Chemo by court order

Director Clinical Service, Child & Adolescent Health Service v Kiszko & Anor [2016] FCWA 19 and 34

The Family Court of Western Australia has ordered that a child undertake chemotherapy to treat a rare form of cancer, contrary to the parents' wishes.

Generally, parents have the power to make decisions about treatment and health matters for their own children. This is different to cases in which children require treatment say, for example, for gender dysphoria.

Parents do not have the ability to consent to medical intervention when the treatment is invasive and irreversible, and not for the purpose of curing a malfunction or disease. In those cases, orders of the court are required regardless of whether or not the parents agree to the treatment.

Background

The child, aged five at the time of the hearing, was diagnosed with a rare brain tumour and had surgery to remove the tumour in December 2015. The child suffered serious side effects post surgery, but there was medical evidence before the court that many of these side effects were improving.

Following the surgery, medical staff advised the parents that the child should receive chemotherapy, potentially followed by radiotherapy. The parents refused treatment and instead wanted the child to receive palliative care. The parents' argument was that they did not want their child to suffer anymore, and instead wanted to ensure a high quality of life for his remaining time.

After calling a number of meetings with the hospital's ethics committee and the parents, the hospital took the drastic step of filing an urgent application with the Family Court, seeking interim orders that the child commence chemotherapy immediately, followed by radiotherapy. The medical team proposed that treatment involving both chemotherapy and radiotherapy was the most appropriate way forward. The parents were refusing standard treatment, and wanted to explore alternative therapies for the child.

Medical evidence

The Family Court of Western Australia judge decided that, given the short time frames involved and the urgency of the case, he would make an interim decision at the hearing for the child to commence chemotherapy, with the decision about radiotherapy to be determined at a later date. The long-term effects of radiotherapy are much more serious than chemo, and include a potential reduction in cognitive ability, particularly when given to young children.

Stephanie Brown looks at the legal background to a recent case which made national headlines.

The hospital provided evidence that studies from similar cases showed that combined chemo and radiotherapy indicated a 50% to 60% survival rate in five years. The use of chemotherapy exclusively gave a survival rate of 30% after five years. Without treatment, the child was likely to die within months.

The court decision

On 24 March the court made interim orders for the child to commence chemotherapy immediately. The matter was again before the court on 16 May to determine whether it should also make orders that the child be required to undertake radiotherapy, noting the more long-term and serious side effects of this treatment.

With the benefit of additional time, the evidence before the court at the second hearing was far more extensive and included expert evidence that supported the parents' position, as well as experts in support of the hospital. There was also evidence that the child's chance of survival had significantly reduced, as well as more compelling evidence from the parents about the child's reaction to the treatment.

At the second hearing, an independent children's lawyer submitted that orders should be made that did not require the child to undergo radiotherapy.

One expert suggested that the chemotherapy continue, and the parents indicated that they would support this course of treatment. Thackeray CJ concluded that, given the hospital and the parents had agreed on this course of action, there was no need to mandate the ongoing chemo. On that basis, the court ordered that the previous orders be discharged, but rather than dismiss the proceedings, adjourned them and gave either party liberty to apply. This course of action would allow the hospital to bring a further application if it considered it was necessary and in the child's best interest.

Jurisdiction and standing

The hospital has standing to bring an application to the court as "any other person concerned with the care, welfare and development of the child".[1]

This case raises an interesting jurisdictional question, particularly when considering what effect the federal Act would have on such an application in Queensland.

In Western Australia, family law matters are governed by the state act, the *Family Court Act 1997* (WA). All other states and territories in Australia apply the *Family Law Act 1975* (Cth). The Western Australian Act in many ways mirrors the Commonwealth Act.

Generally, the Supreme Court has power to determine such matters under the common law jurisdiction of parens patriae. In this case, however, the court determined section 162 of the WA Act conferred the parens patriae jurisdiction on the Family Court. This section mirrors section 67ZC of the Commonwealth Act, which reads:

"In addition to the jurisdiction that a court has under this Act in relation to children, a court also has jurisdiction to make orders relating to the welfare of children."

When making orders under this general welfare provision, the paramount consideration for the court remains the best interests of the child.

There is an important difference, however, between the Commonwealth Act and the WA Act. The Commonwealth Act includes a limitation that the court may only make orders in relation to parental responsibility for a child of the marriage, and does not provide for the court to make similar orders for children of a de facto relationship.[2] The WA Act confers jurisdiction in relation to any child, whether the parents are married or de facto.

In that case, therefore, such an application in Queensland (where the parents of the child are not married) falls instead under the parens patriae jurisdiction of the Supreme Court. As the *Family Law Act* does not exclude the Supreme Court from applying its jurisdiction in this area, applications relating to children from married parents may also be brought before the Supreme Court.

There is some authority to suggest that, even if a child is born outside of marriage, the Family Court would have jurisdiction to hear the matter under the general power the court has to make orders about "any aspect of the care, welfare and development of the child or any other aspect of parental responsibility for a child".[3] The more recent parens patriae cases in Queensland, however, appear to have been brought before the Supreme Court.

Queensland cases

Recently, the Supreme Court of Queensland exercised its parens patriae jurisdiction and ordered that a child be provided with a blood transfusion if it became necessary during a liver transplant operation.[4] The parents were Jehovah's Witnesses and had agreed to the transplant but did not consent to the child receiving a blood transfusion during the operation. The hospital took the matter to court to obtain orders, prior to the operation, that the doctors could provide a blood transfusion. There was evidence that a blood transfusion was necessary in about 95% of such operations.

As outlined in that case, the primary consideration for the court when determining these matters is the welfare of the child. This is not dissimilar to the 'best interest' consideration under the *Family Court Act 1997* (WA) or the Commonwealth *Family Law Act 1975*.

Applications by 'third parties' requiring the intervention of the court into matters that many see as parenting issues are rare, and they raise important questions about the power of the court to make decisions in the place of parents.

In addressing this point, Thackray CJ in the Western Australian case said: "…parental power is not unlimited. It is to be exercised in the best interests of the child. In this case, there is a dispute as to what is in the best interests of the child, hence the necessity for the court to make the decision where others involved cannot."[5]

Although not common, it will be interesting to see whether, given the recent media attention on the Western Australian case, there is an increase in these types of applications before the courts.

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Notes

1 *Family Court Act 1997 (WA),* s185(2), which mirrors s67C(1) of the *Family Law Act 1975* (Cth).

2 Section 69ZH *Family Law Act 1975* (Cth).

3 *Department of Health and Community Service v JWB and SMB* (1992) 175 CLR 218 (Marion's case).

4 *The Hospital v T and Anor* [2015] QSC 185.

5 *Director Clinical Service, Child & Adolescent Health Service v Kiszko & Anor* [2016] FCWA 19 at [73].