Neutral Citation Number: [2019] EWCOP 35

Case No: COP 13481291

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before:

MRS JUSTICE THEIS

- -

Between :

GUYS AND ST THOMAS' NHS FOUNDATION TRUST	**Applicant**
- and -	
	Respondent
X **(By her Litigation Friend, the Official Solicitor)**	

- -
- -

Ms Katie Gollop QC (instructed by **Hill Dickinson LLP**) for the **Applicant**
Ms Claire Watson (instructed by the **Official Solicitor**) for the **Respondent**

Hearing dates: 25th July 2019; Judgment 16th August 2019

- -

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.

....

This judgment was delivered in public and is published in accordance the with terms of the Reporting Restrictions Order dated 25 July 2019

Mrs Justice Theis DBE:

Introduction

1. This matter concerns an application made by Guys and St Thomas' Foundation Trust ("The Trust") for a declaration regarding capacity and orders for serious medical treatment relating to X, a woman who is in the advanced stages of her pregnancy. In addition, they sought a reporting restrictions order ("RRO") preventing her being identified.

2. Whilst X opposes the application she recognises through her counsel, Ms Watson, that it would be open to the court on the material available to it to make an interim declaration of capacity, and that if the court did so, there would be no disagreement between the parties as to the form of the order.

3. The application was initially dealt with by me Out of Hours in the early hours of this morning, when a telephone hearing took place. X joined that hearing and was at that time unrepresented. The court made a short-term order, until the matter could be listed this morning, when X would have the benefit of her own representation, which she wanted.

4. This application raises two wider issues.

5. First, it is a matter of concern that X was put in the position she was. The Official Solicitor was put on notice about the application by the Trust yesterday afternoon, which elicited the following response from the Official Solicitor at 16.33: *'As you probably know, we don't offer an out of hours service and we note that given the urgency of the situation you intend to make an urgent out of hours application tonight. Given that, we can't assist with any out of hours application. If the matter extends beyond tonight, please do let me know.'* Looking forward such a position is, in my judgment, unhelpful. Why should the timing of an application have an impact on X's ability to be properly represented, which she would have been if the application had been made a few hours earlier? I raised the court's concern about this with Ms Watson, who appeared this morning on behalf of X, instructed by the Official Solicitor with one of the Official Solicitor's representatives present. Irrespective of what has happened in the past, I invite the Official Solicitor to urgently review this position and consider putting in place arrangements that will ensure appropriate representation out of normal court hours for those individuals who are the subject of urgent applications that potentially involve serious medical treatment.

6. Second, whilst understanding the difficult position the Trust was in, as X had only recently attended their hospital, every effort must be made to issue such applications during normal court hours. Hearing these cases Out of Hours should be limited to the cases where that is really necessary. It must have been obvious by late yesterday morning that an application would be required. Directions could have been given at 2pm, which would have secured X's representation. This court is used to dealing with urgent applications at short notice and could have accommodated the case yesterday afternoon.

7. Before turning to the detail of the case can I pay tribute to X, who in the circumstances which I have described, acted with admirable dignity in a situation which must have been extremely difficult for her, representing herself about an issue

of serious medical treatment in proceedings where it was said there were reasonable grounds for the court to believe she did not have capacity to consent to the treatment. During the telephone hearing in the early hours of this morning she was able to explain what her position was and had considered the documents she had been given.

8. I would like to also express the court's gratitude to the two clinicians, who not only joined the hearing by telephone in the early hours of this morning but were also available on the telephone when the court hearing took place in normal court hours this morning.

9. Due to the urgency of the position the parties were informed at the conclusion of the hearing the order that would be made. What follows are my reasons for making the order.

Relevant background

10. Due to the urgency of the situation the court has only limited information about the background.

11. This is X's first pregnancy. There is reference to it being a result of a very short-lived relationship, with the consequence that the father has taken no part in the proceedings and has no continuing contact with X.

12. X has a history of difficult relationships, possible substance and alcohol abuse and mental health difficulties since about 2015 which according to X were brought about due to events in her own childhood. According to Dr Y (Consultant Psychiatrist) she has had multiple previous admissions to hospital with psychotic symptoms and has had various different diagnoses, including Acute and Transient psychotic disorder; bipolar disorder; schizoaffective disorder and personality disorder.

13. X was initially booked for antenatal care with another hospital and was the subject of a 6 week mental health admission between January and March 2019.

14. Following her discharge, it was reported there was limited contact with X. X takes issue with this and said she attended all appointments offered to her.

15. Prior to attending the Trust hospital on 23 July (when she was 42 + 3 weeks) there had been two previous scans which raised concern as they showed a reduction in fetal growth during that time. Earlier tests had revealed a high risk of Downs syndrome.

16. Over the previous 24 hours or so the clinical team explained to X that they considered the baby was compromised and there was a high risk of a still birth. They discussed with X the interventions (Induction of Labour and/or Caesarean section) that may be required to secure a safe delivery of the child due to the level of difficulties and risk.

17. In his statement, Mr Z (Consultant in Obstetrics, Maternal and Fetal Medicine) confirmed as X was more than 40 weeks, the baby was small, the blood flow was compromised and the fluid around the baby was reduced, X was advised she would need delivery, ideally by Caesarean section, to reduce the risk of the baby dying in utero. In discussions X declined all interventions, although has stated she wished for the baby to be born alive and for steps to be taken to achieve that.

18. Dr Y, Consultant Psychiatrist, set out in his statement his assessment of X, following his review of her records and meeting with her on 24 July. He notes the history of X's mental health which has included previous admissions to hospital with psychotic symptoms with different diagnoses including acute and transient psychotic disorder, bipolar disorder, schizoaffective disorder and personality disorder. During the pregnancy X has had a 6 week admission to an inpatient psychiatric unit earlier this year.

19. Following X attending the Trust on 23 July a request was made by the clinical team for a capacity assessment. X was seen by the on-call liaison psychiatry SHO, with an assessment by the SpR overnight, which included consultation with the on-call Consultant. Both of those assessments concluded X did not have the capacity to make decisions about her obstetric management.

20. A further request for an assessment was made on 24 July and X was reviewed by Dr Y. He noted that during his assessment he considered there was evidence of psychotic symptoms, strongly fixed religious beliefs that were at times contradictory and no insight into her previous mental illness. His view is that X's beliefs, which he considered are a product of her mental ill health, are preventing her from being able to reasonably weigh up the pros and cons of the proposed treatment. His opinion is that she did not have capacity to consent to Caesarean section including anaesthesia, and that is unlikely to change whilst her psychosis is not treated. He sets out in the statement his analysis of the competing considerations if X did or did not have the proposed intervention and notes X's current wishes are that her unborn baby's health and wellbeing is the most important consideration, yet she still refuses the options as to medical intervention to achieve this. Dr Y concluded that from the psychiatric perspective, having weighed up the risks of the options, he concluded the treatment proposed that allows for the safe delivery of her unborn baby is in her best interests.

21. During the telephone hearing in the early hours of the morning X confirmed she had seen the relevant documents, although had had limited time to consider them. However, she was able to articulate the parts that she disagreed with and confirmed she wanted her baby to be delivered well and safely, she had strong views about wanting to have a natural birth and was very concerned about any medical intervention against her wishes.

22. Having considered the evidence I made an interim declaration that X lacked capacity and made an order that provided for medical intervention in the event it was required between then and the hearing to be listed 8 hours later.

23. At the hearing listed later that morning X was represented by Ms Watson, instructed through the Official Solicitor, and the Trust by Ms Gallop Q.C. Ms Watson was able to get instructions by telephone and to have discussions with Ms Gollop, on behalf of the Trust.

Submissions and Decision

24. As a result of those discussions I was informed X agreed for induction of labour to start as soon as possible. Whilst her wish is for a natural delivery what matters most to her is a healthy live birth, and her wishes and feelings were in that context. X preferred to be treated, if possible, by a female clinician and the Trust, so far as they

are able to, agreed to that. Ms Watson submitted, following her discussions with X, the position of the Official Solicitor is the Official Solicitor did not consider that there was sufficient evidence before the court to rebut the presumption in favour of capacity. As a consequence, despite the conclusions of the assessment of Dr Y, the court did not have jurisdiction if her submissions were accepted. She said X felt she was faced with a dilemma regarding her conflicting religious beliefs; to have a natural birth and to preserve life.

25. Ms Watson's primary submission was that the court should make no order but the order should recite the most recent position of X, what she agreed to (namely the induction of labour) with the facility to come back to court for further urgent orders if X lost capacity and further intervention was required that she did not consent to. She recognised that may be difficult to manage for the Trust, as the position may be so urgent it couldn't await a return back to court. In the alternative, Ms Watson submitted that an order which recited X's most recent position was one which could lawfully be made on the available evidence.

26. Ms Gollop submitted that there was sufficient evidence through the assessment of Dr Y that the court could make an interim declaration that X lacked capacity to weigh up the pros and cons of the proposed treatment. If that submission was accepted, she submitted the court should make an order as inducing labour will increase the intensity of the contractions, which can in turn increase fetal distress which brings the balance down in favour of the court making an order for the child to be delivered by way of Caesarean section, if that is the only way for the child to be born safe and well.

27. Having considered the submissions of the parties there is, in my judgment, in accordance with s 48 Mental Capacity Act 2005, reason to believe that X lacks capacity in relation to the matter, namely the medical intervention that may be necessary for X to give birth to a baby who is safe and well. On the evidence the court has from Dr Y, which I accept, his assessment is X is unable to reconcile her conflicting beliefs (on the one hand of wanting a natural birth and also wanting a live, well and safely born baby) in a way that she is able to balance the pros and cons. Additionally, there is, in my judgment, a real risk the position is unlikely to change and is more likely to deteriorate. He concluded X showed limited insight in relation to her previous mental ill- health. I have carefully considered the submissions on behalf of the Official Solicitor regarding capacity but looking at all the evidence and information available to the court I am satisfied the interim declaration should be made.

28. Ms Gollop and Ms Watson have been able to agree the terms of the order, in the event that the court made the interim declaration as to capacity, which I approve.

Postscript

29. The court was informed the following day that X had given birth to a baby without the need for surgical intervention.