Neutral Citation Number: [2021] EWCOP 14

Case No: COP 13707957

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
AND IN THE MATTER OF V

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2021

Before :

THE HONOURABLE MR JUSTICE HAYDEN
VICE PRESIDENT OF THE COURT OF PROTECTION

- -

Between :

SD	**Applicant**
- and –	
ROYAL BOROUGH OF KENSINGTON AND CHELSEA	**Respondent**

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- -

SD appeared in person.
Mr Tony Harrop-Griffiths (instructed by **Bi-borough Legal Services**) for the **Respondent**

Hearing dates: 10th February 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

This judgment was delivered following a remote hearing conducted on a video conferencing platform and was attended by members of the public and the press. 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 respondent and members of her 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 Hayden :

1. This is an application made pursuant to section 15 of the Mental Capacity Act 2005 ("MCA 2005"), it concerns the welfare of V, who is a lady in her early seventies living in a care home in the South-West of England. V has been living with Korsakoff's syndrome, a form of alcohol-related brain damage, for over a decade. The applicant, SD, is V's daughter who lives in New York, from where she has attended, remotely. SD seeks a declaration that it would not be lawful or in her best interests to administer V with a vaccine against Covid-19, or indeed, any other vaccine, on the basis that to do so would be contrary both to her best interests and to what SD contends would be her wishes. The respondent, the Royal Borough of Kensington and Chelsea, opposes this declaration, as it considers that it would be in V's best interests to receive a Covid-19 vaccine.

2. SD has not been appointed as V's deputy and, does not have power of attorney for V's health and welfare. She is unrepresented and has, during the course of her eloquent observations, expressed some concern that this lack of formal status may affect the weight given to her position. Though her concerns are understandable, I have impressed upon her that it is her connection with V that counts i.e. that fact that she is her daughter and can be assumed to be well placed to help the court in evaluating her mother's best interests.

3. Following a short discussion with SD and upon her request, I appointed her as V's litigation friend.

V's life and background

4. V has lived, quietly and comfortably, at her specialist care home since 2011. I heard oral evidence from both Mr Lindsay Lawrence, V's social worker, and from Mr A, V's day-to-day carer, who gave evidence remotely from the care home when asked to do so, on very short notice. I also heard evidence from SD about V's life before the advancement of her Korsakoff's syndrome.

5. V lived in London, where SD grew up. She arrived in the UK as a Polish immigrant, with little money. For many years, she worked hard as a waitress. V was plainly ambitious for her daughter and was able to ensure she received a good education. V worked hard to assist her daughter in gaining a scholarship to a very highly regarded school, which gave her a remarkable start in life. SD presents as confident and intelligent, and has enjoyed a very active career in sports, competing in and teaching snowboarding, living in various countries across the world. All this is in stark contrast to the hardships V faced as a young woman.

6. SD moved to live in Poland shortly after her mother was admitted to the care home. In her evidence SD explained that she went to live abroad because the United Kingdom had become too heavily associated with dark and distressing periods in her life. However, while living in Poland, she continued to visit her mother regularly, every couple of months.

7. Sadly, over the course of her life, V has struggled to regulate her use of alcohol. For many years she drank secretly and alone. Gradually her subterfuges became less efficient and eventually the extent of her drinking became obvious to SD. SD told me, and I accept, that in the decade before she was admitted to the care home, V incrementally lost her ability to conduct her life in any really effective way. SD spoke movingly of her efforts to curtail her mother's drinking and her own gradual realisation that this was a forlorn hope. As she recounted this, SD betrayed no resentment towards her mother but the pain of this period in her life was obvious and continues to resonate. She told me that she had become the parent in the relationship.

8. SD also told me that, historically, her mother had been, in her view, too deferential to those in authority, and to the medical profession, in particular. She trusted her doctors, unquestioningly following their advice. SD related an incident in which her mother had all her dental fillings replaced with ones which were, in SD's view, of inferior quality. This arose, in SD's opinion, as a result of a naïve and incurious reliance by her mother on a poor recommendation from a dentist. Though I am careful not to extrapolate too great a significance from this episode, it does cast some light on the way V has lived her life and her perhaps sometimes diffident compliance with the advice of medical professionals. She is of an age and generation where such views were commonplace. SD has a very different approach to these relationships. She has lived, as I have said, a very different life to that of her mother. She is confident and speaks authoritatively. She queries and mistrusts advice, she prefers to make her own decisions. The two women are or at least have become, very different, at least in this sphere. I found it interesting to note that SD did not recognise this or appreciate that it might, in the context of the wider picture, undermine the case she was seeking to advance.

9. I heard evidence that V was a remarkably strong woman and I have no doubt that, in her own way, she remains so, despite the shadow cast over her life by her Korsakoff's disease. Mr A, her carer, told me of her robust, and sometimes slightly ribald, sense of humour. He told me that she had *'a gentleman friend'* with whom she sits, every afternoon, holding hands while watching television. Mr A explained that she enjoyed participating in the day-to-day running of the care home, for example, clearing away cutlery and cups after meals. I was reminded of V's former employment as a waitress. Mr A's kindness and enjoyment of the company of V was obvious to me. SD also paid fulsome tribute to the high-quality and sensitive care her mother had received from Mr A over the years.

Factual background to this application

10. Mr A explained that, fortunately, V's care home has survived the entirety of the Covid-19 pandemic, so far, without there being a single known case. The care home has a professional and dedicated staff who, at considerable disruption to their own lives and to the lives of their families, have gone to enormous lengths to protect the residents. At some stages Mr A has moved into the home, separating himself from his family, to reduce risk of infection. Most of the residents, V included, are unable to appreciate the need for social distancing. In addition, and in light of the specialised care required, the care home has kept a rigid regime; there has been no 'window' or 'garden' contact with family or friends, only telephone and video conferencing.

11. On 13th December 2020, SD told the care home by email that her mother was not to receive the new Covid-19 vaccine, or indeed, any other vaccine. She told the care home that she did not think that the vaccines had undergone sufficiently rigorous safety trials and, in her view, there were unacceptable risks of side effects which contraindicated the taking of the vaccine.

12. Mr A explained that on the day the care home was set to vaccinate its residents, V had followed the other residents into the room where the vaccinations were being dispensed. She knew nothing of her daughter's position. Mr A had to tell her that she was not to receive the vaccine. She waited for about twenty minutes in the room, and then drifted away. Her general level of functioning means that the issue has now gone from her mind and she has not returned to consider it. There is no question that V does not have the capacity any longer to evaluate the question of receiving the vaccine for herself.

13. SD told me in evidence that she had been surprised to discover that her mother had been receiving the annual flu vaccination every year since her arrival at the care home, and that her mother had not expressed any resistance to receiving the Covid-19 vaccine. In the light of what she had told me earlier, of her mother's acceptance and indeed diffident response to medical advice, I found SD's reaction inconsistent.

14. On 12th January 2021, the care home informed the Royal Borough of Kensington and Chelsea of the situation. The Local Authority then began to consider the best way forward for V. It has taken nearly a month for the application to come before me. I indicated that I consider this delay to have been unsatisfactory. When an issue arises as to whether a care home resident should receive the vaccination, the matter should be brought before the court expeditiously, if it is not capable of speedy resolution by agreement. This is not only a question of risk assessment, it is an obligation to protect P's autonomy. In the intervening period, Mr A told me that there was a suspected Covid-19 risk in the care home, which happily came to nothing. It is axiomatic that if Covid-19 had entered the home, V would have been at considerable risk. It is important that I record that every other resident and staff member has now been vaccinated.

15. In late January 2021, SD spoke with Dr W, V's general practitioner, who was unambiguously clear that he thought it was in V's best interests to receive the vaccination. On 24th January 2021, SD made this application with the objective of preventing V having the vaccine.

Submissions of the parties

16. SD has stated that the available vaccines for Covid-19 are to be regarded as still in preliminary trials, which are unlikely to produce what she identifies as reliable data for some time; when pressed, she suggested not before February 2023. While she does not question the integrity and commitment of the medical profession or the existence of the Covid-19 virus, she nevertheless believes that her mother is being compelled *"to take part in a trial"* against her will, and in which her autonomy is being suborned. This drives her to conclude that it would not be in V's best interests to be vaccinated until what she views as a safe, effective and properly trialled vaccine is available. In particular she considers the research should specifically focus on patients

who, like her mother, suffer from dementia or organ damage. Self-evidently, these are SD's views, V is no longer able to organise her thoughts in such a way.

17. It is also SD's position that her mother would not have wanted to receive the vaccine, had she had the capacity to decide whether or not to receive it. V's compliance with flu vaccinations for the past nine years has been, in her view, evidence only of her general disorientation in the world, and not her true beliefs and wishes. Again, this cannot easily be reconciled with what SD has told me of her mother's relationship with medical professionals before she lost capacity.

18. It is important that I identify the issues that SD referred to and the abundant material she presented during the course of her application:

    i) A one-page document purporting to outline trials showing that ivermectin, an anti-parasitic drug, is effective at preventing Covid-19 produced by an organisation based in the USA. Information about where, when and by whom these trials were conducted, and whether they were peer-reviewed, is conspicuously absent. The document cites only Vo sources, a website and a study conducted by the president of the same organisation which published the document;

    ii) A screenshot of the website of the USA organisation showing the president of that organisation testifying to a US Senate Committee;

    iii) A screenshot of a blogpost on the website of the British Medical Journal, which reported that the Norwegian medicines regulator was investigating whether or not the deaths of 23 very frail, elderly patients shortly after receiving the vaccine were coincidental;

    iv) A screenshot of a blogpost on the website of the British Medical Journal from October 2020 about the potential limitations of data collected in Covid-19 vaccine trials;

    v) A presentation given to the Center for Disease Prevention and Control about six cases of anaphylaxis (a severe allergic reaction) following administration of 272,001 doses of the Pfizer/BioNTech vaccine in the UK, recommending that persons with anaphylaxis following Covid-19 vaccination should not receive additional doses of Covid-19 vaccines;

    vi) A screenshot of a study about what risks should be disclosed to participants in clinical trials of Covid-19 vaccines;

    vii) A screenshot of an article reporting that over 200 Israelis were diagnosed with Covid-19 vaccine days after getting the Pfizer/BioNTech vaccine. The same article notes that immunity to Covid-19 needs time to develop, and that immunity increases eight to ten days after the first injection;

    viii) A screenshot of a website showing an ongoing Phase-III study of the Oxford-AstraZeneca vaccine starting in August 2020 expected to conclude in February 2023. The screenshot notes that the estimated primary completion date in March 2021;

ix) A screenshot from a website quoting the General Medical Council guidelines confirming that the same ethical considerations concerning consent to receive any vaccine also apply to the Covid-19 vaccine;

x) A screenshot from a study without visible authors or a date concerning the challenges of testing SARS-CoV vaccines in mice;

xi) A letter from a person who claimed to know V for over 24 years, saying that V had discussed "her vaccine-damaged daughter" and that she had told her "emphatically that she would not have the vaccine again due to the damage she had witnessed had befallen her daughter". This person did not give oral evidence during the hearing.

19. Mr Harrop-Griffiths, counsel for the Local Authority, contended that this material, which has varying degrees of cogency and weight, is entirely eclipsed by the countervailing factors pointing to the Covid-19 virus being in V's best interest. The following factors tipped the balance in favour of a conclusion that being vaccinated for Covid-19 is in V's best interests, in particular:

i) Whether V is offered the Pfizer/BioNTech or the Oxford-AstraZeneca vaccine, both have been rigorously tested and are fully approved for use by the **Medicines and Healthcare products Regulatory Authority** ("MHRA"). Addressing one of SD's objections, it is pointed out that there have been sufficient clinical trials to meet the required safety, quality and effectiveness standards;

ii) The minimal risk identified, of any common side effects, was taken into account by V's GP, when making the recommendation that it would be in her best interests to receive the vaccine;

iii) As a resident in a care home, where all those being looked after are suffering from Korsakoff's syndrome and varying degrees of dementia, V's remains both at significant risk of contracting the virus and of becoming seriously ill or dying if she does so. residence in a care home, age and health mean that there is a risk of her contracting and becoming seriously ill with Covid-19.

Legal framework

20. There is no dispute that V lacks the capacity, by virtue of her Korsakoff's syndrome, to make the decision as to whether to receive the Covid-19 vaccine. In considering whether to make a declaration, pursuant to section 15 Mental Capacity Act (MCA 2005), i.e. best interests, I consider the applicable factors at section 4 MCA 2005, in particular:

i) The need to consider all the relevant circumstances (section 4(2) MCA 2005);

ii) V's past and present wishes and feelings as far as they are ascertainable (section 4(6)(a) MCA 2005);

iii) The beliefs and values that would be likely to influence V's decision if she had capacity (section 4(6)(b) MCA 2005);

iv) Other factors V would be likely to consider if she were able to do so (section 4(6)(c) MCA 2005); and

v) The views of SD, Mr A and V's social worker, as people engaged in caring for V or interested in her welfare, as to what would be in V's best interests (section 4(7)(b) MCA 2005).

21. Covid-19 vaccinations have only been available, in the United Kingdom, for approximately two months. I addressed some of the issues that arise in **Re E (Vaccine) [2021] EWCOP 7** at [17]. They were also touched upon, tangentially, in **UR, Re [2021] EWCOP 10**. In **Re E** (supra) I observed:

> "*I recognise that the world faces the challenge of an alarming and insidious virus. Nobody can possibly have missed the well-publicised and statistically established vulnerability of the elderly living in care homes… For the avoidance of doubt and though no epidemiological evidence has been presented, I take judicial note of the particularly high risk of serious illness and death to the elderly living in care homes. In stark terms the balance Mrs E, aged 80, must confront is between a real risk to her life and the unidentified possibility of an adverse reaction… This risk matrix is not, to my mind, a delicately balanced one. It does not involve weighing a small risk against a very serious consequence. On the contrary, there is for Mrs E and many in her circumstances a real and significant risk to her health and safety were she not to have the vaccine administered to her."*

22. The matrix of risk I identified above, applies, in my judgement, with equal force to the circumstances that have arisen here. The evidence highlighted the following and requires to be set out:

i. If V were to become infected with Covid-19, she possesses a number of characteristics which make her particularly vulnerable to severe disease or death. She is 70 years of age, she carries significant excess weight, and she has dementia resulting from her Korsakoff's syndrome;

ii. most importantly, she lives in a care home. It is an inescapable fact that in the UK, more than a quarter of the deaths due to Covid-19 have occurred within care home settings;

iii. V's particular care home, by virtue of its specialism, deals with a unique category of risk. V has been described as 'a wanderer', though far less frequently of late. In consequence of her short-term memory problems, it is impossible for V to follow the principles of social distancing and preventative hygiene measures. Evidence from Mr A demonstrates that she is very sociable, and it would not be feasible within the setting of this care home for her to self-isolate if she contracted Covid-19;

iv. Every member of staff, and every other resident of V's care home, has now been vaccinated. Mr A told me that, while they are not free from the risk of

> contracting Covid-19 until we are all free from that risk, because no vaccine is 100% effective, this fact nevertheless will result in the care home's residents having greater contact with the outside world in due course. Providing it is safe to do so, he hopes that the residents will be able to venture outside and go for walks, so that they will have something of their basic liberty restored to them. Accordingly, just as the risk to all other residents of the home diminishes, V's risk of contracting the virus will elevate as the outside world gradually returns.

23. For these reasons I consider that V's particular vulnerabilities, the circumstances she lives in and the potential consequences, if she does not receive the vaccine, create a real and significant risk both to her health and well-being. Moreover, it is not an overstatement to say that her life is put at risk.

V's wishes and feelings

24. SD suggests that, when determining what V's wishes in relation to the Covid-19 vaccine would be if she were capacitous, I should place no great weight on the fact she has received an influenza vaccine in her care home, every year for the past nine years. SD considers that V was simply *"following the herd"* when she lined up and received her flu vaccine and similarly when she put herself forward for the Covid-19 vaccine. SD suggests this was attributable to her mother's cognitive impairments and a facet of her Korsakoff's syndrome.

25. Paradoxically, in the light of the evidence that SD gave, I do not consider that V's compliance should be attributed to her condition. As SD told me, her mother was, while capacitous, readily compliant with the advice of her doctors. Her response both to the flu vaccines and to the Covid-19 is consistent with her earlier capacitous behaviour.

26. There can be no doubt that the view SD advances represents her own carefully analysed and researched view of the risk she perceives the UK authorised vaccines present. She has also told me that she has spent much of her life acting as "a parent" to her mother. I have no doubt that she considers herself to be doing the right thing and I am equally sure that she believes the decision ought to be hers and nobody else's. In this respect, in my assessment and for understandable reasons, SD continues to think of herself as her mother's parent. V is now an incapcitous adult, with a long independent life behind her, whose autonomy is protected by the framework of the MCA. In circumstances where an individual is not capacitous and cannot take medical decisions for themselves, the court is required, in the absence of agreement, to identify best interests for itself, surveying the entire canvas of the available evidence. Strongly held views by well-meaning and concerned family members should be taken into account but never permitted to prevail nor allowed to create avoidable delay. To do so would be to expose the vulnerable to the levels of risk I have identified, in the face of what remains an insidious and highly dangerous pandemic virus.

27. It also pertinent to record that V is not in any way anxious about the process of vaccination itself. The history of this case establishes that conclusively.

Views of Mr A

28. Mr A explained that he had worked in V's care home for the past twenty years, most of his adult life. He told me he has had contact with V nearly every day since she arrived there, nine years ago. Mr A has been, on a day-to-day basis, perhaps the person closest to V by virtue of her daughter living abroad. He is not related to her and is not, in any biological sense, her family, but like so many carers of his calibre, he has filled a void generated by the pandemic. His views on whether a vaccine would be in V's best interests are therefore important, and I do not think SD disagrees. He is manifestly concerned about V's enhanced vulnerability if she does not receive the vaccine, and I take this into account, as part of the overall picture, when determining her best interests.

Views of SD

29. SD predicated her application on a wish to see greater data in relation to the efficacy and safety of the vaccines. However, as her evidence evolved, she appeared to place increasing emphasis on the potential of what she termed *"other solutions"*. She was, to put it mildly, extremely enthusiastic about the viability and potential for an anti-parasitic drug that she had read about, namely 'ivermectin'. She was in no doubt that this would most effectively protect her mother from the Covid-19 virus.

30. Ivermectin has not, at least as yet, achieved credibility with any public health authority, as a treatment for Covid-19; oral ivermectin appears to be an unlicensed treatment for some forms of scabies and other parasites. I found it striking that SD rejected the overwhelming view of the public health authorities in relation to the certified vaccines, speculating about the risks of unforeseen side effects or adverse reactions, yet wholeheartedly embraced the unquantifiable risks of an unlicensed and unendorsed drug.

31. I explained to SD that it is not the function of the Court of Protection to arbitrate medical controversy or to provide a forum for ventilating speculative theories. My task is to evaluate V's situation in light of the authorised, peer-reviewed research and public health guidelines, and to set those in the context of the wider picture of V's best interests.

32. Though she has argued her case forcefully, I have been left with the impression that SD is unable to disentangle her own anxieties about the vaccines and her personal scepticism relating to the process of endorsement, from her analysis of her mother's best interests. SD's advocacy for the use of ivermectin is both logically unsustainable and entirely inconsistent with her own primary position. I have no doubt that SD's opposition to her mother receiving the vaccine is generated by real concern and distress. This, however, is not shared by her mother and does not reflect V's own authentic view. None of this is to question SD's sincerity, it is simply a reflection of the fact that filial love and concern can sometimes occlude rather than focus objective decision making.

Conclusion

33. In the circumstances and for all the above reasons, I find that the risk to V's life and health, if she were not to have the vaccine, would be unacceptably high and that it is in her best interests to receive it. In cases such as this, there is a strong draw towards vaccination as likely to be in the best interests of a protected party (P). However, this

will not always be the case, nor even presumptively so. What it is important to emphasise here, as in so many areas of the work of the Court of Protection, is that respect for and promotion of P's autonomy and an objective evaluation of P's best interests will most effectively inform the ultimate decision. It is P's voice that requires to be heard and which should never be conflated or confused with the voices of others, including family members however unimpeachable their motivations or however eloquently their own objections are advanced.