Case No: LV22C50388

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
LIVERPOOL DISTRICT REGISTRY

Neutral Citation Number: [2022] EWHC 1869 (Fam)

Liverpool Civil and Family Justice Centre
Vernon Street
Liverpool
L2 2BX

Date: 30 June 2022

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Wirral Borough Council	**Applicant**
- and -	
RT	
-and-	**First Respondent**
NT	
(By His Children's Guardian)	**Second Respondent**

- -
- -

Mr Jamil Khan (instructed by **Wirral BC**) for the **Applicant**
The First Respondent did not appear and was not represented
Mr Simon Povoas (instructed by **McAlister Family Law**) for the **Second Respondent**

Hearing date: 30 June 2022

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Approved Judgment

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with the welfare of NT, an born in June 2022 and now aged 6 days old. Wirral Borough Council applies for a declaration under the inherent jurisdiction of the High Court that it is in NT's best interests to undergo surgery to investigate, and if necessary repair, a suspected obstructed bowel. Wirral Borough Council is represented by Mr Jamil Khan of counsel. NT is represented through his Children's Guardian by Mr Simon Povoas of counsel.

2. The mother of NT is RT. She does not appear and is not represented. She is an Estonian national. Sadly, the mother is currently labouring under significant mental health issues. She is currently the subject of a section under the Mental Health Act 1983 and thus is detained under the mental health legislation. It remains to be formally established at this stage of the proceedings whether the mother has litigation capacity. Given the urgency of this matter, for the reasons I shall come to, I am satisfied that it is appropriate to proceed in the mother's absence.

3. The putative father of NT is NL. The local authority has not been able to date to establish contact with the putative father despite making attempts to reach him by telephone. It is understood that the father has his own physical and mental health difficulties. It would not appear to be the case that the putative father holds parental responsibility for the child but, again, this remains to be confirmed.

4. Within this context, the court has before it the evidence of the social worker in the form of an initial social work statement, of Mr T, consultant paediatric surgeon and of Dr P, neonatal consultant. Both Mr T and Dr P also gave oral evidence to the court.

BACKGROUND

5. The background can be stated shortly. NT was born by way of Caesarian section on 24 June 2022. In her statement to the court, Dr P, the following points are made regarding NT's birth and subsequent clinical course:

    i) NT was born prematurely at X Hospital, at 30+5 weeks gestation with a birth weight of 1655 grams, following an unbooked pregnancy.

    ii) NT was born in poor condition and required resuscitation at birth. He was intubated and ventilated and received medication to help with lung immaturity.

    iii) He showed evidence of infection and was commenced on antibiotics. There was significant derangement of his blood parameters (in the form of deranged clotting) and NT required multiple blood products.

    iv) Within the context of his deranged clotting, his cranial ultrasound shows a unilateral, significant bleed to the intra-ventricular system of his brain.

    v) From day one NT had a distended abdomen. X-rays of his abdomen were performed and were discussed with the surgical team at Alder Hey Children's Hospital. The appearances were suggestive of an obstruction in the bowel. Following a multidisciplinary meeting in the evening of 28 June 2022 the

decision was made that NT should be transferred to either Liverpool Women's Hospital or Alder Hey Children's Hospital the following day for surgical review and further investigations.

vi) Following a further multidisciplinary meeting on the morning of 29 June 2022 NT was transferred to the Neonatal Unit at Liverpool Women's Hospital and was reviewed by Mr T (Consultant Surgeon). A plan was made to perform washouts of his bowel in an attempt to decompress his abdomen. This was not successful and on further surgical review by Mr T today the decision was made to transfer him to the surgical unit at Alder Hey Children's Hospital for further management including possible bowel surgery.

vii) NT is now at Alder Hey and breathing independently, but has persistent abdominal distension and signs of infection. The clinical team are concerned that if untreated, the presumed blockage in his bowel may lead to significant problems such as gut perforation and leakage of bowel content into the abdominal cavity, which may be life threatening.

6. The court also has a short report in email form from Mr T, consultant Paediatric surgeon at Alder Hey Children Hospital who is on call for surgery this week. As I have noted, Mr T also gave oral evidence.

7. In his short written report, Mr T states that he was first consulted about NT yesterday. From a surgical perspective, Mr T opines that in addition to his other problems, NT has clinical and radiological evidence pointing towards a diagnosis of bowel obstruction. Whilst this is not definite, Mr T has a high degree of suspicion. He does not think that there are any timely interventions or investigations he can perform short of a laparotomy, which is an operation to open the abdomen to diagnose the exact cause of the problem and treat any obstruction. With respect to the risk of not operating or delaying an operation on NT, in his written evidence Mr T confirmed the risk is of perforation of the bowel. Dr T is clear in his written evidence that this is a life threatening complication which would require emergency surgery.

8. In his oral evidence before the court, Mr T confirmed the contents of his short report provided to the court by email. Further, Mr T further confirmed that all attempts at more conservative modes of treatment that have been attempted over the course of the past 48 hours have not alleviated the concerning symptoms exhibited by NT. In particular, his abdomen remains distended. Within this context, Mr T was clear that the more conservative modes of treatment have now been exhausted and that the appropriate course is surgery to investigate the cause of NT's continuing symptomology and to provide treatment for it.

9. With respect to the question of the benefits of surgery as balanced against the risks, Mr T stated that whilst NT is not at present *in extremis*, if he has some form of bowel obstruction (there being several possible causes for such obstruction) that condition is a dynamic one in which the risk of a perforation of the bowel can increase quickly. Mr T's oral evidence was again that perforation of the bowel is a life threatening condition that can result in overwhelming infection and septic shock leading to death. The statistics show a very high risk of mortality in such situations. These risks are increased in the case by the fact that NT was born prematurely and is accordingly very fragile.

10. In these circumstances, Mr T further made clear to the court that the risk of performing surgery on NT prior to a perforation to the bowel developing is much lower than performing such surgery after a perforation has taken place. In these circumstances, Mr T considered that delaying surgery would increase the risks to NT both in terms of the risk presented by the occurrence of a perforation *per se* and the risks presented by having to perform surgery following such a complication developing. Dr T confirmed that the deranged clotting exhibited by NT following his birth, and which resulted in a bleed on the brain, has been remedied such that that is not a risk factor in the surgery.

11. Within this context, Mr T was of the opinion that the benefits of surgery on NT at this point in time, with the concomitant need for a general anaesthetic, outweigh the risks of undertaking such a procedure. As such, both doctors responsible for NT's treatment are clear that it is in NT's best interests now to undergo laparoscopic surgery in order to investigate and, if necessary repair, the possible obstruction of his bowel. Each considered that the risks of that surgery not being undertaken extend as far as, and include, the risk of death.

12. With respect to the parents, there is lack of clarity in respect of the mother's position. Further and in any event, it remains to be formally confirmed the extent to which she currently has capacity make decisions regarding medical treatment for NT in the exercise of her parental responsibility.

13. At the time of NT's birth, the mother was already beginning to show signs of acute mental illness. The mother has a formal diagnosis of schizophrenia with psychosis. On 28 June 2022 the mother was formally assessed by a Consultant Psychiatrist as suffering from an acute episode of mental illness and was deemed at that point in time to lack capacity to make decisions in respect of NT. As at 27 June 2022 the mother presented as confused and perplexed, she denied auditory hallucinations but talked about Jehovah's witness, the mafia in Estonia and Mormons in her local area. She was dishevelled, had poor self-care and was low in mood. She had deteriorated significantly over the past 24 hours. She was refusing medication or inpatient admission The mother was subsequently detained under s.5 of the Mental Health Act 1983. She remains so detained. The local authority continues to consider that she does not have capacity to take decisions in respect of NT. District Judge Cuddy has rightly today directed the local authority file and serve a capacity assessment in respect of the mother.

14. It is equally the case that the views of NT's putative father are not before the court. Whilst the local authority has endeavoured to contact the putative father, this has not proved possible. The local authority understands that the father is a veteran who suffered very extensive combat injuries and who labours under his own significant physical and mental health difficulties. It has not been possible in the short time available before it has become necessary urgently to consider the current application whether the father has parental responsibility and, if so, whether he is capable of exercising the same.

15. Within the foregoing context, there is at present no one who is in a position to exercise parental responsibility in respect of NT.

16. With respect to the proceedings now before the court, regrettably the local authority appears to have failed to identify that the authorisation of medical treatment for NT by the court may require an application under the inherent jurisdiction, given the nature of

the medical treatment in question and the very young age of the premature subject child. In the circumstances, the local authority issued an application for an interim care order and the matter this morning came before District Judge Cuddy. Having made an interim care order District Judge Cuddy immediately identified the need for the matter to come before a judge of the High Court for consideration of the question of medical treatment. Following consultation, I directed the matter be re-allocated to me.

17. Having regard to the background I have related, the local authority appears to have proceeded to apply for an interim care order with a view to exercising the parental responsibility thereby conferred on it to consent to the surgery required by NT, pursuant to s.33 of the Children Act 1989. If that is the case, the approach was a misguided one.

18. Whilst in *Re H (A Child)(Parental Responsibility: Vaccination)* [2020] 2 FLR 753 the Court of Appeal made clear that is no longer necessary for a local authority to seek an order under the inherent jurisdiction in order to consent to the vaccination of a looked after child, in circumstances where vaccination is not a grave or serious medical procedure, the circumstances of this case are *very* different. In *Re H (A Child)(Parental Responsibility: Vaccination)*, the Court of Appeal reiterated the following principle:

> "[26] On a strict reading of s.33(3)(b), and subject only to the exceptions already highlighted, the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.
>
> [27] However, whilst that may be the case when considering the section in isolation, local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in Re C (Children) [2016] EWCA Civ 374; [2017] Fam 137 (Re C), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child."

And in that context at [30]:

> "[30] In *Re C* therefore it was held that:
>
> i) Certain decisions are of such magnitude that they should not be determined by a local authority without all those with parental responsibility having an opportunity to express their view to a court as part of the decision-making process;
>
> ii) Section 100 CA 1989 is available to a local authority *in serious medical treatment cases* because it is not seeking to *confer* a power on itself; the High Court is instead being asked to use its inherent jurisdiction to *limit, circumscribe* or *sanction* the use of power which the local authority already has by virtue of section 33(3)(b);

> iii) As the section provides, leave to apply can only be granted where the court has reasonable cause to believe that, if the inherent jurisdiction was not exercised with respect to the children, they would be likely to suffer significant harm."

19. Bowel surgery on a six day old premature infant who has suffered complications, including a bleed to the brain is, in my judgment, *plainly* serious medical treatment and of such magnitude that the decision as to whether surgery should be undertaken should not be determined by the local authority alone without all those with parental responsibility having the opportunity to express their view to the court as part of the decision making process.

20. I appreciate that the position in this case is complicated by the fact that the mother is at present not capable of expressing a considered view regarding the treatment, and that it remains unclear whether the putative father has parental responsibility. However, given the gravity of the medical treatment proposed and the current condition of NT, I remain satisfied that it is appropriate for the question of whether NT should undergo a serious surgical procedure in the context of the complications consequent upon his prematurity to be the subject of consideration by the court.

21. In this context, just before this hearing commenced the local authority issued an application on form C66 for permission to invoke the inherent jurisdiction and for a declaration that it is NT's best interests to undergo the medical treatment recommended by his treating doctors, including laparoscopic surgery to investigate and, if necessary, repair an obstructed bowel.

22. Within the context I have outlined, both the local authority and the Children's Guardian submit that it is in NT's best interests NT's best interests to undergo laparoscopic surgery under a general anaesthetic for the purpose of investigating his suspected bowel obstruction and treating that bowel obstruction or such other cause of his symptoms that is identified.

THE LAW

23. The law to be applied in respect of these difficult applications is itself straightforward. In *Re E and Another (Minors: Blood Transfusion)* [2021] EWCA Civ 1888, following a review of the authorities, the Court of Appeal reiterated as follows:

> "[49] These cases, spanning persons of all ages, mandate an assessment from the individual's point of view by which the court seeks to identify his or her best interests in the widest sense. The assessment will be driven by circumstances that will vary widely from case to case."

24. In *Re E and Another (Minors: Blood Transfusion)*, the Court of Appeal further reminded judges that the court must focus on the matters relevant on the particular facts of the case before it. Within this context, and acknowledging the starting point being the strong, but rebuttable, presumption that it is in a person's best interests to stay alive, the Court of Appeal observed at [52] that:

> "In one sense, an unfettered welfare assessment does not sit easily with presumptions or starting points. But, approached carefully, these are more

> matters of form than substance. What is important is that the court identifies the factors that really matter in the case before it, gives each of them proper weight, and balances them out to make the choice that is right for the individual at the heart of the decision. If this process is properly carried out so as to arrive at a sound welfare decision, the court will not be acting incompatibly with rights arising under Arts 2, 3 and 8 (and, here, 9) of the European Convention on Human Rights."

25. The best interests of the subject child must be considered in their widest sense, with every consideration capable of bearing on the decision being taken into account and balanced by the court on the facts of the particular case. This means that the court will not be bound to follow the evaluation provided by the medical witnesses in the case, albeit that that evaluation will often carry significant weight. It also means that the weight to be accorded to the wishes and feelings of the child must be considered in accordance with their age and understanding, the Court of Appeal in *Re E and Another (Minors: Blood Transfusion)* pointing out that there is a significant difference between a young child and a child who is Gillick competent with respect to the treatment proposed.

DISCUSSION

26. Having considered the evidence before the court, I am satisfied that it is in NT's best interests to undergo urgent laparoscopic surgery to ascertain whether he has an obstructed bowel and, if so, to treat that obstruction surgically. My reasons for so deciding are as follows

27. I start with the presumption that it is in NT's best interests to stay alive. That that is the appropriate starting point in this case is underlined by the fact that both treating clinicians are clear that if left without the treatment they recommend, the risks to NT extend to, and include, a risk of death should NT suffer a perforated bowel. The risks to NT of complications arising out of a failure to treat him are amplified by the fact that he is a premature baby and, accordingly more fragile.

28. Whilst he is too young to express his own views, I am satisfied that within this context NT would want medical treatment aimed at ensuring his survival.

29. Having heard the evidence of Mr T and Dr P, I am satisfied that it is clear that the benefits to NT of surgery plainly outweigh the risks of such a procedure being undertaken. Further, I am satisfied that it is in NT's best interests to have that surgical procedure as soon as possible having regard to the increased risks attendant on attempting such a surgical intervention following a perforation. I find that the benefits of surgery at this point in time significantly outweigh the risks.

30. I have, of course, borne in mind that the mother has not been before the court to give her view as a parent with parental responsibility for NT. Equally, the putative father is not before the court. However, I am satisfied that even if one or both parents were to object to NT receiving the medical treatment proposed, on the medical evidence before the court such objection could not operate to alter the conclusion I have reached that such surgery is in NT's best interests. Further, I bear in mind the observation of Holman J in *NHS Trust v MB and Others* [2006] EWHC 507 (Fam) that:

> "It is important to stress that the references to the views and opinions of the parents, their own wishes, however understandable in human terms, are wholly irrelevant to the consideration of the objective best interest of a child, save to the extent in any given case that they may illuminate the quality and value of a child parent relationship."

CONCLUSION

31. In conclusion, having regard to the totality of the evidence before the court and holding NT's welfare as my paramount consideration, I am satisfied that it is in NT's best interests to undergo laparoscopic surgery under a general anaesthetic for the purpose of investigating his suspected bowel obstruction and treating that bowel obstruction or such other cause of his symptoms that is identified.

32. In the circumstances, I grant permission to the local authority to invoke the inherent jurisdiction (in circumstances where otherwise NT would be likely to suffer significant harm), and make declarations as to his best interests accordingly.

33. The care proceedings in respect of NT will be remitted to District Judge Cuddy, who has listed the matter for a further CMH on 14 July 2022.

34. That is my judgment.