

Neutral Citation Number [2018] EWCOP 45

COURT OF PROTECTION

Case No: COP13340368

Courtroom No. 1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday, 8th November 2018

Before:
THE HONOURABLE MRS JUSTICE THEIS DBE

B E T W E E N:

THE ROYAL BOURNEMOUTH AND CHRISTCHURCH HOSPITALS NHS FOUNDATION
TRUST & DORSET HEALTHCARE UNIVERSITY NHS FOUNDATION TRUST

and

SE
(By her litigation friend, the Official Solicitor)

MS V BUTLER-COLE appeared on behalf of the Applicants
MS B DOLAN QC for the Official Solicitor on behalf of the RESPONDENT

JUDGMENT
(Approved)

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MRS JUSTICE THEIS:

Introduction

1. This matter is an application made by the two NHS Trusts, The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Dorset Healthcare University NHS Foundation Trust (the applicants) for the court to make declarations in the Court of Protection in relation to medical treatment (leg amputation) concerning SE.
2. Before I turn to the background to this matter, I would like to make a number of general comments.
3. I am giving this short extempore judgment because it is now just before 7pm. This application was only issued yesterday, 7 November, despite the fact that it had been known to the applicants and the medical team on 24 October that very serious medical treatment was going to be likely and that an application would need to be made.
4. I am told, despite the size of these Trusts, they did not have access to appropriate legal advice to be able to advise them as to the steps that should have been put in place on proper notice to the family. As a result they dealt with the matter by way of a safeguarding referral to the Local Authority and it was only at some point during that process they were alerted to the fact that actually the appropriate course was to issue an application to this court, resulting in an application being issued yesterday and the matter being heard today in the urgent applications court, which already had an extremely busy list.
5. The court has had the benefit of the position statement filed on behalf of the applicants, by Ms Butler-Cole, and the position statement on behalf of the Official Solicitor, by Ms Dolan QC.
6. In addition, the court was informed at one of the hearings earlier today that the two daughters of SE had been served. One of her daughters, C, has been at court today and has been involved in detailed discussions outside court. She addressed the court with eloquence and compassion in relation to the situation she has found herself in, having to be here to deal with the extra information that she wanted to be provided about the arrangements for the care of her mother prior to any operation and the post-operative care arrangements. As she said, with understandable feeling, she is now not going to see her mother before the operation because of the lateness of this application and the extra information that was required.
7. I am satisfied that these applicants did not take the steps and procedural route they should have done and I am going to direct that a letter shall be sent to Mr Justice Hayden (Vice President of the Court of Protection) by 20 November, copied to me and the parties, setting out what I am told are the concrete changes that have been made as a result of this case to ensure that those on the front line are not without effective legal advice in relation to applications that should be made in a timely way (the details of the letter are set out at the end of this judgment).
8. It also appeared during one of the hearings this afternoon, that there seemed to be some uncertainty as to whether C's sibling, J and her brother, W, had been given notice of this

application. It appears there was a conversation with J yesterday when she was told that the papers were going to be emailed to her. According to Ms Butler-Cole's instructing solicitor they were emailed, but there was no confirmation as to whether she had actually received those documents.

9. In relation to the existence of W, his existence was raised during one of the hearings today when C indicated that there was a third child of SE. There was some suggestion that he had not much involvement in relation to SE's recent medical care, although in fact the notes only related to a relatively short period of time, so the position remained unclear. I took the view that I needed to be satisfied that J had received the papers by email, and arrangements had been put in place to notify W of the existence of the application and the evidence. That resulted in an adjournment and a note being sent through from Ms Butler-Cole to the court timed at 17.19, confirming that the Official Solicitor had spoken to both J and W by phone, separately.
10. J confirmed that she had received the papers, had read them and discussed them with W, and that they both agreed that their mother should have the operation. J said it is a horrible decision to make and she is aware of the risks, but without it, her mother will die. J said her mother is frightened because of her heart, but she wants to live, and W confirmed it has to be done.
11. It was only as a result of that information, that a further draft Order was submitted to the court, which confirms who had notice in relation to this application and their consent to the Order being sought, so that the correct process and procedure has taken place.
12. As noted, it is extremely unfortunate, to say the least, that this family in the already difficult situation they find themselves in, are placed in the situation they are in but, as C understands, the court has to deal with the reality it is faced with and I have endeavoured to ensure there has been notice and discussion so that any order the court makes has the confidence and knowledge of all parties.
13. The impact of delay in dealing with these applications was highlighted by Hayden J in *CB v Medway Council & Anor (Appeal) [2019] EWCOP 5 (06 March 2019)* at paragraph 15 "*Moreover, I feel constrained to say, that which I have already stated in several cases, delay is invariably inimical to P's welfare. Timetabling and case management must focus on a sensible and proportionate evaluation of P's interests and not become driven by the exigencies of the litigation. Whilst the Mental Capacity Act does not have incorporated into it the imperative to avoid delay in the way that the Children Act 1989 does, the principle is nonetheless embraced by the Court of Protection Rules, which require the application of the "overriding objective". In any event the avoidance of delay is a facet of CB's Article 6 and Article 8 rights.*" I agree. Whilst, of course, it is understood emergencies do arise, in this case the emergency was due to the failure to have any effective system in place for securing legal advice for clinicians in the Trusts. I hope that the procedures now put in place (as set out at the end of this judgment) will be replicated elsewhere to avoid this situation happening again.

Relevant Background

14. In support of the application, the court has read the COP3 statement from

Dr Stephen Taylor, Consultant Psychiatrist who deals with the position in relation to capacity, and also from Dr Godfrey, Vascular Surgeon, who is the clinician responsible for the care of SE.

15. In addition to those statements there has been additional information placed before the court today as a result of the discussions that have taken place outside court.
16. Firstly, from Dr Godfrey, who confirms he agrees an email record of a telephone conversation with him today, where he stated having looked at the other medical conditions SE has he confirmed, putting it in a summary form, that the position in relation to SE's foot, cannot wait for any further procedures because of the high risk and danger to her life of any delays in the amputation procedure. He also indicated that the presentation has worsened over the course of this week, the wound has started to smell, which indicated that the infection was progressing, SE herself had reported feeling weaker and he considered that reinforced his opinion he set out in his statement that there is an urgency for this surgery to take place and any further delay is going to put SE's life at risk.
17. Secondly, a document was put before the court called a 'Mental Health Care Plan', which is to be read with the vascular care plan the court has seen. It is from Dr Taylor and sets out the detail of what is proposed to be put in place by the hospital tomorrow morning in relation to pre-operative care. According to C, this is something she has been asking about for some time, and now has more understanding about precisely what is being done. This is an issue that has concerned the Official Solicitor as well. So, there is now a detailed programme in relation to the care that will be provided, which seeks to anticipate all the different scenarios that may take place tomorrow and what steps will be put in place.
18. It also deals with the position on post-operative care, what support will be there to be able to deal with any distress SE is likely to have following the operation and also the provision in relation to medication and liaison with the psychiatric team. So, what this provides is a structure both before and after the operation (that is now agreed between the parties should take place), which enables the operation to take place in a way that is managed, where there is advance knowledge about what steps can, and are likely to be taken in each of the possible scenarios. This is something C has wanted.
19. Having set out the updated position, there is no issue between the parties that SE lacks capacity to be able to make decisions in relation to the medical procedure that is proposed. That is confirmed by the opinion expressed by Dr Taylor and is confirmed by the position taken by the Official Solicitor, where they have set out that they are satisfied that by reason of her schizophrenia, the patient lacks the capacity to decide whether to undergo an amputation.

Discussion and Decision

20. In relation to the legal principles the court has to consider, s. 4 Mental Capacity Act 2005 requires the court to determine whether what is proposed is in SE's best interests. That requires a wide review or requires consideration of a wide range of factors having

undertaken an analysis of the evidence the court has, bearing in mind the position in relation to SE's circumstances. Ms Butler-Cole has rightly referred the court to two authorities, the first being *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67 at 38, which sets out the best interest test, and the need for the court to look at welfare in the widest sense, not just medical, but social and psychological and consider the nature of medical treatment in question, what it involves and its prospects of success.

21. As Ms Butler-Cole rightly says, the situation in this case differs from the position in *Wye Valley v Mr B* [2015] EWCOP 60, a decision of Mr Justice Peter Jackson (as he then was), where in fact there was a refusal to grant the application to carry out the procedure that would have resulted in the amputation of his leg because it was considered that P was clear in his refusal by saying that even if he was going to die, he do not want the operation and the expert evidence in that case was that the decision whether to treat or not was very finely balanced.
22. In this case, the court needs to consider the balance sheet, as helpfully set out by Ms Butler-Cole, in her position statement. There are four matters that need to be considered in favour of surgery taking place.
23. Firstly, the important consideration that SE will die without surgery, probably in a relatively short time frame. The evidence is clear in relation to that and is unchallenged.
24. Secondly, that insofar as her wishes can be ascertained, she does not wish to die and so that is a matter that favours the surgery taking place.
25. Thirdly, she is more likely than not to survive surgery. The national average risk in relation to this surgery is between 5 and 10%. In the circumstances for SE, the worst case scenario there is thought to be a 35% chance of her not surviving, but that is caveated by the fact that it has been very difficult to be able to carry out an assessment of that chance or not and whether those risks are as high as that, because there has been an unwillingness to engage in the pre-operative procedures that would normally have taken place.
26. Finally, both SE's daughters and her son both consider, although accepting it is an extremely difficult decision, that it is in her best interests to be able to have the surgery.
27. The factors to consider against the surgery taking place are that there is some evidence to suggest that SE does not wish the surgery to take place although this is contrary, when considering the balancing exercise, to her wish not to die. There was some equivocation in relation to her views about not having the surgery and sometimes she did say, for example on 1 November, that she was not sure.
28. The risk of mortality as a result of the procedure, as I have indicated, is more than 5 to 10% and at worst 35% because of her other health conditions and there are also risks of other non-fatal problems, including phantom limb syndrome, pain, infection and organ malfunction, but these risks have to be viewed against the certainty of death without any

amputation.

29. Although SE lacks capacity and many of her views about amputation are tied to her delusional beliefs, she also has a rational concern about the risk of death during the procedure as a result of her own particular cardiac problem.
30. When this court does balance the factors for or against any surgery taking place, the fact is that if she does not have the surgery, she is very likely to die. She does not wish to die and those who have her interests at heart, through her family as well as this court, support the Order being made.
31. Therefore, for those very brief reasons, I endorse the Order that has been agreed between the parties. The court has admiration for the manner in which the family have faced the difficult decision that her family have had to make and as C has said, she was right to come to court. She was right to be able, with the assistance of the Official Solicitor, to get the further detail in relation to the care, pre-operative and post-operative, that her mother will need and require which is now in writing. Also, it was right that the alternatives were explored properly with Dr Godfrey as to whether there should and could be any delay in relation to this procedure to enable other operative procedures that are going to be required to take place.
32. However, it is quite clear that everyone, having considered those options, has reached the conclusion that the matter cannot wait any longer and so her best interests will be met by this court endorsing the Order that has been agreed and giving the applicants permission to be able to carry out the procedures set out in paragraph 4, namely the amputation of her right leg in accordance with the Care Plan dated 6 November and the Additional Care Plan dated 8 November.
33. I wholly endorse paragraph 5 which is the arrangements for the Care and Treatment are authorised as lawful and paragraph 6 which sets out the agreement in principle to convene a Case Conference within two weeks of the surgery being carried out, which the family and the various parts of the multi-disciplinary team will be invited to be able to support SE's medical, psychological and other care she requires after this procedure has taken place.
34. Therefore, I will endorse the Order that has been agreed between the parties and put before the court.

Postscript

35. The Chief Executive, Tony Spotswood, of The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust sent a letter to the court dated 20 November 2018. This letter details the changes they had implemented following the experience of this case. They are set out as follows:
 1. *The Trust's Mental Capacity Act Policy has been amended to provide more detail on the situations where staff may need to make an application to the Court of Protection and who to contact both within and outside of normal working hours to obtain advice, including legal advice. These changes are due to be formally approved at a meeting of the Trust*

Protection Safeguarding Committee on Friday, 7 December.

2. *The changes and the need for timely escalation have been highlighted to staff in the weekly Staff Bulletin on 19 November 2018.*
3. *Separate briefing sessions on the changes to the Mental Capacity Act Policy have been held with teams in the Emergency Department, Acute Medical Unit, Surgical Assessment Unit and Critical Care, as these are the areas most likely to be involved in these applications.*
4. *Contact details for the Trust's solicitors have been provided to Adult Safeguarding to support timely access to legal advice from external legal advisers if required. The information held by the Clinical Site Team for out of hours contacts has been checked to ensure that this is up to date.*

While these types of applications are not something that the Trust is required to make frequently, we recognise the importance of timely escalation and the provision of appropriate advice for patients and their families.

Other Trusts may want to review their procedures and consider the helpful framework set out above.

End of Judgment

Transcript from a recording by Ubiquis

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This transcript has been approved by the judge.