Neutral Citation Number: [2020] EWCOP 31

Case No: 13614772

IN THE COURT OF PROTECTION

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2020

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

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Between :

UNIVERSITY HOSPITAL COVENTRY AND WARWICKSHIRE NHS TRUST	**Applicant**
- and –	
K	**Respondents**
- and -	
Mrs W	

- -
- -

Ms Fiona Paterson (instructed by **University Hospital Coventry and Warwickshire NHS Trust**) for the **Applicant**
Ms Katie Scott (instructed by **Official Solicitor**) for the **K**

Hearing dates: 22nd June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by the press. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the names and addresses of the parties and the protected person must not be published. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden :

1. I am concerned in this case with an urgent application brought by the University Hospital Coventry and Warwickshire NHS Trust. This is a final hearing, held remotely, in which the Trust have asked me to consider questions of capacity and best interests relating to a young woman who will be named in this judgment as "K."

2. On 20th May 2020 K was referred by her local hospital to the Applicant's University Hospital Coventry because it is a tertiary centre for cancer treatment. She had already undergone a series of diagnostic radiological and pathological investigations shortly before the referral was made. A final report resulting from those investigations was presented on 1st June 2020 and K was seen for the first time in the out patients' clinic on 3rd June 2020 by Dr S a Consultant Oncologist, in the presence her mother (Mrs W) and her step father (Mr W).

3. During that appointment Dr S took what strike me as sensitive and creative measures to facilitate and promote K's understanding of her challenging medical situation. She was provided with easy-read literature about her diagnosis and treatment and, Dr S took the interview carefully and slowly so as to enable K to absorb the sometimes complex and distressing but, relevant information about her diagnosis and prognosis. My impression is that Dr S found the process of assessment challenging but, ultimately, concluded that whilst K was able to understand some of the concepts she was unable to retain them sufficiently well to be able to weigh and evaluate the contemplated treatment.

4. As what is proposed is complex and intrusive treatment and has what Ms Paterson, who acts on behalf of the Applicant, has described as 'a life altering complexion' to it even if successful, Dr S arranged a further appointment for S, accompanied by her mother, with a Senior Consultant Oncologist Dr H. The meetings was also attended by a Clinical Nurse Specialist.

5. I have heard oral evidence from Dr H as Ms Scott, who appears on behalf of the Official Solicitor, properly wished to test the evidence on capacity. Ms Scott, for reasons entirely beyond her control has not been able to meet or speak with K primarily because K did not wish to engage with the lawyers representing her in these proceedings. This is her choice, it is an entirely understandable one and I respect it. However, it is important that I record that K and her mother attended the hearing remotely and both participated in it.

6. The evidence from Dr H revealed that K is a young woman who has a real understanding that she has a condition which is *"serious"* or *"bad"*. He does not believe that she understands that it is a condition that she might die from. He has articulated the consultant's dilemma here as being a wish to approach the patient in a way that gives a realistic appraisal of the risks of treatment without frightening the patient away from the treatment. Dr H's evidence was that although K has heard the word*, "cancer,"* it had not sunk in that this is a life - threatening condition. He told me that he had informed K that following the treatment *"she would not be able to have babies"* as it would expedite the menopause. Though I sensed that Dr H was more comfortable that K had grasped this information, he was not completely sure.

7. I also heard evidence from Mrs W, intending to help me with an understanding of her daughter's general level of functioning and to gain some impression of her personality. I found her evidence extremely helpful. She told me her daughter enjoyed watching medical programmes such as Casualty and Holby City and, while she grasped words, she did not always retain the meaning. Her leisure activity is characterised by watching repeat episodes of various TV programmes in which her understanding of them increases gradually with each viewing. In simple and straightforward lay terminology, Mrs W was saying to me exactly the same thing as the doctors had described. I am entirely clear that K can understand words and concepts to a degree but cannot retain them to evaluate them so as to be able to use or weigh them. In these circumstances she lacks the capacity to consent to medical treatment.

8. The Trust is seeking an order declaring that K, who is in her mid-thirties, lacks the capacity to consent to the medical treatment for her cancer and further, that it is in her best interests to undergo a combination of radiotherapy and chemotherapy with the aim of trying to cure her or at least to provide her palliative and symptomatic relief. The Trust wishes K to start the treatment by 30th June 2020, the cancer having been diagnosed in late May.

9. It requires to be said that without the treatment K will die within a year and her death will be painful, exacerbated by complications such as fistulas. By contrast, the treatment contains a 30 – 40% chance of being effective, i.e. there is a 30 – 40% prospect of survival for more than 5 years, after which it is considered she will have a normal life expectancy. Her current symptoms which are painful, will abate. However, the treatment will trigger an early menopause and render her infertile.

10. There is consensus amongst the treating clinicians both in respect of K's capacity to understand the treatment and that receiving the treatment is in K's best interest. K's mother also agrees. Additionally, it is important to note, that whilst the early stages have been onerous and although there is much worse to come K has been enthusiastically cooperative.

11. Notwithstanding the broad consensus, the Trust have properly, in my view, decided that this is a case that should come before the Court. Ms Paterson has identified three principal reasons. Firstly, this is highly intrusive treatment over a considerable period of time. Secondly, one impact of the treatment is that it involves the premature onset of menopause for a woman in her late thirties who does not have children. Thirdly, because the treatment plan is so onerous, there is a distinct possibility that K may withdraw her cooperation to the treatment when it becomes more distressing. The Trust have brought the application in order to evaluate, with the overview of the court, what course to pursue if K felt unable to comply with the treatment plan. The advantage of bringing the application pre-emptively is that it allows for careful planning in circumstances which may become very difficult. The view was taken that a reactive application to court in the circumstances contemplated was not likely to facilitate good planning. I agree and commend the approach the Trust has taken. Though this is a short, extempore judgment, it provides an opportunity to assist Trusts more generally as to the kind of circumstances in which applications should be brought to court. Wider guidance is available: **Serious Medical Treatment, Guidance [2020] EWCOP 2.** In particular, I would emphasise the following from that document:

> *"10. In any case which is not about the provision of life-sustaining treatment, but involves the serious interference with the person's rights under the ECHR, it is "highly probable that, in most, if not all, cases, professionals faced with a decision whether to take that step will conclude that it is appropriate to apply to the court to facilitate a comprehensive analysis of [capacity and] best interests, with [the person] having the benefit of legal representation and independent expert advice."[5] This will be so even where there is agreement between all those with an interest in the person's welfare.*
>
> *11. Examples of cases which may fall into paragraph 10 above will include, but are not limited to:*
>
> *a. where a medical procedure or treatment is for the primary purpose of sterilisation;*
>
> *b. where a medical procedure is proposed to be performed on a person who lacks capacity to consent to it, where the procedure is for the purpose of a donation of an organ, bone marrow, stem cells, tissue or bodily fluid to another person;*
>
> *c. a procedure for the covert insertion of a contraceptive device or other means of contraception;*
>
> *d. where it is proposed that an experimental or innovative treatment to be carried out;*
>
> *e. a case involving a significant ethical question in an untested or controversial area of medicine.*
>
> *12. Separately to the matters set out above, an application to court may also be **required** where the proposed procedure or treatment is to be carried out using a degree of force to restrain the person concerned and the restraint may go beyond the parameters set out in sections 5 and 6 Mental Capacity Act 2005. In such a case, the restraint will amount to a deprivation of the person's liberty and thus constitute a **deprivation of liberty**.[6] The authority of the court will be required to make this deprivation of liberty lawful."*

12. In her evidence Mrs W, assured me and, did so entirely convincingly, that she *"will be with K every step of the way"*, trying to reinforce the importance of the treatment. Dr H told me in evidence that if there are occasions when K feels unable to come into hospital for the treatment, the situation would be looked at carefully and sensitively and all efforts will be made to try and encourage her back to the treatment or as much of the treatment as she can withstand.

13. Although there has been proper scrutiny of the question of K's capacity on behalf of the Official Solicitor, it is also right that I should emphasise that K has indicated both to Dr S and Dr H that she is keen to go ahead with the treatment, at least at this stage.

Mrs W has expressed concern that *"once the initial novelty of attending hospital"* wanes and the side effects start to become difficult to bear, K may no longer wish to continue with the treatment as she does not, in Mrs W's view, believe that she is risking death. That will present a difficult clinical situation. I am clear the doctors, nurses and Mrs W will continue to reinforce and press upon K the absolute necessity of continuing treatment if she is going to survive.

14. In order to obtain benefit from the treatment I have been told that it is necessary for K to undertake approximately 10 sessions of externally delivered radiotherapy and 2 sessions of chemotherapy. The external radiotherapy is delivered through the abdominal skin. It has been further explained to me that the first five of the six weeks of treatment will be delivered to K as an out-patient. K will only be admitted as an inpatient on the week when she will undergo internal radiotherapy. Dr H, in his statement, has explained that the side effects of the treatment are anxiety, nausea and diarrhoea. Mrs W is very anxious of the impact on these on her daughter, but there is much optimism that they can be treated effectively and indeed prophylactically in anticipation of the symptoms. Dr H has said that if a small dose of sedative such as lorazepam is not sufficient to address her anxiety a more powerful form of sedation can be considered.

15. In her position statement, prepared for this hearing, Ms Paterson summarises how the treating clinicians believe that the side effects of the treatment can be treated effectively and how, if K refuses to attend hospital on a particular day or days, they will try to accommodate her with additional sessions at the end of the plan. However, if K consistently refuses to attend the hospital for treatment, they consider that it will not be in her best interests to take coercive measures to compel her to travel to hospital, using restraint. I agree. To do so would compromise her dignity and would be inimical to her best interests. The clinicians have made the utilitarian and thoughtful calculation that this type of restraint is more likely to exacerbate K's withdrawal than encourage her cooperation.

16. I am satisfied that it is highly unlikely, having regard to s.4(3)(a) and (b) of the MCA, that K will regain capacity during course of treatment and/or before 30th June 2020, but to the extent that it has been possible she has participated in decision making about her treatment.

17. All of this leads me to endorse the approach of the Trust, an approach that is supported by the Official Solicitor. It is also important that I emphasise that having taken the sensible measure of coming pre-emptively to the Court, a further application, should a situation arise which proves to be challenging or delicately balanced, is not precluded.

18. I am optimistic that K's own resolve and Mrs W's determination, will set her fair in the challenges in the weeks ahead. I would like to wish her luck and thank her for coming to the court (remotely) to meet me today. I am aware that K did not really want to come to court but I should like to record that I found her to be charming, smiling and relaxed throughout.