IN THE COURT OF PROTECTION
N/C NUMBER: [2021] EWCOP 71

No. COP1385977T

Royal Court of Justice
Strand
London, WC2A 2LL

Thursday, 9 December 2021

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
IN THE MATTER OF MP

Before:

MR JUSTICE MOOR

(In Public)

B E T W E E N :

LANCASHIRE TEACHING HOSPITALS NHS FOUNDATION TRUST
Applicant

- and -

(1) PM
(By her litigation friend, the Official Solicitor)
(2) LANCASHIRE AND SOUTH CUMBRIA NHS FOUNDATION TRUST
(3) PZ

Respondents

REPORTING RESTRICTIONS/ANONYMISATION APPLIES

MR BROWNHILL appeared on behalf of the Applicant.

MR HOCKTON (instructed by Simpson Millar LLP) appeared on behalf of the First Respondent, instructed by the Official Solicitor.

MS PATTERSON appeared on behalf of the Third and Fourth Defendants.

J U D G M E N T
(via Microsoft Teams)

MR JUSTICE MOOR:

1 I am concerned with a young woman, PM, born in 1993 and therefore 28 years of age. She is pregnant. Unfortunately during the pregnancy, she has suffered certain setbacks. For the purpose of this judgment, the setbacks with which I am concerned have been gestational diabetes, which appears to have led to a very large baby, although there may be other reasons for that as well, and she has had to be sectioned pursuant to s.3 of the Mental Health Act due to mental illness and psychosis, delusional beliefs, aggression and lack of insight.

2 I am pleased to be able to say that, with medication and treatment, many of those problems have, in fact, resolved themselves. As I will explain in due course, I spoke to her during the course of this hearing and I am able to make a positive report as to her current health. Nevertheless, there is no doubt, after consideration of the evidence with great care, that she remains lacking in capacity both to conduct these proceedings and to take the choices and decisions that she needs to take in relation to the birth of her clearly much loved baby son.

3 She has been in hospital now since 2 October 2021. At times, she did not think she needed to be in hospital, but it is clear to me that she now recognises the need for her to be there. She has alternated over the last few weeks between wanting a natural delivery of her child and wanting a Caesarean section. The current position, as I will explain, is that she would like to have an elective Caesarean section but not under general anaesthetic. She has made that very clear to a number of doctors over the last few days, and indeed to myself.

4 On 6 December 2021, she was taken ill. She felt dizzy. She had nausea and abdominal pain. There was an unwitnessed fall and she felt there was a lack of foetal movement. She was not coping well with pain at the time. She was taken to the delivery suite at X Hospital. I believe she has remained in a family room there since. Fortunately, those symptoms appear to have

resolved. Most importantly, investigation has revealed no problems with the baby. Foetal movement has been shown to be entirely normal.

5 On 6 December 2021, the Trust made this application for declarations that PM lacked capacity in relation to these proceedings and to take the relevant medical decisions, and that it was in her best interest to undergo a planned Caesarean section in accordance with the clinically agreed birth plan. The Caesarean section has been booked for 14 December 2021.

6 I have read the capacity assessment of Dr CC at the Department of Obstetrics and Gynaecology, who is a Consultant Obstetrician. In her capacity assessment, she tells me that PM was diagnosed with an episode of acute mania in pregnancy with associated psychosis. She had disordered thought processes. She cannot retain information or understand complex information. She cannot process choices. She does not have insight and, due to her disordered thought processes, she cannot weigh up the benefits and burdens of her choices. The doctor was clear that she lacked capacity.

7 I have also read a report from the same doctor dated 8 December 2021, as to the obstetric position. The baby is on the 97th centile, which suggests that the baby boy is very large indeed. The clinicians are clear that the best way to deal with this is by an elective Caesarean section under a spinal block. In other words, the mother will remain awake during the process of the Caesarean section. The reason for this is clear. As a consequence of the size of the baby, there is a risk of what is called shoulder dystocia. In other words, the baby may get stuck and unable to emerge in a natural birth. It is also apparently far better to have a planned Caesarean section due to the risks of heavy bleeding and maternal morbidity if an emergency section has to take place in advanced labour.

8 It is clear that PM's husband now also supports this procedure, although at one point it is right to record that he was in favour of a normal delivery.

9 I have also read a report dated 8 December from a Consultant Psychiatric, Dr SG. She tells me that there is a risk of deterioration to PM's mental health post-partum; that PM does not believe she has a mental health problem; and that the doctor takes the view that PM lacks capacity to consent to the treatment or make a decision as to the mode of delivery. She does not have capacity to conduct these proceedings and is unable to assimilate new or complex information.

10 I have also read a statement from Melanie Varey who is the Head of the Court of Protection Team at Simpson Millar Solicitors, who is the agent for the Official Solicitor acting on behalf of PM. I was told in the statement, that, at the time that Mrs Varey went to the hospital to see PM, PM was dizzy. She felt lightheaded. She was numb. She felt very cold. She told Mrs Varey that she was spinning when she lied down and that there was a darkness in her eyes. Mrs Varey thought that this was probably due to the diabetes. PM said, with force, that she wanted the Caesarean section because Dr C had said it was safest for her baby. The safety of her baby was paramount. But she wants to be awake during the section. She said she cannot tolerate the weight of the baby anymore. She is a little bit nervous.

11 I have also read a statement from the Consultant Anaesthetist, BA and I have heard some oral evidence from her this afternoon. Dr BA agreed that a Caesarean section was the appropriate way forward. The spinal block was the best approach. This would have the great advantage that the mother would see the baby being born. She would be able to feed and hold the baby as soon as possible. Moreover, the baby is usually more alert than if delivered under a general anaesthetic. There is likely to be less post-operative nausea and vomiting and an improved recovery. In ordinary circumstances, there is less risk.

12 There are however some risks to the procedure, but they are very rare. PM may require a general anaesthetic if she became unduly anxious; or if she stopped cooperating; or if there is a failure of the spinal block; or if she requested a general anaesthetic; or if there was excessive bleeding, pain or discomfort. There are, of course, marginally increased risks from a general anaesthetic, but again most of the risks are rare or have only mild consequences. I am satisfied that such an emergency general anaesthetic would only take place if there really was no alternative and it was essential.

13 The Trust's position is that I need to authorise a general anaesthetic as a contingency option if the spinal anaesthetic does not work, or if PM becomes upset during the procedure.

14 Given that there is broad agreement in this case I can set out the law very quickly. Section 1(2) of the Mental Capacity Act provides that:

> "*A person must be assumed to have capacity unless it is established that they lack capacity."*

15 The burden of proof lies on the person asserting lack of capacity and the standard of proof is the balance of probabilities. Determination of capacity is always decision specific having regard to the clear structure provided by s.1 to s.3 of the Mental Capacity Act. Capacity is required to be assessed in relation to the specific decision at the time the decision needs to be made and not a person's capacity to make decisions generally. Section 1 provides:

> *"(3) A person is not to be treated as unable to make a decision unless all practicable steps to help her do so have been taken without success.*
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision*."

15 Pursuant to s.2 of the Act:

> *"(1) A person lacks capacity in relation to a matter if at the material time she is unable to make a decision for herself in*

> *relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
> *(2) It does not matter whether the impairment or disturbance [in the functioning of the mind or brain] is permanent or temporary*."

The question for the court is not whether the person's ability to take the decision is impaired by the impairment of, or the disturbance in the functioning of, the mind or brain, but rather whether the person is rendered unable to make the decision of thereof.

16 Pursuant to s.3(1) of the Act:

> "*A person is unable to make a decision for herself if she is unable -*
> *(a) to understand the information relevant to the decision,*
> *(b) to retain that information,*
> *(c) to use or weigh that information as part of the process of making the decision, or*
> *(d) to communicate his decision (whether by talking, using sign language or any other means)."*

This is the so-called functional test. An inability to undertake any of these four aspects of the decision-making process as set out in s.3(1) will be sufficient for a finding of incapacity provided the inability is because of an impairment of, or a disturbance in the functioning of the mind or brain. There must be a causal connection.

17 I am satisfied that PM lacks both litigation capacity, at present, and the capacity to decide on the most appropriate way to deliver her baby. She has been getting better which is good news. It may well be that she will soon recover capacity, but that is not the issue. As at today's date, she lacks capacity and I have jurisdiction under the Court of Protection to make a best interests decision in relation to her case.

18 So far as the law on best interests decisions is concerned, I can be even briefer. Where a person is unable to make a decision for themselves, there is an obligation to act in their best interests [s.1(6)]. When determining what is in a person's best interests, consideration must

be given to all relevant circumstances; to the person's past and present wishes and feelings; to the beliefs and values that would influence their decision if they had capacity; and to the other factors that they would be likely to consider if they were able to do so [s.4(6)]. Account must be taken of the views of anyone engaged in caring for the person or interested in their welfare [s.4(7)].

19 An additional factor, of course, is the health of the baby and it is clearly permissible to take that into account, if only because it is in the best interests of PM that the health of her baby is protected.

20 I am entirely satisfied, in this case, that an elective Caesarean section should be authorised. Indeed, for the most part, it is what PM wants. I spoke to her during the course of the hearing. I can report that she was in extremely good spirits. She was smiling at me and waving at me throughout. She told me she wanted her baby as soon as possible. She wanted him to grow up to be a policeman. She said she was very well, which is good to hear. She said she was in no pain. She confessed that she was a stout girl and that her baby's weight had got too much for her. She wanted the Caesarean section and she wanted to be awake. She was very happy with Dr CC.

21 I am therefore quite satisfied that this Caesarean section is in her interests. It is the safest way to deliver her baby. It is highly likely that an emergency Caesarean section would be needed, if I did not approve an elective one, given the size of the baby and the risk of the baby's shoulders getting stuck. It is not satisfactory to do it on an emergency basis. It places unnecessary risks on both mother and baby and it would be very distressing.

22 I am therefore quite satisfied that I should approve this elective Caesarean section. I am also quite satisfied it should be done under spinal block. In other words PM will be awake. This

is what she wishes and she should be awake for the birth of her baby, if at all possible. I must, however, authorise a general anaesthetic if that becomes necessary for her safety and the safety of the baby. I consider this is only likely to happen if she requests it; or the spinal block does not work; or she becomes distressed and unduly anxious; or there is some other complication that requires a general anaesthetic. It is only to be done if strictly necessary. I authorise it as a fall back.

23 I believe that concludes the directions and authorisations that I need to deal with in this judgment. Of course, there will be a number of ancillary declarations that are required. If there is anything else substantive that I have not dealt with, counsel will no doubt draw it to my attention at this point.

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CERTIFICATE

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