



Family Court Orders Child With Cancer To Undergo Chemotherapy in Landmark Case

Court Exercises Its Jurisdiction over the Welfare of Children to Override Parents' Decision

The case of *Director Clinical Services, Child & Adolescent Health Services and Kisko & Anor* [2016] FCWA 19 was heard by the Family Court in Western Australia. The matter was heard by Chief Judge Thackray on an urgent basis. The case revolved around a sick child ("Oshin") who had a brain tumour. With standard medical intervention the child had a 50% chance of survival after 5 years. Without treatment he was certain that he would die in a matter of months. The parties, however, objected to treatment based on an underlying belief that the child would suffer. The Princess Margaret Hospital believed it was in the best interests of the child that he have the standard treatment and applied to the court to make this order.

BACKGROUND

5 year old Oshin became ill sometime in November 2015. The parents took Oshin to the doctors on several occasions and were referred to the Princess Margaret Hospital ("PMH"). Oshin was severely ill and medical tests revealed that he had a brain tumour.

The medical advice to the parents was that Oshin required urgent surgery to attempt to remove the brain tumour. The parents accepted this advice and consented to surgery. On 3 December 2015, Oshin underwent surgery to remove the brain tumour. The surgery removed the bulk of the brain tumour but there were side effects. The parent's found the side effects and impact of the surgery on Oshin to be very troubling and they had concerns about the amount of time it took for Oshin to recover. Further, Oshin found further hospital visits very distressing and became highly emotional.

PARENTS REFUSAL FOR STANDARD TREATMENT

During Oshin's recovery from the surgery, it was recommended that he receive treatment including both chemotherapy and radiotherapy. Oshin's parents, however, disagreed with this course of action based on Oshin's reaction to the surgery. The PMH referred the matter to an Ethics Committee for further consideration and direction.

The parents presented a range of arguments to the Ethics Committee including that the mother had a bad back which would affect the care that she could give Oshin after he received treatment. The father was on unpaid leave and felt it would be difficult to provide care. In addition to these factors, the mother expressed her experience with family members who had died from cancer implying that a great deal of suffering may occur. The mother proposed that she apply alternative therapies for Oshin treatment focusing on nutrition.

In support of the mother's proposition that she provide alternative treatment, the mother provided evidence of qualifications including a Diploma in Bodyworks and an Advanced Diploma in Diet and Nutrition and further evidence



that she had studied naturopathy. The mother claimed that she had already started nutrition treatment and was giving Oshin herbal therapies.

The Ethics Committee advised that its decision had to reflect what were in the best interests of the child. It concluded that at times it might be necessary to limit parental autonomy to act in the best interests of the child. Although the Ethics Committee could not make this determination, it could recommend this course of action. To assist in considering what was in the best interest of a child, the committee proposed that decisions should be based on the burdens and benefits of treatment to the child.

The Ethics Committee considered three primary options available for Oshin's treatment:

1. Reliance on alternative therapy;
2. A curative approach where standard treatment is applied to attempt to cure the brain tumour; and
3. A palliative approach where treatment is provided to prolong life and reduce suffering but where the treatment does not have the aim of curing the brain tumour.

On 16 February 2016 and 17 March 2016 Oshin underwent medical resonant imaging. The observations from these procedures revealed that the brain tumour was proceeding in a linear path rather than spreading in an explosive like pattern. Based on this information, the doctors involved in Oshin's treatment concluded a curative approach was appropriate rather than a palliative approach.

The Ethics Committee were unanimous in holding that if Oshin did not receive the curative approach he would die and that the curative approach was in his best interests. Based on this advice and the parents continuing refusal to consent for Oshin to receive treatment, the PMH commenced proceedings for a court to determine what is in the best interests of the Oshin.

COURT'S JURISDICTION

In order to decide upon the matter before it, the court must have jurisdiction. Oshin's parents were not married and were in a de facto relationship. In the WA jurisdiction, de facto matters are dealt with under the *Family Court Act 1997* (the "WA Act") of Western Australia and not the Commonwealth *Family Law Act 1975*. This is a departure from all other states and territories within Australia. Section 36 of the WA Act confers non-federal jurisdiction on the Family Court of Western Australia including in making orders for the welfare of a child where the parents were not married to each other at the time of birth.

Further, section 162 of the WA Act provides that a court has jurisdiction under the Act to make orders relating to the welfare of the child and that regard must be had to the best interests of the child as the *paramount consideration*. The judge continued on to say these provision confer the *parens patriae* (parent of the nation) jurisdiction of the Western Australia Supreme Court on the Family Court of Western Australia.



WHO MAY BRING AN ACTION IN THE BEST INTERESTS OF A CHILD?

According to section 185(2) of the WA Act the following people may apply to the court for it to exercise its jurisdiction to act in the best interests of the child:

1. either or both parents;
2. the child;
3. a grandparent; or
4. any other person concerned with the care, welfare or development of the child.

The PMH clearly falls into the category of a person concerned with the care, welfare or development of the child.

COURT'S APPROACH TO ORDER TREATMENT FOR CHILD WITH LIFE THREATENING CANCER

The evidence provided to the court based on expert medical opinion was that Oshin's chances of survival if immediate curative treatment was provided could be:

1. If only chemotherapy was provided, 30% after five years; and
2. If both chemotherapy and radiotherapy were provided, 50% after five years.

The Court referred to the High Court case of *Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ("Marion's case") for assistance in its determination. This case found that parents have an implicit power to consent to medical treatment for a child incapable of providing consent. What is in the child's best interests, however, is a limit on parental power. Where a dispute arises as to what is in the best interests of a child, a court may intervene.

The Court also referred to the case of *Minister for Health v AS* (2004) 29 WAR 517, and the decision in that case that "protection of the child should be evaluated above all other interests, although those other interests should not be disregarded" and that the court's power should be exercised "with great caution".

The Court considered a number of factors including the child's wishes to not have treatment; the parent's strong wishes for Oshin to not have treatment and the medical evidence which concluded that if no treatment was received Oshin would die in a matter of months and that if treatment was provided Oshin would have "a good prospect of a long-term cure".

In this case, Oshin faced certain death if he did not receive treatment. If he did receive treatment he had a 50% chance of surviving past 5 years and potentially being cured. The Court determined that it would be in the best interests for Oshin that he undertake the standard curative approach of treatment. The Court found that "the prospect of the long-term cure is the matter that must most heavily weigh in the decision".