

'Altruistic' Children and Special Medical Procedures

The Family Court has been named as the appropriate court to decide whether children should undergo certain medical procedures. Until now, previous cases have concerned a procedure said to be for the child's benefit.

DANNY SANDOR reports on a recent application where this was not the prime reason for the proposed medical intervention.

In *Marion's Case* (1992) 175 CLR 218, which considered a proposal to sterilise a young woman with an intellectual disability, the High Court decided that parents cannot consent to certain special medical procedures being performed on children. The requirement of Court approval is not, however, limited to sterilisation procedures. Court authorisation has also been sought for the gender reassignment of a 14-year-old child (*Re A* (1993) FLC 92-402), and the performance of cardiac surgery on an 11-year-old in circumstances where the parents refused to consent (*Re Michael* (1994) FLC 92-471).

THE CASE In *GWV and CMW* (judgment delivered on 21 January 1997, not yet reported), the family faced a difficult situation. Mr. and Mrs. W are the parents of a boy 'B', nearly ten years old. Mrs W's 26-year-old sister was diagnosed in 1996 as suffering from leukemia and was not expected to live beyond mid-1997. Her chances of survival, while still uncertain, depended upon finding a suitable donor for a transplant of the blood cells which are normally found in the bone marrow.

There are two methods by which this may occur: from bone marrow, where it is collected under a general anaesthetic through needles into the hips; or alternatively, the cells can be stimulated to move into the blood stream where they can be gathered using catheters inserted into the vein, perhaps under a general anaesthetic, with the remainder of the blood reinfused.

B was found to be the only fully matched relative donor. Although a number of potential unrelated donors had been identified on

the Australian Bone Marrow Donor Registry, the chances of the recipient surviving were greater if B were the donor.

The parents sought an order authorising the performance of the necessary procedure on B, and a declaration that they are authorised to consent to the performance of the procedure on him.

Due to the special circumstances of the case, the Judge directed that the boy be a party to the proceedings. This enabled him to put instructions to the Court through his own solicitor. A Child Representative was appointed to make submissions which not just reflected his wishes, but also what was considered by the Child Representative to be in his best interests (see *Pagliarella and Pagliarella* (1993) FLC 92-400, and Harrison and Sandor 1996). The hospital and the Commonwealth Attorney-General intervened to be heard on certain legal questions.

The child's capacity for informed consent

Most special medical procedure cases have been concerned with the above mentioned proposed sterilisation of a girl with an

intellectual disability which precluded her ability to legally consent or refuse to consent to the surgery (*Marion's Case*) (see Nicholson, Harrison and Sandor 1996). Here, there was no question of disability, only the issue of whether B was competent to decide for himself whether to undergo the procedure.

The Court relied on a psychologist's evidence that B is an intelligent boy with an understanding of what is involved in the procedure but without the depth necessary for a capacity to give informed consent. Accordingly, the Court had to decide whether this was a special case outside the ordinary scope of the parents' authority to consent to the procedure. If so, it was necessary for the Judge to decide whether it was in B's best interests for the Court to authorise it.

Two unusual aspects

Two unusual aspects of the case were central to arguments about whether Court authorisation was necessary.

The proposed procedures are quite different in nature from sterilisation, the surgery which was in issue in *Marion's Case*, which is the foundation of the current law. Sterilisation is 'invasive, irreversible and major surgery', whereas the bone marrow or cell harvest, while invasive and requiring a general anaesthetic, is certainly neither irreversible nor major in the spectrum of possible interventions.

Second, unlike all previous Australian cases, the purpose of the procedure itself was not for the boy's physical benefit but for that of his aunt.

The decision

After considering these factors, the Judge decided that Court authorisation was necessary even though the procedure was less serious in its risks and consequences than sterilisation or organ donation. In doing so, he placed emphasis on the need for an external safeguard in situations where a child is undertaking an altruistic act for the benefit of a third party, and was

RESOURCE ON SPECIAL MEDICAL PROCEDURES

A new print resource on special medical procedures is now available for families and those supporting them. *A Question of Right Treatment: The Family Court and Special Medical Procedures – An Introductory Guide* is specifically tailored to the Queensland service system but also contains information of broader relevance. It is a joint venture by three key organisations involved in Queensland special medical procedures cases – the Family Court of Australia, the Legal Aid Office (Queensland), and the Department of Families Youth and Community CarZe.

The guide costs \$14 and can be obtained from Ms Denise Deane, Registry Manager, Family Court of Australia, PO Box 9991 Brisbane 4001. Phone: (07) 3248 2214.

alert to the potential for children to be placed under pressure to take part in medical procedures.

GWW and CMW should not, therefore, generate any fresh sense of legal uncertainty among health professionals about procedures for the benefit of children which are merely invasive. It seems most appropriately read as confined to circumstances where the purpose of the medical procedure is to benefit someone other than the child.

In this case, it was clear on the evidence that there was no such pressure. B had a very definite wish to be a donor. He had reached his decision despite his parents' initial attempts to dissuade him and he appreciated that it would not be his fault if the transplant was unsuccessful.

Moreover, the psychologist warned that there were likely to be negative effects on the boy if the application were refused:

'It is his desire to help his aunt which is a decision that he has reached after deep thought about the issue. He apparently is aware that the final decision is not his but that of the court, however he would be puzzled and confused at not being permitted to proceed as it would directly contradict his personal value of "helping". [The psychologist] hypothesised that the confusion and puzzlement may manifest itself in future years in a lack of respect for authority and particularly for the court system.'

The Judge also considered it was relevant to his decision that there was a relationship between B and the recipient – not a special relationship, but an ordinarily close familial one. Indeed, he expressed the view that if the child was donating to a stranger 'the court would be reluctant, if not in total opposition, to the procedure being performed'.

With these factors in mind, the Judge concluded that the psychological benefit to the boy of permitting his participation outweighed the risks and consequences of the procedure. The application was therefore granted as being in the best interests of B.

References

- Harrison, M. and Sandor, D. (1996), 'News from the Family Court' *Family Matters*, no. 44, pp. 38–41.
- Nicholson, A., Harrison, M. and Sandor, D. (1996), 'The role of the Family Court in medical procedure cases', *Australian Journal of Human Rights*, vol. 2, no. 2, pp. 242–261.

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Research Directions of the Family Court of Australia

As well as undertaking much of its own research and evaluation, the Family Court of Australia is keen to encourage other interested individuals or organisations to conduct research which will assist in the development of an appropriate body of knowledge about its operations.

JUDI ROBINSON

The Family Court has become proactive in identifying areas requiring research and in undertaking the research internally, where possible. This includes developing further opportunities for cooperative research with other interested individuals or organisations. The Management Information and Research Section of the Family Court is working to develop and promote an advance research program for the next three years. This will enable the Court to be more involved in the research area, to plan research more effectively, and to engage consultants for research when there is a lack of particular expertise within the Court.

With these goals in mind, the Court will be assessing all future research proposals in relation to the research priority areas identified below. These priorities may change over time, as they can be added to by a range of people and, in a proactive sense, research requests will also be sought at regular intervals.

Three Main Areas of Research

In general, the Family Court's own internal research and assistance provided for external research activities will be guided by the research priorities of the Court at any given time. Over the next two to three years, the Court will be concentrating on promoting research effort in three main areas – theoretical and empirical studies, research and evaluation studies aimed at improving the quality of practice, and research and evaluation to generate information for



Family Research
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This is an abridged version of a paper presented during the Institute's Fifth Australian Family Research Conference in Brisbane, in November 1996. The full, unabridged paper is available from the Institute.

internal decision making. Within these priority areas, the Court has identified a range of possible projects that need to be conducted over the next two to three years.

Theoretical and empirical studies

The first area of interest is for theoretical and empirical studies which are concerned largely with the process of clarifying and quantifying family law issues. These are aimed at increasing our understanding of the way family law impacts on separating families. Projects would include research in the following areas:

- post separation parenting arrangements from the perspective of the child;