



Neutral Citation Number: [2021] EWCOP 7

Case No: 13434332

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before :

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

Between :

**(by her Accredited Legal Representative, Keith
Clarke)**

Applicant

- and -

**LONDON BOROUGH OF HAMMERSMITH AND
FULHAM**

1st Respondent

- and -

W

2nd Respondent

Ms Gráinne Mellon (instructed by the Accredited Legal Representative) for the **Applicant**
Mr Francis Hoar (instructed by the London Borough of Hammersmith and Fulham) for the
1st Respondent

W appeared in person.

Hearing dates: 20th January 2021

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.

.....

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 application concerns Mrs E, who is aged 80 years. The issue before the Court is whether Mrs E should receive a vaccination for Covid-19. Mrs E has a diagnosis of dementia and was diagnosed with schizophrenia around 20 years ago. She has lived in a care home in London since the end of March 2020.
2. On 8th January 2021, the London Borough of Hammersmith and Fulham informed Mrs E's Accredited Legal Representative that she was to be offered a Covid-19 vaccination on 11th January 2021. However, W, Mrs E's son, the second respondent, objected to this, by email dated 10th January 2021. As a result of this objection it was decided that, Mrs E should not be vaccinated on 11th January. Considering the objection, Mrs E's representatives urgently sought a declaration, pursuant to section 15 of the Mental Capacity Act 2005 ('MCA 2005') to the effect that it would be lawful and in Mrs E's best interests to receive the vaccine at the next possible date. Unfortunately, there have subsequently been a number of confirmed Covid-19 cases in the Care Home.

Background

3. W told me, in oral evidence, that Mrs E has led a full life and had enjoyed her employment as a legal secretary for many years. She is a devout Christian who is well-known and respected in her community. I do not doubt that she is much loved by her son. He has lived with her, at her home, for a substantial part of his life.
4. Until July 2018, Mrs E lived in her two-bedroom flat in South-West London, where she had lived for 45 years. In view of her significant care needs, Mrs E received an extensive care package, with carers attending her home, day centre visits and the support of her son, W. This care package broke down in September 2018 when she required hospital admission. From there, she was transferred between a number of care homes before a further admission to hospital. She started to live at her present care home, in late March 2020.
5. Proceedings commenced in July 2019 focused upon Mrs E's capacity to make decisions relating to her care and residence, alongside evaluating which of the options might be in her best interest. The parties and the court have experienced significant difficulties in progressing the case; it has been listed for a final hearing on four separate occasions. This is predominantly a result of W's reluctance to permit an occupational therapist to attend at his mother's flat, and his resistance to providing sufficient information about the care and support Mrs E would receive if she were to return there.
6. On 22nd October 2020, the Court of Protection declared, pursuant to section 15 of the MCA 2005, that Mrs E lacked capacity to conduct the proceedings, and make decisions about her residence and care. A final hearing to determine the arrangements for Mrs E's residence and care is listed for 25th January 2021.
7. According to her social workers and other professionals involved in her care, Mrs E is settled in her current care home, though she has consistently expressed a wish to return to her two-bedroom flat. Whilst her mood fluctuates and her cognition is sadly

declining, she has a good appetite, thanks staff for looking after her and smiles at them. She speaks with her son once or twice a week by face-time.

8. W wishes for his mother to return home. This is because he believes that his mother is being kept under a regime which he characterises as ‘abusive’. He gave oral evidence outlining various criticisms of those who have been involved in his mother’s care, including Local Authority employees, carers, hospital staff and his mother’s GP, whom he tells me he has recently reported to the General Medical Council. He has also criticised the court process. He believes that his mother is caught in a “*conspiracy of neglect and ill-treatment*”.
9. It is against the background of these ongoing Court of Protection proceedings that W raised his objection to his mother receiving the Covid-19 vaccine.

Mrs E’s capacity to decide whether she should be vaccinated against Covid-19

10. I was directed to an attendance note, dated 19th January 2021, recording a conversation between Mrs E, her Accredited Legal Representative and a GP, taking place via a video call. During the call, Dr Wade, who is based at the surgery where Mrs E receives medical treatment, asked Mrs E if she remembered Dr Wade explaining that there was a dangerous sickness called coronavirus. Mrs E replied that she did not. Dr Wade then asked her whether she remembered an earlier visit made by her and her colleague, Dr F, when they came to the care home to deliver injections to protect her against the virus. Mrs E did not reply. Dr Wade asked Mrs E whether she wanted the injection, to which Mrs E replied “*Whatever is best for me. What do I have to do?*”. She was reassured by Dr Wade that she did not have to do anything at the moment, and that Dr Wade only wanted to know what Mrs E wanted. Mrs E repeated that she wanted “*whatever is best for me*”. The conclusion of Dr Wade (which was not, in her assessment, in any way delicately balanced) is that Mrs E does not have the capacity to determine whether she should receive the Covid-19 vaccine offered to her.
11. Acknowledging the informality of the assessment of Mrs E’s capacity to decide whether to receive the vaccine, I am nonetheless satisfied that, it is sufficiently rigorous to comply with section 2 and section 3 of the MCA 2005. Mrs E is unable to understand information concerning the existence of the Covid-19 virus and the potential danger it poses to her health. I am also satisfied that she is unable to weigh information relating to any advantages or disadvantages of receiving the vaccine. It is also clear that she cannot retain information long enough to use it to make a decision. This is because of her dementia. I find that Mrs E lacks the capacity to decide for herself whether to receive the Covid-19 vaccine. Evaluating capacity on this single and entirely fact specific issue is unlikely to be a complex or overly sophisticated process when undertaken, for example, by experienced GPs and with the assistance of family members or care staff who know P well.
12. Dr Wade undertook an assessment of Mrs E’s capacity in short order but in a manner which, to my mind, focuses with professional clarity on the salient issues. It does, of course, require to be recognised that in the context of a pandemic and for people in the most vulnerable of circumstances i.e. living in care homes, this presents a challenge of unprecedented dimension. It strikes me that Dr Wade got the balance entirely right. He enquired, respected Mrs E’s autonomy and delicately assessed her range of understanding.

Mrs E's best interests in relation to receiving a Covid-19 vaccination

Mrs E's wishes

13. In determining what would be in Mrs E's best interests, I am required by section 4(6) MCA 2005 to consider, so far as is reasonably ascertainable, her past and present wishes and feelings, the beliefs and values that would be likely to influence her decision if she had capacity, and any other factors she would be likely to take into account if she were able to do so. Mrs E had, prior to her diagnosis of dementia, willingly received the influenza vaccine and is also recorded as receiving a vaccination for swine flu in 2009. I consider the fact that, when she had capacity, Mrs E chose to be vaccinated in line with public health advice, to be relevant to my assessment of what she would choose in relation to receiving the Covid-19 vaccine today.
14. Moreover, while Mrs E lacks the capacity to consent to receiving the vaccine, she has articulated a degree of trust in the views of the health professionals who care for her by saying to Dr Wade that she wanted "*whatever is best for me*". Although this is not a capacitous statement, it is in my view important to emphasise it, particularly as it has been repeated. This is to respect Mrs E's autonomy, which is not eclipsed by her dementia. Moreover, her straightforward and uncomplicated approach resonates with the trust that she has placed in the medical profession in the course of her life, illustrated by her earlier reaction to vaccination.

Views of Mr E's son, Mr W

15. Her son does not share this trust or confidence. He is deeply sceptical about the efficacy of the vaccine, the speed at which it was authorised, whether it has been adequately tested on the cohort to which his mother belongs, and, importantly, whether his mother's true wishes and feelings have been canvassed. He also queries whether the tests have properly incorporated issues relating to ethnicity. I respect W's right to his own views. However, they strike me as a facet of his own temperament and personality and not reflective of his mother's more placid and sociable character. It is Mrs E's approach to life that I am considering here and not her son's. Mrs E remains, as she must do, securely in the centre of this process.
16. By virtue of section 4(7) MCA 2005, I must take into account, as a person interested in Mrs E's welfare, the views of W as to what would be in her best interests. Whilst W has pointed to the speedy authorisation of the Covid-19 vaccines which he says undermine their reliability, he has also said, during the course of his heartfelt submissions to me, that he did not object to the vaccination in principle: he just did not consider that now was the right time for his mother to receive it.
17. 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. I have had many occasions to confront it, in the Court of Protection, over the course of the pandemic. 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

to the virus. 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.

Particular risk presented by Covid-19 to Mrs E

18. I summarise: Mrs E has the following characteristics which compound her vulnerability to becoming seriously ill with, or die from, Covid-19:
 - i) She is in her eighties;
 - ii) She is living in a care home;
 - iii) The care home in which she lives has confirmed recent positive cases of Covid-19;
 - iv) She has been diagnosed with Type II diabetes; and
 - v) She lacks the capacity to understand the nature or transmission of Covid-19 and is inevitably challenged, as so many living with dementia in care homes are, by the rigours of compliance with social distancing restrictions.
19. It is a fact that Mrs E lives in a country which has one of the highest death rates per capita, due to Covid-19, in the world. By virtue of her vulnerabilities, the prospects for her if she contracts the virus are not propitious; it is a risk of death, and it is required to be confronted as such. The vaccination reduces that risk dramatically and I have no hesitation in concluding that it is in her best interests to receive it. Accordingly, I make the declaration, sought by Mrs E's representatives, pursuant to section 15 MCA 2005. I would add that, in the light of the Covid-19 outbreak at the home, I consider that Mrs E should receive the vaccine as soon as practically possible. I have delivered an ex tempore judgment on this application in order to avoid any further delay.
20. It is important that I record that W, in a tirade against the Local Authority, volunteered that he had been criticised, over the last few years, as "vexatious", "obstructive" and "a safe guarding risk to his mother". I do not know the background of W's behaviour and it has not been necessary for me to consider it. I would however note that his approach to this sensitive issue was combative and highly litigious. I also consider his complaint against Dr F, his mother's GP, reflects his sense of frustration rather than any justifiable criticism of the doctor's actions.