

Neutral citation number: [2024] EWCOP 40 (T2)

Case No. 14095064-03

IN THE COURT OF PROTECTION

Chester Civil & Family Justice Centre  
Trident House  
Little St John Street  
Chester  
CH1 1SN

**Heard on 16<sup>th</sup> May 2024**  
**Judgment given on 16<sup>th</sup> May 2024**

Before:

HER HONOUR JUDGE HOWELLS  
SITTING AS A TIER 2 JUDGE OF THE COURT OF PROTECTION

B E T W E E N:

HEALTH BODY A

and

(1) JW BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR  
(2) CHESHIRE WEST AND CHESTER COUNCIL

Representation:

MR T JONES appeared on behalf of the Applicant

MR B MCCORMACK appeared on behalf of the First Respondent

MS O KIRKBRIDE appeared on behalf of the Second Respondent



JUDGMENT  
Approved

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*This judgment was delivered in public, and the proceedings are subject to the Transparency Order dated 16 May 2024. The anonymity of JW must be strictly preserved, and nothing must be published that would identify JW, either directly or indirectly. 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.”*

HHJ HOWELLS:

NOTE

The names of health professionals have been anonymised solely to ensure that J or the place where she lives are not identified by jigsaw identification.

Background

1. This application concerns the administration of dental treatment including possible extraction under general anaesthesia and associated medical treatment to JW who I will refer to as “J”. J is a young woman who has diagnoses of learning disability, autism and Avoidant/Restrictive Food Intake Disorder (‘ARFID’). She has previously been subject to separate Court of Protection proceedings in relation to where she should live and who she should have contact with. She currently lives in a residential placement with a team of support.
2. The substantive application before the Court is the Health Body’s application, dated 26 March 2024, issued on 4 April 2024, for the following namely: permission to bring the application, a declaration that J lacks capacity to make decisions regarding a dental examination and treatment under general anaesthetic, a declaration that it is lawful and in J’s best interest to undergo a dental examination and treatment under general anaesthetic and a declaration that it is lawful and in J’s best interest to have associated treatment while she is under general anaesthetic, namely a blood test, a smear test and for her hair and nails to be cut. This is my ex tempore judgment on that application.
3. I have previously case-managed this matter. As this is an application which relates to serious medical treatment: it was referred to the Vice President of the Court of Protection, Theis J, who released the matter to me. That was on the basis that the Official Solicitor

would be instructed to represent J's interests. The Official Solicitor is so instructed. The parties, therefore, are the applicant Health Body who are anonymised for the purpose of this case so that J's residence and where she lives is not inadvertently disclosed. The Local Authority who are responsible for J's care are a respondent. J, through the Official Solicitor is also a respondent. J's mother who is a party to the separate welfare proceedings has been informed of these proceedings but has indicated that she does not wish to be joined as a party.

4. I turn then to the relevant facts. J has indicated over a number of months that she has had problems and pain with intermittent and transient toothache. This is against a background where J has had a reduced diet and poor oral hygiene for many years. It is not known precisely when this started but certainly, since August 2023, support staff have noted that J has demonstrated pain by putting her hands to her mouth and grimacing. Support staff have noticed that J's front teeth are discoloured and "bad".
5. Steps were taken back in October 2023 for J to undergo a dental examination. However, J was unable to cooperate or tolerate this and she was noted to be aggressive and disruptive at the appointment despite the fact that she had received a mild sedative before. The Health Body's position is that J is suffering from dental problems which require treatment. That treatment is only achievable under a general anaesthetic. Until there is a full examination of J under such anaesthetic, it is unclear the extent to which treatment is required.
6. Further, given that it is proposed that J undergoes a general anaesthetic, the applicant Health Body proposes that this would be an optimum opportunity to carry out a blood test on J in relation to her general health. Further, it is proposed that a cervical smear test should take place. J has had difficulties also with her hair and nails. She is unable to manage them herself. She is unable to tolerate others providing care in relation to them. Her hair has been described as "matted". Her nails are unkempt. It is proposed that whilst under general anaesthetic, a hairdresser and a podiatrist should be present and cut J's hair so that it is more manageable in the future to clean, and deal with her nails.
7. The Health Body has carried out best-interest assessments and meetings with a range of professionals including Dr Z who is a specialist dental practitioner, J's general practitioner, Dr P and other clinicians including Dr M who is an anaesthetist, all of whom were present today. They provided evidence in respect of the risks and benefits of general anaesthetic and the treatment that is required. It is the position of the Health Body, approved by the Local Authority and the Official Solicitor that such a course of treatment including sedation under

general anaesthetic and the possible administration of medication covertly to J are in J's best interest.

#### Legal Framework

8. I am going to deal very briefly with the legal background because that is agreed between the parties. By section 15(1) of the Mental Capacity Act 2005, the Court may make a declaration as to whether a person lacks capacity to make a specific decision. Section 16 empowers the Court by making an order to make a personal welfare decision on behalf of an incapacitated person which includes, under section 17(1)(d) the giving of consent to the carrying out of treatment by a person providing health care.
9. The Court must exercise its jurisdiction in accordance with the relevant exceptions of the Mental Capacity Act 2005, in particular, the overriding principles in section 1, the test of capacity in sections 2 and 3 and the requirements for assessing best interests in section 4. In relation to the presumption of capacity, I note that a person must be assumed to have capacity unless it is established that they lack capacity. That is to be read with section 2(4):

“In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of the Act must be decided on the balance of probabilities”.
10. It is, therefore, for the party asserting that a person lacks capacity to establish that be the case on the balance of probabilities. In terms of the test, I have considered specifically what was said by Munby J in *A Local Authority v MM and Another* [2007] EWHC 2003 (Fam) and I read into this judgment, paragraph 81 of his judgment in relation to that issue.

“Before I leave *Re MB* and section 3(1) of the Act, there is one other point to be made. It will have been noticed that in *Re C Thorpe* J identified, as the second of three ingredients of the test, the ability or capacity to ‘believe’ the relevant information, whereas that ingredient is seemingly missing both from the formulation of the test in *Re MB* and from section 3(1) of the Act. The answer to this seeming lack of correspondence between the tests in *Re C* and *Re MB* was provided by Mr Joseph O'Brien on behalf of KM. It is to be found towards the end of the passage which I quoted above from Butler-Sloss LJ's judgment in *Re MB*. If one does not ‘believe’ a particular piece of information then one does not, in truth, ‘comprehend’ or ‘understand’ it, nor can it be said that one is able to ‘use’ or ‘weigh’ it. In other words, the specific requirement of belief is subsumed in the more general requirements of understanding and of ability to use and weigh information”.
11. In terms of the duty of assisted decision-making:

“...a person is not to be treated as unable to make a decision unless all practical steps to help them to do so have been taken without success”.

That is section 1(3).

12. The principle must be read alongside section 4(4) which requires that a best-interest decision-maker:

“...must so far as reasonably practical, permit and encourage the person to participate or to improve his ability to participate as fully as possible in any act done for them and any decision affecting them”.

13. Pursuant to section 3(2):

“A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means)”.

14. I also recognise, pursuant to section 1(4) of the Act that unwise decision-making does mean lack of capacity and a mentally competent adult is entitled to make decisions that are not in their best interest as set out and explained in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

15. In terms of best interests, I refer to section 1(5) of the Act:

“An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests”.

16. In assessing that, the decision-maker including the Court in these circumstances is not concerned with narrow medical best interest but:

“must look at the individual’s welfare in the wider sense, not just medical but social and psychological. They must consider the nature of the medical treatment in question, what it involves and its prospects of success. They must consider what the outcome for treatment for the patient is likely to be”.

That is Lady Hale’s judgment in *Aintree* at paragraph 30.

17. I also note the procedural requirements that are required as set out in the subsections of section 4 of the Act in terms of how that is carried out.

18. In terms of the balancing exercise, the best-interest assessment is in the nature of a balancing exercise where the preservation of life carries the greatest but not necessarily preponderant weight, I note from *E v Northern Care Alliance NHS Foundation Trust* [2021] EWCA Civ 1888:

“The law reflects human nature in attaching the greatest value to the preservation of life, but the quality of life as experienced by the individual must also be taken into account”.

19. I note also that the least restrictive alternative should be considered pursuant to section 1(6) of the Act, and I also consider respect for human rights. By virtue of section 6 of the Human Rights Act 1998, the best-interest decision-maker, again, including the Court must also act compatibly with the protected persons human acts, materially, those under Article 8, the right to respect of private life which includes the right of bodily integrity. I also note Article 3 of the Act and other articles which may or may not be relevant. I take all of that into consideration when reaching the decisions in this case.

#### Position of the Parties

20. I turn then to the position of the parties. The parties agree that J is unable to understand or weigh in the balance information relevant to the decision whether to consent to dental treatment, the taking of blood, the smear test, hair and nail treatment and any associated medical treatment including a general anaesthetic because of an impairment of, or a disturbance in the functioning of, the mind or brain, namely her learning disability and autism. Accordingly, she lacks capacity to consent to that treatment. On the basis of the information I have read, that appears to me to be an entirely correct agreement by the parties and I make a declaration that J lacks capacity in relation to each of the relevant matters which are set out in the draft order including the ability to litigate.

#### Discussion

21. In terms of the determination, I have been referred to a number of authorities in skeleton arguments, particularly *United Lincolnshire Hospital NHS Foundation v Q* [2020] EWCOP 27, *Livewell Southwest Community Interest Company v MD* [2020] EWCOP 57 and others. I recognise that the Court of Protection has in previous cases, made determinations as to the best interests in terms of dental treatment. Of course, each case is fact-sensitive. Whilst other judges may have considered such treatment appropriate, I determine this case not in relation to what they have said, but in relation to what is in J’s best interests. I am satisfied that J lacks capacity to give or refuse consent for any of these treatments. There is no reasonable prospect that J will at some time recover capacity to decide the issue for herself in the future.
22. As for her best interests, I am satisfied that none of the medical professionals have made assumptions about what might be in J’s best interests on the basis of her age, appearance, condition or behaviour. I am satisfied that all reasonable practical steps have been taken to

permit, encourage and assist J to participate in the decision-making process, that her wishes, feelings and values and beliefs have been ascertained so far as can reasonably be done. For example, I note that Dr Z has spoken to J on more than one occasion and it is clear that J did not wish to or was not able to engage in providing her feelings and wishes to Dr Z and other professionals in this case.

23. I am satisfied that the relevant persons caring for and with an interest in J's welfare have been consulted and that their views have been taken into account. In particular, I note that J's care team have been involved in the Health Body's decision-making. Further, J's mother, although she is not a party to these proceedings, has been consulted. She agrees that J would not be able to tolerate dental treatment and other invasive treatment if she were not under general anaesthetic. She agrees that these are matters which need to be investigated and, in fact, in the past, on a date I do not know, J has had a previous anaesthetic in relation to certain treatments. In relation to the cervical smear test, J's mother accepts that J would not be able to tolerate that were she not under general anaesthetic. She appears to accept it is in J's best interest to have such investigations.
24. As to the substantive best-interest assessments, I have considered the factors that weigh against both treatment and those which favour the status quo, i.e., not having such treatment, because it is accepted that it would not be achievable for J to have any of the treatments proposed without general anaesthetic. I have considered that in the wider sense; not just medical but social and psychological. I have considered and balanced the factors for and against each of the treatments separately.
25. In relation to dental treatment, I note that J is reported to have complained of pain in her mouth over several months but will not allow an examination to be carried out to identify the cause of the pain. When J went to see a dentist, she became very upset and the appointment was not successful. When J was taken to the hospital clinic to meet the dental and anaesthetic team, she became very distressed and attempted to run away and threw furniture. J's pain has been managed by way of paracetamol. She has been given paracetamol 18 times over the past two weeks although it is not absolutely clear whether this was linked directly to tooth or mouth pain.
26. If J's teeth remain untreated, she may suffer dental infection which might require future hospital admission. The impact on J would be to require an escalation of treatment in an emergency situation which would cause considerable distress. That would mean treatment in a new environment with unfamiliar clinicians. As against that, early intervention which is

what is proposed by this treatment plan with a view to avoiding emergency admission would provide, as set out in what I consider to be a carefully drawn-up and well-thought-through care plan, a careful consideration of how to reduce any pain or distress to J and to ensure that she is able to cope as best as possible with these interventions. It deals with a number of eventualities including whether certain medication is available or not. The care plan has been, in my judgment, well thought-through and is sought to minimise the upset, confusion and disturbance which J may suffer.

27. In terms of administration of sedation and general anaesthetic and the potential risks, these are addressed in the witness statement by Dr M, consultant anaesthetist, dated 10 May 2024. That has a step-by-step approach in terms of medication being taken the night before the appointment followed by a sedative 90 minutes before the appointment and pre-medication when J is in the car at the hospital which could be given to J in diluted cordial.
28. Patient funding application has been requested to obtain midazolam tablets but that has not yet been approved by the relevant Authority. In the circumstances, it may be at the time of the procedure this will not be available and it is proposed that diazepam would be used in place. I mention this because it is clear to me that all eventualities have been considered as carefully as they can be in all of the circumstances.
29. In the event of escalation to more invasive sedation, the updated care plan explains that this can be either with one injection by one anaesthetist or, for speed, two injections into two thighs by two anaesthetists at the same time. It is reported that this would be extremely rare and it would involve the use of ketamine which might have the side-effect of hallucinations but these are minimised, I note, with co-administration of benzodiazepine. Therefore, again, all of that has been considered.
30. Any general anaesthetic has risks. However, J is considered by the evidence of Dr M to be an extremely low risk in relation to general anaesthetics. Weighing and balancing the risks of general anaesthetic and the benefits of dental investigations, in my judgment, it is in J's best interest, despite the serious nature of such anaesthesia to undergo such treatment under general anaesthetic as proposed and agreed by the parties in the care plan which I have seen. That shows to me a minimisation of risk for J. It avoids future emergency treatment. It is necessary treatment and it will ease, I hope, the pain and discomfort that J is currently under.
31. In terms of the other proposed tests and interventions, the parties, again, agree in principle that it is in J's best interest to undergo blood tests, a cervical smear and to have her hair and nails managed when she is under general anaesthetic. Weighing up and balancing the

benefits and risks of those separately, in relation to the blood tests, this is largely non-invasive. Dr P, the GP, states it would be extremely beneficial particularly because J has been experiencing secondary amenorrhoea, i.e., she does not have periods, and she has a very limited diet. Blood tests which would include testing for testosterone and sex hormone would assist in determining her future treatment and her future management. Given that any disadvantage to J would be relatively minor if she were under general anaesthetic, there would be minimal distress. In my judgment, it is in J's best interest for her future medical treatment to have the blood taken as proposed.

32. In terms of nail and haircutting, it is reported that J has severely matted hair at the back of her head. Her nails are overgrown and in poor condition. J is reported to have told her staff that she would like to have her head shaved which is, in my judgment, considered to be an indicator that she is distressed by the condition of her hair. If J's nails and hair were in a more manageable condition, she could be supported in the future to engage in routine-maintenance care of them. In the long term, therefore, she may accept staff support to meet her personal care needs. Progress in relation to that has been slow but, in my judgment, if J's hair and nails can be dealt with whilst under general anaesthetic (she is not tolerating that care if she is not sedated), then this will avoid the potential need for repeat procedures in the future. In my judgment, it is in J's best interest to undergo such treatment.
33. Finally, in relation to the proposed cervical smear screening, the consensus of the best-interests disciplinary team meeting was that due the relatively invasive nature of the testing on J's presentation and behaviour, the smear test is not something she could tolerate without sedation and/or general anaesthesia. Dr P, who is J's GP, has prepared a balance sheet document dated 8 May 2024 in which she records that a single smear test could save J's life and that by detecting a pre-cancer early, the treatment needed would be relatively minor. I recognise that a smear test is an invasive and personal investigation; however, I also recognise that there is a risk identified that J, in the past, could have contracted the HPV virus and a key benefit of a screening programme is detection of potential cancer early to avoid less arduous treatment in the future.
34. I balance against that the potential risks of vaginal pain and bleeding in the days following the procedure and distress that may be caused for J in not understanding what has happened. There is also the risk that J may be triggered to emotional distress because of what might have happened to her in the past (in respect of which no findings have ever been made nor any clear allegations made. I make that clear). I accept that this is a relatively finely-

balanced decision but I conclude, in line with the parties' positions and in line with what the MDT meeting said that the possible benefits are likely to outweigh the burden of more invasive treatment if needed at a later stage which could hopefully be avoided. The Health Body proposed a specialist nurse should undertake the smear test which appears to me to be appropriate. Weighing all of this up, I am satisfied that it is in J's best interest to have a cervical smear whilst she is under general anaesthetic.

35. The final issue which I may need to determine although the parties have not specifically addressed me to it is whether J's mother should be present. However, I do make a determination in relation to that. The parties are all of the view that it would not be in J's interest for her mother to be present when J is sedated and anaesthetised. That is what J's mother has said she would like to happen. However, I note what is said in the witness statements of the social worker and the clinical professionals in relation to the presence of a parent.
36. In some circumstances, it certainly would be appropriate where it would prevent upset or disturbance. However, for the reasons that are given in those statements and because of the difficult history that there has been in this matter, in my judgment, it would not be appropriate or in J's best interest for her mother to be present. The relationship between J and her mother has had its problems and contact has been very delicately built up. It is hoped that this is something which will continue in the future as something that is in J's interests. The presence of J's mother when J is having an anaesthetic may, in my judgment, unbalance this and create difficulties in the future. It may cause J upset and distress. In all the circumstances, I do not consider it to be in J's best interest for her mother to be present. However, of course, as is proposed, J's mother should be told about the progress of the investigations and the treatment and kept fully informed.
37. In all the circumstances, for the reasons that I have given, I consider it to be in J's best interests to undergo a general anaesthetic for a dental investigation and appropriate treatment. If upon examination it transpires that she has manageable or functional teeth with treatment, then it is hoped that such treatment would alleviate any pain or distress that J has. If, however, it is considered in the clinical opinion of the clinicians that J's teeth are not capable of being preserved, it would, in any event, still be in J's best interest given the pain that she has presently had, for appropriate extraction to take place. I note that J's diet is a soft diet and so whilst aesthetically, the removal of her teeth may cause distress, it should

not impact upon her ability to eat and drink in the long term. In relation to the other investigations under general anaesthetic, I have set out my reasoning above.

38. For the avoidance of doubt, I am satisfied that the treatment is compatible with J's human rights. Whilst such treatment is also *prima facie* interference with the right to bodily integrity protected by Article 8, such treatment may be justified under Article 8(2) as a necessary and proportionate means of achieving the legitimate end of protecting J from harm. I am satisfied that here there is a medical necessity for J to receive the proposed dental treatment, hair and nail cutting, cervical smear and blood tests and general anaesthetic for reasons of medical requirement. There will be no breach of J's human rights in those circumstances.
39. For the reasons I have given, that is my judgment.

**End of Judgment.**

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