

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

S

MORGAN LCJ

[1] Nothing is to be published in relation to this case which could identify the patient referred to herein as 'S' or his family. S is 26 years old. He lives with his mother, P. P is a practising Jehovah's Witness and her son also attends that church with her. His mother reports that S seems to enjoy attending church and has positive social contact as a result. He has a history of global developmental delay of unknown aetiology. He attended a special school and is reported as having severe learning disabilities. It has been assessed that S is not capable of consenting to his own medical treatment and thus his mother was requested to consider signing a consent form as a parent/guardian on his behalf. Upon discussion with her she has agreed the treatment plan to address the dental health of her son in terms of the administration of a general anaesthetic and teeth extraction. That is more particularly set out in Schedule 1 to the summons and consisted, inter alia, of the extraction of the lower right eight, lower right six, upper left eight and lower left eight, the restoration of the upper right six or extraction, if prognosis is poor upon examination, and the extraction of upper left seven if damaged and not restorable.

[2] It was however noted by the treating physicians involved that the planned operation would require the availability of blood products for use in the event of severe bleeding to safeguard S's life. Based upon her religious views, his mother objects to the use of any blood products. There is a minimal risk of severe bleeding during the proposed surgery and thus there is a low likelihood that blood products will be required in any circumstances. The treating clinicians have further met with P on 13 June 2013 to explain their concerns that they must be able to have recourse of those products in the event that surgical complications arise that result in the administration of blood products being necessary to safeguard S's life. This will only arise if any bleeding cannot be arrested by the use of surgical and sutures in the first instance. At the conclusion of that meeting P advised that she was unable to give her consent to the use of blood products. Following some further time to reflect

after the meeting, she has remained of the view that blood products should not be used.

[3] It has been assessed that the dental treatment plan is in S's best interests and his mother and treating physicians agree in that respect. The clinicians are however unwilling to proceed with the procedure without access to blood products to enable a transfusion in the event that this is required during surgery to safeguard the patient's life. It is unlikely that such complications will arise but as they are foreseen as potential outcomes the responsible clinicians want to know how they can act if it is necessary in the best interests of their patient. I understand that advices have been sought within the Trust as to whether there would be any other method of transfusion available that would be acceptable to Jehovah's Witnesses. Ms Shirley Murray, haemophiliac nurse and Northern Ireland Haemophiliac Co-ordinator attended the meeting on 13 June 2013 and advised that there was no practical alternative and she has confirmed that in an e-mail of 9 July 2013 which has been available to the court. A theatre slot is now booked to perform the surgery on 20 August 2013. It is not in S's best interests to have the surgery unduly delayed as he is likely to experience increasing levels of pain.

[4] The first question is the test in relation to capacity. That was helpfully set out in Re MB [1997] 2 Family Law Reports 426 which provided:

“That a person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent or to refuse treatment. That inability to make a decision will occur when:

- (a) The patient is unable to comprehend and retain the information which is material to the decision especially as to the likely consequences of having or not having the treatment in question.
- (b) The patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision.”

[5] In this case there has been a joint assessment by a psychiatrist, Dr McGurgan, and Dr Stephens, the specialist in relation to special needs dental care, who both are clearly of the opinion that S would not be able to satisfy either of those tests and that proposition is accepted by his mother and indeed is plain from a reading of the papers, so I accept that this is a case in which S lacks capacity.

[6] The second question is what is the role of the court in those circumstances in relation to such a patient and that is helpfully set out, albeit in a slightly different

context in the case of Herczgfalvy v Austria [1993] 15 EHRR 432 where the court said:

“While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless retain the protection of Article 3 of the Convention whose requirements permit of no derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist.”

[7] There are a number of Convention rights that play in this case. The first is the positive duty on the courts to preserve the life of S which arises under Article 2 of the Convention. There is the obligation under Article 3 of the Convention to ensure that there is no imposition of inhuman or degrading treatment in relation to him. Thirdly, there is the right arising under Article 8 in relation to his private and family life and to ensure that that is respected. In this case that element in particular is developed as a result of the report from the Official Solicitor which demonstrates that S enjoys a close and loving relationship with his mother and with his extended family. I have no doubt that if it were necessary and approved to use blood products in relation to him that would be a matter that would cause a measure of a distress to his mother and that that would be transmitted to S as well. So I have to take that into account.

[8] The decisions arising in this case are among the most sensitive of all of the decisions that judges are called upon to make. There is no doubt that all of those who have given evidence before me, who have been involved in this case and are in court, have a commitment to ensure the best interests of S. The proposal is that the declaration should be made so that blood products would be available if it were necessary in order to deal with a risk to life. Therefore the options for the court are either to make the declaration on the basis that otherwise S would potentially lose the life that has been so well made for him by his mother or alternatively not to do so. There is what I judge to be a very small risk indeed of risk to him from infection or rejection if the proposed treatment is necessary in light of the evidence of Dr O'Neill. I acknowledge that the distress suffered by his mother is one that would be transmitted to him and that may affect his private life. I apply the tests set out by the European Court that a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading and where medical necessity has been

convincingly shown to exist that that is likely to be in the best interests of the patient.

[9] I conclude that because of the risk to the life of S in the very limited circumstances in which blood products could be used in this case that I should make a declaration to permit that to happen. I want to make it clear that the declaration only permits the use of blood products in circumstances where it is necessary and that has been put to the court on the basis that it is necessary to ensure that S's life is preserved. So those are the only circumstances in which blood products may be used on foot of this order.