

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 HOLDEN AT GEORGE TOWN, GRAND CAYMAN

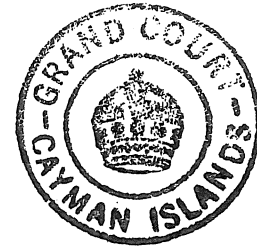
3 CAUSE NO. 202 OF 2012

4 BETWEEN:

5 MB & CB

6 v

7 RB



9 Appearance: Mr. Jamal Young on behalf of the Applicants

10 Before: Hon. Justice Williams

11 Heard: 23rd April 2012

12
13 **HEADNOTE**

14 *Trespass – Person – Battery – Surgical operation on mentally handicapped adult – Adult unable*
15 *to consent to open heart surgery – Whether Operation without consent justified – Operation*
16 *considered to be in adult’s best interests – Whether jurisdiction in court to approve operation*
17 *being performed - Jurisdiction of court to grant declaration as to validity of proposed medical*
18 *operation – Procedure to apply when applying for a declaration - Whether Section 13 and*
19 *Section 14 of the Mental Health Law confer jurisdiction on the Court to decide questions*
20 *relating to medical treatment.*

21
22 **EX TEMPORE RULING**

1 1. This is an ex tempore ruling, as the circumstances of the case make it imperative that
2 there be an immediate decision. It will not read as neatly as a written ruling, but
3 importantly it will enable the parties to know immediately at the close of this hearing the
4 reasons for my decision.

5
6 **Procedural Background**

7 2. MB & CB are the parents of the Respondent, RB (DOB 20th February 1990), an adult
8 aged 22 years. By an Originating Summons filed on the afternoon of Thursday, 19th April
9 2012 the Applicants seek the following orders:

10 i) that they be granted temporary/interim guardianship of their daughter. It appears
11 that is pursuant to s.14 of the Grand Court Law (2008 Revision) and O.80 of the
12 Grand Court Rules, 1995 (Revised);

13 ii) that pursuant to s.13 and s.14 of the Mental Health Law (1997 Revision), they
14 may act singly or jointly, for and on behalf of their daughter solely for the
15 purposes of providing the required consent for and on her behalf in relation to the
16 open-heart surgery scheduled for 24th – 25th April 2012 at Miami Children's
17 Hospital and/or any rescheduling thereof;

18 iii) that they may act, singly or jointly, for and on behalf of their daughter in relation
19 to any and all medical treatment which is required to be performed by any other
20 medical facility in the continental United States;

21 iv) that they be permitted to sign, singly or jointly, any and all documents necessary
22 to accomplish the purposes set out in the above paragraphs;

23 v) that the order remain in force for a period of one year; and

1 vi) that there be liberty to apply.

2
3 3. This Application has not been brought and presented in a manner that the Court would
4 ordinarily expect or accept when orders of this gravity are sought, especially when there
5 is no local precedent dealing with the complex legal issues involved. There appear to be
6 no case authorities emanating from the Courts of the Cayman Islands on the question
7 whether, as a matter of common law (and if so in what circumstances), medical treatment
8 can lawfully be given to a person who is disabled by mental incapacity from consenting
9 to it.

10
11 4. The First Applicant's affidavit discloses that she was notified on or around 10th February
12 2012 by Dr. Courtney Cummings that he had formed the view that Raquel was not
13 competent enough to understand the nature of her consent should heart surgery be
14 required. It appears that she was told that there would be a threshold requirement for the
15 Applicants to have guardianship over RB's medical affairs as they related to the surgery
16 prior to the surgery being performed. It appears that the Applicants did very little
17 thereafter to act upon this advice. It appears that only after they received a letter from
18 Miami Children's Hospital on 18th April 2012 confirming that RB would need to report at
19 the hospital on 24th April 2012 that anything has been done to bring this application
20 before the Court. The inevitable consequence is that the application has been brought in a
21 hurried, ill-prepared and unsatisfactory manner. The form of the application is defective
22 and the Court has no jurisdiction to make the orders sought in the Summons pursuant to
23 the statutory provisions relied upon. Not one case authority has been placed before the

1 Court by Counsel and therefore all the relevant case law referred to herein had to be
2 researched and provided by the Court to the Applicants' attorney. When the supporting
3 affidavit was filed on Thursday afternoon on 19th April 2012 it exhibited no medical
4 evidence indicating why RB was not competent to understand the nature of her consent
5 and/or why the proposed surgery is necessary and in her best interests. On perusing the
6 papers, due to the evident urgency of the matter, I had to have a message sent to the
7 Attorney highlighting this deficiency and requiring such information to be placed before
8 me. On Friday, 20th April 2012 the Court chased up the attorneys to see if this application
9 was going to be made. It is only this morning, Monday, 23rd April 2012, that the Court
10 heard that the application is to move forward and the Court received the undated
11 affidavit of Dr. Cummings – the affidavit will need to be dated and I require an
12 undertaking from Counsel that that be done.

13
14 5. The manner of the application has left the Court in an invidious position, especially
15 having regard to the subject matter of the application and the need for an immediate
16 decision. Counsel appears before me with the affidavit of Dr. Cummings at 10:30 a.m.,
17 his clients due to fly out with RB at 12:50 p.m. today, with surgery scheduled for
18 tomorrow. The Court would have been entitled to refuse to hear the matter today,
19 requiring Counsel to go away and file a properly drafted summons and to adequately
20 prepare thus enabling an informed presentation of the application. However, that
21 approach would not have been feasible, as the urgent and complex surgery is proposed to
22 be carried out tomorrow and his clients are due to fly out in about an hour and half from
23 now.

1 6. I will, in light of my concerns, at a later stage in this ruling set out the recommended
2 procedure for this type of application if made in the future.
3

4 **Background**

5 7. RB unfortunately has Down's Syndrome. The medical evidence now before me is set out
6 in Dr. Cumming's affidavit. Dr. Cummings is the attending physician of RB in the
7 Cayman Islands after she was admitted on 4th February 2012 suffering from respiratory
8 and cardiac complications. He recommended that she receive expedited treatment at
9 Miami Children's Hospital.
10

11 8. Surgery is required to attempt to correct or diminish some of these irregularities which
12 include:

- 13 a) closing a hole in the middle of her heart and inserting a valve;
 - 14 b) creating a conduit for blood flowing from the lower left ventricle and inserting a
15 valve;
 - 16 c) completely closing a partial hole in the upper part of her heart;
 - 17 d) opening up restricted pathways of arteries leading from the heart to the two lungs;
18 and
 - 19 e) removing scar tissue.
- 20

21 9. Dr Cummings is of view that RB is not mentally competent to understand or consent to
22 the complex cardiac surgery. It is contended that RB's mother has been advised that in
23 the USA the hospital requires for an adult who has diminished mental capacity a guardian

1 to sign consent forms for admission and treatment at facilities in the USA. Even as I
2 deliver this ruling a letter is arriving attached to an email from the hospital. Excuse me as
3 I pause to read the letter. I note that the letter from Denise Valor, Licensed Clinical Social
4 Worker, at Miami Children's Hospital, confirms that under Florida Law a guardian must
5 consent and that the surgery is needed as RB has a complex congenital heart disease.

6
7 10. I am satisfied having regard to s.14 Grand Court Law and O.80 r.28 and r.29 that it is
8 appropriate to appoint the Applicants as guardians for RB to handle her affairs. I find that
9 she is incapable of managing her own affairs. **I make that order.**

10
11 11. I am satisfied on the medical evidence that RB is mentally incapable of herself reaching a
12 considered decision on whether or not this operation should be carried out.

13
14 12. I am satisfied that it is in RB's best interest to have the operation.

15
16 13. However, that is not the end of it. If RB were a minor the matter could be dealt with by
17 making her a Ward of Court and then exercising the Court's jurisdiction to decide
18 whether the operation was in her best interests, which would be the paramount
19 consideration.

20
21 14. I am now required to consider whether the decision about the surgery can be taken on her
22 behalf and if it can then by whom, under what legal power, and by what procedure. Can
23 the Court give consent to surgery on behalf of an adult who is permanently disabled by

1 mental incapacity from giving consent in person? *Lord Brandon of OakBrook* in the
2 House of Lords decision of **re F. (Mental Patient: Sterilisation)** 2 AC 1 at 54 paragraph
3 C set out these three questions of law and legal procedure that needed to be considered:

4 *“The first question is whether it is necessary or desirable for the court to*
5 *become involved in the matter at all. The second question is, if so, what*
6 *jurisdiction does the court have to deal with the matter, and according to*
7 *what principles should that jurisdiction be exercised. The third question is,*
8 *assuming that the court has jurisdiction and is bound to exercise it in a*
9 *particular manner, what procedure should be used for the invocation and*
10 *subsequent exercise of that jurisdiction.”*

11
12 I will address these three points later herein.

13
14 15. His Lordship went on to say at page 54, paragraph H:

15 *“For reasons which will become apparent later, no court or judge has*
16 *now any jurisdiction with respect to the person of an adult under mental*
17 *disability comparable with the wardship jurisdiction of the High Court*
18 *with respect to the person of a minor in a similar condition. Because of*
19 *this, no ready answers are available to the three questions referred to*
20 *above in the case of such an adult, and a separate examination of them*
21 *has to be made.”*

1 The Law

2 16. The starting point is that any intentional touching of an adult body, however slight is
3 prima facie tortious if it occurs without his consent. Under an established common law
4 rule (“the consent rule”) it is both tortious and criminal to perform acts such as surgical
5 operations on the body of an adult without his or her consent, the tort law offence being
6 that of a form of trespass to the person known as battery.

7
8 17. In Collins v Wilcock (1984) 1 WLR 1172 at 1177 **Robert Goff LJ** stated:

9 *“The fundamental principle, plain and incontestable, is that every*
10 *person's body is inviolate. It has long been established that any touching*
11 *of another person, however slight, may amount to a battery. So Holt CJ*
12 *held in Cole v Turner (1704) 6Mod. 149 that ‘the least touching of another*
13 *in anger is a battery.’ The breadth of the principle reflects the*
14 *fundamental nature of the interest so protected. As Blackstone wrote in his*
15 *Commentaries, 17th ed. (1830), a Vol. 3, p. 120: ‘the law cannot draw the*
16 *line between different degrees of violence, and therefore totally prohibits*
17 *the first and lowest stage of it; every man's person being sacred, and no*
18 *other having a right to meddle with it, in any the slightest manner.’ The*
19 *effect is that everybody is protected not only against physical injury but*
20 *against any form of physical molestation.”*

1 18. However, there are instances where patients are unable to give or refuse their consent to
2 an operation, for example when urgent treatment is required and the patient is
3 unconscious and any delay would be damaging to his health.

4
5 19. **Lord Brandon of Oakbrook** at page 55 D outlined a further example as being:

6 “... Where a patient, though adult, cannot by reason of mental disability
7 understand the nature or purpose of operation or other treatment.”

8
9 20. He went on to say that in such circumstances:

10 “The common law would be seriously defective if it failed to provide a
11 solution to the problem created by such inability to consent. In my
12 opinion, however, common law does not so fail. In my opinion, the
13 solution to the problem which the common law provides is that a doctor
14 can lawfully operate on, or give other treatment to, adult patients who are
15 incapable, for one reason or another, of consenting to his doing so,
16 provided that the operation or other treatment concerned is in the best
17 interest of such patients. The operation or other treatment will be in their
18 best interest if, but only if, it is carried out in order either to save their
19 lives, or (as is RB’s case) to ensure improvement or prevent deterioration
20 of their physical or mental health.”

1 21. His Lordship continued:

2 *“In my opinion, the principle is that, when persons lacked the capacity,*
3 *for whatever reason, to take decisions about the performance of*
4 *operations on them, or the giving of other medical treatment to them, it is*
5 *necessary that some other person or persons, with the appropriate*
6 *qualifications, should take such decisions for them. Otherwise they would*
7 *be deprived of medical care which they need and to which they are*
8 *entitled.*

9 *In many cases, however it will not only be lawful for doctors, on the*
10 *ground of necessity, to operate on or give other medical treatment to adult*
11 *patients disabled from giving their consent; it will also be their common*
12 *law duty to do so.”*

13
14 22. At page 56 paragraph B he added:

15 *“In the case of adult patients suffering from mental disability, they will*
16 *normally, in accordance with the scheme of the Mental Health Act 1983,*
17 *be either in the care of guardians, who will refer them to doctors for*
18 *medical treatment, or of doctors at mental hospitals in which the patient*
19 *either reside voluntarily or are detained compulsorily. It will then again*
20 *be the duty of the doctors concerned to use their best endeavours to do, by*
21 *way of either an operation or other treatment, that which is in the best*
22 *interests of such patients.*

1 *The application of the principle which I have described means that the*
2 *lawfulness of operating on, or giving other treatment to, an adult patient*
3 *disabled from giving consent, will depend not on any approval or sanction*
4 *of the court, but on the question whether the operation or other treatment*
5 *is in the best interests of the patient concerned. That is, from a practical*
6 *point of view, just as well, for, if every operation to be performed, or other*
7 *treatment to be given, required the approval or sanction of the court, the*
8 *whole process of medical care to such patients would grind to a halt.”*

9
10 23. **Lord Jauncey of Tullichettle** at page 83 paragraph G in **re F.** shared the sentiments of
11 **Lord Brandon of Oakbrook** stating:

12
13 *“I should only like to reiterate the importance of not erecting such legal*
14 *barriers against the provision of medical treatment for incompetence that*
15 *they are deprived of treatment which competent persons could reasonably*
16 *expect to receive in similar circumstances. The law must not convert*
17 *incompetents into second-class citizens for the purposes of health care.*

18 *There are four stages in the treatment of a patient, whether competent or*
19 *incompetent. The first is to diagnose a relevant condition. The second is to*
20 *determine whether the condition merits treatment. The third is to*
21 *determine what the merited treatment should be. The fourth is to carry out*
22 *the chosen form of merited treatment. In the case of a long-term*
23 *incompetent, convenience to those charged with his care should never be a*

1 *justification of the decision to treat. However, if such persons take the*
2 *decision in relation to the second and third stages (supra) solely in his*
3 *best interest and if their approach to and execution of all four stages is*
4 *such as would be adopted by responsible body of medical opinion skilled*
5 *in the particular field of diagnosis and treatment concerned, they will have*
6 *done all that is required of them and the acting will not be subject to*
7 *challenge as being unlawful.”*

8
9
10 24. It therefore appears that the involvement of the Court is not strictly necessary as a matter
11 of law. It is necessary and good practice in cases involving irreversible operations such as
12 sterilisation. *Lord Griffiths* at page 68 G in **re F.** indicated that, in cases involving
13 operations, the sterilisation should be approved by the High Court but such a process was
14 not required for the treatment of diseased organs. However, I am not critical of the fact
15 that such an application comes before me where the surgery is as major as that involved
16 in this matter, namely open-heart surgery.

17
18 25. Having dealt with the first question, namely whether it is desirable for the Court to get
19 involved, I move on to the second question concerning the jurisdiction of the Court and
20 the principles upon which it should be exercised.

21
22 26. The primary submission made on behalf of the Applicants, and the only ground set out in
23 the Summons before me, is that the Court has jurisdiction pursuant to s.13 and s.14 of the

1 Mental Health Law (1997 Revision). However, it is clear on the authorities from England
2 and Wales that the Court does not have such jurisdiction.

3
4 27. In T V T and Another (1988) Fam 52, *Wood J* held that there was no power for anyone
5 to give consent for the operations on behalf, in that case, of a 19-year-old severely
6 mentally handicapped woman with a mental age of about three under the provisions of
7 the Mental Health Act 1983. Part VII of that Act is headed “Management of Property and
8 Affairs of Patient.” Section 95 gives the judge the power to make orders “with respect to
9 the property and affairs of a patient.” *Wood J* noted at page 57 paragraph H that this
10 phrase was considered in Re W (E.E.M) [1971] Ch. 123. by *Ungoed-Thomas J* who
11 stated at page 143:

12 *“So my conclusion is, in particular with regard to legal proceedings,*
13 *including divorce proceedings, that the Court of Protection is not limited*
14 *in its jurisdiction to dealing with a patient's property or financial affairs,*
15 *nor limited to dealing with such other matters as maybe within its*
16 *jurisdiction in their property or financial aspects, but that it has exclusive*
17 *jurisdiction over all the property and all the affairs in all the aspects but*
18 *not to the management or care of the patient's person.” (my emphasis)*

19
20 28. *Lord Brandon of Oakbrook* also considered the same issue of jurisdiction under
21 paragraphs 93 to 96 Part VII of the Mental Health Act 1983 in re F. His Lordship
22 concluded at page 59 paragraph E:

1 *“The expression “the affairs of patients,” taken by itself without regard to*
2 *the context in which it appears, is, in my view, capable of extending to*
3 *medical treatment of patients other than treatment for the mental disorder.*
4 *There is further an obvious attraction in construing that expression, as*
5 *used in Part VII of the Act of 1983, as having that extended meaning (“the*
6 *wider meaning”), since there would be a judicial authority, namely, a*
7 *judge nominated under section 93 (1), who would have statutory power to*
8 *authorise, or refuse to authorise, the sterilisation of an adult woman of*
9 *unsound mind such as F. There are two passages in the sections of the Act*
10 *set out above, if they do not expressly support the wider meaning, or be at*
11 *least consistent with it. The first is the passage in section 95 (1) (a) “for*
12 *the maintenance or other benefit of the patient” (my emphasis). The*
13 *second is the passage in section 96 (1) (k) “the exercise of any power*
14 *(including a power to consent) vested in the patient, whether beneficially,*
15 *or as guardian or trustee, or otherwise” (again my emphasis). It seems to*
16 *me, however, that, when one examines the general tenor of Part VII of the*
17 *Act, and more particularly the context in which the two passages referred*
18 *to above are to be found, the expression “the affairs of patients” cannot*
19 *properly be construed as having a wider meaning. It must rather be*
20 *construed as including only business matters, legal transactions and other*
21 *dealings of a similar kind.*

22 *I would, therefore, hold that Part VII of the Act of 1983 does not confer on*
23 *a judge nominated under section 93 (1) any jurisdiction to decide*

1 *questions relating to the medical treatment of a patient, such as the*
2 *question of F's sterilisation in the present case."*

3
4 29. S.13 and s.14 of the Cayman Islands Mental Health Law use similar wording. The note in
5 the margin for s.13 shows that this section is dealing with the jurisdiction of the Grand
6 Court over the property of patients and persons under guardianship. The note in the
7 margin for s.14 states that the section is dealing with the powers of the Grand Court
8 exercising jurisdiction under s.13. That section set out what the Court may do on behalf
9 of a patient or person under guardianship. It is clear that the jurisdiction is limited to
10 business matters, legal transactions and other dealings of a similar kind and not to
11 medical treatment of a patient or a person in respect of whom a guardian has been
12 appointed under s.14. I therefore find that s.13 and s.14 of our Mental Health Law do not
13 confer on the Grand Court any jurisdiction to decide questions relating to the medical
14 treatment of a patient, such as the question of RB's operation in the matter before me.

15
16 30. It has not been pleaded or argued before me whether jurisdiction derives from the *Parens*
17 *Patriae* jurisdiction. Despite this, I do briefly consider the same. In the absence of any
18 informed submissions made before me concerning the position in the Cayman Islands, I
19 find I am assisted by *Lord Brandon of Oakbrook's* learned deliberations at page 57
20 paragraph D in re F. when he says:

21 *"There is an ancient prerogative jurisdiction of the Crown going back as*
22 *far perhaps as the 13th century. Under it the Crown as parens patriae had*
23 *both the power and the duty to protect the persons and property of those*

1 *unable to do so for themselves, a category which included both minors*
2 *(formerly described as infants) and persons of unsound mind (formerly*
3 *described as lunatics or idiots). While the history of that jurisdiction and*
4 *the manner of its exercise from its inception until the present day is of the*
5 *greatest interest, I do not consider that it would serve any useful purpose*
6 *to recount it here. I say that because it was accepted by the Court of*
7 *Appeal and not challenged by any of the parties to the appeal before your*
8 *Lordships, that the present situation with regard to the parens patriae*
9 *jurisdiction was as follows. First, so much of the parens patriae*
10 *jurisdiction as related to minors survives now in the form of the wardship*
11 *jurisdiction of the High Court, Family Division. Secondly, so much of the*
12 *parens patriae jurisdiction as related to persons of unsound mind no*
13 *longer exist. It ceased to exist as a result of two events both of which took*
14 *place on one November 1960. The first event was the coming into force of*
15 *the Mental Health Act 1959, Section 1 of which provided:*

16 *“subject to the transitional provisions contained in this Act, the*
17 *Lunacy and Mental Treatment Acts, 1890 to 1930, and the Mental*
18 *Deficiency Acts, 1913 to 1938, shall cease to have effect, and the*
19 *following provisions of this Act shall have effect in lieu of those*
20 *enactments with respect to the reception, care and treatment of*
21 *mentally disordered patients, the management of their property,*
22 *and other matters related thereto.”*

1 *The second event was the revocation by warrant under the Sign Manual of*
2 *the last Warrant dated 10 April 1956, by which the jurisdiction of the*
3 *Crown over the persons and property of those found to be of unsound*
4 *mind by Inquisition had been assigned to the Lord Chancellor and the*
5 *judges of the High Court, Chancery Division.¹*

6 *The effect of section 1 of the Act of 1959, together with the Warrant of*
7 *revocation referred to above, was to sweep away the previous statutory*
8 *and prerogative jurisdiction in lunacy, leaving the law relating to persons*
9 *of unsound mind to be governed solely, so far as statutory enactments are*
10 *concerned, by the provisions of that Act. So far as matters not governed by*
11 *those provisions are concerned, the common law relating to persons of*
12 *unsound mind continued to apply. It follows that the parens patriae*
13 *jurisdiction with respect to persons of unsound mind is not now available*
14 *to be invoked in order to involve the court or judge in the decision about*
15 *the sterilisation of F.”*

16 31. The 1959 Act in England was intended to be comprehensive, thus leaving nothing on
17 which prerogative powers in relation to mentally disordered persons could continue to
18 operate. In **T v T** at page 58 paragraph *H Wood J* expressed regret that the warrant had
19 been revoked when he stated:

¹ The 1959 act was brought in brought fully into force on 1 November 1960, 11 days later the following notice appeared in the London Gazette at page 7631:

“having regard to the provision made in the mental health act 1959 with respect to the management of the property and affairs of mentally disordered persons, the Queen has been pleased by Warrant under Her Majesty’s Royal Sign Manual, bearing date the 1st instant, to revoke the Warrant under the Royal Sign Manual dated the 10 April 1956, entrusting the Lord Chancellor and certain other judges of the Supreme Court of judicature with jurisdiction respecting the caring commitment to the custody of persons of unsound mind and their estates.”

1 *“The facts of this case illustrate the usefulness and indeed, may I*
2 *respectfully suggest, the necessity for a residual jurisdiction even when*
3 *codification purports to cover every eventuality. The simplest remedy*
4 *would be to issue a fresh warrant restoring this common law*
5 *jurisdiction.”*

6
7 32. In the vacuum of informed or in fact any submissions from Counsel on this issue, it
8 would be inappropriate for me to express any concluded view as to whether the Crown's
9 residual prerogative power still exists in the Cayman Islands in such circumstances as this
10 case. Our Mental Health Law, which is in dire need of updating, is not as comprehensive
11 as the similar legislation in England and Wales. In light of this uncertainty concerning the
12 *parens patriae* jurisdiction, I feel it necessary to consider whether there is any other
13 possible jurisdiction grounding the Court's involvement in this matter.

14
15 33. No application has been made for an order under O.15 r.16 Grand Court Rules for a
16 declaration that the operation would not amount to an unlawful act by reason only of the
17 absence of RB's consent. Despite this, I am of the view that I can consider whether it
18 would be appropriate to make a declaration pursuant to my inherent jurisdiction. I do so
19 as a decision is required so urgently. The issue as to whether consent can be given by
20 declaration has until the House of Lords' decision in **re F.**, been open to debate.

21
22 34. In **T v T** it was held that it was in the best interests of the Defendant that she should
23 receive surgical treatment without delay and in the exceptional circumstances, the

1 medical advisers were justified in performing the operation without express or implied
2 consent and that, accordingly, the Court would exercise its discretion to grant a
3 declaration notwithstanding that it related to a future event. The declaration was given in
4 the following terms:

5 *“it is declared that: (i) to effect a termination of the pregnancy of the first*
6 *defendant; (ii) to deal with any complications that might arise in the*
7 *course of the said termination of pregnancy, whether by hysterotomy or*
8 *otherwise, and: (iii) to effect the sterilisation of the first defendant; would*
9 *not in any such case amount to an unlawful act by reason only of the*
10 *absence of the first defendant's consent;*

11
12 35. **Wood J** stated at page 67 paragraph G that:

13 *“The incision made by the surgeon's scalpel need not be and probably is*
14 *most unlikely to be hostile, but unless a defence or justification is*
15 *established it must in my judgment fall within the definition of a trespass*
16 *to the person.*

17 *Thus in the present case I must face the fact that the operative procedures*
18 *proposed are prima facie acts of trespass. It would be wholly unrealistic*
19 *on the facts of this case to think in terms of any implied consent.*

20 *I am convinced, as are all the lay and professional persons involved in this*
21 *case, that it is in the best interests of the first defendant that these*
22 *procedures should be carried through and I have made the declarations*
23 *which was sought. I am content to rely upon the principle that in these*

1 *exceptional circumstances where there is no provision in law for consent*
2 *to be given and therefore there is no one who can give their consent, and*
3 *where the patient is suffering from such mental abnormality as never to be*
4 *able to give such consent, a medical adviser is justified in taking such*
5 *steps as good medical practice “demands” in the sense that I have set out*
6 *above and on that basis it is that I have made the declaration is sought.”*

7
8 36. In **re F.** the Court of Appeal indicated that for future cases a declaration should not be
9 regarded as the appropriate remedy. The Court of Appeal appeared to express a view that
10 the court has no power to grant a declaration that the doctor will not be liable for trespass
11 if he operates on a patient without either her consent or the consent of a person legally
12 authorised to give consent in respect of the patient. Also they appeared to suggest that a
13 declaration can be made only in respect of a legal right, and no such right is known to the
14 law.

15
16 37. **Lord Donaldson MR**, sitting in the Court of Appeal, said:

17 *“a declaration changes nothing. All that the court is being asked to do is*
18 *to declare that, had a course of action been taken without resort to the*
19 *court, it would have been lawful anyway.”*

20
21 38. **Butler-Sloss LLJ** concurred and added:

22 *“a declaration cannot alter the existing position... The court by a*
23 *declaration alone cannot give approval.”*

1 39. The House of Lords found in re F, that the declaration procedure, although criticised by
2 the Court of Appeal, was the appropriate and satisfactory procedure. **Lord Brandon of**
3 **Oakbrook** stated at page 63 paragraph F that it was not right to describe this jurisdiction
4 as being under Order 15 r.16. His Lordship said that the jurisdiction was part of the
5 inherent jurisdiction of the High Court, and the rule does no more than say that there is no
6 procedural objections to an action being brought to a declaration whether any other kind
7 of relief asked for is available. He concluded on page 63 paragraph G:

8 *“There can, in my view, be no doubt that the High Court has jurisdiction,*
9 *in a case like the present one, to make a declaration with regard to the*
10 *lawfulness of operation the sterilisation proposed to be carried out.”*

11
12 40. His Lordship went on to say at page 63 paragraph C, when dealing with the Court of
13 Appeal’s concerns, that:

14 *“The substantive law is that a proposed operation is lawful if it is in the*
15 *best interests of the patient, and unlawful if it is not. What is required from*
16 *the court, therefore, is not an order giving approval to the operation, so as*
17 *to make lawful that which would otherwise be unlawful. What is required*
18 *from the court is rather an order which establishes by judicial process*
19 *whether the proposed operation is in the best interests of the patient and*
20 *therefore lawful, or not in the patient's best interest and therefore*
21 *unlawful.”*

1 41. I am satisfied that I have the jurisdiction to make a declaration in the circumstances of
2 this case. I am satisfied that it would be appropriate to do so, as the operation is urgently
3 required and clearly is in the best interests of Raquel who sadly is not competent to give
4 consent or withhold consent. The test in **Bolam v Friern Hospital Management**
5 **Committee (1957)** 1 W.L.R 582 is applicable. It provides that a doctor will not be
6 negligent if it is established that he acted in accordance with practice accepted at the time
7 by the responsible body of medical opinion skilled in the particular form of treatment in
8 question. This is a test to be applied when deciding whether an operation or other
9 treatment was in the best interests of an adult incompetent to give consent.

10
11 42. The orders sought in the originating summons are clearly not appropriate and are far too
12 wide. Accordingly the order I make is in the following terms:

13
14 **i). It is declared that the open-heart surgery proposed to be**
15 **performed on the defendant being in the existing**
16 **circumstances in her best interests can lawfully be performed**
17 **on her despite her inability to consent to it.**

18
19 **ii). It is ordered that in the event of a material change in existing**
20 **circumstances occurring before the said operation has been**
21 **performed any party shall have liberty to apply for such**
22 **further or other declaration or order as may be just.”**

1 **Procedure to be Adopted in an Application for a Declaration**

2 43. Having regard to my concerns about the way that this application has been brought before
3 the Court, it may be useful to give some guidance concerning future applications. I can
4 do no better than adopt, albeit with local adaption, the procedures suggested by *Lord*
5 *Brandon of Oakbrook* in re F. Accordingly, I recommend:

- 6
- 7 (i) Applications for a declaration that a proposed operation on or medical
8 treatment for a patient can lawfully be carried out despite the inability of
9 such a patient to consent thereto should be by way of originating summons
10 issuing out of the Grand Court. Once established, this should be out of the
11 Family Division of the Grand Court;
- 12 (ii) The Applicant should normally be those responsible for the care of the
13 patient or those intending to carry out the proposed operation or other
14 treatment if it is declared to be lawful;
- 15 (iii) The patient should always be a party and should normally be a respondent.
16 In cases in which the patient is a respondent the appointment of a guardian
17 ad litem should be considered; and
- 18 (iv) With a view to protecting the patient's privacy, but subject always to the
19 judge's discretion, the hearing will be in Chambers, but the decision and
20 the reasons for that decision will be given in open Court.

21

22 44. A case of this nature should not come straight on for final hearing after the filing of the
23 Summons. There should be a summons for directions heard by a judge and it will be for

1 him to decide on the hearing of such summons whether any, and if so, what further or
2 more detailed directions should be given in the case. The party seeking a declaration
3 should set out the precise terms of the declaration sought in the summons.
4

5 45. I have prepared the order which I now sign for you to take away and it will read that:

6
7 **BEFORE** Richard Williams J at the Law Courts, Grand Cayman on the 23rd day of April 2012

8
9 **UPON HEARING** Mr. Jamal Young for the Applicants

10
11 **UPON READING** the affidavit of MB sworn on 19th April 2012, the undated affidavit sworn by
12 Dr. Courtney Cummings filed on 23rd April 2012 and the letter from Denisse Valor dated 23rd
13 April 2012

14
15 **IT IS ORDERED:**

- 16
17 1. That MB and CB be appointed as guardians for their daughter, RB.
18
19 2. It is declared that the open-heart surgery proposed to be performed on the
20 Defendant being in the existing circumstances is in her best interests and can
21 lawfully be performed on her despite her inability to consent to it.
22

1 3. That in the event of a material change in existing circumstances occurring before
2 the said operation has been performed any party shall have liberty to apply for
3 such further or other declaration or order as may be just.

4
5 *****A copy of the transcript of my ex tempore ruling will be provided to the parties*****
6

7
8 **DATED this 23rd day of April 2012.**



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11
12 **HON. RICHARD N. WILLIAMS**

13 **JUDGE OF THE GRAND COURT**
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