Cloak & dagger in the Court of Protection?

Closed proceedings & covert medication. In the first of a two-part series, **Dr Laura Davidson** asks if the Court of Protection has retreated to the realm of secrecy

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IN BRIEF

- In closed Court of Protection proceedings excluding her mother who was a party, the covert administration of hormone medication was authorised to a young woman.
- The case raises multiple serious concerns, including around lack of disclosure and the right to family life.

There have been some extraordinary goings-on in the Court of Protection of late. In *Re A (Covert Medication: Closed Proceedings),* within the case *A Council v A (by her litigation friend, the Official Solicitor) and others* [2022] EWCOP 44, a single judgment was published containing Part One (following a closed hearing on 15 September 2022 to which B was not a party) and Part Two relating to an open hearing involving all parties from 20 to 22 September 2022. A prior judgment of Judge Moir was also published simultaneously (*The Local Authority v A & Ors* [2019] EWCOP 68). However, the complex history of the case is best understood in chronological order.

What was the background?

A, a 20-year-old woman with mild learning disability and Asperger's syndrome, suffered from epilepsy, a vitamin D deficiency, and primary ovarian failure (POF). She had not gone through puberty and lived with her mother, B. Having been home-schooled she had no real peers, and the local authority (LA) considered B to have infantilised A and limited her choices.

Between 2011 and 2017, A had not seen a GP and had not attended follow-up epilepsy appointments since discharge to adult services in 2016. In 2017 she suffered ten generalised clonic seizures within 24 hours, was taken to hospital and made subject to an urgent deprivation of liberty authorisation pursuant to Schedule A1 of the Mental Capacity Act 2005 (MCA 2005) when her mother sought her discharge. A cognitive assessment by a clinical psychologist indicated a full-scale IQ of 65: within the learning disability range.

At some point, A was discharged home. She and B resisted any medication regime change, for reasons which remained unclear to the court. Properly monitored endocrine (sex hormone replacement) therapy had no long-term health risks, but A missed two appointments at the endocrine transition clinic. Finally attending with her grandmother, she agreed to take oral oestrogen replacement tablets and vitamin D to avoid premature osteoporosis in her 30s and 40s, but later tests revealed she had taken neither. Accordingly, in Court of Protection proceedings brought by the LA in April 2018, consultant endocrinologist Dr X described A's long-term prognosis as 'extremely bleak'. She was at serious risk of increased seizures, cardiovascular disease, osteoporosis and fractures, with worsening outcomes the longer she remained untreated. A's outdated epilepsy medication also increased her risk of osteoporosis.

A treatment plan was thought likely to fail if A remained at home. During a part-heard six-day trial, Judge Moir granted an urgent interim application for A's removal to a residential placement, apparently due to concerns that A might abscond or come to harm due to resistance to the LA's plan. The only published judgments provide little detail about such concerns. Despite seeming consideration of A residing with her grandparents, this was discounted for reasons that remain unclear. The final hearing concluded with declarative orders of incapacity with respect to A's residence, care and treatment for epilepsy, vitamin D deficiency and POF. Permission to appeal the residence decision was refused.

Cessation of contact between A & her mother

Once A moved to Placement A, she consistently refused hormone medication. A year and two months later on 17 June 2020, the court held that contact between A and B was not in A's best interests due to concerns about B's adverse influence. The judgment has not been published. Mr Justice Poole's judgment, however, contains a reference to B having given notes to A during face-to-face contact to encourage her not to submit to medical advice (para [41]). It is unclear what part this played in the decision to stop contact.

Three months later, on 25 September 2020, a closed *ex parte* hearing took place before Judge Moir in the absence of B and her lawyers. Despite B's party status, she was not even advised of this after the fact. The hospital trust succeeded in an application for A to be covertly administered hormone treatment for her POF if she refused it. Only a few healthcare professionals and carers were told of the plan, to avoid its detection.

Two years thereafter, a further closed review hearing occurred on 15 September 2022 before Poole J at which A was described

as having settled into the placement well, becoming more socialised. While still wishing to go home, she had no complaints about the care home or staff. She consented to vitamin D supplements and second-generation epilepsy medication, but continued to refuse hormone treatment. Thus, continuous covert administration occurred from late 2020 to mid-2022 amid court reviews. Contact between A and B was reinstated at some point—supervised to ensure that B did not raise prohibited matters, but limited to telephone contact. By September 2022, only twice-weekly 30-minute calls were permitted. B had not seen her daughter by video or in person for over two years.

The precariousness of this elaborate duplicity came to the fore when a blogpost was published on a respected website run by The Open Justice Court of Protection Project. This questioned the justification for A's lengthy separation from her mother and her home, purportedly required to enable endocrine treatment—seemingly never provided. Understandably, B then made an application for her daughter's return home 'in large part because she believes that A has not had any benefit from medication… [for POF] whilst at Placement A' (para 41).

Meanwhile, A had in fact achieved puberty, developing breasts and normal body hair distribution, with no side effects reported. In June 2022, her hormone treatment was changed to maintenance therapy. Dr X gave evidence that non-continuation meant high risk of early osteoporosis, fractures and cardiovascular complications. Benefits were greater during longer regime adherence. Unaware of this, B's application contended she would encourage A to accept hormone treatment at home provided A consented. However, in the closed hearing Poole J observed that 'A's lack of capacity is demonstrated by the striking fact that she has not once commented on the bodily changes she has undergone over the past 18 months' (para [26]). The court found that it remained in A's best interests to continue to receive hormone treatment.

Ending the deception

Mr Justice Poole clearly found the complex legal and medical ethics in the case (and quite possibly some procedural decisions of the circuit judge—see para [61]) vexing. Various options for plan disclosure were considered in the absence of B; 'it was necessary to conduct a closed hearing in order to determine whether closed hearings should continue' (para [9]). The judge stated that although 'the reasons why the covert medication plan was authorised in 2020 were sound…the very success of the covert hormone treatment plan has created the problem of how to end it with the least harm to A' (para [38]). There was concern that the blogpost might lead someone to conclude that covert medication was the only explanation for A's continued placement. Poole J considered the plan's continuation 'fraught with risk' of physical and mental harm to A if she discovered the deception due to lost trust in her carers and increased distrust of healthcare professionals (para [29]). Having apparently previously refused food prepared at the placement, it was thought that she might do so again.

With an ever-increasing risk of discovery of the ruse, the court found the balance of risks and benefits to A of covert medication had altered (para [38]). Dr X's evidence was that medication benefits were lower than in the first year of the covert regime. Poole J indicated that 'anxious consideration' was necessary on 'what, if anything, A should be told about the changes to her body and the medication she has had'. Long-term covert medication was 'unsustainable', but equally, 'its immediate cessation would not be in A's best interests'. How to transition to open medication with the least harm to A was to be explored via 'a controlled process, if possible' (para [38]).

The judge expressed regret that it had not been possible to ascertain family views based on the true facts, and noted the difficulties of continuing the plan 'without the fully informed co-operation of B' (para [42]). Surprisingly, no party considered that B *ought* to be informed of the past covert medication, despite her upcoming application on contact and residence. Poole J, however, recognised that 'it would be difficult to have anything resembling a fair hearing of B's applications' (para [45]) and neither a hearing nor a judgment could be 'given without actively misleading B and observers' (para [43]). Similarly, giving only the gist of the withheld material to B would alert her to the likelihood that closed hearings had concerned surreptitious administration of hormone treatment (para [44]).

It was held that minimising harm to A was more likely if B could be persuaded to support a transition plan to open medication. Further, informing B of the covert medication would protect her Art 6 rights at the ensuing hearing. The LA and the trust were ordered to devise a treatment plan for court review on 'how to exit the covert medication regime with the least possible harm being caused to A' (para [48](iv); see also para [63](iii)). Telephone contact would continue for four weeks, whereupon supervised face-to-face contact could resume fortnightly for an hour a week. Injunctive orders were made against B's disclosure to A of the deception.

Cause for concern

Having set the scene, a further case note and comment will cover the next hearing and explore proportionality and lawfulness. The practice of covert medication itself will also be discussed in more detail. In the meantime, some of the (numerous) troubling aspects of this case are highlighted.

First, scant consideration in the previous two years seems to have been given to B's right to a fair hearing pursuant to Art 6 of the European Convention on Human Rights, or A's and B's rights under the MCA 2005 to have A's former carer and closest relative consulted about her treatment and care pursuant to s 4(7)(b).

Even more concerning is B's exclusion from seeing her daughter for over two years. Although intimating that 'there have been a number of factors leading to the decisions to remove A from home, and then to restrict contact with B' (para [58], Part Two), Poole J admitted that 'the primary ground for opposing face to face contact between A and B, or even indirect contact by video, is to avoid B seeing the physical changes in A and realising that she must have been administered hormone treatment without her knowledge' (para [41]). He viewed it as 'at least arguable that it is in A's interests to see her mother in person or by video but that level of contact would be highly problematic whilst the use of covert medication is withheld from B' (para [45](vi)).

Were the real reasons for the cessation of contact properly discussed in any of the closed hearings not yet published? Why could an injunction in conjunction with supervised in-person contact not have dealt with any risk of B derailing the covert medication plan? The evidence suggests that hormone treatment induced puberty within 'a year or so' (para [28]). Why was disclosure not discussed prior to that year's end? Was continued covert hormone treatment and physical separation of mother from daughter—significant interferences with their Art 8 right to family life—truly necessary for two years, and the least restrictive approach to A's best interests? In any event, once A's puberty had been achieved, there can have been no justification to prevent face-to-face contact between A and B, by video or in person.

It appears to the author that while the Human Rights Act 1998 remains in English law, damages under it for breaches based on unjustified interference seem ripe for the picking. **NLJ**

Pt 2 will cover the next hearing in this case, and explore proportionality and lawfulness.

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