A Gillick competent minor's refusal to consent to medical treatment is not determinative (Re X (a child) (No 2) An NHS Trust v X)

This analysis was first published on Lexis®PSL on 01/02/2021 and can be found here (subscription required)

Family analysis: The issue in Re X (a child) (No 2) An NHS Trust v X involved a challenge to the 'conventional wisdom' that no child has an absolute right to refuse medical treatment, even if the child is Gillick competent or, having reached the age of 16, is presumed to be Gillick competent pursuant to section 8 of the Family Law Reform Act 1969 (FLRA 1969), and whether the court, in the exercise of its inherent parens patriae or wardship jurisdiction, can overrule that decision in an appropriate case. The challenge was unsuccessful and the court held that Re R (A Minor) (Wardship: Consent to Treatment) and Re W (A Minor) (Medical Treatment: Courts Jurisdiction) remain good law. Claire Watson, barrister, at Serjeants' Inn Chambers considers the implications of this decision.

Re X (a child) (No 2) An NHS Trust v X [2021] EWHC 65 (Fam)

What are the practical implications of this case?

The judgment provides a helpful summary of the legal principles to be applied in applications to the court which concern the medical treatment of children and confirms that the law as set out by the Court of Appeal in *Re R (A Minor) (wardship: consent to treatment)* [1992] 1 FLR 190 and *Re W (a minor) (medical treatment: court jurisdiction)* [1993] 1 FLR 1 remains valid and applicable in these cases. It also provides, for the first time, a detailed analysis of the impact of the Mental Capacity Act 2005 (MCA 2005) and the Human Rights Act 1998 (HRA 1998) on those well-established principles, confirming that nothing in those Acts operates to exclude the powers of the court in the inherent jurisdiction and under the Children Act 1989 (ChA 1989) to make orders in the best interests of children up to the age of 18.

Citing with approval his earlier judgment in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, the judge emphasised that in cases such as this, which concern strongly held religious beliefs, it is not the role of the court to pass any judgment on those beliefs and the starting point for the common law is respect for an individual's religious principles, subject always to the paramount consideration of the child's welfare.

As to the procedure to be followed when making an application to the court for a declaration concerning the medical treatment of a minor, the judge confirmed that in relation to children under the age of 16, the application should be brought under the inherent jurisdiction and an application for a specific issue order under ChA 1989, s 8. In relation to a child who has reached the age of 16, the judge stated that the application should be sought solely under the inherent jurisdiction.

Are there wider implications for practitioners dealing with non-medical treatment children proceedings?

Sir James Munby, sitting as a High Court judge, was concerned in this case with the effect of a Gillick competent child's refusal to consent to treatment in circumstances which would probably lead to death or serious permanent harm and held that, while due regard would be given to the wishes of the child and those of their parents, those wishes are not determinative. However, it was noted that in some non-medical contexts, and even in some medical contexts, where the life or health of the child was not at risk, the decision of a Gillick competent child, which is not objectively foolish or irrational, will be determinative. The judge emphasised that the context and circumstances would be crucial but whatever the subject matter of the decision to be taken by or on behalf of a child, the paramount consideration for the court would always be the welfare of the child.

What was the background?

This application concerned X, a 15 year old girl who suffers from sickle cell syndrome. She is a Jehovah's Witness, as is her mother. On occasions, as a consequence of her medical condition she suffers a sickle cell crisis, which requires admission to hospital and, in the opinion of her treating clinicians, life-saving treatment with a blood transfusion. There were two such crises in June and October 2020 when urgent applications had to be made to the court for declarations permitting top up blood transfusions to be administered (Re X [2020] EWHC 1630 (Fam) and *Re X* [2020] EWHC 3003 (Fam), [2020] All ER (D) 60 (Nov)).

Having regard to the views expressed by the court regarding the unsatisfactory nature of such serious applications being made on an urgent basis, a rolling two year order was sought authorising further top up blood transfusions in the event of further serious deterioration in X's condition until she reached 18 years of age. The application came before Sir James Munby who made an order permitting a single top up blood transfusion to deal with the immediate crisis, but adjourned the matter for proper and due consideration to be given to the argument raised by X that Gillick competent minors should be afforded the exclusive right to decide their own medical care in the same way as their peers aged 18 or over.

What did the court decide?

Following a detailed analysis of the seminal decisions of the Court of Appeal in *Re R (A Minor) (wardship: consent to treatment)* [1992] 1 FLR 190 , *Re W (a minor) (medical treatment: court jurisdiction)* [1993] 1 FLR 1 in the context of legal and societal developments since the early 1990s, including HRA 1998, MCA 2005, the decision of the Supreme Court in *In re D Birmingham City Council v D (Equality and Human Rights Commission and others intervening)* [2019] UKSC 42, [2020] 1 FLR 549 and the decision of the Divisional Court in *Bell & another v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin), [2020] All ER (D) 30 (Dec), the judge held that it is settled law that:

- in relation to medical treatment neither the decision of a a Gillick competent child under the age of 16 nor the decision of a child aged 16 or 17 is determinative in all circumstances
- there are circumstances in which the decision of a child, including 16 and 17 year old, can be overridden by the court
- the court must start from the general premise that the protection of the child's welfare implies at least the protection of the child's life and it is the duty of the court to ensure so far as it can that children survive until adulthood

As to children over the age of 16, the judge clarified that where medical treatment falls within FLRA 1969, s 8, the 16 or 17 year old is conclusively presumed to be Gillick competent such that the test of Gillick competence is bypassed and has no relevance. Thus, in the context of medical treatment, the analysis of Lord Donaldson in *Re W (a minor) (medical treatment: court jurisdiction)* [1993] 1 FLR 1 applies and the proper approach is, as follows:

- until the child reaches the age of 16 the relevant inquiry is whether the child is Gillick competent, and
- once the child reaches the age of 16 the child is assumed to have legal capacity, unless the child is shown to lack mental capacity as defined in MCA 2005, ss 2 and 3

The judge rejected the argument that MCA 2005 ousted the common law and now represents a complete code concerning the medical treatment of capacitous persons over the age of 16, giving them an exclusive right to decide their own medical treatment. The judge concluded that there is nothing in MCA 2005 which throws any doubt on the continued validity of *Re R (A Minor) (wardship: consent to treatment)* [1992] 1 FLR 190 and *Re W (a minor) (medical treatment: court jurisdiction)* [1993] 1 FLR 1 and there is nothing in MCA 2005 to suggest that there is any need for judicial re-evaluation of the legal principles established by those cases.

As to the impact of HRA 1998, Sir James Munby held that the application of the common law principles established in *Re R* and *Re W* does not, of itself, involve any breach of Articles 3, 8, 9 or 14 of the European Convention on Human Rights, and preserving the lives of children until adulthood is a legitimate aim.

It was argued that the decision of the Canadian Supreme Court in *AC and others v Manitoba (Director of Child and Family Services)* 2009 SCC 30, [2009] 5 LRC 557 provided persuasive authority for the

proposition that the decision of either a Gillick competent child or a child aged 16 or more is always, and without exceptions, determinative in relation to medical treatment. However, the judge disagreed. While paying great respect to the status of the Supreme of Canada as one of the most distinguished courts of the common law world, Sir James Munby concluded that the judgment of the majority in that case confirmed that 'the court always has the last word'. The judge found nothing in any of the Canadian jurisprudence to which the court had been referred which casts doubt on the determination that *Re R* and *Re W* remain good law.

While it was acknowledged that the common law is capable of moving with the times and adjusting to social and legal developments, Sir James Munby did not consider that this entitled the court to reject the law as set out by the Court of Appeal in *Re R and Re W* and stated that the change contended for by X 'is a matter for Parliament, not the courts'.

Finally, Sir James Munby refused the application for an order permitting the NHS Trust to give X top up blood transfusions in the event of further life-threatening sickle cell crises in the period up to her 18 birthday. While he accepted that the court has jurisdiction to make a prospective or anticipatory order of the kind sought by the NHS Trust, the judge accepted that there was a risk of privileging 'medical paternalism' over judicial protection and considered that there should be judicial scrutiny of any clinical decision that a blood transfusion was appropriate and the only acceptable treatment, particularly when transfusion practices may vary.

Claire Watson is a barrister at Serjeants' Inn Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk