**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 108**

**P1097/24**

OPINION OF LADY CARMICHAEL

In the petition by

A HEALTH BOARD IN RESPECT OF KL

Petitioner

**Petitioner: Jardine; NHS Central Legal Office**
**Curator ad litem: Innes KC, in person**

3 December 2024

[1] This is an application by petition to the *parens patriae* jurisdiction of this court for authority to give surgical treatment to KL, who was born in December 2023. The petitioner is the health board which operates the hospital in which it is proposed the operation should be carried out.

[2] The law and procedure relating to applications of this sort is set out in the decision of a Full Bench in *Law Hospitals NHS Trust* v *Lord Advocate* 1996 SC 301.

**Background**

[3] KL was born prematurely in a hospital which is operated by a health board other than the petitioner ("health board B"). He stayed in hospital until March 2024. His mother died before he was discharged from hospital. His parents were not married. His maternal aunt registered his birth. KL's father is not registered as his father. KL was discharged into

the care of his maternal aunt with whom he has lived since then. He has contact with his father. Neither his aunt nor his father has acquired parental responsibilities and rights in relation to KL. There is at present no-one who has parental responsibilities and rights in relation to him.

[4] KL has a patent ductus arteriosus ("PDA"). That is a blood vessel connecting the arterial and pulmonary arteries. It is a structure that usually closes in healthy children who are born at term. It is more likely to remain open when a baby is born prematurely. It causes blood flow to be directed away from KL's body circulation, and into his lungs instead. As result of the PDA, KL has poor weight gain, has to work harder to breathe and has to take diuretics. He has to work harder to breathe because of the excess blood flow to his lungs, and his growth is poor because of the extra energy he has to expend in order to breathe.

[5] The petitioner provided two medical reports. One was from a consultant in paediatric cardiology, and the other from a consultant paediatric cardiac surgeon. They agreed that surgical closure of the PDA under general anaesthetic was the only appropriate treatment for KL. At his age, medical management will not close the PDA. There is a less invasive treatment known as interventional device closure. That involves passing catheters through a vein in the groin to the heart and major arteries to place a device in the PDA to obstruct the blood flow. KL's PDA is too large, so that a device could not be deployed without a significant risk of embolisation.

[6] The risks of not treating the PDA in the short term include poor weight gain and in the longer term irreversible pulmonary hypertension and heart failure. They include viral pulmonary infection leading to ITU admission and ventilation. The proposed surgery has a rate of success without complications of 99% per cent. The risks include bleeding, wound

infection, and risk to life. The risk to life is less than 0.5%. Although the risks do not eventuate in the vast majority of cases, they are serious risks.

[7] The petition was served on KL's aunt and father, on the Lord Advocate, and on the local authority for the area where KL lives ("the local authority"). It is also the local authority for the place where KL was born. No answers were lodged.

[8] When granting first orders I appointed Mrs Ruth Innes KC as curator ad litem to KL. She carried out investigations and supported the proposition that it would be in KL's best interests for the operation to be carried out. Her investigations disclosed that both KL's aunt and his father supported his having the surgery. They disclosed also some matters of concern – not directly related to the surgery – to which I turn in more detail below.

[9] An operation had been planned for early November 2024 but had been cancelled when medical staff discovered that no-one had parental responsibilities and rights in relation to KL. I was told that there was significant doubt as to whether the provisions of section 5 of the Children (Scotland) Act 1995 were intended to confer the right to consent to planned, elective surgical treatment on a person, such as KL's aunt, who has care and control of him, and therefore the responsibility to do what is reasonable in all the circumstances to safeguard his health, development and welfare. That section has not, apparently, been the subject of judicial interpretation. It is more obviously apt to cover situations in which a person with care and control of a child is faced with an emergency requiring surgical, medical or dental treatment to which the child cannot consent.

[10] The consultant paediatric cardiologist who provided a report advised on 19 November 2024 that, ideally, the surgery should be performed in the following two weeks. A procedure had been programmed for the day after the hearing in this petition.

**Decision**

[11] There is no dispute that the proposed surgery is in KL's best interests. I am satisfied on the basis of the information provided to me, which includes the uncontradicted opinions of two consultant clinicians, that it is in his best interests. In light of the urgency of the situation I am satisfied that it is appropriate to exercise the jurisdiction of this court to grant authority for the procedure described in the prayer of the petition.

**Matters arising from the curator ad litem's report**

[12] The curator ad litem's investigations disclosed the following matters, which on the face of things give rise to concern. They relate to what appears to be a lack of social work involvement in ascertaining KL's circumstances and what support may be appropriate for his aunt and his father. They do not relate to the care he is receiving from his aunt.

[13] It is not clear what involvement, if any, there was with the local authority at the time that KL was discharged by health board B into the care of his aunt. KL's aunt recalls being contacted by a social worker, but only at the point when KL's mother became acutely ill in January 2024. KL's aunt told the curator ad litem that no-one had spoken to her about making sure that the legal position for KL was secured. KL's health visitor had provided some advice in relation to social security benefits.

[14] KL's neonatal discharge summary includes an entry under the heading "Social issues" recording that he had an identified, named social worker. The same entry records that the neonatal outreach team had been coordinating discharge under the care of KL's aunt, and that KL would need support and close supervision in the community. From the account given by KL's aunt, it does not appear that the named social worker has had any ongoing involvement with the family. The discharge summary describes KL's aunt as his

"legal guardian", which may have given rise to confusion. She is not his guardian by virtue of an appointment mentioned in section 7 of the Children (Scotland) Act 1995.

[15] The curator ad litem spoke with a senior manager in the litigation team of the local authority. That manager confirmed that the treating hospital had called the social work department to check if anyone had parental responsibilities and rights. That is consistent with a note by an anaesthetist in KL's medical records from early November 2024. The social work department confirmed to the clinician that KL's aunt did not have parental responsibilities and rights.

[16] The social worker who took the call "passed on to the health visitor who was engaged with the family that the aunt should take legal advice and apply for parental responsibilities and rights if she wished to do so". It appeared that the local authority was not aware that KL's mother had died. Having reflected on matters the manager confirmed to the curator ad litem that it was the responsibility of the local authority to review the case and to offer any support or carry out any assessments considered necessary. She told the curator ad litem that she would take matters forward with the head of the Children and Families Service.

[17] It is surprising that there appears to have been no social work involvement at or following KL's discharge. At the very latest, however, an acute issue arising from the fact that no-one has parental responsibilities and rights for KL was highlighted in early November when his operation had to be cancelled. The local authority was made aware of the issue by an inquiry from the treating hospital. It is again surprising that this did not prompt direct communication with KL's aunt.

[18] The lack of communication with KL's aunt during the period after the cancelled operation raises issues not just in relation to the local authority, but also in relation to the

petitioner. KL's aunt told the curator ad litem – and the petitioner did not dispute this – that after the cancelled operation she had heard nothing more until the petition was served on her. That is plainly unsatisfactory. There is, first, the obvious practical concern that she should have been placed in a position that allowed her to plan for the operation. Second, it is not clear why no-one communicated with her with a focus on the need to obtain parental rights and responsibilities so that she could provide consent in KL's interest. Although time was relatively short it is not obvious that an order could not have been sought urgently in KL's local sheriff court.

[19] Health board B are not involved in these proceedings. The local authority received service of the petition, but did not enter the proceedings. Neither has had an opportunity to respond in relation to any of the matters mentioned above, other than insofar as a manager in the local authority has spoken with the curator ad litem. I intend to request that the Clerk of Court send this opinion to the institutions concerned.