

[2021] EWCOP 55
IN THE HIGH COURT OF JUSTICE
COURT OF PROTECTION

Case No. 13777575

Courtroom No. 41

Royal Courts of Justices
Strand
London
WC2A 2LL

11.40am – 11.57am
Friday, 2nd July 2021

Before:
THE HONOURABLE MR JUSTICE KEEHAN
SITTING AS A JUDGE OF THE COURT OF PROTECTION

B E T W E E N:

DARTFORD AND GRAVESHAM NHS TRUST

and

SEB (By her litigation friend, the Official Solicitor)

MISS N KHALIQUE QC appeared on behalf of the Applicant
MISS K GOLLOP QC appeared on behalf of the Respondent

JUDGMENT
(Approved)

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This judgment was delivered in private. 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 children 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.

MR JUSTICE KEEHAN:

1. I propose to give judgment in the case of Dartford and Gravesham NHS Trust v. SEB, an application in the Court of Protection.
2. I shall order that a transcript shall be obtained of this judgment at the expense of the applicant NHS Trust.
3. Last night, on an out-of-hours basis, the Trust, the Dartford and Gravesham NHS Trust, made an application for orders in relation to a 32-year-old single, mixed-race woman, SEB, who was some 38 weeks pregnant and her expected date of delivery was 10 July 2021.
4. However, she went into labour yesterday evening. The Trust sought orders to provide for SEB to give birth via a Caesarean section rather than vaginal delivery.
5. SEB was represented at the hearing yesterday evening by the Official Solicitor, through Miss Gollop QC.
6. At the conclusion of the short hearing, which was urgent because SEB had gone into labour, I made the order sought by the Trust and reserved judgment until this morning.

Background

7. SEB has used illicit drugs, including crack cocaine and alcohol, for a considerable period of time. She is diagnosed with a schizoaffective disorder and was first diagnosed with her mental illness in 2009.
8. She has had 16 admissions to hospital since 2011 and seven admissions as an acute patient in the last two years.
9. SEB responds well to medication but has a history of non-compliance leading to relapses, which in turn usually lead to psychiatric crises and inpatient care.
10. Her psychiatric inpatient admissions vary in length, the longest being five months.
11. Dr Vasudevan is the mother's treating psychiatrist. The mother, he says, presents with disordered thoughts, agitation, and meaningless inappropriate responses to questions.
12. Her illness causes her to be paranoid and chaotic with impaired concentration.
13. She is currently receiving medication as a safe dose for a pregnant patient.
14. This is SEB's first pregnancy to term. She does not have any other children and, up until her recent psychiatric admission last week, she was deemed and presumed to have capacity to make decisions about her obstetric care and mode of delivery.
15. Regrettably, SEB, having attended a detoxification programme in February of this year, subsequently relapsed and began using drugs again, and has continued to misuse substances during her pregnancy, thereby placing the baby at risk of foetal alcohol and/or drug dependency.
16. As a consequence of this, SEB has suffered a significant deterioration in her mental health which required her to become an inpatient in a psychiatric hospital on 23 June 2021.
17. She is currently detained pursuant to section 3 of the Mental Health Act 1983.
18. I am asked to determine whether SEB lacks capacity to make relevant decisions; what will be in SEB's best interests; whether the restraint proposed by the Trust is appropriate and proportionate; and whether there will be a deprivation thereby of her liberty.

Capacity

19. I have regard to the provisions of section 2 and section 3 of the Mental Capacity Act 2005 in relation to determining whether SEB lacks capacity to litigate, and in relation to her obstetric treatment.
20. Dr Vasudevan has concluded that her schizoaffective disorder is preventing from her understanding and retaining information relevant to the decisions she is required to make about her obstetric care and mode of delivery.

21. Dr Waterstone, a consultant obstetrician, has reached similar conclusions in relation to SEB's capacity to make decisions about her obstetric care and mode of delivery. Further, Ms Allon, a specialist mental health midwife, concurs with the views of other professionals as to SEB's bizarre and delusional thinking.
22. She notes:

“She believes that she has been “paying midwives” in Darent Valley Hospital and quickly moved on to the mystical universe not aligning and her speech was very disorganised and disordered. She told us to ‘fuck off’. She declined to engage with me. She believed that the Doppler would transmit rays to the baby and harm the baby. She declined to answer whether the baby had been moving as normal and suggested we are breaking the law by asking her. She appeared more agitated, her paranoid thoughts still present and very disorganised thoughts which were difficult to follow”.
23. Therefore, the totality of the clinical evidence is that:
 - a) SEB is currently experiencing an acute relapse and expressing paranoid delusional beliefs. There is an impairment in the functioning of her mind or brain by reason of her affective disorder. This diagnosis meets the diagnostic test of section 2. Further she is unable to understand, retain, or weigh the relevant information, which renders her unable to make a decision in the terms of section 3 of the 2005 Act.
 - b) She has previously been capacitous and able to participate in meetings around birth-planning and expressed her wishes and feelings clearly against a background of understanding, retaining, and weighing up the salient facts from previous occasions.
 - c) However, there has been an acute and severe deterioration in her mental health with increasing paranoia and bizarre thoughts in June 2021.
 - d) The precipitant for this deterioration is due to sustained misuse of illicit substances. Other stresses may include plans in respect of the unborn child and/or difficult relationships within her family.
 - e) Crucially, it remains difficult to predict how SEB's mental state will change over the next two weeks but it is unlikely she will regain capacity to the extent that she will be able to make relevant decisions regarding childbirth.
24. On the basis of all of that clinical evidence, I am satisfied and find that SEB lacks capacity to litigate and that she lacks capacity to make decisions about her obstetric care and mode of delivery.

Best Interests

25. In considering the best interests in respect of SEB, I have regard to the provisions of section 4 of the 2005 Act.
26. I have regard to the decisions of the Court in a number of previous authorities, namely *Crossley v Crossley* [2007] EWCA Civ 1491; *Aintree University Hospitals NHS Foundation Trust v James & Ors* [2013] UKSC 67; *NHS Trust & Ors v FG (Rev 1)* [2014] EWCOP 30; *NHS Trusts v C (Medical Treatment and Reporting Restrictions Order (1))* [2016] EWCOP 17; *NHS Trust (2) NHS Trust v FG* [2015] 1 WLR 1984; and finally, *The Mental Health Trust, The Acute Trust & The Council v DD* [2014] EWCOP 11.

27. I have taken account of the evidence of Mr Waterstone, consultant obstetrician, Dr Satisha, a consultant anaesthetist, and Ms Allon, the specialist mental health midwife.
28. I accept that the preferred option for the mode of delivery for SEB, in light of her mental health, is a planned Caesarean section.
29. I have regard to the balance sheet set out in the Trust's position statement of the various options and risks associated with natural birth, planned Caesarean section, anaesthetic risks, and risks of the mother refusing treatment.
30. In light of that consensus of medical opinion, I am satisfied that it is in the best interests of SEB that she give birth by way of Caesarean section.

Convention rights and deprivation of liberty

31. I have regard to the SEB's Article 3, Article 5, and Article 8 rights in making the decision.
32. I take account, when considering approving a planned Caesarean section, that the first consideration must always be given to adopting the least interventionist approach.
33. SEB did, when she was capacitous, agree to undergo and wished to undergo a Caesarean section.
34. I am satisfied that any interference with her Convention rights is necessary, proportionate, and justified on the facts.
35. Similarly, I am satisfied and find that the need to restrain SEB during the course of her obstetric care is necessary, proportionate, and justified.

Conclusion

36. Accordingly, in all of those circumstances, I am satisfied that SEB lacks capacity to litigate. She lacks capacity to make decisions about her obstetric care. It is in her best interests to give birth by way of Caesarean section and, if needs be, to be restrained during the course of that procedure if it proves necessary and that any concomitant deprivation of her liberty is authorised by the Court.
37. The Official Solicitor on behalf of SEB queried whether a Caesarean section could be undertaken given that the mother, SEB, was in the early stages of labour.
38. However, as I indicated to the Official Solicitor, the order I was making was permissive, not mandatory, and that, no doubt, the clinicians would review the position as it was on the ground when the time came to take steps to perform a Caesarean section.
39. Accordingly, I made all of the orders sought by the Trust.

Postscript

40. I am delighted to note that leading counsel for the Trust, Ms Khalique, emailed my clerk this morning to give me the news that the planned Caesarean was undertaken, SEB was delivered of a well baby, SEB and the baby were doing well, and that it had not been necessary during the course of the procedure to restrain SEB in any way. In fact, holding the hand of a nurse, SEB walked down to the operating theatre for the C-section to be undertaken.
41. That is the end of this judgment.

End of Judgment

Transcript of a recording by Ubiquis
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This transcript has been approved by the judge.