



IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION  
COURT OF PROTECTION  
**[2013] EWHC 50 (COP)**

No. COP11984767

Royal Courts of Justice  
Thursday, 10<sup>th</sup> January 2013

Before:

MR. JUSTICE HEDLEY

BETWEEN:

A NHS TRUST

Applicant

- and -

P & Anor.

Respondents

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MR. S. MATTEWSON (instructed by Legal Services, A NHS Trust) appeared on behalf of the Applicant.

MRS. B. HARRIS (instructed by TV Edwards LLP) appeared on behalf of the First Respondent.

MR. A. HOCKTON appeared on behalf of the Official Solicitor.

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**J U D G M E N T**

(As approved by the Judge)

MR. JUSTICE HEDLEY:

1. This case concerns a young woman who was born with sickle cell disease, a lifelong genetic condition which results in her requiring regular medical treatment. One of the risks inherent in sickle cell disease is a liability to what the medical profession refers to as cerebral vascular accidents, what laymen might call strokes.
2. In fact a number of those were suffered by this young woman as a result of which she suffers from learning disabilities which place her intellectually in the bottom 1% of the population of this country.
3. As a result of circumstances that require no description, let alone investigation, by me, she was in receipt of a substantial award of damages, but because of her disabilities she required deputies to administer those on her behalf. The joint deputies were her mother and the senior partner of a well-known firm of solicitors.
4. This young woman lives with her mother, sister and other members of the family. They provide a close and supportive network for her. In those circumstances she functions well within a community setting.
5. Towards the end of last year she discovered that she was pregnant. There is a belief that the putative father is known but it would not be right, in these circumstances, to make any observations about what happened. It is the fact of the pregnancy that has brought this matter to the court's attention.
6. This young woman has always cooperated with the medical treatment that she requires and there is no reason to believe that she will not further cooperate with matters relating to her pregnancy. However, there was entirely responsible anxiety raised about her capacity to deal with these matters and, in particular, her capacity to decide whether or not she wished to continue with the pregnancy.
7. It may be that those who decided to institute these proceedings had in mind the judgment of Mr. Justice Coleridge in *an NHS Trust v D* [2004] 1 FLR 1110, and, in particular, may have had in mind the guidance at para.29-38. That guidance, as I understand it, remains authoritative and in those circumstances it is not difficult to understand why a responsible solicitor would decide that the matter should be referred to the court. It came to the court in the category of a serious medical issue.
8. It is right to say that all parties have thoroughly cooperated in terms of enabling the court to investigate the matter. I am grateful for the cooperation that has been received on all sides.

9. The Court of Protection has remarkably wide and extensive powers to act in the best interests of those who lack capacity. Those powers may extend to major issues of medical treatment, including sometimes termination or withdrawal of treatment and may also include matters, as for example here, relating to the continuation of pregnancy. The court, in exercising its best interests jurisdiction, has power to override the views not only of the person concerned but of their family. In those circumstances it is very important that the exercise of those powers should be the subject of public scrutiny except in the most unusual cases. The practice has developed of these cases being held in open court but with restrictions on reporting designed to preserve the confidentiality of the family. The preservation of the confidentiality of the family usually involves preserving the confidentiality of the hospital and treating clinicians, because, of course, as in a case like this, once that is known the identification of the person concerned becomes extremely easy. No complaint is made in this case either of its being conducted in open court or of those restrictions being in place, and that seems to me as it should be.
10. Fundamental to the jurisdiction of the Court of Protection is the question of capacity. It is worth making two or three brief observations about capacity. Capacity is to be presumed unless and until the contrary is established. A finding of incapacity cannot be made unless all practicable steps have been taken to help the person to make the necessary decision. Most importantly, the Act provides:

"A person is not to be treated as unable to make a decision merely because he makes an unwise decision".

In the field of personal relationships that is a very important qualification to the powers of the court. The plain fact is that anyone who has sat in the Family jurisdiction for as long as I have, spends the greater part of their life dealing with the consequences of unwise decisions made in personal relationships. The intention of the Act is not to dress an incapacitous person in forensic cotton wool but to allow them as far as possible to make the same mistakes that all other human beings are at liberty to make and not infrequently do.

11. The question of capacity requires a medical element to it because, as s.2(1) provides:

"For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain".

There is no doubt that that medical definition applies in this case given this young woman's medical condition.

12. Once that is established then s.3 deals with the ability to make decisions. It is important to bear in mind that the ability to make decisions is conditioned by two matters. The first is that it is a matter of evidence as to whether a person has the capacity to make a decision. Secondly, the decision must be a specific decision rather than a general decision, so that a person may have capacity to make several decisions but lack the capacity to make others. Indeed, a person may at one time have capacity to make decisions which they lack at another. A classic example of that relates to the capacity of a woman to make decisions in the immediate aftermath of the birth of a child. Both the Human Fertilisation and Embryology Act 2008 and the Adoption and Children Act 2002 require a period of time to elapse before a decision can be made.
13. Therefore the question in this case is two-fold: first, does this young woman lack capacity to litigate and so require a litigation friend and secondly, does she lack capacity to make a decision about the continuation or termination of her present pregnancy? As to the first decision, there is no dispute within the evidence or between the parties. She manifestly lacks capacity to litigate at the present time and requires the assistance of the Official Solicitor as litigation friend, which has been forthcoming in this case.
14. It is the second decision that lies at the heart of these proceedings. When the case first came before me there were grounds to believe that this young woman lacked capacity to make this decision and therefore the duty of the court was to require evidence addressing that particular issue. Experience has suggested that not everyone familiar with the Mental Health Acts is necessarily in a position to give this kind of very precise guidance and assistance under the Mental Capacity Act 2005. But in this case the Official Solicitor has obtained evidence from Dr. Stephen Tyrer, an independent psychiatrist, for whose report of 7<sup>th</sup> January 2013 the court is very grateful and has found it helpful.
15. Dr. Tyrer's view is that this young woman does have the capacity to decide whether or not to continue with or terminate the pregnancy. The views of the treating clinicians have throughout been that they treat her as a person who has capacity to make this decision and have never, as it were, doubted that particular view. I should say that that also is a view that has been adhered to by the family. It is now the position that all parties and all witnesses whose views have been sought accept the assessment that this young lady has capacity to make this particular decision. That being so, the Court of Protection has no jurisdiction to engage in an assessment of her best interests and nothing whatever should be said about them by the court. It is right to observe that both the expert and professional and family evidence in the case is that it would be in her interests to continue with the pregnancy but that is outwith the current jurisdiction of the court.

16. It is, as I said, very important to bear in mind, particularly in the field of those with significant learning difficulties who may well be unable to function independently in the community in every aspects of their life, that they may very well retain capacity to make deeply personal decisions about how they conduct their lives. One has in mind the question of choice of partners; the extent to which they wish to be sexually active; the extent to which they may wish to make permanent relationships by way of marriage or indeed civil partnership; the extent to which they may wish to be able to make decisions about their own medical care, including, as in this case, the continuation or termination of a pregnancy. It cannot be the case that merely because a person has significant difficulties in functioning in the community, it can be presumed that they lack capacity to make profoundly personal decisions. They may in fact do so but that has to be assessed on an individual basis.
17. It follows from that that, the evidence having established that this young woman lacks capacity to litigate, the court ought to make a declaration to that effect. Secondly, it follows that, the evidence having established that she has capacity to decide whether to continue or terminate her pregnancy, the court ought to make a declaration to that effect also but the court should go no further than that, nor does it do so.
18. Accordingly, I propose to make the order in the form submitted by the parties, which contains those two declarations, and effectively nothing else subject to any question of costs. I propose to make the press restriction order on the basis that has been earlier indicated.