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IN THE COURT OF PROTECTION
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Royal Courts of Justice
Strand
London, WC2A 2LL

Monday 15 May 2023

IN THE MATTER OF PATRICIA

Before:

MR JUSTICE MOOR

B E T W E E N :

- (1) Z NHS FOUNDATION TRUST
- (2) Y NHS FOUNDATION TRUST

Applicants

- and -

- (1) Patricia
- (2) X NHS FOUNDATION TRUST
- (3) V NHS INTEGRATED CARE BOARD

Respondent

REPORTING RESTRICTIONS APPLY
ANONYMISATION APPLIED

J U D G M E N T

(via Microsoft Teams)

A P P E A R A N C E S

MISS S ROPER KC (instructed by Kennedys Law LLP) appeared on behalf of the First Applicant.

MS K GOLLOP KC (instructed by Browne Jacobson LLP) appeared on behalf of the Second Applicant and Second Respondent.

MS V BUTLER-COLE KC (instructed by Bindmans LLP) appeared on behalf of the First Respondent.

THE THIRD RESPONDENT did not appear and was not represented.

MR JUSTICE MOOR:-

- 1 I have been dealing again with Patricia, who was born in 1999, and is therefore twenty-three years of age. I remind everybody that there is a reporting restriction order in place to prevent the identification of Patricia, her family and her treating clinicians.

- 2 There is no doubt that Patricia suffers from anorexia nervosa. It has made her extremely ill indeed. I take the view that she is and has been perilously close to death. There is also no doubt whatsoever that, over ten years of treatment, has simply not worked, including compulsory treatment, treatment in a number of different settings and at a number of different times over a prolonged period.

- 3 Last week, on 9 May 2023, I gave a significant judgment in which I decided that Patricia should not be treated by nasogastric feeding under compulsion, whether it be via restraint or sedation. I did so as Patricia was passionately opposed to such treatment. I did not consider that ordering such treatment would do any good to her in the long term. Moreover, I was of the view that it would cause her very significant distress. I wanted to avoid that distress. I

wanted to afford her autonomy. I stand by that decision. I did so on the basis that I considered that there were reasonable grounds for believing that she lacked capacity to decide on her medical treatment.

4 I now have to make a final decision as to her capacity to decide on her medical treatment. Again, it is not an easy decision to take. Moreover, the situation is unusual as it is agreed by all parties that she does, at present, have capacity to litigate, capacity to instruct her own lawyers and to conduct this litigation herself. As a result of that, the Official Solicitor was discharged as her Litigation Friend and she now instructs Ms Victoria Butler-Cole KC herself via her solicitors. It is right that one of my colleagues, Mostyn J, once described a situation where a party has litigation capacity but does not have capacity to take decisions as to their medical treatment to be as rare as a snow leopard, but another, Hayden J, took a more nuanced position, saying it all depended on the facts of each particular case.

5 I proceed, of course, on the basis that there is a presumption of capacity. The burden of establishing a lack of capacity is on the two NHS Trusts who ask me to find a lack of capacity. The standard of proof is the balance of probabilities: is it more likely than not that Patricia lacks capacity? The date on which I have to decide the issue is today. I also remind myself that a person is not treated as being unable to make a decision unless all practicable steps have been taken to help her take that decision without success. I am entirely satisfied that all practical steps have been taken to try to assist her. Very importantly, a person is not to be treated as unable to make a decision merely because she makes an unwise decision. I have had that well in mind.

6 The question for me is whether she can understand the information that is given to her; whether she can then use it and weigh it to come to an appropriate decision, whatever that

decision may be. I have the evidence of three doctors, two of whom have given oral evidence before me today.

7 The first was Professor Paul Robinson, who was originally instructed by the Official Solicitor. In his report, dated 18 February 2023, he said that Patricia suffers from a mental disorder, namely anorexia nervosa. She has a distorted body image. She is very articulate. She was correct in her definition of capacity and the court's powers. He took the view that, at the time, she had capacity to conduct proceedings, but she told him that she knows she wants to do something but her eating disorder stops her. Her father has, on occasions, been able to persuade her, but not for long. So, in his view, her mental disorder had prevented her, and was preventing her, from using and weighing the information. He took the view, and still takes the view, that she therefore lacks capacity as to medical treatment which could, in this case, be fatal to her.

8 Dr B has been her treating psychiatrist for the last five years. She therefore knows Patricia very well. She undertook a capacity assessment of Patricia on 13 December 2022. She also diagnosed anorexia nervosa. She said that Patricia has an incredible fear of gaining weight and, as a result, is severely chronically malnourished. Patricia is not able to discuss the information that is provided to her. Dr B could not say that she was able to retain the information. Patricia did tell Dr B that she was fed up with being in and out of hospitals and would rather die than go through that again. She said she would follow a meal plan but Dr B pointed out that she had not managed to do so even with support in hospital. Patricia could not understand the necessity for improving her nutrition. Dr B considered that she lacked capacity to take decisions as to her medical treatment.

- 9 Dr B saw her again on 26 April 2023. She took the view that Patricia was in a worse position. She was in a worse condition mentally. Her physical condition had deteriorated. Her anorexic thinking was more dominant and that reinforced Dr B's conclusions.
- 10 It is right to say and note that Dr H, another consultant psychiatrist, reported on 22 March 2023. He confirmed that Patricia has a severe eating disorder, but he was of the view that she did have the capacity to decide on her medical treatment and that she did not wish to be treated against her will. He has not, however, seen her recently.
- 11 Before I deal with the oral evidence I heard today, I should note that, during the course of these proceedings over the last couple of weeks, Patricia has been able to increase her calorie intake from around 700 to 800 calories per day to 1,200 to 1,300 per day. That is a significant achievement, for which I have given her, and continue to give her, credit. It is not, however, in the view of the Trusts, sufficient to sustain her in the long term. The clinicians take the view that she needs to increase her intake to over 2,000 calories a day, such that she would then be sufficiently well to be discharged to an eating disorder unit or to go home. It is, however, an achievement, and I do give her credit for it.
- 12 Of course, inevitably, Ms Butler-Cole KC submits to me that this is evidence of her capacity. Miss Roper KC and Ms Gollop KC, for the two Trusts, disagree and rely on Dr B, whose evidence was that this improvement was effectively forced upon Patricia because of the threat that I would order nasogastric feeding under restraint if she did not do so. Dr B also considered that Patricia had been unable to free herself of the anorexia sufficiently to enable her to get to the desired calorie intake of over 2,000 calories per day and, it is submitted, it is highly unlikely that she will do so.

- 13 Both Professor Robinson and Dr B confirmed their written views in their oral evidence to me this morning. Professor Robinson told me that, in his view, Patricia does not have capacity to make decisions as to the management of her anorexia and, in his view, this is the case at all times. He took the view that this is best seen by the fact that, if you ask her or tell her to do something in relation to her anorexia which might lead to weight gain, she will usually refuse to do so and do the opposite. He told me that his view was that this is because her decision making is taken over by her anorexic illness. That had echoes for me of what he told me in his oral evidence on 9 May 2023 when he said that Patricia has a partner. The partner is anorexia. It controls the other part of her mind and stops her carrying out what she knows is actually in her best interests.
- 14 Ms Butler-Cole asked Professor Robinson if his view was that all those with anorexia nervosa lacked medical capacity. He replied that some do have capacity if they manage to overcome and control their anorexia and improve. If Patricia was to decide as week that she was going to get out of her anorexia – as he said, the majority of patients do – she will then regain capacity, but, he added, that is not the position yet. Patricia had increased her oral intake and that was quite positive. The anorexia allows her to take some steps, but not enough to get out of the condition completely. It is possible that might be changing for Patricia, but, for the Professor, that was not the case as yet.
- 15 Dr B said that when she saw Patricia in late April 2023, she thought Patricia was even more anorexic than before. She did not consider Patricia was able to understand information that Dr B was providing to her. Patricia said that she did understand, but Dr B did not consider she did. Dr B told me that she was basically telling Patricia she was dying, and Patricia’s response was, “I know, but”. For Dr B, the “but” was the crucial word. Dr B felt Patricia did not understand how serious the situation was and that she could die at any moment. Dr B took the view that what had helped her to increase her calorie intake was the threat of her

being fed by nasogastric tube, with restraint, against her wishes, but Dr B was still of the view that Patricia was not taking on board how likely it was that she would die.

16 Patricia's liver is failing. She is at the pre-death stage. She does not want to die, but she cannot bring herself to increase her calorie intake up to 2,000 calories a day, even by increasing at 200 calories per day. If, argued Dr B, she had capacity, she would do that because she tells the doctors she wants to live.

17 Dr B felt Patricia did have more capacity last year when she agreed to nasogastric feeding and improved dramatically, but her current increase, the doctor felt, was due to the court's threat. Dr B has seen Patricia many, many times. She told me that Patricia will make small adjustments, but she will stop as soon as the threat is removed. I sincerely hope that Dr B is wrong. I very much hope that Patricia can continue to make these improvements. I fear, however, that Dr B may be right, and that causes me nothing but dismay.

18 Last week, I rejected the evidence of both Professor Robinson and Dr B in relation to force-feeding Patricia by nasogastric tube. I did so for the reasons I outlined then and have summarised earlier in this judgment. This week, however, I have decided that I should accept their evidence.

19 As far as Professor Robinson is concerned, I have already indicated that I was particularly taken by his evidence last week about Patricia having a partner, namely anorexia, which controls the other part of her mind and stops her carrying out her wishes. That is, in my view, clear evidence of incapacity.

20 Dr B is an important witness because, unlike Dr H, she has known Patricia for five years. She has had very close contact with her and she is clear in her view that, at present, the

anorexic thinking takes over such that Patricia cannot decide for herself. I accept that evidence.

21 I find that I do have jurisdiction on the basis that Patricia, at present, lacks capacity to take decisions as to her medical treatment. I accept the submission that Ms Butler-Cole KC made to me that judges should not automatically come to the conclusion that those with anorexia nervosa lack capacity. I am clear that, if Patricia was to get herself to a position where she was well enough to go back to an SEDU unit or to go home, by taking over 2,000 calories a day, I might well take a different conclusion. My mind is entirely open.

22 Despite the fact that I take the view that I, in the Court of Protection, have jurisdiction to deal with this case, I repeat, and I repeat loud and clear for Patricia to hear, that I am still of the view that she should have her autonomy on the basis that it is not in her interests to force-feed her against her wishes, as it would be futile and cause her nothing but distress and turmoil. I accept her evidence when she tells the court that, if she put on weight as a result of compulsory nasogastric feeding, she would just lose it again as soon as the nasogastric feeding stopped. Last week, I did say to her that, if her liver function deteriorated, I would really hope that she would be able to accept nasogastric feeding not by compulsion, but by agreement, as she did last year, with dramatic improvements in her health. I am quite sure that, if she was to do that, it would be relatively easy for Ms Butler-Cole to convince me that she had regained capacity and I would dismiss these proceedings. That is not the position today. I have, therefore, decided that I do retain jurisdiction, but I am still of the view as to her best interests as articulated in my judgment on 9 May 2023.

CERTIFICATE

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**** This transcript has been approved by the Judge****