

Anticipatory declarations and obstetrics

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Why are these cases in court?

- Re FG [2015] WLR 1984
 - MHA?
 - PD9E/SMT
 - More than transient forcible restraint
 - BI dispute (or capacity dispute?)
 - DOL

Anticipatory declarations

- Fluctuating capacity
- S.15
 - (1) The court may make declarations as to—
 - (a) whether a person has or lacks capacity to make a decision specified in the declaration;
 - (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
 - (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

Different factual scenarios

- “Elective” CS or staged plan
- X presently has capacity and
 - Agrees to the plan, including any sedation or restraint
 - Agrees with elements of the plan
 - Disagrees with the plan

Re R [2023] EWCOP 5

- If only safe option is elective CS, the decision is whether to have an elective CS
- Relevant information:
 - Why elective CS is proposed
 - Procedure involved
 - Benefits and risks to mother and fetus of the potential options

Uncertainties

- Will X lose capacity?
- Will X object to a plan she previously agreed to?
- Will any objection be the result of a loss of capacity, or just a change of view?
- Will the more invasive elements of a staged plan actually be required?

T (Shrewsbury & Telford)

- **No anticipatory declaration**
- Nothing more than a “small risk” that T might lose capacity
- Instead, write an ‘advance statement’ of wishes and feelings
- If there is a true emergency, rely on the doctrine of necessity
- “There needs to be some caution about turning what are in truth medical decisions into legal ones.”

Can you rely on necessity?

- *Doctors undoubtedly have a power, and may have a duty, to act in an emergency to save life or prevent serious harm where a patient lacks capacity or cannot express a view... However, **we very much doubt that such a power exists in respect of treatment that has been foreseen and refused by a capacitous patient. It is doubtful whether such circumstances can properly be described as an emergency.***

E & F (Minors : Blood Transfusion) [2021] EWCA Civ 1888

Advance decisions

- If X currently has capacity, she can write an ADRT to refuse any intervention she chooses, including a CS even if her life or the fetus's life is at risk
- Can X also consent to a DOL in advance?
 - Sedation for clinical reasons (eg emergency GA)
 - Sedation/restraint arising from mental disorder

Somerset NHS Foundation Trust v Amira [2023] EWCOP 25

- Rejects anticipatory declarations on principle
- Rely on s.5/6 and s4B
 - BUT s4B only applies ‘while a decision is being sought from the court’, and covers life-sustaining treatment or vital acts for P, not for third parties (ie. the fetus)
 - AND if predictable and refused by X, not within the ‘emergency’ category either?

Difficult choices for Trusts

- Apply early – risk having to withdraw
- Apply late – costs risk (but see **West Hertfordshire Hospitals NHS Trust v AX** [2023] EWCOP 11)

...

- Don't apply if X has capacity and is in agreement with the plan?
- Do more thorough advance planning
- Revisit FG?

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