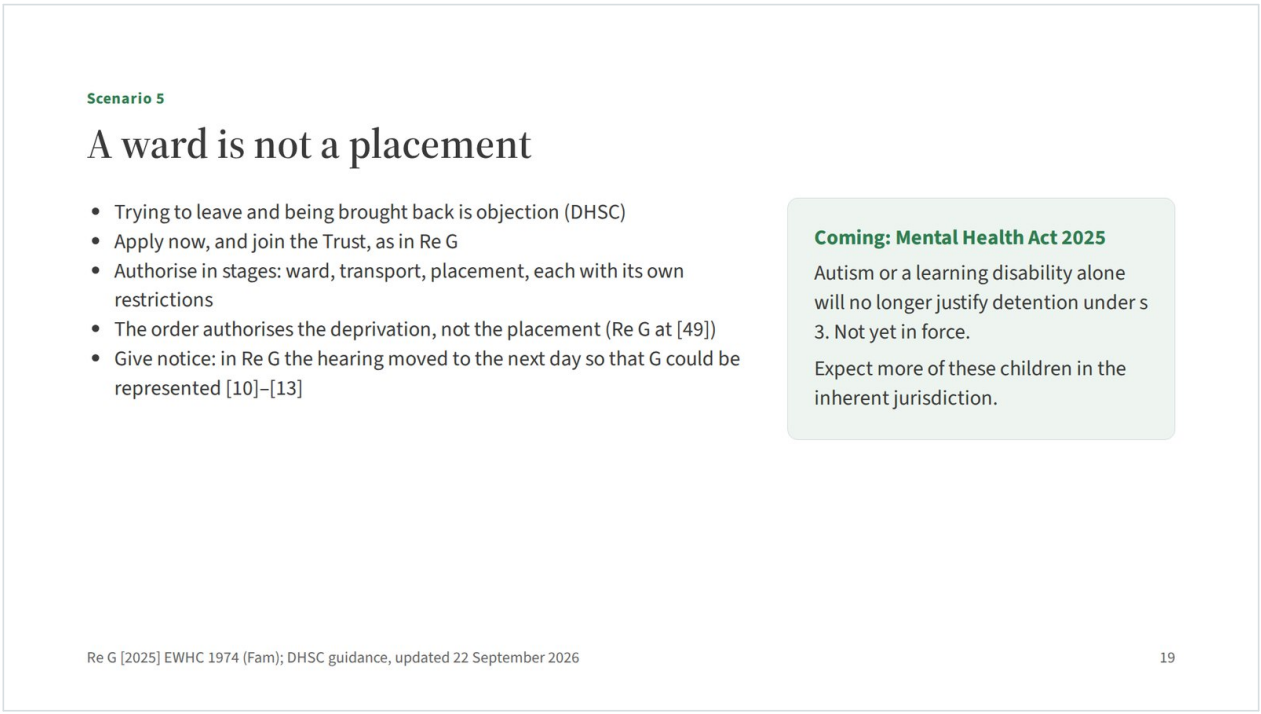
SLIDE 18



The fifth scenario. A 13-year-old in care has spent five days in an emergency department after her placement ended. She is medically fit. The hospital needs the bed and will not detain her. She has tried to leave twice, and security staff brought her back. The only option is an unregistered property with agency staff, available from tomorrow.

Is she deprived of her liberty now, on the ward? Who should apply, and for what?

SLIDE 19



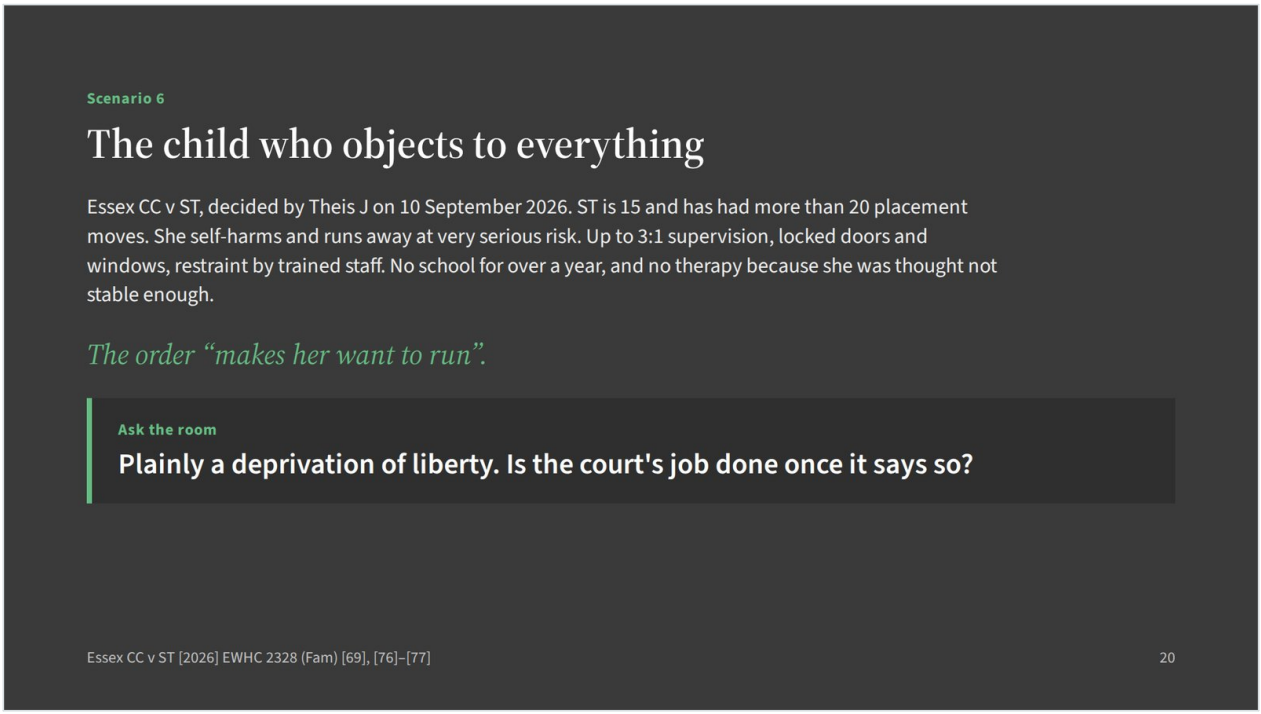
A ward is not a placement. In Re G the Trust explained why. There was no healthcare need for admission, staying there was harming the young person, and an acute bed was being kept from children who needed it (Re G at [5]). A child who tries to leave and is brought back is objecting, so this child is very likely deprived of her liberty on the ward, and the state is responsible for it.

The authority should apply now and join the Trust. The court can authorise the ward itself, as Ms Justice Henke did in Re G while G was told of the plan (at [15]), and it can authorise in stages: the ward, the journey and the new placement, each with its own restrictions and an early review. The order authorises the deprivation of liberty, not the placement. Notice matters even in a crisis. In Re G the hearing was put back a day so that G could be represented, and nobody was put at risk (at [10]–[14]).

Looking ahead, the Mental Health Act 2025 will stop people being detained under section 3 of the 1983 Act on the basis of autism or a learning disability alone. When that comes into force, more of these children are likely to come through the inherent jurisdiction, or through the Court of Protection at 16 and 17.

Scenario 6: the child who objects to everything, and restraint (slides 20–22)

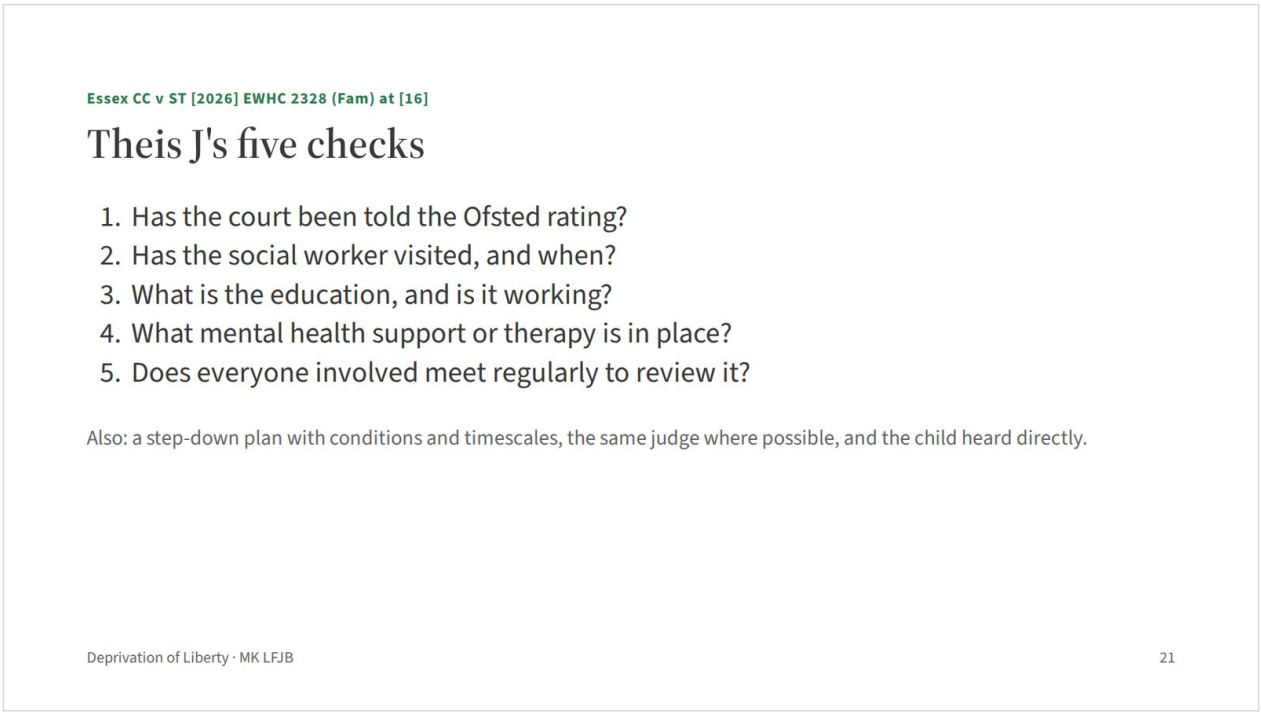
SLIDE 20



The sixth scenario is a real case, Essex County Council v ST, decided by Mrs Justice Theis in September. ST is 15 and has had more than 20 placement moves since coming into care in 2017. She self-harms and runs away when she is at very serious risk. Her order allowed up to three-to-one supervision, restraint by trained staff, locked doors and windows, and the removal of sharp objects (at [69]). She objected to all of it. Her Guardian reported that the order makes her want to run (at [77]). She had not been in school since February 2024, and she had no therapy because she was thought not stable enough for it.

This is plainly a deprivation of liberty. Is the court's job done once it says so?

SLIDE 21

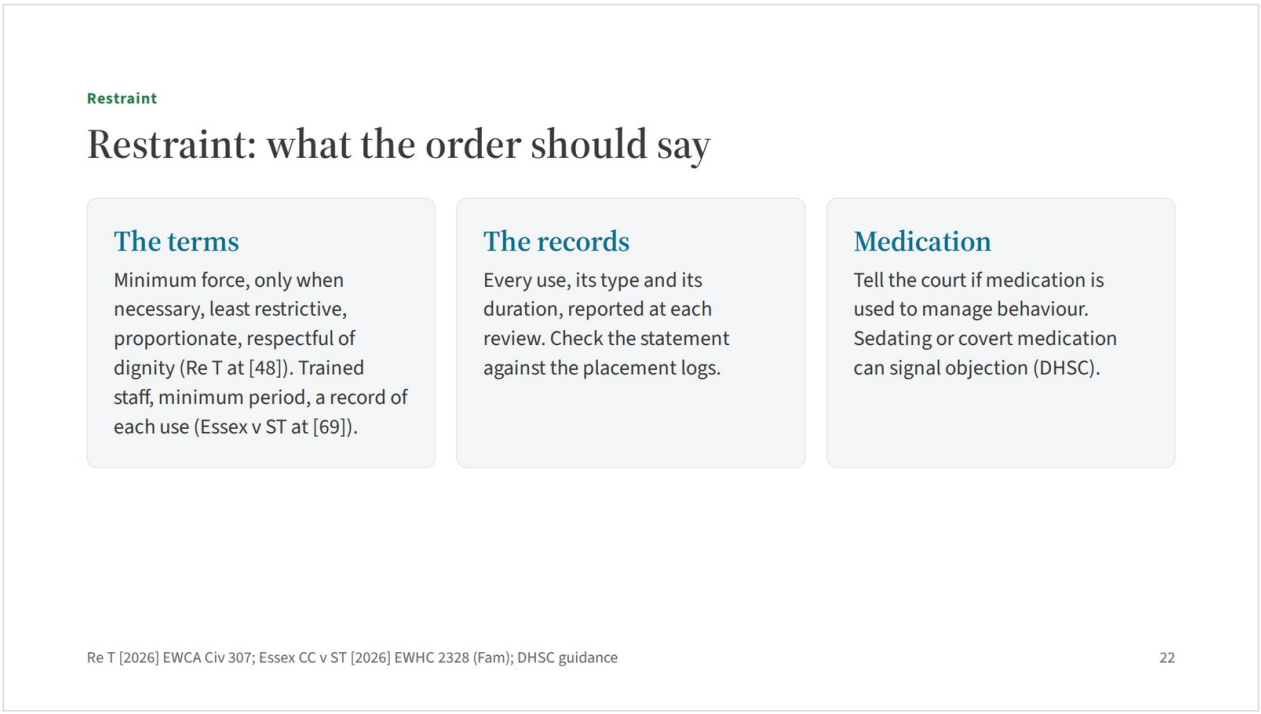


Mrs Justice Theis dealt with whether there was a deprivation of liberty in a sentence (at [76]). The rest of the judgment is about what the court found when it looked properly. The court had varied the order to a placement rated Inadequate without being told. Nobody from the authority visited for four weeks. The authority kept paying for online tuition with a take-up of 7%. ST had no therapy because she was not stable, in a placement where no therapy was available. It took eight hearings to get a full picture, and the judge credited the Guardian with looking under the lid of the authority's general assertions (at [13]–[14]).

From that came five checks, which the judge said any court dealing with these applications should actively consider (at [16]). Has the court been told the placement's Ofsted rating? Has the social worker visited, and when? What are the education arrangements, and are they working? What mental health support or therapy is in place, and is it working? Is everyone involved in the placement meeting regularly to review it?

She also tied the order to a step-down plan: from three-to-one to two-to-one, then to one-to-one after four weeks without missing episodes, with isolated incidents met by keywork rather than more staff (at [62]). She heard six of the eight hearings herself, and that continuity is what let her see the pattern. The same point was made in EBY. The judge there said that the longer proper arrangements for education, health and welfare took, the more that would weigh against continuing the order (EBY at [54]).

SLIDE 22



A word on restraint. The restraint terms are standard, and the Court of Appeal used them in Re T (at [48]), so I will not read them out. What matters is checking them. Is the standard wording actually in the order? Does it include what the order in ST added: trained staff, the minimum period and a written record of every use? At each review, ask for those records and compare them with the placement's own logs, because they do not always match. Ask, too, whether medication is being used to manage behaviour, because the Department of Health and Social Care treats sedating or covert medication as a possible sign of objection.

Set Mustafa beside ST and you can see the new approach at work. In Mustafa, frequent restraint of a content child was not a deprivation of liberty. In ST, the supervision, the locked doors and her objection made it plain.

What is coming (slide 23)

SLIDE 23

Finally, what is coming. Section 13 of the Children's Wellbeing and Schools Act 2026 received Royal Assent in April. When it is brought into force, section 25 will speak of depriving children of their liberty rather than restricting it, and it will extend to what the Act calls relevant accommodation: accommodation provided for the care and treatment of children that is capable of being used to deprive them of liberty. The criteria will be the familiar ones, a history of absconding with a risk of significant harm, or a risk of injury to the child or to others.

What will that mean? I put these forward as likely consequences rather than settled law. First, the judges change. This court already hears these cases through section 9 judges once the national list releases them, but section 25 applications are Family Court business and need not go before a section 9 judge. Second, the test changes. Under section 25, if the criteria are met the court must make the order. That is a different exercise from the best interests evaluation, and the close scrutiny of the placement, that the inherent jurisdiction involves. Third, the inherent jurisdiction narrows. Where a section 25 placement is available, leave cannot be granted (Re T [2026] EWCA Civ 307 at [27]), so more cases will have to go the statutory route.

What is not yet clear is whether unregistered placements will still need orders under the inherent jurisdiction. The definition says nothing about registration, so an unregistered home that provides care and can lock a child in may well be relevant accommodation, and then section 25 would govern it. That will turn on what care and treatment means and on the regulations. If such homes end up outside section 25, the inherent jurisdiction will probably still be there for cases of imperative necessity, as it is now. In A Mother v Derby City Council [2021] EWCA Civ 1867, the Court of Appeal held that unregistered homes have always been outside the statutory scheme, and that the High Court can still authorise a deprivation of liberty in them, because it authorises the deprivation of liberty, not the placement (at [73], [87]–[88]).

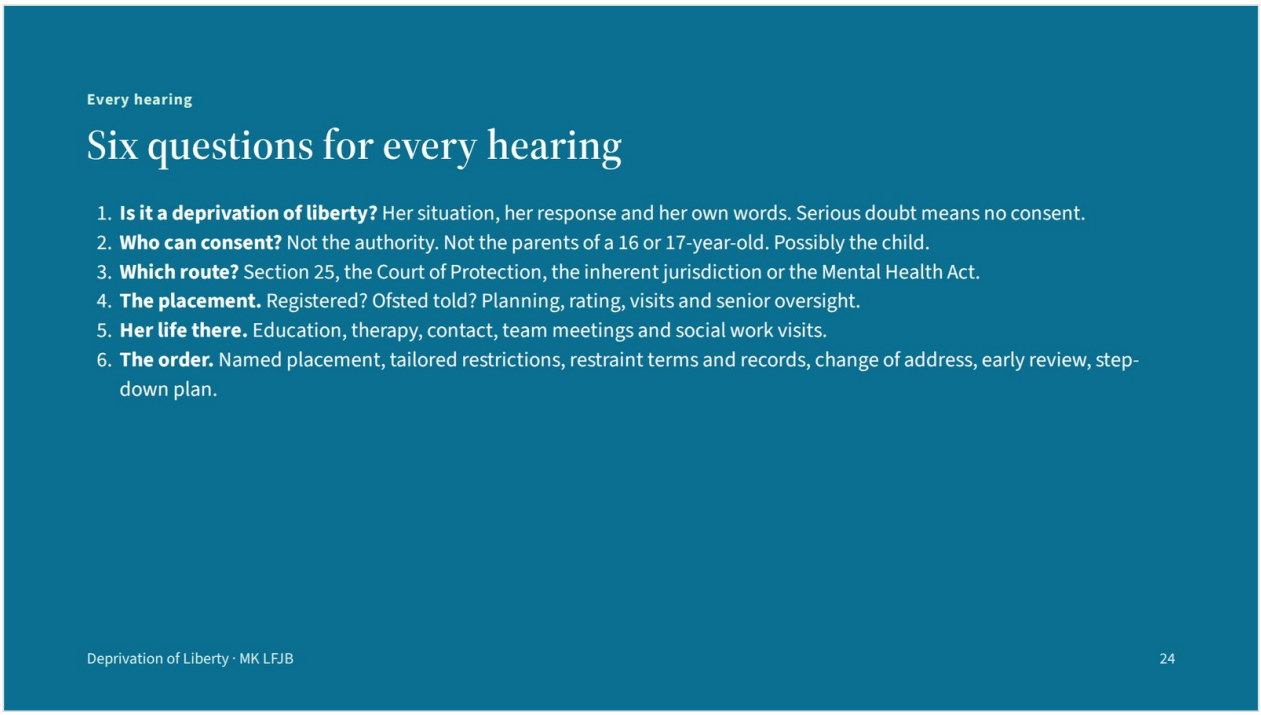
Fourth, it may reach some 17-year-olds, because section 25 already applies to a 17-year-old accommodated under section 20, although it does nothing about the bar on care orders at 17. Much will depend on regulations that have not yet been published, and no commencement date has been

announced.

There are other things to watch: the Mental Health Act change I mentioned, any appeal in Mustafa, the question of parental consent for under-16s after AGNI, further guidance from the Department of Health and Social Care, and the next set of figures in December, which will cover the first full quarter after AGNI.

The checklist and close (slides 24–25)

SLIDE 24

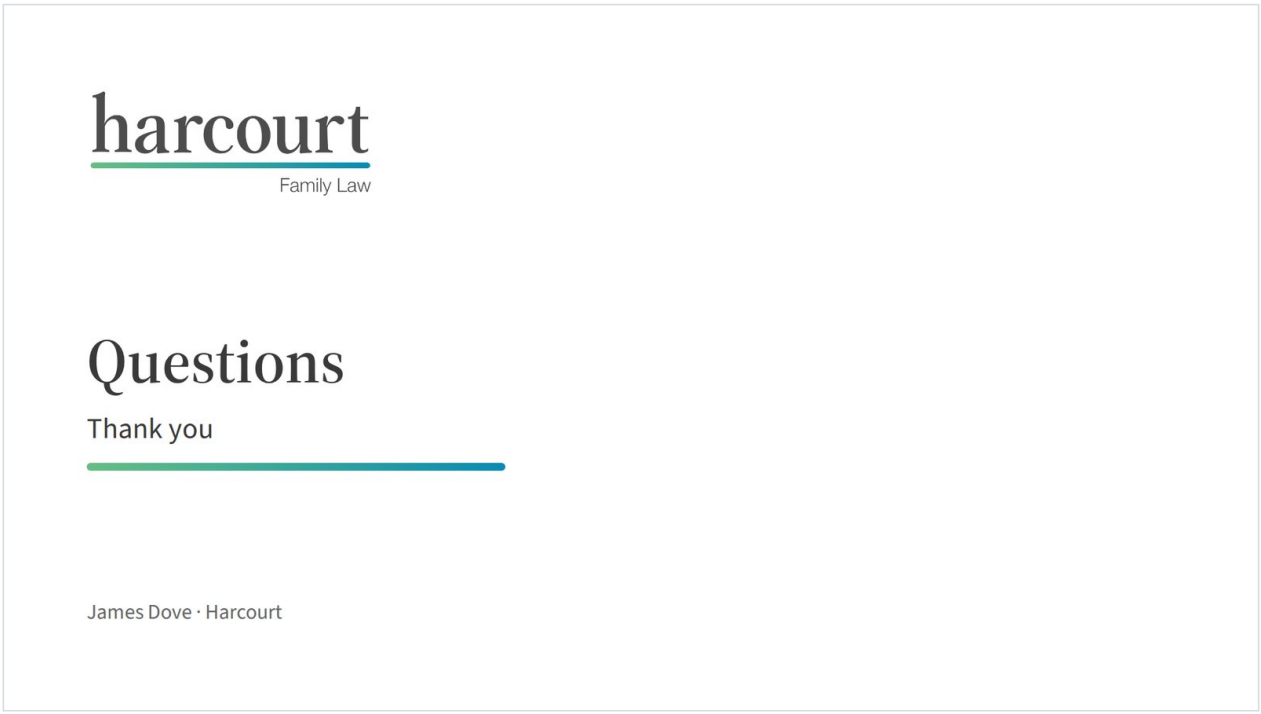


Let me finish with the six questions I promised, for every hearing. Each comes from something we have looked at this afternoon.

First, is this a deprivation of liberty at all? Look at the child's situation, her response and her own words, and remember that serious doubt means no consent. Second, who can consent? Not the authority, and not the parents of a 16- or 17-year-old. Possibly the parents of a younger child, within the zone of parental responsibility, and possibly the child herself. Third, which route? Section 25 if there is a bed, the Court of Protection for a 16- or 17-year-old who lacks capacity, the inherent jurisdiction where neither is available, or the Mental Health Act if she is detainable under it. Fourth, the placement. Is it registered, has Ofsted been told, what is its rating, who is visiting, and which senior manager is overseeing it? Fifth, her life there: education, therapy, contact, team meetings and social work visits. Sixth, the order itself. Name the placement, tailor the restrictions, check the restraint terms are there, require records, build in a mechanism for moves, set an early review with the same judge where possible, and include a step-down plan.

If there is one message to take away, it is this. For a settled child who is content, AGNI may mean there is no longer a deprivation of liberty to authorise, so the evidence of what she understands and wants becomes the heart of the case. For the most troubled children, little has changed in law. The court's task is the one Mrs Justice Theis performed in the Essex case: to look properly at the arrangements, and to make the order a bridge to a proper placement, with a plan to bring it to an end.

SLIDE 25



Thank you.

James Dove, Harcourt, 14 October 2026