SUPREME COURT OF QUEENSLAND

CITATION:	*Children's Health Queensland Hospital and Health Service v AT & Anor* [2018] QSC 147
PARTIES:	**CHILDREN'S HEALTH QUEENSLAND HOSPITAL AND HEALTH SERVICE** (applicant) **v** **AT** (first respondent) **ST** (second respondent)
FILE NO/S:	SC No 5611 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	14 June 2018 (*ex tempore*)
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2018 and 14 June 2018
JUDGE:	Atkinson J
ORDERS:	**1. The minor referred to in this application not be referred to by name but by the reference "K".** **2. The identity of K is suppressed such that the full name of the child, the child's family members and their occupations, the child's medical practitioners and other medical staff, and any other fact or matter that may identify the child must not be published in any way, and only anonymised Reasons for Judgment and Orders (with cover-sheets excluding the parties' real names) shall be released by the Court to non-parties without further contrary Order of the Court (it being noted that each party shall be handed one full copy of these Orders with the relevant details included, for provision to the treating medical practitioners and to enable their execution).** **3. Subject to any contrary order of the Court, the Court file must not be made available for search or review by any person who is not a party to the proceeding or a party's legal representative to the proceeding.** **4. The affidavits, exhibits, written submissions and parties' correspondence with the Court within this proceeding must be placed in a sealed envelope and may only be opened by further order of the Court**

(with the sealed envelope to be so marked).

5. **The audio recording of these proceedings on 13 and 14 June 2018 not be published or made available except to Auscript for the purpose of making a transcript, or to the Court.**

6. **Any transcript of the proceedings on 13 and 14 June 2018 be made available only to a party to the proceeding or a party's legal representative in the proceeding, or to the Court.**

7. **A declaration is made in the following terms:**

   The Children's Health Queensland Hospital and Health Service and medical practitioners and nurses acting on its behalf in providing medical and nursing services to K are authorised to perform a hemispherotomy (also known as functional hemispherectomy), being a procedure to surgically divide K's cerebral hemispheres and remove a section of the left cerebral hemisphere, and any associated intervention, care and treatment as may, in their medical judgment, be desirable or necessary according to good medical practice in preparation for the surgical procedure, during the surgical procedure and/or in the post-surgical period, including but not limited to:

   (a) pre-operative MRI;

   (b) intraoperative or post-operative blood transfusion;

   (c) the placement of a drain at the surgical site to remain in place for a period following surgery; and

   (d) the surgical placement of a ventriculo-peritoneal shunt if hydrocephalus occurs following surgery.

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATING TO CARE AND PROTECTION – POWERS RELATING TO MEDICAL TREATMENT – where the child was a ten-month-old who suffers from refractory epilepsy – where the child's condition was expected to worsen over time unless emergency surgery was performed – where the applicant applied for orders permitting a hemispherotomy to be performed on the child – where a hemispherotomy is the standard surgery for the child's condition and offers the child the best prospects for neurological development – where the respondents were the child's parents and did not consent to the procedure for religious reasons – whether the *parens*

patriae jurisdiction should be exercised to permit the procedure to be performed on the child

Supreme Court Act 1867 (Qld), s 22

Carseldine v The Director of the Department of Children's Services (1974) 133 CLR 345, cited
Children, Youth and Women's Health Services Inc v YJL (2010) 107 SASR 343, cited
In re R (A Minor) (Wardship: Consent to Treatment) [1992] Fam 11, cited
In re W (A Minor) (Medical Treatment: Court's Jurisdiction) [1993] Fam 64, cited
Marion's case (1992) 175 CLR 218, cited
R v Gyngall [1893] 2 QB 232, cited
Re Beth (No 3) [2014] VSC 121, cited
Re Natalie [2012] NSWSC 1109, cited
Re: Sadie [2015] NSWSC 140, cited
Re Suppressed [2013] QSC 334, cited
State of Queensland v B [2008] QSC 231, cited
State of Queensland v Nolan [2002] 1 Qd R 454, cited
The Hospital v T [2015] QSC 185, cited

COUNSEL: M Hickey for the applicant
J J Allen QC with C R Smith for the first respondent
C C Minnery for the second respondent

SOLICITORS: MinterEllison for the applicant
Legal Aid Queensland for the first respondent
Antigone Legal for the second respondent

Jurisdiction

[1] K is a little boy who is lying ill in the Lady Cilento Children's Hospital in Brisbane. He was born on 22 July 2017. He has the good fortune to have two parents who love him very much and who are very devoted to him and who have looked after him extremely well for the whole of his short life to date.

[2] However, for all but two months of his life, he has been in hospital. This is because he was born with cortical dysplasia in the left hemisphere of his brain. Because of this condition in his brain, he suffers from what is referred to as refractory epilepsy. That means epilepsy which is not treatable with medication. He suffers from frequent and severe seizures. Many treatments have been tried with K. They include that he has been treated with a variety of anticonvulsive drugs, some of which have serious side effects and all of which have the effect of sedating him. A trial of cannabis oil treatment was tried but eventually was abandoned when it made no difference to his condition. A ketogenic diet has been trialled to try and improve his condition.

[3] In addition, importantly, particularly for his parents, as well as the conventional Western medical treatments, there has been, throughout his time in hospital, a number of traditional remedies from his parents' home country applied to K to try to improve his condition. They are set out in great detail by the social worker who has been assisting the parents since K has been hospitalised. They include treatment with holy water, which I understand is very important within their religious tradition, prayers by a monk and traditional ceremonies in which smoke has been administered to K. In all of these, the hospital has done everything it can to try to make sure that all of the traditional remedies that the parents have sought have been able to be administered to K. No harm has been done to K through any of those treatments.

[4] But, in the end, it appears that all of them have been, essentially, ineffective. The medications have provided some but not complete relief from his symptoms, and the traditional treatments, while important spiritually, have not been able to resolve his physical problems. K continues to suffer from frequent and serious convulsions as a result of the untreatable epileptic seizures. During the time he has been in hospital, he has been required to be administered rescue medication on many occasions when his situation became very serious, and he has had numerous admissions into the paediatric intensive care unit.

[5] K has been fortunate to be under the care of highly qualified doctors. Dr M is a Consultant Paediatric Neurologist who has undertaken the care of K while he has been in hospital. Dr M has sought the advice, in particular, of Dr H, also a well-respected Consultant Paediatric Neurologist who is the director of the Children's Epilepsy Program at the Royal Children's Hospital in Melbourne. Both of them have the same opinion as to the suitable treatment for K in his present situation.

[6] In addition, they sought the advice of Dr L, who is a Staff Specialist in Paediatric Neurology and the Lead Investigator on Medical Cannabis Trials in Paediatric Epilepsy in New South Wales, particularly in relation to the trial of cannabis. Dr L put forward three alternative possibilities for the future treatment of K, all of which I will consider. In addition, K has the good fortune that there is a Consultant Paediatric Neurosurgeon, Dr W who works and operates at the Lady Cilento Children's Hospital in Brisbane, who has performed the relevant operation on a number of occasions without any adverse outcome.

[7] I have also been assisted, of course, by reading the affidavits of K's father and mother and listening to them tell their stories in Court. They are, of course, the most important people in K's life, and I welcome and appreciate that they have been supported in Court by members of their community.

[8] It is fortunate that the seizures from which K suffers are felt only on the left side of his brain. However, as time has gone on, those seizures are beginning to affect the right side of his brain, which is intact and might be referred to as the good side of his brain.

[9] Dr M and Dr H are of the firm opinion that the only way to preserve K's brain and to ensure that he has the best possible chance of a future life, is to perform an operation called a functional hemispherectomy. This is a serious operation. It involves

disconnecting the left side of his brain from the right side of his brain, the intention being to preserve intact the good side of his brain and to prevent or at least substantially reduce these constant seizures from which K suffers.

[10] Their advice is that he has already suffered from developmental delay. As an 11 month old baby, he is not yet able to do much of what might be expected of a child of that age, and it is their opinion that if this operation is not performed and performed urgently, there will be further deterioration in his brain function. K's parents have refused to consent to the operation, and that is why this matter has come to this Court. That is not because they do not love their baby – they clearly do – but because they retain hope that traditional remedies might provide what might be described as a miracle cure. This is in accordance with their sincerely held religious and cultural beliefs.

[11] However, for further traditional remedies to be attempted, that would now require a flight to their home country with the baby which, no matter how efficiently it was done, would be very arduous. There is no evidence that he could receive the expert level of expert medical care that is available to him in Brisbane, in addition to the traditional remedies, if he were to return to his parents' home country.

[12] It is on this basis that the applicant has come to the Court to ask for the Court to provide its consent, in the absence of the parents' consent, for the hemispherotomy to be performed.

[13] The Supreme Court has a *parens patriae* jurisdiction which is exercised to protect the person and property of people, especially children, who are unable to look after their own interests.[1]

[14] Lord Esher MR described the jurisdiction in these terms in *R v Gyngall*:[2]

> "The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child."

[15] However, the Court's powers when exercising the *parens patriae* jurisdiction are much broader than that of a natural parent, as explained by the High Court in *Marion's case*:[3]

> "The more contemporary descriptions of the parens patriae jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction …
>
> No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by

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1 *Supreme Court Act* 1867 (Qld) s 22; *Marion's case* (1992) 175 CLR 218 at 258-259 (Mason CJ and Dawson, Toohey and Gaudron JJ); *Carseldine v The Director of the Department of Children's Services* (1974) 133 CLR 345 at 350 (McTiernan J); *State of Queensland v Nolan* [2002] 1 Qd R 454 at 455 [7] (Chesterman J).

2 [1893] 2 QB 232 at 241.

3 (1992) 175 CLR 218 at 258-259 (Mason CJ and Dawson, Toohey and Gaudron JJ).

> parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the parens patriae jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power."

[16] In the exercise of this jurisdiction, the Court may override the wishes of a child's parents.[4] The overriding consideration for the Court is the 'best interests of the child'.[5]

[17] The *parens patriae* jurisdiction of this Court has been used in the past to permit blood transfusion to a child whose parents' religious beliefs meant that they objected to such transfusions on his behalf[6] and to permit the termination of a young girl's pregnancy.[7] Interstate, the jurisdiction has been used to authorise the confining in secure accommodation of young children for their own protection[8] and the making of non-resuscitation and non-ventilation orders.[9]

[18] The parties in this case were in agreement that the parens patriae jurisdiction was enlivened.

[19] Once satisfied that the Court has jurisdiction to consider this case, it was then appropriate to consider the options for treating K, acting only in his best interests.

[20] The first option is to do nothing. That is not really a viable option. It does appear that if nothing at all were done, if he were taken off medication and nothing was done, his condition would just get worse and worse. That would not be in his best interests.

[21] The second option is to allow him to go home with his parents and there only to be palliation. The doctors have given their opinion, which I accept, that this is not an ethically reasonable approach to take if one is guided, as this Court must be, only by what is in the best interests of this young child. If he were to go home, he would have further persistent seizures. That would have an adverse impact on his ability to grow and develop. He would need further medication with its further adverse impact on his ability to grow and develop. The serious risks that would be faced to K set out in detail in the affidavit material mean that such an option would not be in his best interests.

[22] Another option, which is the option that the parents favour, is that they take him to their home country to try the traditional remedies, in particular the holy water that is only available there. But, unfortunately, the medical evidence is that it is not medically

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4 *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 at 25 (Lord Donaldson MR); *In re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64 at 81 (Lord Donaldson MR); *State of Queensland v Nolan* [2002] 1 Qd R 454 at 456 [8] (Chesterman J).

5 *State of Queensland v Nolan* [2002] 1 Qd R 454 at 455 [7] (Chesterman J); *Children, Youth and Women's Health Services Inc v YJL* (2010) 107 SASR 343 at 347 [28] (White J).

6 *The Hospital v T* [2015] QSC 185 [25]-[26].

7 *State of Queensland v B* [2008] QSC 231; *Re Suppressed* [2013] QSC 334

8 *Re: Sadie* [2015] NSWSC 140; *Re Beth (No 3)* [2014] VSC 121.

9 *Re Natalie* [2012] NSWSC 1109.

appropriate for him to fly, and Dr M has expressed the opinion, which I accept, that he is concerned that K would not survive a flight to their home country. Furthermore, it would appear that he cannot travel without travel insurance. And, for travel insurance, he would need a medical clearance. And no ethically responsible treating doctor could give him a medical clearance to travel.

[23] Another alternative is to have a lesser operation than the one proposed. I can see why that is attractive to the parents, acting cautiously, but the medical advice is that it is not advisable for him to have that operation. It would expose K to the risks of any surgical procedure without the benefit of ridding him of seizures. Dr H has expressed the view that such an operation would be futile, and I could not give my consent to exposing K to those risks when there is no medical benefit to be obtained from the operation.

[24] The only other alternative is for K to undergo the hemispherotomy. That is supported by Dr M, Dr H, Dr W and all of the research literature that I have been taken to carefully by counsel for the applicant. It appears, from their opinion and from that literature, that without surgery K will never be able to walk; he will never be able to converse. It must, however, of course, be said that with or without the operation K will still have significant developmental delay. He was born with a problem. The problem is never going to entirely go away. But the operation, the hemispherotomy, gives him the best chance to reach his potential. As Dr H and Dr M in particular say, this operation is necessary for those purposes. There is an urgent need for this surgery to take place to prevent further deterioration in K's condition.

[25] I have thought long and hard about this, because I understand this is not the parents' preference, and he is their child, and it is they who will be bringing him up. It is they who will be with him before the operation, waiting for him while he is having the operation and be with him while he recuperates and once he is discharged from hospital. But I am satisfied that that operation is in his best interests, and I am fortified by the fact that their love for their child and their involvement in his physical, emotional and spiritual development will stay with him through the days and weeks, months and years to come.

[26] I therefore order as follows:

1. The minor referred to in this application not be referred to by name but by the reference "K".

2. The identity of K is suppressed such that the full name of the child, the child's family members and their occupations, the child's medical practitioners and other medical staff, and any other fact or matter that may identify the child must not be published in any way, and only anonymised Reasons for Judgment and Orders (with cover-sheets excluding the parties' real names) shall be released by the Court to non-parties without further contrary Order of the Court (it being noted that each party shall be handed one full copy of these Orders with the relevant details included, for provision to the treating medical practitioners and to enable their execution).

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