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RADICAL SURGERY AND THE LIMITS OF PARENTAL CONTROL: THE REMOVAL OF HALF OF BABY K'S BRAIN

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The Queensland Supreme Court, exercising its *parens patriae* jurisdiction, upheld an application by a hospital to undertake an extreme procedure known as a functional hemispherectomy on a baby who suffered from frequent and severe seizures in circumstances where the parents refused to consent to the operation.

IN ISSUE

This case concerned an application to the Court to provide authority, in the absence of the parents' consent, for a procedure known as a hemispherectomy to be performed on a baby, known in the proceedings as K.

THE BACKGROUND

K, who was 11 months old at the time of the hearing, was born with cortical dysplasia in the left hemisphere of his brain. Because of this condition, K suffered from refractory epilepsy which was not responsive to medication. As a result he continued to suffer from frequent and severe seizures. The hospital tried many conventional western medical treatments, and K had a number of traditional remedies from his parents' home country. This included treatment with holy water, prayers by a monk and traditional ceremonies in which smoke was administered to K. No harm was done to K through any of those treatments.

Initially the seizure activity was confined to the left half of the brain however the fitting began affecting the right side of his brain (the 'good' side, which was still intact).

K was under the care of highly qualified doctors while in hospital who were all of the opinion that the only way to preserve K's brain, and ensure he had the best possible future, was to perform a functional hemispherectomy. This procedure involves disconnecting the left and right sides of the brain, and removing the entire left side. The intention is to preserve intact the 'good' side of the brain, and prevent (or at least substantially reduce) constant seizures. K's Doctors said that he had already suffered from development delay, and if the operation was not performed urgently there would be further deterioration of his brain function.

K's parents refused to consent to the operation. Atkinson J expressly stated in her judgment that this was not because they did not love their baby – they clearly did. However they

retained hope that traditional remedies may provide a "miracle" cure, in accordance with their sincerely held religious and cultural beliefs. To attempt these further remedies, K would need to fly with his parents to their home country, which would have been arduous for him. Further, there was no evidence that K could receive the expert level of medical care available to him in Brisbane, in addition to the traditional remedies, if he were to return to his parents' home country.

DECISION OF THE QUEENSLAND SUPREME COURT

Atkinson J made her decision in the Supreme Court's *parens patriae* jurisdiction, which is exercised to protect the person and property of people, especially children, unable to look after their own interests. In the exercise of the *parens patriae* jurisdiction, the Court may override the wishes of a child's parents based on what is in the 'best interests of the child'.

Atkinson J found that without the surgery K would never be able to walk or converse. With or without the operation, K would still have significant developmental delay – he was born with a problem, and that problem would never entirely vanish. However, the hemispherectomy would give K the best chance to reach his potential.

Of all the other options available for treating K (doing nothing, providing only palliation and allowing K to go home with his parents, travelling to his parents' home country or undergoing a lesser operation than the one proposed), none were appropriate based on the medical evidence, nor were they in K's best interests.

Atkinson J understood that this was not the parents' preference. However, Her Honour was satisfied that the operation was in K's best interests, and she was fortified by the fact that their love for their child and involvement in his physical, emotional and spiritual development would stay with him through the days, weeks, months and years to come.

A declaration was made authorising the hospital to perform the hemispherectomy, and any associated intervention, care and treatment desirable or necessary.

IMPLICATIONS FOR YOU

The Court, in the exercise of its *parens patriae* jurisdiction, can overrule the wishes of the parents where it is in the child's best interests to do so. While the wishes of the parents may be overridden, they are nevertheless respected – as Atkinson J demonstrated in her judgment and her statements regarding the care K's parents had taken with him up to this point. Ultimately, attempts are made to balance the parental responsibilities (such as K's parents' staying with K throughout the procedure and afterwards) with medical evidence and opinions, focussing always by the best interests of the child.

Children's Health Queensland Hospital and Health Service v AT & Anor [2018] QSC 147

Emily Kelly, a graduate in our Insurance & Health team, assisted with writing this case note.

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