Deprivation of liberty in midwifery—taking a case to court

Last month's legal column discussed how the acid test for determining a deprivation of liberty applied to the care of women who lack decision-making capacity (Griffith, 2014). As a general rule, where a deprivation of liberty occurs in a hospital maternity unit midwives can use the deprivation of liberty safeguards to authorise it (Ministry of Justice, 2008). There will, however, be occasions where the matter will have to be decided by the courts through a welfare order (NHS Trust and others v FG [2014]).

Welfare order

The Mental Capacity Act (2005), section 16 allows a court to settle matters relating to the welfare, or finances, of a person who lacks capacity. The order issued by the court, called a welfare order, can include a direction authorising a deprivation of liberty in a person's best interests.

Guidance from the Court of Protection

In the case of NHS Trust and others v FG [2014], the official solicitor asked the Court of Protection to issue guidance to local authorities and health bodies and professionals setting out when and how to bring a case concerning the maternity care of a woman who lacks capacity to court.

The official solicitor provides access to the justice system to those who are vulnerable because they are children or lack mental capacity. By bringing cases on behalf of the vulnerable, the official solicitor mitigates:

- The disadvantage experienced by the vulnerable because of their disability or age
- The vulnerability of such people to social exclusion.

The official solicitor invited the court to issue guidance in relation to the maternity care of women who lack capacity because there has been instances where there was a lack of understanding of:

- The planning to be undertaken in such cases
- The procedures to be followed
- The timing of an application to the Court of Protection and/or the Family Division of the High Court
- The evidence required to support an application to the court.

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Types of cases that must be brought to court

The guidance issued by the Court of Protection applies to cases where a pregnant woman lacks capacity to make decisions about her maternity care as a result of a mental disorder. NHS Trusts and boards must apply to the Court of Protection or family division of the High Court where the woman's circumstances fall into one of four categories:

Category 1

The proposed interventions probably amount to serious medical treatment irrespective of whether the obstetric treatment would be provided under the Mental Capacity Act (2005) or Mental Health Act (1983).

Category 2

There is a real risk that the woman will be subject to more than transient forcible restraint.

Category 3

There is a serious dispute as to what obstetric care is in the woman's best interests whether this is between clinicians, or between the clinicians and the woman and/or those whose views must be taken into account as part of the consultation required when determining best interests under the Mental Capacity Act (2005), section 4(7).

Category 4

There is a real risk that the woman will suffer a deprivation of her liberty that cannot be authorised without a welfare order from the Court.

Serious medical treatment

Serious medical treatment is defined as providing, withdrawing or withholding treatment where:

- There is a fine balance between the benefits and risk of treatment
- There is a fine balance between a choice of treatments
- The proposed treatment would have serious consequences for the woman because it (Court of Protection, 2014):
  - Would cause serious, prolonged pain, distress or side effects
  - Have major consequences for the woman
  - Have a serious impact on future life choices.

In relation to obstetric treatment, the guidance issued by the Court requires that a delivery by caesarean section in circumstances where the benefits and burdens are finely balanced or would involve more that transient forcible restraint are considered to be in category 1 and should be brought to court for a decision.

It is essential to identify cases to which one of the four categories apply and to do so as early as possible. In community settings the onus will be on the midwifery team to do that.

Any case that meets the referral category will require an assessment of the woman's capacity to make decisions in respect of obstetric care and regular meetings between midwifery and mental health teams to identify risks and plan how and when obstetric care is to be delivered in her best interests. If the midwife has concerns about the woman's ability to care for her unborn child then the relevant social services department should be involved as well.

If the local authority proposes to

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withhold the care plan for the unborn child from the mother then, unless there is an emergency, an application should be made to the court no later than 4 weeks before the expected date of delivery.

Applications to the Court

The guidance requires that an application should be made to the court at the earliest opportunity and must be made no later than 4 weeks before the expected date of delivery. This will allow:

- The Official Solicitor to undertake any necessary investigations
- The hearing to be a few days before the proposed interventions
- The parties the opportunity to ensure the court has all the relevant and necessary evidence at the final hearing.

The following evidence should be filed and served in every application:

- A care plan from the Mental Health Trust for the transfer of a woman from a mental health unit to an obstetric unit
- A care plan from the maternity unit for the woman's obstetric care
- A care plan relating to the issue of restraint at the obstetric unit
- A witness statement from the woman's responsible clinician
- A witness statement from a consultant obstetrician.

Details of the full guidance can be obtained from: http://www.bailii.org/ew/cases/EWCOP/2014/30.html#annex

Effect of a welfare order

A welfare order that authorises obstetric care, the use of restraint or a deprivation of liberty set out the parameters of forcible care that can be lawfully given to the woman. The welfare orders are therefore permissive not mandatory. That is the midwifery team can use the restrictive and compulsory measures authorised by the Court but are not compelled to do so if a less restrictive intervention can be used instead. Midwives will always work in a climate of consent and do all they can to establish a rapport and cooperation from the women in their care. A welfare order from the court will authorise intervention where a woman's lack of capacity prevents cooperation and will allow obstetric care in the woman's best interests while promoting her human rights by having the court independently scrutinise the proposals for care. BJM

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Court of Protection (2014) Practice direction E—Applications relating to serious medical treatment. CoP, London

Griffith R (2014) Use of Deprivation of Liberty Safeguards in midwifery. *British Journal of Midwifery* **22**(10): 752–3

Ministry of Justice (2008) *Mental Capacity Act 2005, Deprivation of liberty safeguards, Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice.* The Stationery Office, London

NHS Trust and others v FG [2014] EWCOP 30

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