

Observing religious practices for those lacking capacity

Published 9 June 2017

Summary

The extent to which religious practices should be observed for adults lacking capacity can give rise to sensitive and complex issues for the organisations responsible for their care.

In a recent case involving an incapacitated adult from a Muslim family - *Re: IH (Observation of Muslim Practice)* - the Court of Protection looked at this issue in detail and set down some helpful points of principle to be followed in such cases, including the need to balance respect for religious customs and practices against any risk of harm which these may carry for the incapacitated person.

Whilst the IH case focused on two specific aspects of Islamic practice - fasting during Ramadan and removal of body hair - the principles are applicable more generally to how religious background and culture should be reflected in care provision for those who lack capacity to make their own decisions about such matters.

In this briefing we look at the Court of Protection's decision and the practical impact of the case for health and social care providers/commissioners.

What was the case about?

The case related to an adult - IH - with a profound learning disability involving severe intellectual impairment (equivalent to a 1 - 3 year old). He is dependent on others for all aspects of his care and requires 2:1 support 24 hours a day. He frequently becomes agitated with outbursts of aggression of varying degrees of severity, often without warning. Prior to 2013, he had lived with his family at home. Since then, he has been living in supported accommodation with a care package provided by the Local Authority and commissioned by the CCG.

IH's family are devout Muslims and, whilst IH was living at home, they involved him as far as possible in their routine religious practices and observances, including daily prayers, celebrating Eid and eating Halal food, although the expert evidence before the Court was that, due to the degree of his intellectual impairment, IH was not capable of any understanding of religious matters or the customs and practices associated with this.

The case focused on the removal of body hair, which is a recommended practice within the Islamic faith. Since IH's move into supported accommodation, this hair removal had not taken place, and his father was strongly of the view that it should do. The concern of those delivering IH's care was that the process of hair removal could cause him to become stressed, which could lead to outbursts of agitation/aggression, putting both him and his carers at risk.

A further issue before the Court was whether IH should observe the practice of fasting during Ramadan, which is part of adhering to the obligatory Five Pillars of Islam.

The Court heard from an expert in the Islamic faith who explained that people who are not 'legally competent' under Islamic law are exempt from Islamic rituals because they are deemed to be in a perpetual heightened state of spirituality by virtue of their incapacity. As someone clearly not 'legally competent', IH was accordingly under no religious obligation in relation to either fasting or hair removal. The Court also heard expert evidence about one of the cardinal principles of Islam - 'No hurt no harm' - which essentially means it would be wrong to create a situation in which observance of Islamic custom would, or would be likely to, cause harm to the person (i.e. IH) or his carers. As detailed below, the Court found these to be important factors to be weighed in the balance when deciding what would be in IH's best interests.

What did the Court decide?

The Court decided that it was not in IH's best interests either to fast during Ramadan (which all the parties, including IH's family, agreed with in any event) or to have his body hair removed.

In reaching this decision, the Court emphasised the obligation on health and social care bodies who make arrangements for the care of adults lacking capacity to create a care environment/routine which is supportive of the person's religion and facilitates their access to/observance of religious practices as far as reasonably practicable.

The Court also highlighted the need to follow the Mental Capacity Act rules in relation to best interests decision-making, which include having to take account of the person's beliefs and values - insofar as reasonably ascertainable - which would be likely to have influenced their decision if they had capacity. On this point, the judge accepted that, if IH had capacity, he probably would have observed these practices as this would have been entirely consistent with the religious and cultural norms within his home and community.

However, all factors have to be weighed in the balance as part of the best interests decision-making process, including any risks of harm which following a particular religious practice might carry with it.

In summary, the evidence before the Court was that there was no religious obligation on IH (because of his incapacity) to fast or to undergo hair removal and no other benefit to him but there were risks of harm associated with these - hence the Court's decision that it would not be in his best interests to undertake these practices.

Practical impact

Whilst the Court was keen to emphasise that each case turns on its facts, this judgment provides helpful guidance to organisations with responsibility for providing/commissioning care packages for adults lacking capacity where issues arise in relation to observing religious customs and practice.

Key points to take from the case include:

- CCGs and Local Authorities commissioning/providing care packages must - where it is reasonable and in the incapacitated person's best interests - facilitate observance of religious custom and ritual;
- Individual religious customs/rituals should be assessed on their own merits in the context of the particular case, as the risks and benefits will vary between them and from case-to-case;
- Care planning must explicitly take account of all available information about religious/cultural practices which the incapacitated person would have been likely to follow if they had capacity, but this must be carefully balanced against any associated risks of harm, including ascertaining the views of all relevant professionals.

How we can help

Our national team of Mental Capacity Act and Court of Protection specialists have extensive experience of advising commissioners and providers across the health and social care sector.

We are able to provide responsive, practical advice on all aspects of the law in this area, including:

- Court of Protection welfare applications relating to care and/or accommodation;
- Serious medical treatment cases;
- Section 21A challenges to DoLS authorisations;
- Responding to Orders for Section 49 reports, including advice on effective report preparation;
- Interface between the Mental Capacity Act and Mental Health Act.

We can also provide bespoke training in relation to all aspects of Court of Protection proceedings.

If you need advice in relation to any Court of Protection matter, please contact [Gillian Weatherill](mailto:gweatherill@dacbeachcroft.com) on: +44(0)191 4044045 or gweatherill@dacbeachcroft.com.

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