Latest on when to go to court in 'no dispute' treatment cases

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Although the Supreme Court decided earlier this year in 'Y' that it is not mandatory to seek court approval before withdrawing clinically assisted nutrition and hydration (CANH) where everyone is in agreement, this leaves open the question of when bringing 'no dispute' best interests decisions before the court is still the appropriate way forward.

The recent case of *University College London Hospitals NHS Foundation Trust v KG* sheds some further light on this and suggests that - despite the 'Y' decision - applications should still be made to the Court of Protection in cases involving novel/untested treatments, even where there is complete agreement about what is in the patient's best interests.

We look at this case and what it means in practice.

What was the KG case about?

The case related to a middle-aged man who had been diagnosed with sporadic CJD, which is a progressive neurodegenerative condition. His life expectancy was likely to be less than 12 months.

The issue before the court was whether KG should be given a completely new drug (called PRN100), which had never been tested on/given to humans.

Possible adverse side-effects/ reactions were unknown and it was impossible to quantify the chances of the drug bringing any benefit, although there was some evidence from animal studies that it could have a positive effect on the progression of CJD in humans.

Faced with the prospect of no alternative treatment, however, the clinical team, family and KG himself (insofar as he was able to express a view despite lacking capacity) were in unanimous agreement that the drug should be given.

What did the Court of Protection decide?

Having weighed up the possible advantages/ disadvantages of this novel treatment and having taken into account the views of KG's family and KG himself (who made clear that he wanted as much time as possible with his family), the judge found that it was 'plainly' in KG's best interests to have the treatment.

Significantly, however, the judge stopped short of agreeing with the Trust's proposal - made in light of the 'Y' decision - not to make further court applications in future cases of possible treatment with this drug where there is no dispute about best interests.

Instead, the judge took a cautious approach and suggested that it '*...might be premature to arrive at such a conclusion until the results of this treatment are known. It may be that the benefit or risk analysis changes*'.

Where does that leave us?

This case highlights there are still circumstances where - even though there is no dispute about best interests - an application to the Court of Protection is the right way forward because there is doubt about the outcome/effect of what is being proposed - e.g. because the treatment is novel/ untested.

This fits with the MCA Code of Practice (which was described by the Supreme Court in 'Y' as being 'rather ambiguous' about when an application to court should be made), which suggests that decisions involving ethical dilemmas in untested areas such as innovative treatments for CJD are 'likely' to be referred to the court.

As ever, though, whether or not a court application is needed will turn on the particular scenario facing the clinical team.

How can we help?

Our national team of MCA and Court of Protection specialists provide responsive, practical advice on all aspects of the law in

this area, including:

- Advice on whether an application needs to be made to the Court of Protection in serious medical treatment cases, including decisions relating to novel treatments or CANH withdrawal
- Court of Protection welfare applications relating to care and/or accommodation
- Section 21A challenges to DoLS authorisations
- Training on all aspects of the Mental Capacity Act and Court of Protection proceedings.

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