

Neutral Citation Number: [2014] EWHC 1445 (Fam)

Case No: FD1400566

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 21 March 2014

BEFORE:

MR JUSTICE MOSTYN

BETWEEN:

AN NHS TRUST

Claimant/Respondent

- and -

A, B, C AND A LOCAL AUTHORITY

Defendant/Appellant

MR M MYLONAS, QC (instructed by Capsticks) appeared on behalf of the Claimant

The Defendant was unrepresented

Approved Judgment

Court Copyright ©

The Judge hereby gives leave for this judgment to be reported in this anonymised form. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location.

Digital Transcript of Wordwave International, a Merrill Communications Company

101 Finsbury Pavement London EC2A 1ER

Tel No: 020 7421 6131 Fax No: 020 7421 6134

Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com

(Official Shorthand Writers to the Court)

1. MR JUSTICE MOSTYN: I am giving this judgment in open court. It is important that I begin with that statement so that anyone who later reads the transcript of this judgment understands that proceedings of this nature are not done in secret by some mysterious court determined to prevent the public from knowing what is being done in its name.
2. I am concerned with a child, whom I shall call A, who was born on 13 March 2001 and who, therefore, has just passed her 13th birthday. She lives in the north of England with her parents.
3. On 17 March 2014, that is to say four days ago, her grandmother took her to her general practitioner, she, the grandmother, having noticed earlier, that A appeared to have a bump at her waist. A pregnancy test performed at the GP's practice confirmed that she was pregnant.
4. The following day she was reviewed and examined urgently by a consultant paediatrician who referred her for an urgent scan to assess the gestational age. That scan took place on 19 March, two days ago. The result of the scan estimated, and these estimates are usually pretty accurate, that she was over 21 weeks pregnant.
5. In the result, she was reviewed in the antenatal clinic by a consultant obstetrician and gynaecologist and a senior midwife. Further, a consultant paediatrician has been consulted and there have been meetings with the Trust Safeguarding Team.
6. The application is made to me for declaratory relief. If I determine that A does not have the appropriate capacity to consent to the continuation or termination of this pregnancy, then the application by the Trust is for declarations that it would be in her interests to terminate that pregnancy. On the other hand, if I do determine that she does have the appropriate capacity then the Trust seeks a declaration to that effect so that the position is put beyond doubt and that any later criticisms of the Trust, in taking the steps that they did, can be deflected.
7. Because this has come before me at such extremely short notice, it has not been possible to give notice to the press of these proceedings. But one of the orders I have been asked to make, is a reporting restriction order which I will explain a little later. This order, while emphasising the importance of transparency in these proceedings, nonetheless provides for any party, and that would include press organs affected by the order to apply to vary it upon giving notice.
8. The previous meetings between A and the specialists revealed her to be uncommunicative and in the result a view was formed or, at the very least, a doubt was raised as to whether she had the necessary competence. At this point, I should explain what the legal test is for the necessary competence. It is set out in the well-known case of Gillick v West Norfolk and Wisbech Area Health Authority & Anr, [1986] 1 FLR 224 at page 239 in the speech of Lord Fraser Tullybelton where he stated:
"I conclude that there is no statutory provision which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve."

9. The Trust has been represented before me by Mr Mylonas, QC and he agrees that if I am to determine that A does have sufficient understanding and intelligence to know what a termination would involve, then that is the end of the matter. The actual decision in Gillick concerned the provision of contraception. In that case, the attempt by Mrs Gillick to have declared unlawful a policy which would have permitted her children under the age of 16 to be given contraception was unsuccessful.
10. It is implicit in that decision that provided the child, under the age of 16, has sufficient understanding and intelligence, she can then be lawfully prescribed with contraception even if the result of that would lead her to take steps which are wholly contrary to her best interests. So, the question of best interests does not really inform the primary decision I have to make which is whether she has the necessary capacity.
11. Today, A has been interviewed in consultation by Dr Ganguly who is a consultant psychiatrist of some considerable experience with his field of expertise extending to treating children and young people. In attendance at the consultation with Dr Ganguly was the consultant obstetrician. The meeting was thorough and exhaustive and Dr Ganguly was very clear in his evidence. I fear that I would not do justice to the clarity of his evidence if I were to attempt to summarise it and so I direct that a transcript of his evidence be obtained and appended to this judgment.
12. I fear that attempts by me to summarise it may lead to its full impact being lost. Suffice to say, he was clear that A had a very clear understanding of her position and of the options that were available to her. Those options, namely continuance of the pregnancy or its termination, were discussed.
13. Dr Ganguly was clear to me that she fully understood the implications of the options; the risks that were involved in relation to each option were explained to her and, in his opinion, she fully understood that. Although she was softly spoken, she was able to explain to him that her wish was to terminate the pregnancy as she felt that she could not cope with its continuance and it would stress her to a considerable degree. She was very clear in her understanding that whichever option she chose it would carry a certain amount of risk
14. Dr Ganguly was also clear that the decision that was reached by A was hers alone and was not the product of influence by adults in her family. Dr Ganguly did not detect in her any sign of distress when she set out her position to her.
15. On the basis of that evidence which, as I say, I have attempted to summarise, probably inadequately, I am completely satisfied that A has sufficient understanding and intelligence within Lord Fraser's definition and I accordingly make a declaration to that effect. It will now be for A to decide what she wishes to do. Her present intention is to have a termination and, of course, if she goes down that route she must have it soon because the legal 24-week limit is fast approaching. If she decides to continue with the pregnancy, then I am expecting that her family and, indeed, Social Services will need to give her considerable support and assistance. It also goes without saying that should she go through with a termination her family will need to be at her side and to assist her and support her after what is inevitably going to be an unpleasant and traumatic experience.

16. All those latter comments of mine are irrelevant to the primary decision I have to make which is that I am satisfied that A has the necessary capacity to make her own decision. The consequence of that declaration is that if a termination is performed, there is no question of any liability, either civil or criminal, being imposed on the Trust or any of the clinicians who are involved in the procedure.
17. I now turn to the question of the application for a reporting restriction order. This court has power to make a reporting restriction order if it is necessary and in the best interests of A. I am completely satisfied it would be wholly contrary to the best interests of A if this judgment were to identify her or if any press organ were, as a result of this judgment, to attempt to identify her.
18. I am, therefore, satisfied that the reporting restriction order which is drafted in accordance with the now standard terms that are available should be made but I draw attention to the paragraph 16 which gives the parties, and more particularly any person affected by the restrictions in the order, to apply to vary it on giving no fewer than 48 hours' notice.

Transcript of Dr Sarojit Ganguly Evidence – (see paragraph 11 above)

Friday, 21 March 2014

DR SAROJIT GANGULY (AFFIRMED) (Via Video link)

MR JUSTICE MOSTYN: Thank you very much. Dr Ganguly, I am the judge sitting in this court today. I just want to read out one very short passage from the famous decision of Gillick v West Norfolk & Wisbech Area Health Authority [1985], all right.

A. Yes.

MR JUSTICE MOSTYN: It is very short. It says this:

“There is no law which compels me to hold that a girl under the age of 16 lacks the legal capacity to consent to contraceptive advice, examination and treatment provided that she has sufficient understanding and intelligence to know what they involve.”

A. That’s correct.

MR JUSTICE MOSTYN: That is the test.

A. Yes.

MR JUSTICE MOSTYN: Now you will be asked some questions by Mr Mylonas.

MR MYLONAS: Can I first of all ask you questions about your expertise, how long you have been a psychiatrist for and what your experience is of carrying out capacity assessments.

A. Sure. My name is Dr Sarojit Ganguly. I am a Member of the Royal College of Psychiatrists and I am on the specialist register for child adolescent psychiatry, so I am a child and adolescent psychiatrist. I have been in psychiatry for the last ten years or so and I have been a consultant in child and adolescent psychiatry for the last four months. I am employed by the Bradford District Care Trust.

Q. You have been involved with paediatric psychiatry. How often do you carry out assessments of capacity in children?

A. I have to say that this very formal setting, and I am being asked questions in a very formal court setting, I have not had occasion to give evidence in terms of capacity for a young person. But having said that, any kind of decision that we take, any kind of treatment that is undertaken for young people day in and day out, involves a capacity assessment as part of routine.

Q. When did you assess A -- we will refer to her as A because we are sitting in open court and members of the press may attend?

A. I assessed her this morning.

Q. Where did that assessment take place?

A. This was at the Bradford Royal Infirmary at N4 Ward. That is one of the maternity wards in Bradford Royal Infirmary.

Q. How long did you speak to her?

A. We stayed for approximately 45 minutes.

Q. Had you had the opportunity to speak to any of the other family members?

A. That's right. I had occasion to speak to A's mum and her grand mum, and I also previously spoke to the social worker to ascertain the background of the situation and the case and to ascertain some of the history regarding A.

Q. When you spoke to A, did you form the view ... what view did you form about her understanding of the pregnancy?

A. From what I observed today, she certainly had a good understanding of the fact that she was pregnant and what it involved. We had fairly extensive discussions ... can you hear me?

MR JUSTICE MOSTYN: Yes; very clearly.

A. So we had fairly extensive discussions with regards to both the pregnancy and some of the options and she seemed to be really following the conversation quite clearly.

Q. Can I just ask some specific questions then?

A. Yes.

Q. And I want some understanding of the different options open to her. If she continues with the pregnancy, did you form a view that she understood what that would mean, both during the course of the pregnancy and after she had had the child?

A. Well, what she did tell me was that she wanted a termination of pregnancy and she said that the reason why she was saying that was that, in her view, she would not be able to cope with carrying on with the pregnancy and that she would be feeling stressed if she carried on with the pregnancy.

Q. That is a very helpful one sentence summary of her position. How much discussion was there between you about her desire to end the pregnancy?

A. Sure. Well, in the first instance she was asked about what her views were and she was clear and persistent throughout the interview in saying that she wanted a termination of pregnancy, that she did not want the baby, is the way that she put it I think. We communicated to her or we asked her ... sorry, I will rephrase that. We went with her about the various options, including having a termination, continuing with the pregnancy, having the baby, having the baby taken away or perhaps rearing the child and she was able to, in my opinion, understand it because she was able to recount, she was able to tell us again, she was able to retain the information and tell us what these options were. So it would appear that she had a fair amount of understanding of what we were talking about.

Q. Can I move on then to deal with her understanding of what was involved in a termination.

A. Sure.

Q. Because what is involved in a pregnancy and the birth, the fact she would have a small child to look after is perhaps more obvious to a 13 year old girl than what is involved in a termination.

A. Yes.

Q. What did you explain to her about what was involved in a termination?

A. Sure. During this interview, the obstetrician, Dr Kukreja was also present and that was very helpful because she was able to go through in great detail about both the procedure and the risks and benefits of the procedure in question. Whilst these options were being discussed, she had sufficient option to check out anything that she did not understand and we tried to make the discussion child-friendly so that she would be able to understand the gist of what we were saying. So I think there was a fairly extensive discussion about what the termination of pregnancy involved in terms of both the process as well as the risks.

Q. Can I just compare that very important view with the information that is before the court arising from discussions with the paediatricians and obstetrician previously when it was suggested that A was not very communicative and that the provisional view was reached that there was some doubt about her ability to understand. It sounds as though she was much more communicative this morning?

A. I have not seen her prior to today morning but from what I have been told and having chatted with my colleagues, other clinical colleagues, yes, it would appear that ... I can only suppose that this has been a particularly stressful week for her and from what I have been told by the other doctors, that she was definitely more communicative today than she was previously, bearing in mind that it was not ... she still comes across as a very soft-spoken girl and one has to bear in mind that, you know, her age is such and the situation was such that she didn't say a lot. But I think in my opinion she said enough to be able to communicate and to tell us clearly about what she wanted.

Q. Can I just go back then, when you talk about the discussions and the obstetrician having gone through the procedure in great detail, and any checking of it. Did you form a view about whether she understood what was being explained to her and understood the consequences of a termination?

A. It is difficult to exactly say whether she understood every nuance of the conversation, but it appeared as if she definitely got the gist and the main points of what was being discussed in that what the procedure would involve, for example, taking tablets, et cetera, in, for example, what would happen if it did not carry on according to plan, that some of the options that the doctors might have to go through. So these things I think in broad and general terms I think she understood. Whether she understood everything in great detail is questionable, because she is after all, 13 years old. So I would say that she understood the gist of it to the extent that it would be necessary for her to reach a decision.

Q. And fundamentally that, if she reached a decision to terminate the pregnancy, that she would no longer have the baby and there would be no prospect of her continuing with it?

A. Exactly that. Exactly that.

MR JUSTICE MOSTYN: Could you ask if she understood the risks of this surgery, what could go wrong?

MR MYLONAS: Doctor, you spoke about the obstetrician discussing the details with A, as part of that conversation, were the risks discussed as well, the risks of termination?

A. Yes, they were. There were a couple of things to direct here. I think what was being communicated very clearly was that under the circumstances, any course of action would carry a certain amount of risk and I am just putting, I am just basing my statement here from what I have heard from my other medical colleagues here, but my

understanding from those conversations was that any course of any action, as in carrying on with the pregnancy or the termination of pregnancy, carried with them sufficient amount ... sorry, it carried with them risks, and it would be difficult to actually say which one would be a more risk process actually. I think in the conversation with A, there was very clear communication about risks involved with the termination of pregnancy procedure.

Q. Thank you. His Lordship's question was whether you thought she understood the risks that were being explained to her?

A. I think in general terms yes. I mean, for example, some of the things that the doctor was telling her was that, you know, if the medicines were not sufficiently successful, then she may have to stay in hospital, she might have to go through invasive procedures, there might be risks of infection, it might affect, for example, the prospects of having children subsequently. So actually, without going into too much detail, I think we had a fairly extensive discussion about the various risk elements, both immediate and subsequent. And in the room, of course, her mum and grandmother also at hand and they felt that the discussion was something that I think A was ... she understood adequately.

Q. Can I just deal with two more issues? You have referred to mum and grandma being in the room with her and I know that she has been staying at home with her mum and possibly her grandma overnight. Did you form the view that her decision about the termination was her own wish or that she had been, perhaps, coerced or pressed into that decision by ---

MR JUSTICE MOSTYN: Or influenced.

MR MYLONAS: --- or influenced by her family?

A. We went into that specifically. We addressed that question specifically during our interview this morning and both A herself ... I mean, A was clear in telling us that this decision was her own, that she had made up her mind. Independently, the mum and grandma said that they did not in any way coerce her into this decision. I would also like to point out that in the interview itself, I did not detect any obvious sign of distress from A's part. She seemed calm, she seemed appropriate. Her responses, her eye contact and her speech seemed appropriate and I did not feel in my opinion, I did not detect any sign of distress or any suggestion that she might be either distressed or suffering from any acute mental illness for that matter.

MR JUSTICE MOSTYN: Right.

MR MYLONAS: There was only one other issue I just wanted to see if you could help us with, Doctor. You may want to address this because it was a primarily an assessment of capacity. One of the issues is about the impact of either a termination or continued pregnancy on A. Have you formed a view as to whether or not it would be in her best interests from her mental health perspective to continue or to end the pregnancy?

A. That is a very difficult thing to comment on you will appreciate. Having said that, one of the things that A specifically said when they asked her about why she wants not to have the baby, she said that having... continuing with the pregnancy or having the baby would, I quote, she said that "I will not be able to cope." When I asked her what she meant by that, she said that she would feel too stressed. So I would assume from this

response that in her mind, continuing with the pregnancy would be something that she would find distressing as to what effect directly it might have in terms of either the termination or the continuing of pregnancy. At this point in time it is difficult to assess because, as I said, in the interview as such, she presented as appropriate and there was no sign of distress. I have heard that she is generally a bubbly, happy child from what her parents tell me. So once again, it is difficult to say with certainty what the effect might be but from her own point of view, she communicated that it would be stressful to carry on with the pregnancy.

MR JUSTICE MOSTYN: Thank you very much.

MR MYLONAS: Thank you, Doctor, can you just wait there.
