[2016] FCWA 75

JURISDICTION	**:**	FAMILY COURT OF WESTERN AUSTRALIA
ACT	**:**	FAMILY COURT ACT 1997
LOCATION	**:**	PERTH
CITATION	**:**	DIRECTOR CLINICAL SERVICES, CHILD & ADOLESCENT HEALTH SERVICES and KISZKO & ANOR [2016] FCWA 75
CORAM	**:**	O'BRIEN J
HEARD	**:**	25 AUGUST 2016
DELIVERED	**:**	1 SEPTEMBER 2016
FILE NO/S	**:**	PTW 1388 of 2016
BETWEEN	**:**	DIRECTOR CLINICAL SERVICES, CHILD & ADOLESCENT HEALTH SERVICES Applicant AND ANGELA JADE KISZKO First Respondent ADRIAN COLIN STRACHAN Second Respondent

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Catchwords:

CHILDREN - medical treatment - doctors at children's hospital renew application for six year old child to receive chemotherapy and radiation therapy for a brain tumour - the parents oppose curative treatment and seek that palliative care only be administered - consensus of medical opinion that chemotherapy and radiation therapy offer the only prospect of cure - by reason of delays in treatment to date, prospects of cure are remote - treatment would be accompanied by very significant side effects - conflicting expert opinions on whether curative treatment should be mandated over the parents objections - the Independent Children's Lawyer recommended that there be no order for curative treatment - there must be clear justification for a Court interfering with parental responsibility - consideration of child's best interests - palliative care ordered.

Legislation:

Family Court Act 1997 (WA)

Category: Reportable

Representation:

Counsel:

Applicant	:	Ms Conley
First Respondent	:	Mr Wong
Second Respondent	:	Mr Wong
Independent Children's Lawyer	:	Ms Cohen

Solicitors:

Applicant	:	State Solicitor's Office
First Respondent	:	WN Legal
Second Respondent	:	WN Legal
Independent Children's Lawyer	:	Legal Aid WA

Case(s) referred to in judgment(s):

B and B Family Law Reform Act 1995 (1997) FLC 92 – 755
Banks & Banks (2015) FLC 93-637
Brightwater Care Group (Inc) v Rossiter [2009] WASC 229
CDJ v VAJ (1998) 197 CLR 172
Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218
Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor [2016] FCWA 19
Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor [2016] FCWA 34
In re Marion (No 2) (1994) FLC 92-448
In re T (Wardship Medical Treatment) [1997] 1 WLR 242
Minister for Health v AS (2004) 29 WAR 517
Re Norma [1992] NZFLR 445
The NHS Trust v A (A child) [2007] EWHC 1696 (Fam)

Background

1 Oshin Kiszko is six years old. On 1 December 2015 he was diagnosed with medulloblastoma, a type of brain tumour. On 3 December 2015, with the consent of his parents, Oshin underwent surgery to remove the tumour.

2 Following the surgery, there was disagreement between the medical staff at Princess Margaret Hospital ("PMH") and Oshin's parents about ongoing treatment. In accordance with an established protocol for treatment of medulloblastoma in children of Oshin's age, the treating doctors wanted to administer radiotherapy and chemotherapy, with such treatment to commence within 28 to 36 days after the surgery.

3 Oshin's parents did not agree. Their preference was to pursue alternative therapies.

4 The commencement of conventional treatment was delayed as discussions continued between Oshin's parents and the hospital, as summarised in the judgment of Thackray CJ delivered on 20 May 2016 ("the May judgment").[1]

5 Treatment did not commence. Testing undertaken on 16 February 2016 and 17 March 2016 showed that Oshin's disease was progressing. Abnormal cells, consistent with medulloblastoma, were present in Oshin's cerebrospinal fluid. The conclusion drawn by the doctors was that a palliative approach to Oshin's care could not be supported and that the proposed conventional treatment involving both chemotherapy and radiotherapy should commence urgently. They estimated at the time that the recommended treatment would give Oshin a 50 to 60 per cent prospect of being alive in five years which, if achieved, would be regarded as a "cure", giving Oshin a good chance of a long life.

6 Oshin's parents remained firmly opposed to the recommended treatment.

The initial court proceedings

7 Proceedings were commenced in this Court by PMH's representative on 18 March 2016. Those proceedings were heard urgently by Thackray CJ, who received evidence that the tumour was "on the cusp of a massive and irreversible progression, suggesting that it is critical that [Oshin] commences treatment with curative intent urgently, and that each day which passes may make the difference between whether curative or palliative treatment is considered appropriate."

8 Over the strong objections of Oshin's parents, Thackray CJ made interim orders authorising the commencement of treatment. His reasons for doing so are contained in his judgment delivered on 24 March 2016 ("the March judgment").[2]

9 At that point, it was not practicable for the recommended radiotherapy treatment to commence because of the delay which had occurred. The practical effect of His

[1] *Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor* [2016] FCWA 34.
[2] *Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor* [2016] FCWA 19.

Honour's orders was that Oshin would commence induction chemotherapy only, with the question of whether or not radiotherapy was to proceed being adjourned. Oshin's parents were given liberty to bring the matter back to court once they had obtained the evidence they hoped to find to persuade His Honour that the proposed treatment was not in Oshin's best interests.

10 Oshin then underwent two courses of induction chemotherapy. The effects were measured by tests conducted on 12 May 2016. The results demonstrated a significant reduction in the size of cancerous nodules in Oshin's brain, but only a very minor response to the significant disease evident in the cerebellar folia. "Degenerate small cells", which could be cancer cells, were revealed in Oshin's cerebrospinal fluid.

11 The treating doctors regarded the results of the first two courses of chemotherapy as "pleasing" but concluded that the level of response was such that further chemotherapy alone would not save Oshin's life. They recommended that high-level dosage of radiotherapy in conjunction with chemotherapy be administered in order for Oshin to have a realistic chance of survival. They assessed Oshin's chances of survival with the recommended course of treatment as having reduced to around 30 to 40 per cent given the delays which had occurred. They confirmed their view that in the absence of the recommended treatment, Oshin would likely die within months.

12 Oshin's parents maintained their opposition to the recommended treatment.

The resumed court proceedings

13 The proceedings were therefore relisted before Thackray CJ at the request of the Independent Children's Lawyer ("ICL") appointed by the Court and funded by Legal Aid WA.

14 Through the ICL, a review of Oshin's case by the highly respected paediatric oncologist and neuro-oncologist Professor Kellie was undertaken. Professor Kellie provided a report, the content of which is set out in detail in the May judgment. In short, Professor Kellie's findings corresponded closely to those of the doctors at PMH and strongly supported their initial decision to reject the proposition that Oshin be given only palliative care. He agreed with the doctors at PMH that Oshin's best chance of survival was presented by a combination of chemotherapy and radiation therapy and that the administration of chemotherapy only would present reduced chances of survival.

15 Professor Kellie provided detailed evidence as to the long-term side effects of craniospinal radiation therapy. His evidence in that regard was again consistent with that of the doctors at PMH. They agreed that those side effects included a prospect of significant hearing loss, increased risk of stroke, significant risk of long-term hormone deficiencies, the risk of developing cataracts and other visual impairments including legal blindness, and inevitable depression of intellect. Dr G of PMH did not shy away from a description of the long-term side effects of radiation therapy as "horrific".

16 The opinion of the PMH doctors at that time was that treatment with chemotherapy without radiotherapy held virtually no hope for Oshin's survival.

Accordingly, they confirmed their recommendation that Oshin be treated with a combination of chemotherapy and radiation therapy. They maintained that recommendation while acknowledging the impact on Oshin's quality of life of the side effects of radiation therapy.

17 Professor Kellie held some hope that a continuation of chemotherapy might, in itself, lead to a cure for Oshin. That said, he agreed that Oshin's prospects of survival were significantly greater with a combined treatment of chemotherapy and radiation therapy.

18 At the commencement of the hearing on 16 May 2016, Oshin's parents remained adamantly opposed to both chemotherapy and radiation therapy. By the conclusion of that hearing their views had changed. They advised the Court of their desire for Oshin to receive chemotherapy treatment only. They remained opposed to radiation therapy, primarily because of the acknowledged long-term side effects of that therapy even if it was successful in securing Oshin's survival. In their view, the consideration of the difficult balance between maintenance of life and quality of life weighed against the pursuit of radiation therapy.

19 While the views of Professor Kellie and the PMH doctors as to the treatment which would afford Oshin the best prospect of survival coincided, their opinions as to the appropriate course in the face of parental opposition to that recommendation differed.

20 Professor Kellie said that it was his practice to present to parents both options, enabling consideration of treatment with a combination of chemotherapy and radiation therapy (with a higher survival chance) or the alternative of treatment with chemotherapy only (with a lower survival chance but with significantly lesser long-term side effects). He agreed with the PMH doctors that the "vast majority" of parents presented with those options would choose the higher survival chance, but said that in his experience at least a "substantial minority" of parents would opt for the chemotherapy only approach. In those circumstances, he would respect the decision of the parents.

21 In the event the parents opted for the chemotherapy only approach, he would recommend another scan after a further two courses of chemotherapy. If that scan revealed a "complete radiological response" to the chemotherapy, he would renew his recommendation that radiation therapy be administered. If the parents remained opposed to that renewed recommendation he would again respect that decision.

22 As is apparent from the application to the Court, it was in that regard that the views of Professor Kellie and the views of the doctors from PMH diverged.

23 For the reasons set out in the May judgment, Thackray CJ declined to impose radiation therapy. His Honour said at [68]:[3]

> In the absence of a consensus of qualified medical opinion, there is, in my view, no role for the State in directing the parents to act in accordance with

[3] *Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor* [2016] FCWA 34.

> one entirely valid opinion in preference to another. My view is reinforced by the fact that at least in Professor Kellie's clinical experience, although it is not the experience of the doctors at PMH, a substantial minority of parents would follow the course adopted by Oshin's parents.

24 The course to which His Honour referred was the continuation of chemotherapy. His Honour did not, as was subsequently reported, make an order for chemotherapy or otherwise impose any decision on Oshin's parents. By the conclusion of the May hearing, Oshin's parents had reached their own decision that the administration of two further courses of chemotherapy, as recommended by Professor Kellie, was in Oshin's best interests. They gave a voluntary undertaking to that effect.

Developments after the May hearing

25 Oshin's parents met with Dr V and Ms M from PMH on 23 May 2016 to discuss Oshin's further treatment in accordance with that undertaking. Dr V explained that Oshin would be given two further cycles of chemotherapy, as advised by Professor Kellie, and then reassessed. He explained that if there was a complete response or very minimal disease left at the time of reassessment, the relevant protocol required consolidation therapy with three high-dose chemotherapy cycles and stem cell rescues.

26 The Applicant gave evidence that it was apparent from that meeting that the parents had thought Oshin would be able to commence palliative care once he had finished the additional two cycles of chemotherapy. They had apparently not appreciated that the two further cycles of chemotherapy recommended by Professor Kellie were part of a longer process of treatment with curative intent.

27 Oshin commenced his third cycle of chemotherapy on 24 May 2016. The proposed, and agreed, fourth cycle of chemotherapy did not take place for good reasons associated with Oshin's low blood counts and not because of any resistance or lack of cooperation by his parents.

28 Oshin's progress was assessed by Magnetic Resonance Imaging ("MRI") on 7 July 2016. The report as to the results of that assessment noted "significant interval improvement in the leptomeningeal and nodular cerrabellar disease particularly in the posterior cranial fossa."

29 Oshin's parents met again with Dr V on 11 July 2016. Dr V explained that he was happy with the MRI results, which were consistent with his expectations for how Oshin would respond to the chemotherapy thus far.

30 Dr V raised two options for Oshin's further treatment. The first and preferred option was that Oshin proceed straight to consolidation therapy, involving three cycles of high-dose chemotherapy with stem cell rescue followed by 23.4 gray craniospinal radiation therapy. The proposed radiation dosage was lower than the 36 gray previously recommended, which was the standard postoperative dosage for children of Oshin's age with high risk medulloblastoma. Dr V was open to the lower dosage based on studies indicating that it might lead to reduced side effects in terms of Oshin's cognitive functioning, and given the strong views of Oshin's parents. The other option presented was to proceed with the previously planned fourth cycle of

induction chemotherapy, followed by three cycles of consolidation chemotherapy and 23.4 gray craniospinal radiation therapy.

31 Oshin's parents gave consent for the hospital to proceed with the assessments and investigations required prior to any further chemotherapy, while not making a decision as to Oshin's further treatment at that point.

32 By the time of a further meeting on 15 July 2016, Oshin's parents advised that they had not yet decided how to proceed. By 25 July 2016, Oshin's blood counts had recovered to a sufficient level to enable him to commence further chemotherapy.

33 Oshin's parents subsequently communicated to the hospital their decision that they did not consent to consolidation chemotherapy and/or craniospinal radiation therapy and that they wished Oshin to commence palliative care.

34 The PMH doctors maintained their view that the appropriate course was for Oshin to proceed to curative treatment in the form of consolidation chemotherapy followed by radiation therapy.

The present proceedings

35 That impasse led to the filing of the present application, in which PMH seeks the following orders:

> 1. The undertaking given by the First and Second Respondent through counsel on 20 May 2016 be discharged.
>
> 2. Welfare orders be made under section 162 of the *Family Court Act 1997* (WA) which require the child Oshin Rayne James Kiszko to receive 3 cycles of consolidation chemotherapy, stem cell rescue and craniospinal radiation therapy subject to and in accordance with those orders.
>
> 3. If the Court is not prepared to make orders in accordance with paragraph (2), then welfare orders be made under section 162 of the *Family Court Act 1997* (WA) which require the child Oshin Rayne James Kiszko to receive 3 cycles of consolidation chemotherapy, stem cell rescue and further assessment of treatment needs subject to and in accordance with those orders.
>
> 4. If the Court is not prepared to make orders in accordance with either paragraph (2) or (3), then welfare orders be made under section 162 of the *Family Court Act 1997* (WA) which require the child Oshin Rayne James Kiszko to receive palliative care subject to and in accordance with those orders.
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> 5. The First and Second Respondents each be restrained by injunction from:

(a) allowing the child Oshin Rayne James Kiszko to be interviewed, photographed or included in any form of interview given by the First or Second Respondent, or any person acting on their behalf, to any media outlet;

(b) denigrating via any media outlet, or any social networking site, any staff member at any hospital or community health care service treating the child Oshin Rayne James Kiszko, or allowing any other person to do so on their behalf; and

(c) revealing via media outlet, or any social networking site, the names of any staff member at any hospital or community health care service treating the child Oshin Rayne James Kiszko, or allowing any other person to do so on their behalf.

6. Liberty is granted to the Child & Adolescent Health Services to publish a statement to the media relating to the outcome of these proceedings.

36 Prior to the hearing, counsel for PMH helpfully provided three separate minutes of proposed orders. Those minutes set out the orders proposed by PMH on each of three scenarios:

(1) the hospital's primary proposal, that Oshin be treated with consolidation chemotherapy and craniospinal radiation therapy;

(2) the hospital's secondary proposal, that Oshin be treated with consolidation chemotherapy only and then re-assessed; and

(3) the proposal of Oshin's parents, that Oshin move to palliative care.

37 At the hearing, counsel confirmed the parameters of what I have described as the hospital's secondary proposal. It was accepted that consolidation chemotherapy without radiation therapy offered minimal prospects of a cure; the secondary proposal was put forward by PMH as an option to keep open the possibility of radiation therapy if further testing then confirmed that radiation therapy was indicated.

38 On 22 August 2016 the ICL filed a minute proposing the following orders:

1. The undertaking given by the First and Second Respondents on 16 May 2016 be discharged.

2. The First and Second Respondents to meaningfully engage with the PMH Oncology team, and any other health professionals recommended by Oshin's treating oncologist, as recommended by Oshin's treating oncologist.

3. The First and Second Respondents to ensure Oshin attends all appointments scheduled with his treating oncologist, any other

member of the PMH oncology team, or any other health professional, as recommended by Oshin's treating oncologist.

4. The First and Second Respondents to follow all of the recommendations made by Oshin's treating oncologist, any other member of the PMH Oncology team or any community based paediatric palliative care service in Perth, including but not limited to disease control and pain management.

5. Without admission as to need, the First and Second Respondent be restrained by injunction and an injunction granted restraining each of them from:

   5.1 speaking negatively about any PMH staff or any other health professional treating Oshin, to or in Oshin's presence, or allowing any other person to do so on their behalf;

   5.2 speaking negatively about any of the treatment plans recommended by Oshin's treating oncologist, or doing any acts which may reasonably be considered to undermine Oshin's relationship with PMH staff, to or in Oshin's presence, or having any other person do so on their behalf.

   5.3 from the date of these Orders, allowing Oshin to be interviewed, photographed, videoed or included in any form whatsoever, in any interviews given by the First or Second Respondent or any person acting on their behalf, to any media outlet;

   5.4 denigrating, via any media outlet, or any social networking site, any staff member at PMH or any community health care service providing support to Oshin, or allowing any other person to do so on their behalf; and

   5.5 naming or identifying via any media outlet, or any social networking site, the names of PMH hospital staff or community health care service treating Oshin, or providing any information that could reasonably identify those persons, or allowing any other person to do so on their behalf.

6. The injunctions set out in paragraph 5 remain in full effect and force even after the finalisation of these proceedings.

7. There be liberty to any party to apply to vary or discharge these orders on 24 hours written notice to the other party.

39 In their response filed on 23 August 2016, Oshin's parents sought the following orders:

1. The Court Orders, and Injunction granted on 18 March 2016 be discharged in their entirety.

2. The Application in a Case (Form 2) filed by the Applicants on 18 August 2016 be dismissed.

3. The Respondents be permitted to publish a statement which seeks to address any inconsistencies in any previous media publications.

4. That the First and Second Respondents be restrained by injunction from:

    a. Allowing the child Oshin Rayne James Kiszko to be interviewed or photographed to any media outlet save for any interview or media exposure which reflects Oshin in a positive light and is not related to the hospital;

    b. Denigrate via any media outlet, or any social networking site, any staff member at any hospital or community health care service treating the child Oshin Rayne James Kiszko or allowing any other person to do so on their behalf; and

    c. Revealing via media outlet, or any social networking site, the names of any staff member at any hospital or community health care service treating the child Oshin Rayne James Kiszko, or allowing any other person to do so on their behalf.

40 During the course of the hearing before me, and in discussions held at Court, agreement was reached in relation to a number of matters.

41 It was agreed that regardless of the future course of Oshin's treatment, there was no utility in proceeding with the proposed fourth cycle of induction chemotherapy. At the hearing in May, Oshin's parents had given a voluntary undertaking to proceed with that course of chemotherapy. It was agreed that they should be released from that undertaking.

42 Oshin's parents also agreed that orders should be made to avoid the identification and denigration of staff involved in Oshin's treatment and care. While Oshin's parents maintained that they could not be held responsible for the extraordinarily unfair criticism levelled at medical staff by other persons who would characterise themselves as Oshin's "supporters", they acknowledged that the denigration of the medical and other staff trying to assist Oshin to the best of their capacities was inappropriate and unhelpful. Importantly, they agreed that no matter what the future path for Oshin's care might be, significant efforts need to be made for his sake to improve and then maintain communication and a cooperative working relationship with the staff involved in that care.

43 In that regard, Oshin's parents also clarified their position in relation to the provision of palliative care to Oshin. They confirmed that their desire was to have that palliative care facilitated by PMH and the current medical team.

44 Without deviating from their primary position that the Court should not interfere with their decision-making responsibilities, the parents agreed that if Oshin was to proceed to palliative care in accordance with their wishes, it would be in his best interests for orders to be made to that effect, so as to set an appropriate framework for their ongoing relationship with PMH.

45 During the course of the hearing Oshin's parents also agreed that it was not in Oshin's best interests to be directly involved in any further media coverage. Both parties agreed that the other should have the opportunity to release, at the conclusion of the proceedings, a media statement.

46 Notwithstanding those various agreements, the central issue as to whether Oshin should undergo curative treatment, or move to palliative care, remained unresolved. It is that central issue I am required to decide.

The up-to-date medical evidence

47 At the time of the March hearing, the PMH doctors estimated that the recommended combination of chemotherapy and radiation therapy would, if implemented promptly and adhered to, give Oshin a 50 to 60 per cent prospect of being alive in five years, with the result that he would be regarded as having been "cured" and would have a good chance of a long life.

48 By the time of the May hearing, the PMH doctors estimated that the same recommended approach would give Oshin a 30 to 40 per cent prospect of cure.

49 A clinical report dated 16 August 2016 was prepared by Dr V. In that report, he said:

(a) Oshin had tolerated chemotherapy "reasonably well", with "expected but not serious" complications;

(b) the MRI done on 7 July 2016 showed "a good response to therapy and significant reduction in tumour volume". He noted Professor Kellie was also supportive of moving on to consolidation chemotherapy;

(c) Oshin's treatment had been complicated by non-administration of post-operative radiation therapy, and delay in the administration of chemotherapy;

(d) Oshin's chances of a cure with only the fourth induction cycle of chemotherapy were "almost zero";

(e) with consolidation therapy, and no radiation therapy, "the chance of cure may approach <10 per cent but there is very limited data to support this"; and

(f) a combination of consolidation chemotherapy and radiation therapy remained Oshin's best prospect of cure.

50 Dr V concluded his report by saying:

> With very limited evidence and considering all the delays in providing the therapy, Oshin still has a chance of cure with consolidation chemotherapy followed by radiation therapy and although his prognosis has substantially reduced, [that] therapy… is recommended. Further chemotherapy in absence of future radiation therapy is highly unlikely to be curative and will only be prolonging Oshin's life.

51 In Professor Kellie's first report, dated 5 May 2016, he estimated Oshin's chances of a cure on the recommended treatment approach at 30 to 50 per cent. In a second report dated 14 May 2016, following review of the MRI scans obtained on 12 May 2016, Professor Kellie concluded that Oshin's chances had reduced.

52 Professor Kellie expressed the view that the lower dosage radiation therapy to which Dr V was open would be an option if Oshin achieved a complete radiologic response to chemotherapy, but that where there was some response to chemotherapy but persisting MRI evidence of disease "maximal tolerated doses of craniospinal radiation would be indicated". He acknowledged the significant side effects which would likely follow.

53 In his updated report dated 16 August 2016, Professor Kellie said this:

> I agree with Dr G that without craniospinal radiotherapy Oshin's chances of survival are remote. I am of the opinion that Oshin's chances of achieving long survival with craniospinal radiation are now much lower than the estimates provided in my first report dated 5 May 2016…

54 Dr Kellie explained that what he described as the "huge gaps and delays" in Oshin's treatment allowed the tumour cells to continue growing and dividing at times when no chemotherapy was present, "greatly compromising" the effectiveness of the treatment. While he still recommended that consolidation chemotherapy and radiation therapy provided the only realistic curative option for Oshin, he said that he would be "very cautious about prognosis".

55 Tellingly, Dr Kellie said this:

> For these reasons, whatever the Court accepts was Oshin's prognosis for cure around the time he started chemotherapy in March 2016, his prognosis is substantially less now, even if his parents were fully compliant with treatment recommendations and further therapy (the three high-dose courses with stem cell re-infusions +\- craniospinal radiation) were given without any delays.

56 Professor Kellie expressed the view that the chances of cure were remote, due to the delays in treatment following Oshin's surgery in December.

57 He went on to say that "the delays in delivering effective chemotherapy have been unreasonable, avoidable and have weakened or even negated any benefit that may have been achieved."

58 In the written submissions filed on their behalf for the purposes of the hearing, Oshin's parents acknowledged the accuracy of that statement. Their counsel conceded that PMH was not responsible for the delay in treatment; implicit in that concession was an acknowledgement that the delays in treatment occurred because of decisions taken by the parents.

59 While of course the dreadful nature of Oshin's illness is such that, from the moment of his diagnosis, no predictions could be made with any level of certainty, the accumulated medical evidence over the course of the proceedings supports the following findings:

(1) at the time of his diagnosis and surgery, Oshin had reasonable prospects of a long-term cure had the recommended course of chemotherapy and radiation treatment been administered promptly and consistently;

(2) there was nevertheless at all times a grave risk that even the recommended course of treatment would not be successful in achieving a cure;

(3) even if a cure was achieved, it would almost certainly be at the cost of very significant long-term side-effects affecting Oshin's quality of life;

(4) what Professor Kellie described as the unreasonable and avoidable delays in delivering effective chemotherapy greatly reduced Oshin's prospects of a long-term cure, with that reduction being apparent no later than March 2016;

(5) the effect of those delays continues to reduce Oshin's prospects of a long-term cure;

(6) Oshin's prospects of a long-term cure are now very low, even if the recommended course of curative treatment is now strictly followed; and

(7) Oshin has little or no prospect of survival if the recommended course of curative treatment is not now commenced and strictly followed.

The hospital

60 The PMH doctors remain firmly of the view that, notwithstanding the reduced prospects of a cure, Oshin should proceed urgently to curative treatment in the form of consolidation chemotherapy and radiation therapy.

61 They note that subject to their differing views as to the appropriate radiation dosage, Professor Kellie agrees with the proposed course of treatment. Importantly, he agrees that the proposed course of treatment represents Oshin's only hope, however remote, of a cure.

62 They point out that clinicians at PMH have never stopped curative treatment and embarked on palliative care when a child is responding positively to chemotherapy. They express concern that if they stop treating Oshin with curative intent that will set a dangerous precedent, whereby parents may insist on palliative care when their child is responding to conventional treatment.

Oshin's parents

63 Oshin's parents remain implacably opposed to the pursuit of curative treatment. They believe that a move to palliative care is in Oshin's best interests.

64 On Oshin's behalf, his parents fear the significant long-term side effects, pain and suffering associated with craniospinal radiation therapy. They are distressed by Oshin's fear of even his current treatment and by the changes in his behaviour which they perceive to have been caused by his distress.

65 Oshin's parents believe that the quality of Oshin's life should be prioritised over the duration of his life. They do not want him to spend the time he has left enduring curative treatment processes which have very low prospects of success. Even if the curative treatment processes were to be successful, they regard the long-term side effects of radiation therapy in particular as being too high a price to pay for longevity.

66 They hold deeply to the belief that Oshin has a right to die with dignity and in peace.

67 Both the ongoing dispute with the hospital and the legal process have taken a huge toll on Oshin's parents. That, coupled with the time, intense focus, and physical and emotional energy which they have invested in the dispute, has clearly impacted on their capacity to care for Oshin at the time when he most needs them, to Oshin's detriment.

68 In the May judgment, Thackray CJ took into account the conduct of Oshin's parents and their passionate and highly public objection to Oshin undergoing radiation therapy. He expressed concern about their ability to control their emotions around the topic of treatment in the presence of Oshin. He was fearful that if further treatment was ordered Oshin would again be exposed to his parents hostility and bitterness, potentially causing him even more psychological trauma.

69 By way of one striking example, at the most recent hearing the Court was told of an incident where Oshin was distressed in hospital and his mother was asked by nursing staff to intervene and comfort him. She declined to do so, saying that she did not want Oshin to believe that she condoned what was happening to him. Instead, she took a video recording of Oshin's distress.

The law

70 Section 162 of the *Family Court Act 1997* (WA) ("the Act") provides as follows:

> 162(1) 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.
>
> 162(2) in deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child is the paramount consideration.

71 The relevant law was extensively and eloquently canvassed by Thackray CJ in the May judgment. Helpfully, at the hearing before me all counsel agreed that His Honour's explanation and interpretation of the relevant law was accurate. I respectfully adopt His Honour's analysis.

72 The essential components of the relevant legal principles may be summarised as follows:

> (1) While s 66C of the Act prescribes a checklist of factors the Court is obliged to consider when determining what is in a child's "best interests", most of those factors have no application in a case such as this. The issues that are joined dictate which of the s 66C factors are relevant.[4] The legislation recognises the almost infinite variety of factual situations in which the Court might be asked to determine what is in a child's best interests by the inclusion of subsection 66C(3)(m) which requires the Court to consider "any other fact or circumstance that the court thinks is relevant".
>
> (2) In cases such as the present, more assistance is potentially to be gained from decisions made when a court is asked to authorise what are known as "special medical procedures", and from other cases where a court is asked to exercise its powers when faced with an application to override what would otherwise be the decision-making authority of the parents of a child.[5]
>
> (3) When faced with such an application, the Court must exercise its own independent and objective judgment, balancing all the conflicting considerations in the particular case to assess what is in the best interests of the individual child in his or her individual circumstances.
>
> (4) Considerable weight must be attached to the prolongation of life, but it is not absolute, nor necessarily decisive. Consideration must also be given to quality of life.[6]
>
> (5) It is not for the judge to consider what decision he or she would make in the same circumstances for his or her child, based on a personal world view and moral compass. Rather, the Court's

[4] *Banks & Banks* (2015) FLC 93-637.
[5] *In re Marion (No 2)* (1994) FLC 92-448 at 80,664.
[6] *The NHS Trust v A (A child)* [2007] EWHC 1696 (Fam) at [40].

decision must be informed by an independent and dispassionate view of all the circumstances.[7]

(6) That said, the multitude of elements which together comprise the best interests of a child are wide ranging and multi faceted, and susceptible to a legitimate diversity of views. Best interests are values, not facts.[8]

(7) The State, through the Court, should not interfere in the exercise of parental responsibility unless there is some clear justification for doing so. The power to countermand the exercise of parental responsibility is to be exercised sparingly, and with great caution.[9] In considering whether to exercise that power, it is relevant for the Court to consider whether the approach adopted by the parents is completely at odds with the approach which would be adopted by other parents faced with similar circumstances, or whether there is scope for genuine debate between one view and another.[10]

(8) The Court's decision cannot be made in a vacuum. While the child whose best interests are being considered must be respected as a unique individual, each child lives as a member of his own family, and his welfare and best interests are inextricably interwoven with that family. The interests of the child's family, to the extent that they inevitably bear on the welfare of the child, must accordingly form part of the matrix of elements to be considered in determining the child's best interests.[11]

73 In my view, the ethical and moral nature of the dilemma means that the Court may legitimately be informed in its deliberations not only by the clinical opinions of medical experts, but by their opinions as to the ethical issues. Those opinions are born of specialist expertise, and experience in the value judgments inherent in the treatment of life-threatening illness. By having regard to the views born of that expertise and experience the Court does not abrogate its decision-making responsibility; rather, it better informs the independent exercise of its discretion.

74 Above all, every case is different. The appropriate decision will depend entirely on the facts of the individual case. As Brennan J said in *Marion's Case*:[12]

> The questions raised … starkly demonstrated the quandry of the law when it is invoked to settle an issue which is a subject of ethical controversy and there are no applicable or analagous cases of binding authority.

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[7] *Director Clinical Services, Child and Adolescent Health Services and Kiszko & Anor* [2016] FCWA 34 at [66].
[8] *CDJ v VAJ* (1998) 197 CLR 172 at [152].
[9] *Minister for Health v AS* (2004) 29 WAR 517 at [23].
[10] *In re T (Wardship Medical Treatment)* [1997] 1 WLR 242 at [254].
[11] *Re Norma* [1992] NZFLR 445 at 451.
[12] *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 264.

75 Against that background, two competing legal propositions were raised during the hearing.

76 Counsel for PMH contended that a decision to proceed to palliative care in the face of consensus medical advice that curative treatment remained open, and was recommended, may be outside the scope of parental responsibility, as that concept was considered in *Marion's Case*. Accordingly, counsel contended that the Court's discretion in determining what is in Oshin's best interests as required by s 162 of the Act is not at all constrained by any presumption in favour of, or deference to, the decisions made by Oshin's parents in the purported exercise of that parental responsibility.

77 In *Marion's Case*, the High Court considered the scope of parental responsibility and decision-making authority in the context of determining whether Court authorisation was required for the surgical sterilisation of a teenager who was severely intellectually disabled. The majority determined that Court authorisation was required, notwithstanding the usual scope of parental responsibility and decision-making authority, observing at 250:

> Court authorisation is required, first, because of the significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what are the best interests of a child who cannot consent, and secondly, because the consequences of a wrong decision are particularly grave.

78 Counsel for PMH submitted that in Oshin's case there is a significant risk of his parents making the wrong decision as to what is in his best interests, and that self-evidently in this case the consequences of a wrong decision are particularly grave. Accordingly, she submitted that the decision to pursue palliative care in the face of contrary medical opinion may be outside the scope of parental responsibility.

79 The difficulty with that proposition in the present case is this; it was not contended on behalf of PMH that a decision to decline curative treatment options in favour of palliative care is always or by its very nature outside the scope of parental responsibility. Rather, the contention was that such a decision will fall outside the scope of parental responsibility if made in the face of expert medical opinion that curative treatment options are appropriately pursued.

80 When pressed by me, counsel for PMH was unable to articulate where the line might be drawn to define the point at which curative treatment options are estimated to have a sufficient prospect of success to take a choice for palliative care outside the scope of parental responsibility and decision-making authority. She could only observe that it would depend on the circumstances of the individual case.

81 An assessment by the Court of the level of risk of making the wrong decision will be appropriately influenced by the available expert medical opinion. That said, the question of whether a decision to opt for palliative care is "wrong" is not, as already observed, a purely medical question.

82 Even if the circumstances take a particular decision outside the scope of parental responsibility and decision-making power, the result is to shift that decision-making responsibility and power to the Court. The exercise by the Court of that decision-making responsibility and power is then informed not only by the medical evidence, but by all the other factors which influence a determination of what course of action is in the best interests of the individual child. Necessarily, that will include giving significant weight to the parental role. That is so, as regardless of the exercise of parental responsibility per se the child's welfare and best interests are inextricably entwined with his role as a member of his family in any event.

83 Counsel for Oshin's parents contended that, in circumstances where medical evidence establishes room for reasonable disagreement as to the appropriate course of action, such that the decision preferred by the parents cannot be characterised as indefensible or unsupported by medical opinion, there is no role for the State to play in interfering in the exercise of parental responsibility. He contended that the State should only intervene in circumstances where intervention is clearly required for the protection of the child, and where the child's parents are either incapable of making the necessary decisions in the exercise of their parental responsibility, or the decisions they propose to make are objectively indefensible.

84 Even if the contention of counsel for the parents is correct, nevertheless the application of what might be described as a presumption in favour of the decision-making authority of the parents cannot in any sense preclude the exercise by the Court of its own discretion; rather, in exercising an unfettered decision, the Court must exercise caution in countermanding parental decisions, and do so sparingly.

85 While the question was not addressed by either counsel, the result of the analysis contended for by counsel for PMH would be that in a case such as this the onus would fall on the parents to approach the Court for authorisation of palliative care. The result of the analysis contended for by counsel for the parents would be that the onus would fall on those disputing the proposed decision of the parents to approach the Court to intervene, and countermand what would otherwise be a parental decision.

86 It is not necessary for the purposes of the present case to determine which contention is to be preferred. On either approach, the resolution of the impasse requires the Court to reach its own determination as to what is in the best interests of Oshin.

87 It must also be borne in mind that the present case falls to be determined entirely on its own facts; for reasons which follow, my decision would be the same on either suggested approach.

The court's decision

88 In submissions on behalf of the hospital, I was referred to a Supreme Court decision[13], in which the Chief Justice considered the case of an adult and mentally competent quadriplegic who sought to direct his medical service providers to

[13] *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229.

discontinue the provision of nutrition and hydration to him. In his decision, Martin CJ considered it important to emphasise what that case was not about.

89 In light of the public interest in, and scrutiny of, these proceedings I consider it important to do the same. That is particularly so given the suggestion in some reports that the outcome in this case will in some way set a precedent for decisions to be made about the provision of curative or palliative treatment to other children. In my view, it will not.

90 This case is not about parental rights, nor is it about the perceived power of the medical profession. It is not about whether, in a general sense, quality of life is more important than duration of life, nor is it about the relative merits of traditional medicine and alternative or complementary therapies. It is not about overarching considerations as to the right to life, or the right to a peaceful death, nor is it about a philosophical consideration of the best interests of children generally.

91 This case is solely about Oshin Kiszko, and how to determine what is in his best interests as a unique individual child in the specific circumstances which he now faces.

92 The best interests approach "offers no hierarchy of values which might guide the exercise of a discretionary power… much less any general legal principle which might direct the difficult decisions to be made".[14] The Court's task is to recognise that the facts in individual cases "may vary almost infinitely, that the enquiry is a positive one tailored to the best interests of the particular child and not children in general, and that [it] is required to take into account all factors which it perceives to be of importance in determining that issue."[15]

93 In determining whether or not it is in Oshin's best interests for the Court to mandate that he receive consolidation chemotherapy and radiation therapy, I have taken into account all the matters raised in the evidence and submissions before the Court.

94 I have taken into account both the medical evidence as to Oshin's chances of a cure, and the side effects of the only course of treatment affording him any such chance. I am acutely aware of the fact that both the PMH staff and Professor Kellie recommend the same course of curative treatment, and of the weight that must be given to the prolongation of life. I note that neither PMH nor Professor Kellie have ever ceased treatment of a child who was responding positively to treatment. Implicit in that, of course, is that there was, in each case, parental consent to the continuation of such treatment.

95 I have taken into account the clear deterioration in Oshin's prospects of a cure over the last several months as a result of the delay in treatment. I have not taken into account any fault that might be attributed for that deterioration as my task is to consider Oshin's best interests in the circumstances which he now faces, regardless of how those circumstances arose.

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[14] *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 270.

[15] *B and B: Family Law Reform Act 1995* (1997) FLC 92 – 755 at [9.53].

96 While the task of determining what is in Oshin's best interests falls to the Court, and requires the exercise by me alone of an independent and objective discretion, I am able to inform the exercise of that discretion by reference to the careful and expert considerations of others where those considerations are in evidence.

97 I note in that regard that as early as January 2016 there was a lack of unanimity in the ethics committee of PMH, with at least some members of the committee taking the view that a palliative approach was ethically supportable. I note also that Professor Kellie said in his most recent report:

> Under these circumstances, in a family actively refusing therapy, my opinion is that with proper counselling (as appears to have already been done) ongoing refusal of active treatment with chemotherapy or radiation therapy should be respected because the "therapeutic ratio" – the balance of benefit and harms associated with treatment – is in my opinion heavily weighted in the direction of significant harm if Oshin survives, but offers only a small chance of saving his life.

98 I have taken into account the clear and deeply held views of Oshin's parents as to what is best for him. Oshin's parents know him better than anyone, and have a unique relationship with him. Prior to these proceedings, they have been solely responsible for all important decisions made on his behalf since his birth. Notwithstanding the criticism that can properly be made of some aspects of their conduct in recent months and the decisions they have made, their views as to what is in Oshin's best interests must be given considerable weight, and accorded respect.

99 The importance to Oshin of his relationship with his parents weighs heavily in my decision. That relationship, and the support and love which only his parents can give, are of critical importance to Oshin and to his quality of life over the months to come. I am deeply concerned that any perpetuation of the conflict over Oshin's treatment will continue to diminish the ability of his parents to focus their energies solely on the provision of that support and love directly to him when he needs it most.

100 Taking into account all the medical and other evidence, I conclude that it is in Oshin's best interests to move to palliative care.

101 The determination of best interests is not a precise science. It is multifaceted and complex. It is susceptible to very different conclusions being drawn by different people of equal compassion, sincerity and integrity. While the conclusion I have reached accords with the beliefs and views of Oshin's parents, that is not to demean the beliefs and views of those who disagree, nor the integrity and motives of the doctors involved. There can be no question that they have been motivated at all times by their sincere beliefs as to what is best for Oshin, and by their commitment to fulfil what they regard as being their obligations to him. They have maintained that commitment in the most difficult of circumstances, and in the face of entirely unfair criticism.

Proposed orders

102 Subject to any submissions from counsel, I propose to make the following orders:

1. The First Respondent, Angela Jade Kiszko, and the Second Respondent, Adrian Colin Strachan, are to meaningfully engage with the Oncology team at Princess Margaret Hospital ("PMH"), and any other health professionals as recommended by the treating oncologist for the child, Oshin Rayne James Kiszko born 1 April 2010 ("Oshin").

2. Oshin is to undergo the following treatment:

   (a) palliative care;

   (b) all medical tests, scans and taking of samples which are ancillary to the administration of palliative care;

   (c) the carrying out of all necessary ancillary medical procedures to the administration of palliative care;

   (d) the administration of anaesthetic as required in the administration of palliative care;

   (e) the administration of blood products and\or platelets as required in the administration of palliative care;

   (f) the administration of medications deemed medically necessary for the administration of palliative care, including but not limited to medications for pain relief; and

   (g) all supportive care including, but not limited to, neuropsychology, physiotherapy and occupational therapy.

3. That the clinical staff at PMH are permitted to provide the treatment referred to in paragraph 2 of these orders.

4. The First Respondent and the Second Respondent are to take all reasonable steps to ensure that Oshin attends all appointments scheduled with his treating oncologist, any other member of the PMH oncology team, or any other health professional, as recommended by Oshin's treating oncologist.

5. The First Respondent and the Second Respondent are to follow all of the recommendations, save for intravenous chemotherapy or radiation therapy, made by Oshin's treating oncologist any other member of the PMH oncology team or any community-based paediatric palliative care service in Perth, including but not limited to disease control and pain management.

6. Without admission as to need, the First Respondent and the Second Respondent be restrained and an injunction is hereby granted restraining each of them from:

   (a) speaking negatively about any PMH staff or any other health professional treating Oshin, to or in Oshin's presence, or allowing any other person to do so;

   (b) speaking negatively about any of the treatment plans recommended by Oshin's treating oncologist, or doing any acts which may reasonably be considered to undermine Oshin's relationship with PMH staff, to or in Oshin's presence or allowing any other person to do so;

   (c) from the date of these orders, allowing Oshin to be interviewed, photographed, videoed or included in any form whatsoever, in any interviews given by the first or second respondent or any person acting on their behalf to any media outlet;

   (d) denigrating via any media outlet or any social networking site any staff member at PMH or any community health care service providing support to Oshin, or allowing any other person to do so on their behalf; and

   (e) naming or identifying via any media outlet, or any social networking site, the names of PMH hospital staff or community health care services treating Oshin, or providing any information that could reasonably identify those persons, or allowing any other person to do so on their behalf.

7. The injunctions contained in paragraph 6 of these orders remain in full force and effect even after the finalisation of these proceedings.

8. Liberty is granted to the Clinical Services Child and Adolescent Health Services to publish a statement to the media relating to the outcome of these proceedings, and addressing any inconsistencies in any previous media publications.

9. Liberty is granted to the First Respondent and the Second Respondent to publish a statement to the media relating to the outcome of these proceedings, and addressing any inconsistencies in any previous media publications.

10. All media be permitted to publish a fair and accurate account of these proceedings, subject to the following conditions:

    (a) the report shall not reveal the names of staff at any hospital where Oshin is being treated;

(b) no footage or photography is to be shown of Oshin or his family at or in the vicinity of any hospital at which Oshin is attending from time to time; and

(c) Oshin is not to be interviewed.

11. There be liberty to any party to apply to vary or discharge these orders on 24 hours written notice to the other parties.

12. Each party bear their own costs of the proceedings to date.

I certify that the preceding [102] paragraphs are a true copy of the reasons for judgment delivered by this Honourable Court

Associate
01/09/2016