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Neutral Citation Number: [2019] EWCOP 11

No. 13382445

COURT OF PROTECTION

Royal Court of Justice
Strand
London, WC2A 2LL

Tuesday, 29 January 2019

Before:

MRS JUSTICE LIEVEN

(In Private)
(via phone link)

BETWEEN :

SOUTHERN HEALTH NHS FOUNDATION TRUST

Applicant

- and -

AB & Ors.

Respondents

REPORTING RESTRICTIONS AND ANONYMISATION APPLY

MR M. MYLONAS QC (instructed by Bevan Brittan LLP) appeared on behalf of the Applicant.

J U D G M E N T

E X P A R T E

MRS JUSTICE LIEVEN :

1 This is an application to prevent publication of a video of a patient, AB, in her treating hospital. It is also an application to prevent publication of any story which identifies her in that hospital. I have read the

witness statement of Dr Marlowe, who is the medical director of Southern Health NHS Foundation Trust. AB is detained under section 3 of Mental Health Act. She suffers from a conversion disorder with comorbid acquired brain injury. She was admitted to the University Hospital on 21 September. Can I just check? Was she admitted to A on that date?

MR MYLONAS: Can I just correct you, judge. 21 September she was admitted to A, Southern Health NHS Foundation Trust.

MRS JUSTICE LIEVEN: Right. Sorry, I am not sure that is quite how it is put in the witness statement. She was admitted to A on 21 September. Dr Marlowe's statement makes clear that AB's presentation and indeed capacity varies. At times she is catatonic and lies in a foetal position on the floor. She has a history during these periods of self-harm, and for that reason she wears protective headgear at all times. In the light of AB's condition and the difficulties in accommodating her appropriately, the Trust has had to adapt the room in which she has been living urgently, and it is true to say that the condition of the room therefore looks somewhat poor.

2 On about 20 January 2019, AB's son, W, who is the second respondent, took a video recording of his mother in her room. I have seen that video, and in it the first point to make is that AB is plainly identifiable. The video shows her lying in a foetal position on the floor. W initially put that video on YouTube, and I am told there were some 145 views of it. He then took it down on or about 22 January. The Trust believes that W has now given the video to the Mail Online, a media outlet owned by the third respondent, Associated Newspapers Ltd, with a view to them publishing it on their online website. It also seems possible, if not probable, that they intend to publish it tomorrow. It seems that W hopes that this will draw attention to his mother's condition and to the problems with the mental health provision generally in the NHS or in this hospital in particular. I have seen an informal email statement recording a conversation with a Mail Online reporter that suggests that they intend to publish the video tomorrow. That email indicates that the Mail Online intends to pixilate AB's face from the video, but to publish the son's name and the name of the hospital.

3 The Trust's position is that the publication of the video is in breach of AB's private life and right to privacy and that it is not in her best interests to publish. They also say that even if her face is pixilated out, she will be identifiable both to other patients and staff in the hospital and indeed very possibly to the wider public,

including friends or family. This is partly by reason of the small nature of the hospital but also AB's unusual condition and the fact that she wears protective headgear.

4 I am clear that it is appropriate in these circumstances to make the order. First of all, having seen the video, it is apparent that AB can be identified, even if pixilated, and would be identifiable from the information that Mail Online intend to publish. Secondly, it is clear from Dr Marlowe's statements that AB does not currently have capacity, and although I cannot be absolutely certain, it seems extremely unlikely that AB has regained capacity since the time of the video to give consent to her son to publish it. Thirdly, I have no doubt, having watched it, that the video would be an interference with AB's privacy and her private life. The images are private, they are potentially degrading for AB, and clearly have the potential to cause her distress in the future. In those circumstances, in my view, it is not in her best interests to publish the video at the present time. The draft order provides for W being able to apply to the court at a full hearing if he wishes to do so to seek to lift the injunction, and argue that it is in her interests to publish the video. Further, according to Dr Marlowe, AB may well regain capacity herself relatively shortly, i.e. within a matter of weeks, and if she then wishes for publication, that will be a matter for her. In terms of the balance of convenience, there is no immediate urgency in favour of publication. This is not a situation where if publication does not take place tomorrow, that will change the position as far as AB is concerned. In my view, therefore, the balance of convenience must lie in preserving AB's privacy and dignity until either an application is made to discharge the order or there is a further hearing.

5 In reaching this conclusion, I do balance the importance of freedom of expression and the freedom of the press. However, on the facts of this case, because, firstly, the case is not, as I have said, time sensitive, secondly W can have the ability under the order to restore the case, and, thirdly, that under the order the Official Solicitor will be asked to represent AB, in my view, that puts the balance plainly in favour of granting the order at this stage.

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** This transcript has been approved by the Judge (subject to Judge's approval)**

