



NCN: [2020] EWCOP 33

Case No: COP13588927

COURT OF PROTECTION

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 23/06/2020

Before :

THE HON. MR JUSTICE COHEN

Between :

**A NHS FOUNDATION TRUST**

**Applicant**

- and -

**MC**

**Respondent**

**(by her Litigation Friend the Official Solicitor)**

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**Miss Katie Gollop QC** (instructed by **Hill Dickinson LLP**) for the **Applicant**  
**Ms Bridget Dolan QC** (instructed by **The Official Solicitor**) for the **Respondent**

Hearing dates: 23 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 HON. MR JUSTICE COHEN

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 anonymity of the incapacitated person and members of their family must be strictly preserved. 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.

**The Honourable Mr Justice Cohen :**

1. MC is the subject of an application by an NHS Trust seeking the court's consent for the harvesting of peripheral blood stem cells so they can be donated to her mother who has chronic leukaemia.
2. MC is now just 18 years old and as a result, in a case where an adult lacks capacity to make decisions, the court must make the decision instead. So the first matter I must ask myself is whether MC does lack capacity.
3. In order to assist me in that decision I have two reports of Dr C. It is unnecessary where everyone, not just the Trust but also the Official Solicitor who acts on MC's behalf, agrees she lacks capacity to go into details; suffice it to say that it is agreed she is unable to make decisions for herself to give informed consent for the collection of stem cells and their use.
4. Doctors and the Official Solicitor have discussed with MC on a number of occasions how peripheral blood stem cells are collected and what risks are connected with that procedure; how they are stored, and how they are used for the benefit of the mother. They have reported back that MC has not been able to repeat back in a coherent manner what has been said to her or demonstrate an understanding of the process. This is a result of long-standing learning and language difficulties.
5. I am told that this is the first time that an application for the extraction of bone marrow or stem cell donation by someone lacking capacity has come before the Court of Protection and the first time the Human Tissue Authority ("HTA") has been involved in a case of this nature. This is why we have taken the case more slowly than might otherwise be the case and why I am giving this judgment.
6. Having come to the clear conclusion that MC lacks the capacity to conduct these proceedings and make decisions about the proposed procedure, it is necessary for me to consider her best interests. That raises two separate issues: (1) whether it is in MC's best interests for her stem cells to be harvested for the benefit of her mother; and (2) whether the court should consent to the procedure.
7. MC lives at home with her parents. It is clear to me from everything I have read that she has a loving relationship with them and they with her. She has two younger siblings. Sadly, MC's mother was diagnosed with leukaemia several years ago. The medical advice now received is that notwithstanding being treated with repeated chemotherapy she has not achieved remission and her life expectancy without a stem cell transplant is estimated to be about 12 months.
8. Other members of family have been screened as potential donors but MC is the only one who is a match and, in particular, as the oldest of the siblings, she would be a much better match than her younger siblings, having a body weight more similar to her mother's and thus the capacity to provide more stem cells than her siblings.
9. In considering these matters it is always important to look at what the potential downside or risks may be. MC would be required to have repeated screening blood tests and four injections given over consecutive days. Fortunately these can be given

at home without her having to attend at hospital. The purpose of these injections is to encourage the stem cells to move out of the bone marrow, into the blood stream.

10. The injections do carry side effects, most commonly pain and flu like symptoms. These can be effectively managed with paracetamol and the effects wear off within 24 hours of the injection. As with all injections there is a risk of bruising to the injection site. There is a small possibility of other reactions including an allergic reaction or inflammation of the eye, but this is sufficiently remote that Dr C, who has been carrying out these procedures for 20 years, has never seen it.
11. After the injections MC would be required to attend at hospital and have a line inserted into both arms for 4-5 hours. If it is not possible to place a needle in the arm, access through the femur under local anaesthetic could be required and may require a second visit to hospital. This procedure like all others is not risk free.
12. In considering best interests it is important to bear in mind that this procedure has no physical benefit for MC herself. It is entirely to benefit a third party. In that context I am helpfully reminded by counsel of what was said by Connell J in Re Y (Mental Patient: bone marrow donation) [1997] Fam 110:  

“The taking of blood tests and the harvesting of bone marrow from the defendant, who is incapable of giving informed consent, would amount to assaults upon the defendant and would therefore be illegal unless shown to be in the best interests of the defendant and therefore lawful. The test to be applied in a case such as this is to ask whether the evidence shows that it is in the best interests of the defendant for such procedures to take place. The fact that such a process would obviously benefit the plaintiff is not relevant unless, as a result of the defendant helping the plaintiff in that way, the best interests of the defendant are served.”
13. It is important to add to this what was said by Morgan J in Re G (TJ) [2010] EWHC 3005 (COP):  

“The word "interest" in the best interests test does not confine the court to considering the self-interest of P. The actual wishes of P, which are altruistic and not in any way, directly or indirectly self-interested, can be a relevant factor. [54]”
14. There is, drawn up by the Official Solicitor, a helpful schedule of the benefits and risks. I have already commented on the risks. It is important to look at both sides of the equation.
15. Without the transplant MC’s mother’s prospects are poor and deteriorating. Whilst there is no certainty of the outcome of the procedure it elevates a poor chance of survival to a 43-45% survival rate at 5 years, and that is obviously a potentially highly significant benefit. MC lives at home with a loving family and there are clear benefits, emotional, social and psychological, to MC of her mother’s life being extended.
16. Next I must give weight to the fact that although MC has not understood the details, she understands that her mother is not well and that she may have ability to extend her mother’s life and perhaps enable her to recover. MC wants to do that – it has been her

repeated wish expressed to the doctors and to the Official Solicitor that she wants to give what help she can.

17. I also give some weight, although lesser weight, to the fact that MC may be seen by others positively by acting altruistically.
18. I agree with both Counsel that it is overwhelmingly in MC's best interest to participate in the proposed programme and donate her stem cells for the benefit of her mother. It is in MC's best interests as much her mother's.
19. It is right that I do not leave this judgment without expressing some views about a matter that has troubled the Official Solicitor greatly, not in context of this case but more widely. Apparently, there are about 65 individuals each year under the age of 18 for whom the HTA gives approval for this sort of procedure. It is not known how many of those individuals have difficulties with capacity in the way MC has. MC's case has come before the court because she is in law an adult in circumstances where there is no Lasting Power of Attorney or a Court Appointed Deputy who can give consent, hence the decision is to be taken by me.
20. For others under the age of 18 there is, or was felt to be, something of a vacuum. On analysis that vacuum has been partially but not completely filled. The treating Trust holds no duty of care to the donor because its obligations are to its patient, the donee who will be the recipient of the stem cells. The HTA will check only to see if there is consent and no monetary payment (which is forbidden) or other pressure or coercion applied.
21. Nowhere is there at the centre of what is being considered either by the treating Trust or the Human Tissue Authority, the best interests of the donor. Ms Gollop for the Trust helpfully referred to me to the passage within the accredited assessor's report and it is right that there is a passage headed 'Best Interests' but Ms Dolan is also right to say that it is cursory. It may be that the view was taken that in this case there was an overwhelmingly obvious outcome.
22. I go no further than to say that there really should be a considered risk and benefit analysis by the accredited assessor. I am not criticising the accredited assessor in any way. This is the first application to be considered since the Mental Capacity Act 2005 came into operation. However, it could only be beneficial if a considered deliberation of the factors set out within s.4 of the Mental Capacity Act 2005 was performed in each case where the HTA is faced with an issue of capacity of the donee.