The NHS Trust v A (a child) & Ors [2007] EWHC 169
MEDICAL TREATMENT CONTARY TO PARENTS WISHES: THE ILLUSION OF PARENTAL AUTONOMY

INTRODUCTION

The Trust in this case sought and obtained, a declaration to the effect that it would be lawful for doctors to perform a bone marrow transplant (BMT) on a seven month old child suffering from haemophagocytic lymphohistiocytosis (HLH).[1] The proposed treatment whilst potentially offering a cure for the child, would be lengthy, painful and distressing and carried with it significant risks. A's parents contended that she should enjoy the quality of life that she had remaining to her and refused to consent to the treatment.

BACKGROUND

At the time of the application the child was well and in remission (the term not strictly accurate here). She was living at home with her siblings and parents in a loving and caring family setting. She had by this point already endured a period of serious illness in hospital, where she had received prolonged and damaging treatment, during which A was in obvious pain and distress.

The parents were well educated, practicing Christians with a detailed grasp of the medical issues surrounding HLH and BMT. They adopted a reasoned and analytical approach to medical advice and to the treatment of their child, and had co-operated at all stages up until this point, they certainly accepted as medical fact that without a BMT their child would die. Their strong religious convictions were evidenced in a belief that God has the ability to heal their child and a fervent hope that this would be forthcoming.

MEDICAL EVIDENCE

Accepting the medical evidence before him, Holman J acknowledged that without a BMT it was medically certain that A would die and that the procedure proposed by the doctors was the only effective treatment for the condition. It was clear, he concluded, that if a BMT was to be done at all, it was crucial that it was undertaken whilst A remained well and before the disease became active again.

RISKS & BENEFITS

In the absence of a BMT the risk of death to A was absolute and though it was not possible to predict with certainty the time that she had remaining, Holman J accepted that without the BMT it was probable that the child would die within the year.

[1] HLH is a terminal genetic defect in the immune system and has the effect that a viral infection triggers an abnormal and massive overproduction of the body's scavenger cells (macrophages and histiocytes) which invade and literally eat into vital organs.

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In the circumstances of this case, the doctors estimated that the BMT had a 50 per cent chance of effecting a lasting cure, so that A would enjoy a normal life expectancy [the benefit]. There remained, however, a 10 per cent prospect that she would die during and as a direct result of the treatment; a 30 per cent chance that the treatment would not be successful and she would die from her underlying HLH; and a 10 per cent prospect that although she may survive the treatment it would cause some significant impairment. In the event of a successful BMT, it was highly probable that A would be left infertile.

THE LAW

Where a dispute between parents' and doctors over the treatment of a child exists, the court must apply the relevant law, summarized in the ten propositions set out in *NHS Trust v MB.*[2]

The religious views of the parents would not be taken into consideration, as an objective balancing of A's best interests cannot be affected by whether her parents adhered to one particular belief, or another, or none. Holman J concluded that the case must be decided on the basis of medical knowledge, the evidence and reason. The central principle being with all the relevant factors considered, what was in the objective best interests of the child?

THE DECISION

Holman J concluded that the 50 per cent prospect of a full and normal life (albeit an infertile one) when set against the certainty of death outweighed all other considerations and disadvantages.

COMMENT

This case raises the most profound issues that a court is ever likely to have to consider, the choice between life and death. The judgment reveals the real and potential conflict between the best interests test and parental autonomy. The decision reinforcing the prevailing ethos of the courts that not only are parental wishes not decisive, but significantly that the courts continue to favour medical paternalism over parental wishes.

It is now settled law that parents do not have a right to demand treatment for their child. Following the decision in *Re T*[3] however, judicial strength was given to the argument that scope exists for a 'genuine difference of view between the judge and parents', enabling parents to legitimately refuse treatment on behalf of their child in circumstances where the decision is not founded in 'scruple or dogma'. *NHS-v-A* is instructive because it does not appear to be a case in which such 'genuine scope' existed. The decision in *Re T* continues then to stand in exceptional isolation.

[2] [2007] EWHC 507 (Fam)

[3] [1997] 1 All ER

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The parents' in A cautiously down-played their religious convictions, instead premising their arguments against treatment in terms of the distress and discomfort that a BMT would cause their child. Following this decision it is likely that advocates will continue to struggle, in striking the delicate balance between religious and ethical convictions, which are largely perceived as illegitimate objections when applying the best interest test, and those which are more pragmatic in nature and to which the courts are more receptive.

The real novelty of this decision lies in its unusual facts: unlike most contested medical consent cases, in this case child A will only arrive at hospital for a BMT if her parents are to take her there. There was no suggestion during the proceedings that the court should positively order the parents to take A to hospital for the BMT, and certainly no suggestion that she should be removed from them under a care or similar order. Holman J, preferring instead to rely on indications by the parents, that they have the utmost respect for the inherent wisdom and objectivity of the court.

Thus in the absence of any such order, it is the parents and not the doctors who do and will have final control over whether A undergoes this invasive but potentially lifesaving treatment. Thus NHS-v-A, which at first glance appears to erode the parental autonomy strengthened by Re T, leaves it in practical terms at least, unscathed at this juncture in time.

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