Neutral Citation Number: [2022] EWCOP 23 (Fam)

Case No: COP13627384

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2022

Before:

MRS JUSTICE THEIS

- -

Between:

South Tyneside and Sunderland NHS Trust Foundation	**Applicant**
- and -	
SA (By His Litigation Friend The Official Solicitor)	**Respondent**

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Ms Eloise Power (instructed by **DAC Beachcroft Solicitors**) for the **Applicant**
Mr Conrad Hallin (instructed by **Official Solicitor**) for the **Respondent**

Hearing date: 7th June 2022
Judgment: 8th June 2022

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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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MRS JUSTICE THEIS

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE:

Introduction

1. The court is concerned with an application relating to serious medical treatment concerning SA, age 22 years, who has a diagnosis of Autistic Spectrum Disorder, Severe Learning Disabilities, Communication difficulties and Attention Deficit Hyperactivity Disorder. Due to his needs SA has lived in a 24 hour supported care setting with a care team for the last 10 years.

2. The application is made by the NHS Trust ('the Trust') responsible for SA's dental and medical care. SA is a party and represented by the Official Solicitor as his litigation friend as S lacks capacity.

3. These proceedings were issued on 9 May 2022, directions were made by David Lock QC (sitting as a Tier 3 judge in the Court of Protection) on 19 May 2022 leading to this hearing. In addition he made a transparency order until further order preventing any person from identifying SA, other family members or the place where SA resides.

4. The Trust seeks orders enabling them to examine SA's mouth under general anaesthetic and provide such dental treatment as required, examine SA's ears and perform suction clearance and/or insert grommets and take blood to monitor his current medication. This procedure, if authorised by the court, is planned for 9 June. The Trust submits these orders are in SA's best interests as he appears to remain in pain and discomfort but despite the best efforts of the relevant medical professionals they have not been able to examine SA due to his lack of co-operation, levels of agitation and unpredictable behaviour.

5. The Trust has sought to engage SA's parents in making decisions about their proposals regarding SA's dental and medical treatment. They have been served with these proceedings. SA's mother has responded and informed the court that she speaks for both parents. In the documents filed by the mother she does not consent to the proposed treatment and requests the Trust and the court consider whether any treatment SA does have includes a frenectomy. This is not supported by the Trust. They have provided evidence to support their position in relation to the frenectomy. Although given notice and served with all relevant documents the mother has not attended this hearing, or the earlier directions hearing. There is a statement from her, a position statement and a number of emails which I have seen and read.

6. The Official Solicitor supports the Trust's application in relation to the dental and ENT investigations. In relation to the issue regarding the frenectomy the Official Solicitor was neutral and considered that issue should be considered by the court.

7. This matter was listed for hearing on 7 June 2022 when the court heard the oral evidence from

   (i) Ms PL - Community Nurse learning Disability Team

   (ii) Ms JE - Residential Home Manager

   (iii) Ms RR - Speech and Language Therapist

(iv) Dr P - Senior Dental Officer, Community Dental Service

(v) Mr B – Consultant Oral and Maxillofacial Surgeon

8. Having heard the evidence the Official Solicitor was able to finalise her position at the conclusion of the evidence that the frenectomy procedure was not in SA's best interests. Having heard the evidence the Official Solicitor considered the risks outweighed any benefit for SA of that procedure being undertaken.

9. At the conclusion of the hearing yesterday I announced the court's decision that the Trust's application would be granted for the dental and ENT procedures and that a frenectomy was not in SA's best interests. The reasons for that decision are now set out below.

10. Before doing so can I express the court's gratitude to both counsel for their helpful position statements, and concise and focussed oral submissions. Also, to each of the witnesses who made time to give oral evidence in this case and the clarity with which they expressed their views, which was very helpful. Their oral evidence set out the very great care they had taken in reaching the conclusions they had.

Relevant background and evidence

11. SA currently lives in a supported living setting with a care team. There are two other service users in the home. SA usually has two care workers to support him. He is settled in the placement and has been there since 2018. He often goes out on trips and sees his parents briefly each weekend.

12. Recently SA was observed being in some discomfort by those who support him, it seemed to come either from his mouth or the side of his face. The investigations that have been possible have not been able to establish what the difficulties are.

13. At a dental appointment with Dr S in early March 2022 SA's carers reported that they considered the pain was coming from SA's teeth as he had been hitting the lower right side of his face and hitting his head against a sideboard. It was not possible to examine S at that appointment due to the level of his agitation. As no extra swelling was observed no antibiotics were prescribed, it was thought the cause may be a partially erupted wisdom tooth. The plan was to review the position two weeks later.

14. SA was returned to the clinic four days later as there had been no improvement. SA's carers reported he held the right side of his face, his right ear and picked at his teeth with his hands. Again it was not possible to examine him due to his level of agitation. Antibiotics were prescribed following a diagnosis of possible wisdom tooth, gum infection or a carious tooth causing an infection. In consultation with the care team it was decided that the only way a full examination could be undertaken was under a general anaesthetic.

15. The carers also reported other difficulties SA had relating to recurrent ear infections and vomiting/reflux issues. Dr P agreed to liaise with his ENT colleagues so that any investigations could be carried out at the same time. The report from Ms M (Consultant ENT Surgeon) dated 24 May 2022 sets out the investigations that would be undertaken, the possible treatment options, the potential risks and the steps that will be taken to

mitigate those risks. Ms PL (Community Nurse in the Learning Disability Team) was contacted by Dr S, from the community dental team.

16. Contact was also made with SA's mother to discuss the proposed treatment. She raised the issue of whether a frenectomy could be undertaken at the same time. If that was done SA's mother considered his speech and swallowing would be greatly improved. Dr S agreed to make a referral to an Oral Maxillofacial Surgeon.

17. Further attempts to discuss this with the mother were unsuccessful.

18. Dr S was informed by Mr B (Consultant Oral Maxillofacial Surgeon) that he had rejected the referral as it required an assessment of SA by the Speech and Language Therapy team first.

19. On 20 April 2022 a best interests meeting was held. The mother was invited but did not attend. The unanimous view of those who attended was that SA lacked capacity. The statements from Dr P and Ms PL describe SA's position. Ms PL describes his language level as that of a 2 year old. He understands only very basic commands, he can only make one or two unintelligible sounds and largely communicates by pointing. One record suggests the mother said he would say 'gag' instead of 'dad'. His diagnosis of severe learning disability and associated communication difficulties means that whilst he can, at times, follow simple instructions from his care team, he cannot understand more complex information. Due to his needs he has resided in 24 hour residential placements for about 10 years.

20. The meeting also concluded that his best interests required the proposed investigations under general anaesthetic to identify the source of the pain and treat accordingly. In addition, it was agreed his reflux issues should be investigated and blood sample should be taken to help monitor his psychiatric medication. The reflux issues are no longer pursued as part of this application.

21. Following this meeting further unsuccessful attempts were made to inform the mother of the outcome of the meeting.

22. Ms RR (Head of Speech and Language Therapy) undertook a functional assessment of SA's eating, drinking and communication on 24 May 2022. Prior to that she had spoken to SA's mother twice, but has not been able to contact her following the assessment. In her statement she refers to a letter dated 10 November 2016 from an ENT Consultant which stated that SA had seen two different consultants regarding his tongue tie who explained that since he can project his tongue it would not be in his interests to give him a general anaesthetic to correct his minor tongue tie, although it suggested that could always be done if he required a general anaesthetic at some point.

23. In her statement Ms RR described her assessment as being to consider whether SA's tongue tie may be causing him any functional difficulties in eating, communicating or using his tongue to clean his teeth after eating. In her observations Ms RR observed that whilst his tongue tie did limit the range of his tongue movements during the meal she observed his mouth was clean and emptied after he had finished swallowing a mouthful. In relation to his communication she observed SA's verbal comprehension is at a single word level, he communicates mainly by pointing at things concluding *'there was no evidence that SA was trying to produce a significant amount of speech/language that*

could not be understood because of his tongue tie. SA has a significant learning disability and speech and language disorder that affects his comprehension and expressive language'. Ms RR concluded '*From a SALT perspective it is not considered that there would be any real benefit to SA to having his tongue tie cut (frenectomy). He is eating and drinking well and his communication problems are not likely to be improved by a frenectomy due to the nature of his language difficulties and learning disability. Although there is some limitation of his tongue movements which may be restricting his ability to clean his teeth with his tongue, any potential risks associated with this are mitigated by SA clearing his mouth after eating drinking well to rinse his mouth of any food debris, using his fingers to remove food debris and being supported to brush his teeth twice daily.'*

24. Mr B's statement sets out his opinion in relation to SA having a frenectomy. As regards the benefits of the procedure being done he set out in his statement that this related to possible improvements in speech and feeding. As regards speech he considered in SA's particular circumstances, bearing in mind his limited speech, his learning disabilities and his autism he did not consider SA's tongue tie impacted on his ability to develop speech. His lack of speech was more likely to be related to his learning disabilities. He also did not consider a frenectomy was likely to improve SA's feeding having considered the observations of Ms RR that SA is able to eat foods of most consistencies.

25. In their oral evidence both Dr P and Mr B were pressed by Mr Hallin, on behalf of the Official Solicitor, as to whether they had given sufficient weight to references in the studies they relied upon as to the benefits of a frenectomy in being able to use the tongue more to help clean food from the mouth. Whilst they both recognised the reference to this benefit in the studies, they both expressed some caution in too much reliance on the studies due to the particular features of the individual studies, SA's particular circumstances and the benefits of brushing teeth and eating a healthy diet in managing dental hygiene.

26. Mr B's statement sets out the risks of a frenectomy procedure. There is the relatively low (less than 1%) risk of significant complications, for example caused by bleeding during and immediately after the operation and the more frequent (around 10%) risks of minor complications such as pain and persisting ulceration. There are also the risks associated with SA's inability to comply with post operative management. This concerns the risks from SA interfering with the wound arising from a history of SA picking at his wounds, causing them to become more serious and the difficulties in management, for example caused by SA removing any form of plaster. This has resulted in any wound taking much longer to heal and leaving scars. Mr B's concerns centre on the risks of SA provoking bleeding post operatively. Also the possibility of SA removing the stitches with the consequence the healing process would be interrupted and making it likely that chronic ulcers would form which will periodically become infected causing pain and discomfort. If this happened it could also interfere with his ability to brush his teeth, with the consequent risk of dental complications through tooth decay. The risk of post-operative interference was based in part on the evidence from Ms JE, the manager of SA's current placement. She described how SA had picked at a relatively small spot on his head that became much worse as a result and was difficult to manage as SA would remove any plaster or dressings. This was not an isolated event as she described SA often picks at his skin.

27. A detailed plan was drawn up by the Trust setting out how SA would be brought to hospital, what steps would be taken at each stage and that once in surgery the dental examination, investigation and treatment would take place under Dr P. ENT would then undertake an investigation of the ears to try and identify any source of pain and if any issue is identified (such as a build-up of wax) it would be treated. Then blood samples would be taken. The plan goes on to set out the management of SA's post operative care, initially in the hospital and then by the care team when SA is discharged from hospital. This plan was revised to take into account the additional responses to questions to the medical professionals by the Official Solicitor.

28. In the documents she has provided the mother has focussed on what she considers is the need for the frenectomy procedure to be undertaken. Her view is he would not pick at the stitches and as a result not cause any bleeding. In her communication with Ms PL she is reported as objecting to the treatment going ahead unless the tongue tie is addressed at the same time.

Submissions

29. In their position statement the Trust submit the proposed dental and ENT investigation and treatment is in SA's best interests. SA has presented with likely dental pain and behaviour that suggests that is the source of the pain. The attempts to examine SA's mouth have not been successful and no other less invasive method is suggested. Without undertaking the proposed course, Ms Power submits, SA is likely to remain in pain with the potential distress of repeated treatment. It is accepted the exact nature of the treatment is unclear but Dr P does not consider it is likely extensive treatment will be required.

30. The ENT investigations and treatment are due to the repeated ear infections, which may be the cause, in whole or part, of SA's current discomfort. The proposed treatment set out by Ms M, suction clearance and/or grommets is relatively modest. It is accepted there are inherent risks involved in SA being placed under general anaesthetic and through the expected treatments but those risks are outweighed by the benefits of finding the source of SA's existing pain and discomfort and being in a position to treat it to prevent either hearing loss or recurrent dental or ear infections.

31. In relation to the request by the mother for a frenectomy to be undertaken at the same time that is not supported by the Trust. They rely on Ms RR's assessment and the opinion of Mr B regarding the risks, particularly relating to the post-operative requirements and the risks of SA picking at the surgical site.

32. The Official Solicitor supports the Trust position in relation to the dental and ENT investigations and proposed treatment. They recognise that due to the circumstances of this case where the cause of pain is unknown and various potential causes are being investigated the risks and benefits of precise treatment options are difficult to set out with any precision. The Official Solicitor has asked for amendments to the treatment plan that incorporates Dr P's response to further questions, where he confirmed that in relation to the dental treatment it is a guiding principle to restore all carious teeth where the caries is deemed not to be too advanced, thereby preserving a functional bite where possible. As Mr Hallin set out in his position statement '*The Official Solicitor supports the proposals set out in the amended care plan, and is content that the plan strikes the correct balance between affording the treating dentists clinical discretion, whilst endorsing certain*

principles (such as teeth and bite restoration) that can be said in advance to be in S's best interests. The Official Solicitor also supports the proposed ENT investigations and treatment for possible ear pain, which appear uncontroversial and clearly in SA's best interests. '

33. Having heard the oral evidence the Official Solicitor moved from being neutral about the request on behalf of the mother for a frenectomy to be done as well to not supporting it on behalf of SA. Mr Hallin submitted the evidence demonstrated it would not be in in SA's best interests as the risks outweighed any benefit, in particular the risks of interference with the wound by SA after the operation, the likelihood of him picking at the wound, with the consequent risks of further pain and infection.

34. The mother's position is taken from the documents provided by her. She does not set out a clear position in relation to the dental or ENT investigations and treatment but does make it clear she wants a frenectomy to be undertaken as she considers it could improve SA's communication and ability to eat food.

Discussion and decision

35. The evidence clearly demonstrates SA lacks capacity due to the consequences of his learning disabilities and communication difficulties. He is only able to understand single word commands and would be unable to understand the advantages and risks of the proposed treatment. The statements from Dr P and Ms PL provide the evidential foundation for the statutory test under ss2 and 3 Mental Capacity Act 2005 ('MCA 2005') to be met and the court can and should make final declarations that SA lacks capacity to conduct these proceedings and to make decisions about his medical and dental care and treatment, in particular whether to have investigations and treatment for his apparent ongoing pain and agitation.

36. Turning to consider what is proposed by the Trust. Where a person is unable to make a decision for themselves there is an obligation on the court to make decisions that are in S's best interests (s 1(5) MCA 2005). In considering what is in a person's best interests consideration must be given to all the relevant circumstances, which shall include the person's past and present wishes and feelings, the beliefs and values that would be likely to influence their decisions if they had capacity and any other factors that they would be likely to consider if they were able to do so (s4(6) MCA 2005). Account needs to be taken of the views of anyone engaged in caring for the person or interested in their welfare (s4(7) MCA 2005), which would include SA's mother.

37. The evidence for the dental and ENT investigations and proposed treatments is clear from the statements provided by Dr P, Ms M, Ms RR and Mr B. The situation is being led by the circumstances SA is now in. He is likely to be in pain and discomfort which he demonstrates by self-harming behaviour such as hitting the lower right side of his face, hitting his head on a sideboard, picking his teeth and holding the right side of his face and ear. Through the careful efforts of the clinical dental team, led by Dr P, they have tried in different ways to examine SA, with no success due to the level of his behaviour and agitation. Their judgment is there is no other way of undertaking the investigations other than under general anaesthetic. That is the only way they are likely to be able to identify the source of the problem and if they do to treat it. Whilst there are inherent risks in doing that the benefits of being able to establish what the cause of the pain and discomfort are and to treat SA outweigh those risks.

38. SA has had a recurrent ear infection which it has not been possible to properly investigate. The opportunity provided for that to be done by the ENT team will obviously be of benefit to SA. If the cause is identified, it is likely it can be treated in the way outlined by Ms M, thereby having the benefit of not risking future hearing loss and reducing the risk of future ear infections.

39. Turning to the issue of whether a frenectomy should be undertaken as well, as the mother requests, I am satisfied that procedure would not be in SA's best interests. SA has a good routine of oral hygiene through regular toothbrushing, has a balanced diet and enjoys his food supported by the mealtime plan provided by his carers. Ms RR's evidence from her assessment concluded that neither SA's communication needs or his functional eating would benefit from that procedure. Whilst there is some evidence that such a procedure could possibly make it easier for SA to use his tongue to clear his mouth of food the research evidence about that benefit was far from clear, it was not supported by the medical professionals who have clinical responsibility for SA and there was no evidence this was a functional difficulty that SA had. The risks arising from such a procedure outweigh any benefits. Whilst there are relatively small risks of significant complications during the procedure the much larger risk, in my judgment, would be how SA would manage the post operative care. Mr B confirmed the wound would be 2cm long, it would take 6 weeks for the pain to settle and sutures to dissolve and 3 months to be fully healed. The advice would be oral analgesia for 2 weeks, regular mouthwash (the evidence was SA was most likely to swallow this) and gentle exercises to help improve tongue movements (which it was thought SA would struggle to do). The evidence from Ms JE the care manager and Ms PL is that SA has a habit of picking at wounds, as he has done in the past, making a small wound more serious and in turn more difficult to heal. In my judgment, it is very likely in this case that SA would interfere with any wound following a frenectomy, that would result in complications of further pain and risk of infection and very likely need continued medical attention and intervention. This would be a time when SA may be managing the consequences and changes following any dental treatment and could impact on his day to day needs of eating and his oral hygiene regime.

40. Therefore, I conclude the application should be granted in relation to the dental and ENT investigations and treatment as being in his best interests but not in relation to a frenectomy, as I do not regard such a procedure as being in his best interests for the reasons set out above.