Delay applying to Court of Protection at your peril

Published 13 February 2017

Summary

The Court of Protection has recently given a strongly worded reminder to Trusts not to delay applying to the court in obstetric cases where the mother lacks capacity and is refusing care believed to be in her best interests.

The case of *Re CA (Natural Delivery or Caesarean Section)* involved a pregnant woman with a learning disability and autism who was refusing all obstetric interventions and insisting on a home delivery. The Trust applied to the Court of Protection for a declaration that it was in her best interests to undergo a caesarean section, if necessary using force.

What the Judge found "*extremely concerning*", however, was the timing of that Court application, which was made less than a fortnight before the baby's due date.

Reflecting this concern, the Judge highlighted the importance of following the detailed guidance given by the Court of Protection in the FG case: *"Hereafter, all NHS Trusts must ensure that their clinicians, administrators and lawyers are fully aware of, and comply with, the important guidance given [in FG case] in respect of applications of this sort"*.

This is a good opportunity for Trusts to remind themselves of what the FG guidance requires. To help with this, we have included in this alert a brief summary of what needs to be done and when.

CA case

What was the case about?

CA was a 24 year old woman with a learning disability and autism. She was referred by her GP to the obstetric team at the local NHS Trust at what was initially thought to be around 30 weeks gestation, but subsequent scans showed to be less. She refused to undergo any gynaecological examinations or blood tests, although she agreed to ultrasound scans. CA strongly disliked hospitals/doctors and wanted to have her baby at home. However, she showed little, if any, understanding of the realities of childbirth and did not think it would involve any pain.

As a child in Nigeria, CA had been subjected to abdominal cutting, most likely under some form of physical restraint. Her mother reported that she had also undergone FGM, although CA had refused to be examined to confirm this. It was thought likely that her aversion to medical treatment was linked to her traumatic experiences as a child.

CA's treating obstetrician was of the view that an elective caesarean section would be the safest, least traumatic and most appropriate way to deliver the baby.

About two weeks before CA's due date, the Trust applied to the Court of Protection for an order that it would be lawful and in CA's best interests to deliver the baby by caesarean section.

What did the court decide?

The Court decided that CA lacked capacity to make decisions about the birth of her baby.

In assessing her best interests, the Court emphasised that CA's wishes and feelings were of considerable importance in the balancing exercise, bearing in mind that she had consistently expressed a wish to have her baby at home. However, looking at the evidence overall, the Court concluded that *"…it is manifestly clear that the balance comes down decisively in favour of a planned caesarean section"*.

In the event, an elective caesarean section was successfully carried out the day after the court hearing.

Impact

The case was not of itself unusual. Applications to the Court of Protection in relation to pregnant women who lack capacity to make decisions about their obstetric care are relatively common and the Court looked at best interests in the usual way - i.e. a 'balance sheet' approach, weighing up the advantages and disadvantages of the various options for delivery.

However, the case is notable for the Judge's response to the Trust for not bringing the matter to Court sooner, leaving little

time for the Official Solicitor - acting on behalf of CA - to consider the case and establish her views. The Judge did not mince his words here: *"This extremely unsatisfactory situation has been brought about by the failure of the Trust to start proceedings at an early stage. In this respect, the Trust has manifestly failed to comply with the guidance [given in the FG case]....This guidance is compulsory reading for all professionals involved with such cases"*.

To avoid similar issues, it is worth Trusts reminding themselves (and their obstetric teams in particular) of the need to follow the steps summarised below.

A reminder: Steps to follow in obstetric Court of Protection cases

A full copy of the guidance can be found in the Annex to the FG case. To summarise:

An application should be made to the Court of Protection where a pregnant woman lacks, or may lack, capacity to make decisions about her obstetric care due to a diagnosed psychiatric illness (or other mental disorder) and one or more of the following applies:

- ***Serious medical treatment*** - The proposed interventions probably amount to 'serious medical treatment', including delivery by caesarean section where the merits of this are finely balanced, or where more than transient restraint is likely to be needed; or
- ***Use of restraint*** - There is a real risk that the patient will be subject to more than transient restraint; or
- ***Best interests dispute*** - There is a serious dispute as to what obstetric care is in the patient's best interests; or
- ***Deprivation of Liberty*** - There is a real risk that the patient will be subject to a deprivation of liberty which would be unlawful without a court order authorising it.

Early identification of individuals who may need a Court of Protection application to be made in relation to their obstetric care is essential (e.g. via psychiatric or obstetric teams). Once an individual has been identified, next steps should include:

- ***Assess capacity*** - Obstetric and mental health teams should liaise to assess the patient's capacity to make decisions about their own obstetric care and to plan how and where this care is to be delivered in their best interests.
- ***Involve social services*** - Notify social services of any concerns about the patient's ability to care for their unborn child so they can commence child protection proceedings.
- ***Professionals meetings*** - Hold regular planning and review meetings ('professionals meetings') involving the Acute Trust, Mental Health Trust and Local Authority. These meetings should be chaired by an identified clinician and minutes taken. Discussions should include whether, and if so when, a decision by the Court will be needed to authorise the obstetric care (see circumstances when it is necessary to apply to Court listed above).
- ***Timing of application*** - If a Court application is needed, this should be made at the "*earliest opportunity*" and **no later than 4 weeks** before the expected date of delivery (except in cases of genuine medical emergency).
- ***Legal advice*** - Trusts should seek early advice and input from their legal advisers.
- ***Capacity reviews*** - Given that a patient's capacity can fluctuate, this must be kept under close review throughout antenatal, perinatal and postnatal care.
- ***Evidence*** - The following evidence should be provided with every application:
  - ***Transfer care plan*** - from the Mental Health Trust, detailing plans for transfer from psychiatric hospital to acute hospital (if applicable), including restraint issues.
  - ***Obstetric care plan*** - from the Acute Trust, including details of obstetric and anaesthetic care and interventions proposed.
  - ***Restraint care plan*** - from the Acute Trust, including an assessment of the prospects of non-compliance with care, a description of measures to be used (in a step-wise fashion) and by whom, plus details of any specialist advice about the restraint of pregnant women.
  - ***Psychiatrist's witness statement*** - from the patient's Responsible Clinician, including an assessment of the patient's capacity to consent to the proposed obstetric care and an assessment of best interests from a psychiatric perspective.
  - ***Obstetrician's witness statement*** - from a consultant obstetrician (and/or others from the obstetric/midwifery teams as appropriate) including an overview of the obstetric care to date, details of liaison between the psychiatric and obstetric teams and an assessment of the risks and benefits of the proposed obstetric treatment and alternative management strategies.
  - ***Witness evidence regarding the patient's views*** - e.g. information included in the psychiatrist and obstetrician statements about the patient's past and present wishes and feelings, beliefs and values in relation to the proposed obstetric interventions, plus the views of those close to the patient.

How we can help

Our national team of Mental Capacity Act and Court of Protection specialists have extensive experience of advising providers and commissioners across the health and social care sector on all aspects of Court of Protection matters, including supporting Trusts step-by-step through the process of applying to the Court in obstetric cases. The Court of Protection has often criticised public bodies who have delayed in issuing proceedings, particularly in obstetric cases which are by their very nature time-critical. Early, carefully managed planning is the key to avoiding this.

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

If you need advice in relation to the issues discussed here, please contact Gillian Weatherill on: +44(0)191 4044045 or gweatherill@dacbeachcroft.com.

Authors

Gill Weatherill
Newcastle
gweatherill@dacbeachcroft.com

DAC BEACHCROFT