RE LUCY (GENDER DYSPHORIA) - [2013] FamCA 518

FAMILY COURT OF AUSTRALIA

RE LUCY (GENDER DYSPHORIA) [2013] FamCA 518

FAMILY LAW – CHILDREN – where the child is the subject of a long-term guardianship order in favour of the Chief Executive of the Department of Communities, Child Safety and Disability Services ("the Department") – where the child has no parents – where the child has been diagnosed with Gender Dysphoria – where an authorised representative of the Department seeks an order pursuant to s 67ZC authorising him to consent to "Stage 1 Treatment" on behalf of the child – consideration of *MIMIA v B* (2004) 219 CLR 365 – consideration of the application of s 67ZC to ex-nuptial children – consideration of the limitations in s 69ZH – whether there is a "matter" to which the jurisdiction in s 67ZC can "attach" – whether the rights, duties and responsibilities comprising "guardianship" include or are included in the "matter" of "parental responsibility" in Part VII – where in light of the terms of reference pursuant to s 51(xxxvii) of the Constitution from each of the referring States, the "bundle of rights" comprising "guardianship" must be included in or itself includes "parental responsibility" – where s 69ZH only applies to States which have not referred power to legislate in respect of ex-nuptial children – where Queensland has referred power in respect of ex-nuptial children – where there is a "matter" to which the jurisdiction in s 67ZC can "attach" in the present case – whether the proposed treatment requires authorisation from the Court – consideration of *Marion's Case* – where the proposed treatment is "proportionate" to and "appropriate" for the treatment of a "psychiatric disorder" – where authorisation is not required for Stage 1 Treatment in this case – whether, in any event, the order should be made – whether the treatment is in the child's best interests – where the child has maintained an unwavering view that she is a male since she was a young child – where the child dresses as a male and identifies as a male at school – where at least three experts have diagnosed the child with Gender Dysphoria – where the proposed treatment is reversible and provides a hiatus until the child is "Gillick competent" or becomes an adult – declaration made that the applicant can consent to the proposed treatment.

Acts Interpretation Act 1901 (Cth)
Child Protection Act 1999 (Qld)
Commonwealth Powers (Family Law – Children) Act 1986 (NSW)
Commonwealth Powers (Family Law – Children) Act 1990 (Qld)
Commonwealth Powers (Family Law) Act 1986 (SA)
Commonwealth Powers (Family Law) Act 1986 (Tas)
Commonwealth Powers (Family Law – Children) Act 1986 (Vic)
Commonwealth of Australia Constitution Act 1900 (Cth)
Family Law Act 1975 (Cth)

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Family Law Rules 2004 (Cth)

Explanatory Memorandum, Family Law Amendment Bill 1987 (Cth)

Explanatory Memorandum, Family Law Reform Bill 1994 (Cth)

Fountain v Alexander (1982) 150 CLR 615
Gillick v Norfolk Area Health Authority [1986] AC 112
Harris v Caladine (1991) 172 CLR 84
In re Jane (1989) FLC 92-007
Minister for Immigration and Multicultural and Indigenous Affairs v B and Anor (2004) 219 CLR 365
Re Alex: Hormonal treatment for gender identity dysphoria (2004) FLC 93-175
Re: Alex (2009) 42 Fam LR 645
Re: Sean and Russell (Special Medical Procedures) (2010) 44 Fam LR 210
Secretary, Department of Health and Community Services v JWB and SMB ("Marion's Case") (19 92) 175 CLR 218
Trevorrow v South Australia (No 5) (2007) 98 SASR 136

APPLICANT: Director-General, Department of Communities, Child Safety and Disability Services

FILE NUMBER: By Court Order File Number is suppressed

DATE DELIVERED: 12 July

2013

PLACE DELIVERED: Sydney

PLACE HEARD: Brisbane

JUDGMENT OF: Justice Murphy

HEARING DATE: 4 July 2013

REPRESENTATION

By Court Order the names of counsel and solicitors have been suppressed

Orders

IT IS DECLARED THAT

1. The treatment recommended to be administered to the child Lucy ("the child") born ... 2000 in respect of the child's Gender Dysphoria, namely the administration of luteinising hormone releasing hormone analogue therapy for the purpose of suppression of oestrogen and progesterone ("Stage 1 Treatment") is not treatment of a type for which the Court is required to give authorisation pursuant to s 67ZC of the *Family Law Act 1975* (Cth) .

2. So as to avoid doubt, the Director-General, Department of Communities, Child Safety and Disability Services; her delegate Mr S ...; or, such other person as may be delegated by her in writing, can consent to the "Stage 1 Treatment" on behalf of the child pursuant to the said Director-General's powers, rights and responsibilities which would otherwise be vested in the child's parents and which are conferred on her pursuant to s 13 *Child Protection Act 1999* (Qld) upon

recommendation from, and under the guidance of, the child's treating medical practitioners including, but not limited to, the child's endocrinologist, Dr C, and the child's psychiatrists, Dr T and Dr B, until such time as the child shall have reached such sufficient age and maturity such that the child is competent to authorise and consent to that treatment.

IT IS FURTHER ORDERED THAT

3. So as to protect the child:

a. The full name of the child, his foster family members, his solicitor, his medical practitioners, this Court's file number, and any other fact or matter that may identify the child shall not be published in any way;

b. Only anonymised Reasons for Judgment and Orders (with coversheets excluding the registry, file number, and lawyers' names and details, as well as the child's real name) shall be released by the Court to non-parties without further contrary order of a judge;

c. No person shall be permitted to search the Court file in this matter without first obtaining the leave of a judge.

4. To the extent that the exception provided for in Section 121(9)(g) of the *Family Law Act 1975* (Cth) or the other provisions of that subsection do not otherwise authorise same, the applicant and/or the child's lawyer shall have leave to publish to the child's treating medical practitioners a version of these Reasons which does not encompass the restrictions set out in paragraph 3.

NOTATION :
This Order has been amended on 23 July 2013 pursuant to Rule 17.02 of the Family Law Rules 2004 by deleting in paragraph 3(a) the words "the State of Australia in which the proceedings were initiated".

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Re: Lucy (Gender Dysphoria)* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth) .

FAMILY COURT OF AUSTRALIA AT
BRISBANE

FILE NUMBER: By Court Order the File Number is suppressed

Mr S on behalf of the Director-General, Department of Communities, Child Safety and Disability Services

Applicant

REASONS FOR JUDGMENT

1. The Chief Executive [1] of the Department of Communities, Child Safety and Disability Services ("the Department") makes application for an order that a nominated authorised person within the Department be "authorised to consent to treatment on behalf of the child [LUCY]" who is currently 13 (born in 2000).

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[1] "Chief Executive" is the phrase used both in the order granting long-term guardianship of the child and in the *Child Protection Act 1999* (Qld) ("CPA"). A copy of the "written consent" provided by the Director-General pursuant to s 69ZK of the *Family Law Act 1975* (Cth) ("the Act") annexed to an Affidavit of Mr S filed 28 June 2013 states that the Director-General "perform[s] the duties and carr[ies] out the responsibilities ... that are ascribed to the Chief Executive under the *Child Protection Act 1999*." Thus, a reference to "Chief Executive" in these Reasons can be taken as a reference to the "Director-General" and vice versa.

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2. The child's mother died many years ago. His father is unknown. After a tumultuous and difficult start to his life, an order was made in February 2006 pursuant to the *Child Protection Act 1999* (Qld) ("CPA") "granting long term guardianship of [[the child]] to the chief executive". Pursuant to that order, the child has been in long-term foster care for some seven years. On the evidence before me, his foster parents provide loving and thoughtful care. Their children (and their two other foster children) also contribute significantly to a loving and supportive environment for the child.

3. The child is in every physiological sense, a girl. However, he identifies as a boy. Expert evidence is unanimous that the child fulfils all of the criteria for Gender Identity Disorder/Gender Dysphoria in accordance with the DSM-IV-TR ([302.85]). It is accepted by both his foster parents and the experts that the child has identified as a male since the age of four and has never wavered from

that belief. A consultant psychiatrist, Dr B says: "[h]e has assumed a male role model socially and at school. His playmates are male, and his games are masculine."[2]

[2] Report of Dr B dated 1 July 2013 annexed to an Affidavit of Dr B filed 3 July 2013.

4. The current application is brought so as to permit the child to commence "LHRH Analogue Therapy"; specifically, the administration of a drug called Lucrin via three-monthly intra-muscular injections. The drug effectively stops all further pubertal development.

The Issues

5. It will be appreciated that the application is brought by a person [3] who is not a parent and in circumstances where no parent can be heard. The child is an ex-nuptial child who is the subject of an order made pursuant to State legislation. The application involves, then, a number of issues, some of which are complex:

a. Does this Court have jurisdiction to hear the application and, if so, where is it to be found?

b. If so, does s 69ZK preclude the Court from exercising power?

c. If not, is authorisation required? Is this a "special medical procedure" [4] or, to use the expression in the Family Law Rules 2004 (Cth) ("the Rules "), an "application for a medical procedure"?

d. If authorisation is not required, are there factors which, nevertheless point to this Court formalising a finding to that effect, for example, by declaration?

e. If either authorisation is required, or if a declaration might be made, is it in the child's best interests to make either such order?

[3] "Person" is not defined in the Act . However, pursuant to the *Acts Interpretation Act 1901* (Cth), s 2C , a reference to a "person" in "any Act" includes "... a body politic or corporate as well as an individual."

[4] Adopting, respectfully, the expression used by Nicholson CJ in *Re Alex: Hormonal treatment for gender identity dysphoria* (2004) FLC 93-175 but noting that, as used in these Reasons, the expression is designed to embrace the type of "special case" described by the High Court in *Secretary, Department of Health and Community Services v JWB and SMB ("Marion's Case")* (1992) 175 CLR 218 ("*Marion's Case*") as requiring authorisation of the Court discussed later in these Reasons.

Overview of the Child's Condition and Proposed Treatment

6. The child's identification as a boy has been recognised for some time. That situation was addressed, initially, by referring the child to "X Health Services" and, thereafter, to psychiatrist, Dr Y and psychologist, Mr L. Such issues as were raised for the child by his gender identification were, then, addressed conservatively by way of might conveniently be described as "counselling" or "therapy".

7. The progress of that conservative approach can be seen in the evidence of Mr L who spent six sessions with the child and conducted a psychological assessment of him. There is no formal report from Mr L in evidence. However, emails sent from him to a Child Safety Officer with the Department are in evidence. In those emails:

- Mr L ruled out other "psychological/developmental problems that might inform gender dysmorphia";
- Mr L considered the child was "ambivalent or does not identify as male";
- Mr L considered the child's "cognition of wanting to be male started to develop after [the death of his mother and seeing a photo of him with his mother]".

8. Ultimately, Mr L suggested the child consult an endocrinologist so that "other avenues of assisting [the child] can be canvassed". Dr C, a paediatric endocrinologist, first saw the child in November 2012. At that time, the child was clearly pubescent. Dr C predicted menarche in "about another 18 months". He also predicted, in accordance with the usual progression of puberty, "that body

shape change will happen over the next 12 months and this will be irreversible (body habitus) and extensive surgery (breast removal)" would thereafter be required for the child to become a male in a physical sense.

9. The timeframe over which those significant body changes would take place was predicted to have occurred by about November this year. Dr C saw the child again on 26 February 2013 at which time he predicted that the child's menses were "3-6 months away". At that time, Dr C prescribed Medroxyprogesterone "... so that if I am wrong and periods start sooner this can be stopped".

10. Subsequently, Dr C saw the child a month ago. The doctor wrote a letter to the Department dated 4 June 2013 in which he says "[The child] has progressed since the last appointment with first period about 30 days ago [i.e. about early May 2013]. Medroxyprogesterone 5mg daily has been effective in stopping menses".

11. An affidavit of Dr C, filed by leave on 4 July 2013, contains the following observations:

- "I have completed ... investigations of [the child] to exclude other underlying pathology that could give rise to Gender dysphoria ..."
- "[The child] ... has nearly completed pubertal development."
- "Gender dysphoria is a rare and difficult condition. Young people in this situation, if left without support and treatment, are at high risk of long-term mental illness, such as severe depression and associated risks of self-harm."
- "The effect of delaying the commencement of this pubertal suppression therapy is that puberty will progress beyond its current relatively advanced state to full maturity."
- "There are no long-term risks or side-effects associated with the use of lucrin."

12. The current situation is, then, that the child has reached a significant stage of pubertal development whereby his periods have commenced and he is on the cusp of further development. The treatment proposed by Dr C (and supported by two psychiatrists with whom the child has consulted – Dr T and Dr B) is said to be urgent because, over the next five months, the progress of puberty will continue to accelerate such that, by about November this year, body changes will be so significant that changing them in the future so as to permit the child to become an adult male will require very extensive surgical intervention.

13. It is to prevent that occurring that Dr C recommends the "urgent" commencement of "LHRH Analogue Therapy", which involves the administration of Lucrin as earlier described. The effect of that treatment is that the child's further progression through puberty would cease at the point at

which it has currently reached. When the administration of Lucrin ceases, the normal progress of puberty will continue as and from that time. Very significantly, in terms of the issues about to be considered, Dr C writes:

> The treatment is effective whilst administered and when stopped pituitary [gland] function returns to normal and will effectively be reversible unless other definitive therapies are performed at a later date (after the age of 18 years).[5]

[5] See, letter from Dr C dated 28 February 2013, contained at Annexure "AA-13" to the Affidavit of Ms A filed 28 June 2013.

14. In terms of the effect physically on the child, the intra-muscular injections are described as "painful". As to its side effects, there is the potential for the child to be slightly shorter as an adult than he otherwise might be, but it appears that this side effect is by no means certain. There are, according to Dr C, no other adverse effects, or side effects, of the proposed treatment.

15. As is obvious, if the child is to become an adult male at some later point in his life, very significant surgical intervention will later be required. An effect of the currently proposed treatment is that any medical interventions more extensive than this treatment (and, in particular, treatment or intervention that is irreversible) can be postponed until such time as the child is "Gillick competent" [6].

[6] *Gillick v Norfolk Area Health Authority* [1986] AC 112, at 183-4 per Scarman LJ. "A minor is, according to this principle, capable of giving informed consent when he or she 'achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'" (per the plurality in *Marion's Case* at 395 where the High Court held that this approach "... should be followed in this country as part of the common law.")

16. Here, although the child is described as being "of age appropriate intelligence" and as possessing "insight [that] is appropriate for his age" and "insight with respect to gender [being] far advanced for his age"[7], it is accepted, including by his lawyer, that he cannot be regarded as "Gillick competent" (as, indeed, this application effectively presupposes).

[7] Report of Dr B, above n 2, at p 11.

17. Dr T is a consultant child and adolescent psychiatrist at the R Hospital and Clinical Director for a state children's health facility. In a letter to a Child Safety Officer attached to the Department, Dr T confirms that "[f]ollowing my assessment and perusal of the collateral history, my view is that [the child] meets the DSM IV criteria for Gender Identity Disorder (GID) of Childhood."[8] In his affidavit filed by leave at the hearing on 4 July 2013, Dr T reiterates that "[t]iming is important, given the risk of deterioration in [the child's] mental state should he ... develop secondary female sex characteristics such as breast growth ..."

[8] "Gender Identity Disorder" is the previous "term" for what is now known as "Gender Dysphoria" (see, DSM-V, 5th ed, American Psychiatric Association, 2013, p 451).

18. The child has also consulted with another consultant psychiatrist, Dr B, who is a member of each of the national and international transgender health associations. Dr B agrees that the child fulfils all of the criteria for Gender Dysphoria. In a report dated 1 July 2013, Dr B states:

> It is important to state that the natural course of Gender Dysphoria, untreated, is that psychological stress increases over time, as the person concerned becomes more and more disillusioned with their morphology which does not match their mind set of their assumed appropriate gender.
>
> Untreated Gender Dysphoria invariably progresses to immense disillusionment and then, to chronic depression which can often progress to Major Depression, with significant suicidal risk.
>
> Appropriately managed Gender Dysphoria, tends to carry an excellent prognosis.

Procedural / Preliminary Issues

19. Rule 4.09 of the Rules provides a list of matters upon which evidence "must" be given in applications for a "Medical Procedure". Mr G, counsel for the applicant,

properly concedes that evidence is lacking in respect of two of those matters, namely, whether any "alternative and less invasive treatment is available" and "the reason the procedure is recommended instead of the alternative treatment".

20. I consider it an inescapable inference open from all of the evidence before me as to the nature of the treatment and the nature of the condition to which it here relates, that a less invasive treatment is not available. In addition, I have already referred to the fact that the treatment sought to be authorised is fully reversible and to the fact that a conservative regime of psychological treatment and referral has already taken place.

21. I consider that, in the circumstances of this case, r 4.09(2)(e) should be dispensed with. [9]

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[9] Rules, r 1.12 .

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22. By reason of the circumstances earlier referred to, neither of the child's parents is a respondent to the proceedings. I granted leave to a solicitor, Mr M, to be heard on behalf of the child. Mr M was not appointed as an Independent Children's Lawyer, but had been acting for the child for some time in respect of other matters involving the Department and, it seems plain, is entirely familiar with the issues in this matter and with the child's views.

23. I consider that, in those circumstances, an Independent Children's Lawyer (properly so-called) need not be appointed.

Does This Court Have Jurisdiction?

24. The jurisdictional question argued on this application derives from the fact that it is contended that the treatment proposed for the child is of a type to which the child's guardian – the Director-General or her nominee – cannot consent and because the childis not "Gillick competent".

25. The parents of a non-Gillick competent child can, as part of their duties, powers and responsibilities as parents, consent on their child's behalf to medical treatment and procedures. They cannot, however, consent to treatment or procedures falling within a narrow band of "special cases". [10]

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[10] *Marion's Case* at 390, per the plurality.

26. In *Marion's Case* [11] the High Court held that the decision to authorise sterilisation for "non-therapeutic purposes" was outside the "ordinary scope of parental power to consent to medical treatment."[12] Whilst *Marion's Case* dealt with the sterilisation of an intellectually disabled child, the majority made it plain that it was not "sterilisation" per se which rendered the matter a "special case" requiring an order of the Court. Rather, it was the fact that sterilisation, which would require "invasive, irreversible and major surgery", was sought to be authorised for a "non-therapeutic" [13] purpose.

[11] *Secretary, Department of Health and Community Services v JWB and SMB ("Marion's Case")* (1992) 175 CLR 218 ("*Marion's Case*").

[12] At 397.

[13] Whilst the majority was "hesitant" to employ that phraseology, their Honours noted it was "necessary to make the distinction" between "therapeutic" and "non-therapeutic" purposes, however phrased (*Marion's Case* at 404).

27. As the majority in *Marion's Case* observed, it was factors involved in the "decision to authorise sterilisation" which took it outside the ordinary scope of "parental power". In addition to the seriousness of the procedure and its irreversibility, those factors included the "significant risk of making the wrong decision, either as to a child's present or future capacity to consent or about what is in the best interests of a child who cannot consent" and that "the consequences of a wrong decision are particularly grave".[14]

[14] At 404.

28. The High Court in that case considered that the Court could authorise the sterilisation of a non-Gillick competent child (and, inferentially, otherwise in

respect of that narrow band of "special cases") by reference to the Court's "welfare jurisdiction" which was conferred upon the Court as a result of the 1983 amendments to the Act and which was "similar to the parens patriae jurisdiction" exercised by the Sate Supreme Courts.[15]

[15] At 411.

29. Subsequent to the decision, s 67ZC was introduced into the *Family Law Act 1975* (Cth) ("the Act"). According to at least one Justice of the High Court, that section "reproduce[s] the earlier welfare jurisdiction [recognised by the High Court in *Marion's Case*], arguably in clearer terms ..." [16]

[16] *Minister for Immigration and Multicultural and Indigenous Affairs v B and Anor* (2004) 219 CLR 365 (" *MIMIA v B* ") at [221], per Callinan J.

"Matters": Guardianship and Parental Responsibility

30. Although the term "welfare jurisdiction" is frequently used to describe power exercised by the Court referenced to s 67ZC when making orders authorising a medical procedure, that section is not, despite its wording, itself a source of jurisdiction.[17] If the power is to be validly exercised, this source of jurisdiction must "attach"[18] to a "matter" contained, relevantly, in Part VII.

[17] *MIMIA v B* at, for example, [22].

[18] Respectfully adopting the expression used, relevantly, by Gleeson CJ and McHugh J in *MIMIA v B* .

31. Section 69H(1) of the Act provides:

(1) Jurisdiction is conferred on the Family Court in relation to matters arising under this Part.

32. The use of the word "matters" is, of course, both intentional and important. By reference to s 77 of the Commonwealth Constitution, the Federal Parliament is permitted to make laws relating to the jurisdiction of this Court as a "federal court" (s 77(i)), including jurisdiction exclusive of the jurisdiction of the courts of the States (s 77(ii)). Such jurisdiction as is sought to be conferred by any such law must, however, be in respect of "matters" as referred to in ss 75 and 76 of the Constitution.

33. Thus, to make the order sought pursuant to s 67ZC, the jurisdiction purported to be conferred by that section must attach to a "matter" (within the meaning of ss 75 or 76 of the Constitution) located within, relevantly, Part VII. Section 67ZC cannot do so of itself because it does not:

> ... impose any substantive liabilities or duties or confer rights or privileges on any person. Standing alone, therefore, s 67ZC does not confer jurisdiction in respect of a 'matter' arising under a law of the Parliament because it does not confer rights or impose duties on anyone. [19]

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[19] *MIMIA v B* at [13].

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34. Part VII of the Act relates to "children". In so far as Part VII pertains to "marriage" or the "parental rights, and the custody and guardianship" of children of a marriage, it is a valid enactment, because its provisions are related to specific heads of power in the Constitution.[20] It follows that Part VII cannot apply to children who are not children of the marriage unless the power derives from another provision of the Constitution. It is for that reason that, absent relevant State legislation, this Court had no jurisdiction to make orders in respect of ex-nuptial children.

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[20] Commonwealth Constitution, ss 51 (xxi) and 51(xxii).

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35. Placitum 51(xxxvii) of the Constitution provides a separate head of power. It permits power to be referred by a State or States on the Commonwealth. If that referral is accepted by the Commonwealth, laws the subject of the referral of power can validly be made by the Commonwealth. As is well known, that has

occurred in respect of ex-nuptial children in all States now, except Western Australia. But, important to the Reasons which follow, the Commonwealth law must be made by reference to the actual powers referred by the relevant State Act, to be discerned from the terms of that Act.

36. Where an application for a "special medical procedure" involves parties to a marriage and a child of the marriage, the exercise of the s 67ZC power is readily referable to a "matter" within Part VII; namely, the parental responsibility of a nuptial child. [21]

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[21] See, *MIMIA v B* at [51], per Gleeson CJ and McHugh J.

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37. Where, however, the situation is as presents in the instant case – i.e. an application for orders pursuant to s 67ZC in respect of an ex-nuptial child whose parents are deceased and/or unknown and who is subject to the guardianship of the Chief Executive – it becomes crucially important to determine whether there is a "matter" in Part VII of the Act referrable to ss 75 or 76 of the Constitution to which the jurisdiction referred to in s 67ZC can "attach".

Does the s 67ZC jurisdiction "attach"?

38. I have come to the conclusion that the s 67ZC jurisdiction does "attach" to a "matter" within Part VII in the circumstances of this case.

39. The path to that conclusion involves a consideration of the rights attaching to the Chief Executive under the CPA and examining what powers, precisely, have been referred by Queensland to the Commonwealth pursuant to the *Commonwealth Powers (Family Law – Children) Act 1990* (Qld) ("the Referring Act").

40. The "parental responsibility" of a parent (who is a party to a marriage) in respect of a child of the marriage constitutes a "matter" to which the jurisdiction in s 67ZC can validly attach.[22] The order made on 23 February 2006 in favour of the Chief Executive is, relevantly, an order for guardianship. The Chief Executive is vested, by reference to that order, and pursuant to s 13 of the CPA, with "all the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child."

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[22] *MIMIA v B* at [51]-[52], per Gleeson CJ and McHugh J.

41. The Act can give this Court jurisdiction in respect of "parental rights, and custody and guardianship of infants [of a marriage]" by virtue of sections 76(iv) and 51(xxii) of the Constitution . As a result of the reference of powers by all States but Western Australia, the Court's jurisdiction under Part VII extends in Queensland to "ex-nuptial" children.

42. By the clear terms of, relevantly, s 3(1)(b) of the Referring Act, the Queensland parliament has referred to the federal Parliament the power to make laws in respect of "the custody and guardianship of, and access to children". Specifically, then, Queensland has, relevantly, referred to the Commonwealth Parliament the power to make laws in respect of "guardianship" of ex-nuptial children. That referral of power has been accepted and the Act amended accordingly (see, inter alia, ss 69ZE(1) and 69ZH). However, "guardianship" is not defined in either the Act or the CPA .

43. In *Trevorrow v South Australia (No 5)* (2005) 98 SASR 136 Gray J reviewed a number of authorities in respect of the meaning of "guardianship" and observed that "...there is no established single meaning of the term 'guardianship' and the rights and duties it confers ..." and "[t]he term 'guardianship' may be used in different ways ..."[23] Gray J went on to state that "...guardianship is considered to confer a variable bundle of rights. The nature and extent of those rights are ultimately to be assessed and evaluated from the wording of the particular statutory enactment in question."[24]

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[23] At [440] and [447].

[24] At [450].

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44. Section 13 of the CPA provides:

> **What is the effect of guardianship**
>
> If the chief executive or someone else is granted guardianship of a child under a child protection order, the chief executive or other person has—
>
> (a) the right to have the child's daily care; and
>
> (b) the right and responsibility to make decisions about the child's daily care; and

(c) all the powers, rights and responsibilities in relation to the child that would otherwise have been vested in the person having parental responsibility for making decisions about the long-term care, wellbeing and development of the child.

45. The Act's references to "guardianship" were removed by the 1995 amendments to it. References to "parental rights, guardianship and custody" were replaced with references to "parental responsibility". A question arises, then, as to the relationship between "guardianship" (which is now not referred to in the Act but which is expressly referred by the Referring Act) and "parental responsibility". The question is not answered by reference to the terms of the Act . Reference to the Explanatory Memorandum [25] elucidates the Parliament's intention.

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[25] *Acts Interpretation Act 1901* (Cth), s 15AB(2)(e) .

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46. Whilst, s 61B of the Act , which defines "parental responsibility" as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children", refers to "parents", the Explanatory Memorandum to the *Family Law Reform Bill 1994* (Cth) which introduced s 61B provides:

> The Bill will enact provisions which give parents 'parental responsibility' defined as all the duties, powers, responsibilities and authority which by law parents *and guardians* have in relation to children.[26]

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[26] See, Explanatory Memorandum, *Family Law Reform Bill 1994,* at [3]. Emphasis added.

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47. Further, the Explanatory Memorandum makes plain that the change in terminology did not alter the Court's jurisdiction in respect of "guardianship". Rather, it was intended to "replace the concepts of custody and access, which carry ownership notions and may lead to the belief that the child is a possession ..."[27]

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[27] See, Explanatory Memorandum, *Family Law Reform Bill 1994,* at [3].

48. In any event, s 61B merely defines the concept of "parental responsibility" as used in the Act by reference to a specified bundle of rights that, "by law", parents have. The section does not *confer* rights; it merely defines the bundle of rights embraced by that term. Neither s 61B , nor any other provision of the Act, includi ng, specifically, any provision relating to "parental responsibility", purports to exclude or abrogate the "variable bundle" of rights and/or powers[28] constituting "guardianship" at common law.

[28] *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136 at [446] ; *Fou ntain v Alexander* (1982) 150 CLR 615 at 634 .

49. That the bundle of rights/powers comprising "guardianship" is at least included within the concept of "parental responsibility" as used in the Act is plain from the wording of s 69ZE:

> **Extension of Part to the States**
>
> (1) Subject to this section and section 69ZF, this Part extends to New South Wales, Victoria, Queensland, South Australia and Tasmania.
>
> (2) Subject to this section and section 69ZF, this Part extends to Western Australia if:
>
> (a) the Parliament of Western Australia refers to the Parliament of the Commonwealth the following matters or matters that include, or are included in, the following matters:
>
> (i) the maintenance of children and the payment of expenses in relation to children or child bearing;
>
> (ii) *parental responsibility* for children; or
>
> (b) Western Australia adopts this Part.
>
> (3) This Part extends to a State under subsection (1) or (2) only for so long as there is in force:

(a) an Act of the Parliament of the State by which there is referred to the Parliament of the Commonwealth:

(i) *the matters referred to in subparagraphs (2)*(a)(i) *and (ii);* or

(ii) *matters that include, or are included in, those matters*; or

(b) a law of the State adopting this Part.

(4) This Part extends to a State at any time under subsection (1) or paragraph (2)(a) only in so far as it makes provision with respect to:

(a) the matters that are at that time referred to the Parliament of the Commonwealth by the Parliament of the State; or

(b) matters incidental to the execution of any power vested by the Constitution in the Parliament of the Commonwealth in relation to those matters. [29]

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[29] Emphasis added.

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50. Each of the relevant referring Acts refer power to the Commonwealth Parliament in respect of "the custody and *guardianship* of, and access to children" [30] The referring legislation does not refer power in respect of "parental responsibility"; that concept is defined not in the State legislation but in the Act . If "guardianship" was not a "matter that include[s], or [is] included in" "parental responsibility", the Court would not have jurisdiction to make orders in respect of parental responsibility for ex-nuptial children. That is because, if "guardianship" does not include, or is not included in, "parental responsibility", there has been no referral of power in respect of "parental responsibility" and, thus, no "matter" to found jurisdiction.

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[30] *Commonwealth Powers (Family Law – Children) Act 1986* (NSW); *Commonwealth Powers (Family Law) Act 1986* (SA) ; *Commonwealth Powers (Family Law) Act 1986* (Tas); *Commonwealth Powers (Family Law – Children) Act 1986* (Vic); and, *Commonwealth Powers (Family Law – Children) Act 1990* (Qld). Emphasis added.

51. Plainly, that is not what is intended by the referral of power and, unsurprisingly, the constitutionality of Part VII, in so far as it pertains to ex-nuptial children, has not been challenged.

52. Thus, I conclude that the "bundle of rights" which comprise "guardianship" must itself "include" or at the least be "included in" the "matter" constituting "parental responsibility" in Part VII. As a result, the "bundle of rights" possessed by the Chief Executive, having been granted "guardianship" of the child pursuant to the CPA , "includes" or is "included" within the "matter" of "parental responsibility" in Part VII to which the jurisdiction in s 67ZC can plainly "attach". [31]

[31] *MIMIA v B* at [51].

Does the High Court's decision in *MIMIA v B* Preclude that Conclusion?

53. The conclusion just referred to results, as I have said, from my conclusion as to what flows form the relevant legislation. A further question nevertheless arises: by reference to the decision of the High Court in *MIMIA v B* am I bound to conclude differently?

54. *MIMIA v B* involved an appeal from a decision of the Full Court of this Court ordering the Minister of Immigration and Multicultural and Indigenous Affairs pursuant to s 67ZC of the Act to release five children who were detained in an immigration detention centre in South Australia as unlawful non-citizens, pursuant to the *Migration Act 1958* (Cth) . The appeal to the High Court centred primarily on the scope of s 67ZC .

55. The comprehensive and cogent submissions in the instant case by counsel for the applicant, Mr G, argue that there is no principle enunciated by the Justices of the High Court binding on the question in this case, or otherwise contrary to the interpretation of s 67ZC earlier outlined. The differences in the factual situation in that case when compared to the present case are obvious. Very importantly, that case concerned a third party who did not have rights of "guardianship" or anything akin to those rights. Mr G submits, by way of further distinction:

> ...
>
> a) Gleeson CJ and McHugh J expressly left open the possibility that s [67]ZC was not so limited by section 69ZH ;

b) Kirby J determined the case on assuming, without deciding, that s [67]ZC had the width of operation attributed to it by the Full Court, and

c) Callinan J [whilst] noting the limitations on the power to bind third parties, inferentially left open the operation of s 67 ZC upon the basis that the Commonwealth's power to legislate included matters in relation to, or arising out of...unmarried *parentage* of them on a reference by the state.[3 2]

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[32] Emphasis in original. Footnotes omitted.

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56. The potential for the decision in *MIMIA v B* to impact upon the central conclusions earlier reached derives mainly from what some members of the Court said about the relationship between s 67ZC and s 69ZH .

57. Section 69ZH of the Act provides:

Additional application of Part

(1) Without prejudice to its effect apart from this section, this Part also has effect as provided by this section.

(2) By virtue of this subsection, Subdivisions BA and BB of Division 1, Divisions 2 to 7 (inclusive) (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and 66N), Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivisions B and C of Division 12 (other than section 69D) have the effect, subject to subsection (3), that they would have if:

(a) each reference to a child were, by express provision, confined to a child of a marriage; and

(b) each reference to the parents of the child were, by express provision, confined to the parties to the marriage.

(3) The provisions mentioned in subsection (2) only have effect as mentioned in that subsection so far as they make provision with respect to the parental responsibility of the parties to a marriage for a child of the marriage, including (but not being limited to):

(a) the duties, powers, responsibilities and authority of those parties in relation to:

(i) the maintenance of the child and the payment of expenses in relation to the child; or

(ii) whom the child lives with, whom the child spends time with and other aspects of the care, welfare and development of the child; and

(b) other aspects of duties, powers, responsibilities and authority in relation to the child:

(i) arising out of the marital relationship; or

(ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or

(iii) in relation to the divorce of the parties to that marriage, an annulment of that marriage or a legal separation of the parties to that marriage, that is effected in accordance with the law of an overseas jurisdiction and that is recognised as valid in Australia under section 104.

(4) By virtue of this subsection, Division 1, Subdivisions C, D and E of Division 6, section 69D, Subdivisions D and E of Division 12 and Divisions 13 and 14 and this Subdivision, have effect according to their tenor.

58. In their joint judgment, Gleeson CJ and McHugh J held[33]:

...[D]espite s 69ZH(1) , the terms of sub-ss (2), (3) and particularly (4) of s 69ZH suggest that s 67ZC is confined *by the terms* of s 69ZH(2) and (3). Section 69ZH(4) declares that various provisions of Pt VII have effect according to their tenor. ... Importantly, the terms of s 69ZH(4) also necessarily imply that the various provisions named in s 69ZH(2) – including s 67ZC – do not operate according to their tenor. If they did, Parliament's enactment of s 69ZG and s 69ZH would be unnecessary.

> ... Even if s 67ZC has an operation independently of the terms of s 69ZH(2) and (3), the terms of Part VII, read as a whole, and the constitutional imperatives of Ch III confine the Family Court's jurisdiction and powers with respect to the welfare of the children *in this case* in the same way as do s 69ZH(2) and (3).

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[33] At [49]. Emphasis added.

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59. In a separate, joint judgment, Gummow, Hayne and Heydon JJ said[34] that:

> ...*[I]n its terms*, s 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage.

---

[34] At [105]. Emphasis added.

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60. Leaving aside the very important distinction to be made factually between that case and the present earlier referred to, the reference to *the terms* of s 69ZH , and particularly s 69ZH(2), is important.

61. The terms of s 69ZH make plain an intention to have apply the provisions specified in s 69ZH(2) (which, it should be noted, cover the vast majority of Part VII's provisions) [35] in respect of "the parental responsibility of the parties to a marriage" (s 69ZH(3)) which include (but are not limited to) the matters thereafter specified (s 69ZH(3)(a) and (b)). As the terms of those sub-sections make clear, the section constitutes an attempt to confine, specifically, the operation of Part VII to matters referable to the marriage power. In doing so, as Gleeson CJ and McHugh J observed:

> Section 60F [36] invoked the legislative powers of the Parliament *with respect both to marriage and to divorce and matrimonial causes (s 51(xxxii)).* In so doing, *the Parliament took perhaps a cautious view of the extent of the marriage power*...[37]

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[35] "Subdivisions BA and BB of Division 1 [i.e. "Best interests of children"], Divisions 2 to 7 inclusive (other than Subdivisions C, D and E of Division 6 and sections 66D, 66M and 66N) [parental responsibility, reports, parenting plans, parenting orders, child maintenance orders but excluding obligations, arrest and sending children from Australia and "step-parent maintenance"], Subdivisions C and E of Division 8, Divisions 9, 10 and 11 and Subdivision B and C of Division 12 (other than section 69D) [Location and recovery of children, other orders (including, it should be noted s 67ZC)], injunctions, independent representation of children, family violence, institution of proceedings in relation to children, and jurisdiction of courts].

[36] The precursor to s 69ZH ; s 60F was not materially altered in the renumbered section.

[37] At [81]. Emphasis added.

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62. The strongest pointer to the terms of s 69ZH having the meaning contended for derives, in my respectful view, from the nature and breadth of the provisions the subject of sub-section (2) of the section. As is clear, s 67ZC is but one of many sections within Part VII of the Act to which s 69ZH applies[38]. If s 69ZH confines the operation of s 67ZC to the parental responsibilities of parties to marriage in respect of children to the marriage, it axiomatically also similarly confines the other sections specified within s 69ZH(2) ; no distinction is drawn in s 69ZH(2) bet ween s 67ZC and the other specified sections within Part VII. If the section had that effect, it would render wholly nugatory the referral of power by all States of Australia (save Western Australia) so as to permit Part VII to apply to ex-nuptial children and render this Court without jurisdiction to make parenting orders in respect of ex-nuptial children in those States. This cannot be the purpose of the section.

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[38] See, n 35.

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63. The section *can* have effect according to its terms, however, if it is taken to confine the operation of s 67ZC *and* all of the other sections in Part VII specified within s 69ZH(2) to "parental responsibilities of the parties to a marriage for a

child of the marriage" *in respect of those States that have not referred power in respect of ex-nuptial children.*

64. Section 69ZH(4) reinforces that intention. Subsections (2) and (3) of 69ZH refer to the provisions in Part VII that deal with the Court's powers in and about "parental responsibility" as referred to in s 69ZH(3) . Confining "parental responsibility" in that way gives rise to the comment of Gleeson CJ and McHugh J quoted in [61] above as to Parliament's "cautiousness" in terms of the scope of the marriage power.

65. In a non-referring State, the Court's *power* in respect of "parental responsibility" (as that term is confined in s 69ZH(3)) is limited to the "parties to a marriage" and "the children of a marriage". However, certain provisions specified in s 69ZH(2) , whilst referring to "parents" and "child", do not purport to *confer power* in respect of the issues of "parental responsibility" referred to in s 69ZH(3) . As a result, there is no need for those sections to be read otherwise than in accordance with their terms. This is recognised specifically in s 69ZH(4) b y it specifying those provisions and by it specifically providing that those provisions can have effect in accordance with their terms. As a result, s 69ZH(4) is not "superfluous".[39]

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[39] A concern reflected in the judgment of Gleeson CJ and McHugh J at [49].

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66. The best example of the operation of the subsections of 69ZH is, perhaps, provided by the terms of s 60CC. As is known, that section is a central component of Part VII. That section falls within Subdivision BA of Division 1 of Part VII and, accordingly, by reference to s 69ZH(2), must be read as referring to "parties to a marriage" and "children of a marriage". However, as a result of s 69Z H(4), s 60CC can be read "according to its tenor". This apparent anomaly can be understood by a comparison of the specified provisions of Part VII to which s 69Z H(2) and (3) apply with the specified provisions of Part VII to which s 69ZH(4) ap plies. Reference to each of those provisions reveals a clear distinction between the two. The former deal with the exercise of power. The latter do not. The former requires Part VII to be read down precisely because they deal with the exercise of power. By way of contrast, the sections referred to in s 69ZH(4) do not need to be read down precisely because they do not. In the latter case, the sections can be read as applying both to children of the marriage and "ex-nuptial children" because the necessary connection with the marriage power in the Cons titution is unnecessary; the source of power does not present difficulties when no power is being exercised.

67. Nothing said by any of the Justices in *MIMIA v B* runs contrary to such an interpretation. Such an interpretation is wholly consistent with the terms of the section as enacted and the purpose sought to be achieved by its enactment.

68. To the extent that doubt is said to attend s 69ZH 's meaning or purpose, the relevant Explanatory Memoranda are illuminating[40]. The Explanatory Memorandum accompanying the *Family Law Amendment Bill 1987* (Cth) [41] says:

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[40] *Acts Interpretation Act 1901* (Cth), s 15AB(2)(e) .

[41] Which inserted s 60F, the precursor to s 69ZH, consequent upon the referral of powers by all States except Queensland and Western Australia. Section 60F's terms were not materially altered when renumbered and have not materially altered since.

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69. The present provisions of the Principal Act in relation to children are confined to children of a marriage in reliance upon the Commonwealth's constitutional power in marriage and matrimonial causes. Four States (New South Wales, Victoria, South Australia and Tasmania) have enacted legislation referring power to the Commonwealth Parliament in respect of the maintenance of children and the payment of expenses in relation to children and child bearing *and the custody and guardianship of, or access to, children* . Placitum 51(xxxvii) of the Constitution provides for the Commonwealth to make laws with respect to matters referred by the Parliaments of any State or States but so that the laws extend only to States by whose Parliaments the matters is referred, or which afterwards adopt the law.

70. *The purpose of the new Division 2 is to extend the operation of the Principal Act consequent upon the references of power.* The scheme of the Division is as follows. New section 60E [being encompassed within current ss 69ZE, 69ZF and 69ZG] extends the operation of the new Part VII to the referring States and, if Queensland or Western Australia also refer the relevant legislative powers to the Commonwealth or adopt the provisions of Part VII, to those States also ... *New section*

> *60F will have the effect that the provisions of the Principal Act relating to children will continue to apply in Queensland and Western Australia.*[42]

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[42] Emphasis added.

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69. As the concluding sentence in the quoted [70] makes plain, s 60F was intended to ensure that, notwithstanding the expansion of powers to cover ex-nuptial children arising as a result of the referral of powers by four States, the absence of a referral from Queensland and Western Australia meant that in *those States*, the extent of the power exercisable under the Act was confined to nuptial children.

70. The contention that section 69ZH is confined in its application to States which have not referred jurisdiction in respect of ex-nuptial children is further supported by the Explanatory Memorandum to the 1995 amendments to the Act, which renumbered s 60F to s 69ZH:

> 412. The new section 69ZH re-enacts the former section 60F of the Principal Act and explains that this Part has an additional application. The effect of these amendments is that the provisions of the Principal Act, relating to children, will continue to apply in Western Australia relying upon section 51(xxi) of the Constitution (the marriage and matrimonial causes power).[43]

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[43] Explanatory Memorandum, *Family Law Reform Bill 1994* (Cth).

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71. Thus, when Part VII is being applied in a non-referring State, and where the provisions referred to in s 69ZH(2) (confined per ss 69ZH(2)(a) and (b)) purport to deal with the parental responsibility of the parties to a marriage for a child of the marriage (s 69ZH(3)), then those provisions are to be read as if they were confined per s 69ZH(2)(a) and (b). Doing so ensures that a Court exercising power under the Act in a non-referring State does not purport to act outside of the limits conferred by the marriage power.

72. Once it is accepted (as, in my view, it should be) that s 69ZH applies solely to non-referring States, it is readily apparent that ss 69ZG and 69ZH are not "superfluous"[44]. They are necessary to delineate between the scope of the power exercisable under Part VII in the States and Territories; s 69ZG makes plain that Part VII extends to nuptial and ex-nuptial children in the Territories, whilst s 69ZH ensures that Part VII extends only to nuptial children in those States which have not referred power in respect of ex-nuptial children.

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[44] A concern reflected in the judgment of Gleeson CJ and McHugh J at [49].

Conclusions as to Jurisdiction

73. In my judgment:

- This Court has jurisdiction to entertain the instant application;
- The jurisdiction is found by s 67ZC "attaching" to a matter within Part VII, namely "parental responsibility";
- That occurs because the reference of powers by the Queensland Parliament includes a referral of powers relating to, inter alia, "guardianship" and "guardianship" "include[s], or [is] included in ..." the "matter" of "parental responsibility";
- Neither s 61B nor any other provision of Part VII points otherwise than to that result;
- That conclusion is not inconsistent with any principle enunciated by the High Court in *MIMIA v B* ;
- Nothing said by the High Court in *MIMIA v B* in respsect of s 69ZH o r that section's impact upon s 67ZC precludes such a result;
- Specifically, nothing said by the High Court precludes a conclusion that s 69ZH , properly construed, confines the powers in Part VII to nuptial children in Western Australia (it being the only State that has not referred power);
- Given that this Court has jurisdiction, an order of the type sought is otherwise within power (*Marion's Case*). [45]

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[45] As to the distinction between jurisdiction and power, see, for example, *Harris v Caladine* (1991) 172 CLR 84 at 136 .

The Applicant's Standing and the Effect, if any, of Section 69ZK

Standing

74. The applicant is not the Director-General herself, but rather, the Manager of the relevant Child Safety Service Centre. It is contended that, as such, the applicant has been delegated the powers under s 13 of the CPA including, significantly, the power to bring the present application.

75. I accept the submission on behalf of the applicant that the applicant "stands in the shoes" of the Director-General. If that be accepted, it seems to me clear that the applicant is someone who is "concerned with the care, welfare and development" of the child.

76. That position is in line with authority. [46] I also reiterate the views I expressed in *Re: Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210 at [81] :

> I would add to the matters there referred to that I consider the Act eviden ces a clear intention that a wide category of people should be able to apply to this court where the interests of children are concerned and where it is established that the orders sought are within jurisdiction and power. For example, both the Act and the Rules reflect that position in respect of this specific type of application.

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[46] See, *Re Alex : Hormonal treatment for gender identity dysphoria* (2004) FLC 93-175 and *Re: Alex* (2009) 42 Fam LR 645 (the later decision in respect of the same child). In respect of the latter authority, I have with the greatest of respect to the Chief Justice, some doubt as to whether the Victorian Statutory Guardian is, as her Honour found, "effectively Alex' s 'parent'" (at [148]).

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77. The applicant, thus, has standing to bring the proceedings and is entitled to do so. [47]

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[47] Section 65C of the Act .

Section 69ZK

78. As has earlier been referred to, the child is the subject of a long-term guardianship order pursuant to the CPA . He is, then, a child "who is under the care (however described) of a person under a child welfare law" (s 69ZK(1)). The terms of s 69ZK preclude the Court from exercising power of the relevant type unless, relevantly, "the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained" (s 69ZK(1)(b)).

79. Written submissions on behalf of the applicant chart carefully the legislative path by which the Director-General of the Department of Communities, Child Safety and Disability Services is a "Child Welfare Officer". [48] I accept that submission.

[48] Section 4, Regulation 12BA, Family Law Regulations 1984 ; Administrative Arrangements Order (3) 2012 published in the extraordinary Queensland Government Gazette, 3 April 2012, No. 77, Vol 359.

80. I am satisfied that the terms of s 69ZK(1)(b) have been met and that the written consent referred to in that subparagraph has been obtained.[49]

[49] Affidavit of Mr S (Applicant) filed 28 June 2013 at [7].

81. As a result, s 69ZK does not provide an impediment to the making of the order sought.

Is Court Authorisation Required?

82. Parents have, absent a court order [50] , a bundle of rights which the Act define s as "parental responsibility": "[a]ll the duties, powers, responsibilities and authority which, by law, parents have in relation to children"[51]. As an ordinary incident of that power (and, some might say, duty or responsibility) parents can consent to medical treatment on behalf of a non-Gillick competent child.

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[50] Section 61C, the Act .

[51] Section 61B , the Act .

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83. In respect of that power, and its potential limits, Brennan J said in *Marion's Case* :

> It is necessary to define what is meant by therapeutic medical treatment. I would define treatment (including surgery) as therapeutic when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition *or a psychiatric disorder*, provided the treatment is appropriate for and proportionate to the purpose for which it is administered. "Non-therapeutic" medical treatment is descriptive of treatment which is inappropriate or disproportionate having regard to the cosmetic deformity, pathological condition or psychiatric disorder for which the treatment is administered and of treatment which is administered chiefly for other purposes.
>
> ...
>
> ...Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Within these limits, the parents' responsibilities and powers may be exercised for what they see as the welfare of their children. Within those limits, the parents' authority is wide enough to permit them to authorise therapeutic medical treatment for a child, whether or not the child consents to the administration of that treatment. A fortiori, if the child is incompetent to give consent, whether by reason of age, illness, accident or intellectual disability, *the parents have the responsibility and power to authorise the administration of therapeutic medical treatment, whether or not that treatment involves sterilisation. Such a power is exercised without question when the treatment does not involve sterilisation ... It cannot be right to deny therapeutic treatment to a child unless the parents first obtain the leave of a court.* The power to authorise therapeutic medical treatment exercisable by parents who are guardians and custodians of a child is

exercisable by duly appointed guardians and custodians according to the nature of the treatment and the urgency with which it needs to be administered. [52]

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[52] *Marion's Case* at 419 and 427 . Emphasis added.

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84. It will be observed that his Honour there specifically spoke of "duly appointed guardians".

85. The plurality (Mason CJ, Dawson, Toohey and Gaudron JJ) similarly observed:

> We hesitate to use the expression "therapeutic" and "non-therapeutic", because of their uncertainty. But it is necessary to make the distinction, however unclear the dividing line might be.
>
> > As a starting point, sterilisation requires invasive, irreversible and major surgery. But so do, for example, an appendectomy and some cosmetic surgery, both of which, in our opinion, come within the ordinary scope of a parent to consent to. However, other factors exist which have the combined effect of marking out the decision to authorise sterilisation as a special case. 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. [53]

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[53] *Marion's Case* at 404.

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86. As has been alluded to earlier, based on s 13 of the CPA and the common law concept of "guardianship", I have no doubt that the Chief Executive, as the child's lawful guardian, has the power (and, indeed, the duty and responsibility) to consent to any medical treatment for him that falls into the category of "therapeutic" medical treatment described by Brennan J and the plurality. Further, it is again important to emphasise that the High Court was at pains in *Marion's Case* to emphasise that procedures or treatment for which court authorisation was necessary formed a narrow band of "special cases".

87. "Special medical procedure" is an expression used by Nicholson CJ in, for example, *Re Alex* [54] . It is not defined in the Act or the Rules . Division 4.2.3 of the Rules is headed "Medical procedure" which is also not defined. Rules 4.08 – 4.12 use the expression "Medical Procedure Application" which is defined in the Dictionary to the Rules as "... an Initiating Application (Family Law) seeking an order authorising a major medical procedure for a child that is not for the purpose of treating a bodily malfunction or disease". Neither "major medical procedure" nor "bodily malfunction or disease" is defined.

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[54] *Re Alex* : *Hormonal treatment for gender identity dysphoria* (2004) FLC 93-175 .

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88. As I pointed out in *Re: Sean and Russell*, the former Chief Justice said in *Re Alex* at [175]-[178] :

> 175. While it is the most common type of special medical procedure application, the requirement of court authorisation has not been limited to sterilisation cases. The Family Court of Australia has been called upon to decide applications concerning:
> · the surgical gender reassignment of a 14-year-old with a congenital disorder – *Re A* (1993) FLC ¶92-402;
> · the performance of cardiac surgery on an 11-year-old boy where parental consent was refused – *Re Michael* (1994) FLC ¶92-471; *Re Michael (No 2)* (1994) FLC ¶92-486; and
> · the harvest of bone marrow blood cells from a physically and intellectually healthy 10-year-old boy for transplant to the child's aunt who was suffering from leukaemia – *Re GWW and CMW*. (1997) FLC ¶92-748 .
>
> 176. In *Re GWW and CMW* (supra), Hannon J was faced with a challenge to the Court's jurisdiction and made the following comments at 84,108:
>
> > *"...it is necessary to consider whether this is a special case outside the scope of a parent's power to consent to on behalf of his or her child (Re Marion FLC at 79,171-79,172; CLR at 232). In Re Marion the majority stated that there are features involved in a decision to authorise sterilisation which indicate that in order to ensure the best protection of the interests of a child, such a decision should not come within the ordinary scope of parental power to consent to medical treatment. "Court authorisation is necessary, and is, in essence a procedural safeguard". **The court went on to state that court authorisation is required firstly because of the significant**

risk of making the wrong decision and secondly because the consequences of a wrong decision are particularly grave. *Thei r Honours constituting the majority of the court, noted in some detail the factors which may contribute to the risk of a wrong decision being made and the gravity of the consequences if that were to occur.*

Although their Honours were there dealing with a case involving sterilisation which they referred to as being "invasive, irreversible and major surgery", there are passages in the judgment which indicate that it is not only sterilisation which constitutes a special case and therefore is outside the ordinary scope of parental power to consent. *The majority cited with approval a passage from the judgment of Nicholson CJ in Re Jane (1989) FLC ¶92-007 where at page 77,256 his Honour said:*

> *" The consequences of a finding that the Court's consent is unnecessary are far reaching both for parents and for children. For example, such a principle might be used to justify parental consent to the surgical removal of a girl's clitoris for religious or quasi-cultural reasons, or the sterilisation of a perfectly healthy girl for misguided, albeit sincere, reasons. Other possibilities might include parental consent to the donation of healthy organs such as a kidney from one sibling to another."*

Such procedures involve the invasive, irreversible and major surgery to which the court adverted in Re Marion whereas the procedure of harvesting of stem cells sought to be authorised in the present application, although invasive is not irreversible in that the stems regenerate and the blood is reinfused into the donor. " (emphasis added)

177. I find the passages of his Honour's comments as to principle which I have underlined to be of assistance in the present matter.

178. Like Hannon J, I do not read their Honours in *Marion's* case to be confining the reasons for authorisation to surgical interventions only. It was a factual element of the case - the sterilisation method proposed for Marion. It is hard to imagine that the principled considerations that I

have emphasised in par 176 would be inapplicable if authorisation had been sought for an alternative intervention of similarly irreversible effect for the same purpose, for example the use of radiation or pharmaceuticals.[55]

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[55] Emphasis in original.

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89. I hold to the views expressed in *Re: Sean and Russell* that Court authorisation is necessary only in respect of the type of procedures or treatment analogous to those described in *Marion's Case*. I also hold to the view expressed in *Re: Sean and Russell* that:

> 75. For children, or others who are not "Gillick competent", medical procedures or treatment not analogous to that in *Marion's Case* – even it is to be noted, those involving serious and irreversible consequences including sterilisation – can, and in most case should, be authorised by parents (or guardians) as part of their "parental responsibilities".[56]

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[56] At [75].

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90. I sought to expand on that later in the Reasons:

> 84. Where a decision falls properly within the ambit of parental responsibility, the authorisation or consent to a procedure is a parental decision. In saying that, I do not fail to recognise that the process of decision-making (likely, in many cases to involve a series of separate decisions) is, of course, exquisitely difficult and, in many cases, likely to involve much pain and proper prevarication.
>
> 85. As observed by the High Court, the immediate interests of parents may in some cases conflict with the long-term interests of children currently unable to speak or decide meaningfully for themselves. So, too, the difficult decisions involved are likely to involve the intersection of a number of moral, ethical and clinical dilemmas and decisions for doctors as well as parents.

86. So, too, medical practitioners have legal, moral and ethical obligations that include the provision of all relevant information about treatment, including surgery. That includes, importantly, the proper consideration of any alternative treatments, including no treatment at all – an issue which can be extremely important where a procedure can reasonably await the acquisition of Gillick competence.

87. Those obligations, in so far as the direct involvement of the child is concerned, vary with the child's age, level of maturity, comprehension and intellectual capacity.

88. The desire for apparent certainty provided by a court decision authorising a procedure in circumstances where doubt might otherwise attend the capacity to authorise or consent to it, is also a powerful factor pointing to the desirability of a court decision.

89. Yet here (as is often the case) the children are each nurtured by loving, caring parents who each and together, seek genuinely what is best for their respective children.

90. Where parents are properly and appropriately exercising parental responsibility as the Act and the law contemplate that they will and should; where there is no disagreement between them and where there is no "solely therapeutic" element to the proposed procedure, the dilemmas and decisions for parents and doctors alike are predominantly medical (true though it is that those medical decisions are likely to also involve difficult moral and ethical and parental considerations).

91. In my view, the law should tread very lightly in seeking to intrude in, or impose itself upon, those decisions. It would in my respectful view be sad indeed if the courtroom was to replace a caring, holistic environment within which approach by parents and doctors alike could deal with the (admittedly extremely difficult) medical and other decisions that need to be made.

92. Importantly, such an environment allows the proper consideration of, and attention to, all of the attendant emotional and psychological ramifications for all concerned. (See generally in that respect, the October 2009 discussion paper prepared by an expert advisory group (EAG) established by the Department of Human Services in Victoria "to review treatment of children born with intersex conditions".)

91. Nicholson CJ, in referring to this aspect of the judgments in *Marion's Case* , went on to hold in *Re Alex* :

195. The current state of knowledge would not, in my view, enable a finding that the treatment would clearly be for a "malfunction" or "disease" and thereby not within the

jurisdiction of this Court as explained by the majority in *Mari on's* case. To my mind, their Honours were seeking in that case to distinguish medical treatment which seeks to address disease in or malfunctioning of organs. In the context of sterilisation for example, they would seem to have had in mind a malignant cancer of the reproductive system which required an intervention that was medically indicated for directly referable health reasons. The present case does not lend itself to such a comparison.

196. In light of my analysis in this section, I am therefore satisfied that the treatment plan in the present case falls within the category of cases that require court authorisation. There are significant risks attendant to embarking on a process *that will alter a child or young person who presents as physically of one sex in the direction of the opposite sex*, even where the Court is not asked to authorise surgery. Also, it cannot be said on the evidence that the treatment is to cure a disease or correct some malfunction.[57]

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[57] Emphasis added.

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92. I consider a significant point of distinction between the situation to which Nicholson CJ refers in those passages just quoted and the situation here is that authorisation here is not sought beyond what has been called "Stage 1 Treatment" – that is to say the administration of Lucrin by way of three monthly intra-muscular injections.

93. Indeed, on the evidence before me, the proposed treatment is designed precisely to facilitate a hiatus between a current desire of a 13-year-old child and a later "Gillick-competent" or adult decision. Further, unlike the situation in *Re Alex* , which involved authorisation of treatment which included the administration of testosterone for the purposes of "masculinising" the child, the effects of Lucrin are reversible. Importantly, upon the cessation of the Lucrin treatment, should the child decide to maintain his current sex, normal maturation to "womanhood" can occur by reason of an entirely natural process.

94. More broadly, with the greatest of respect to the former Chief Justice, I consider, respectfully, that the passages referred to present too narrow a picture of ordinary treatments and procedures which fall outside of the narrow band of "special cases" to which the High Court in *Marion's Case* refer. The passages to which I have earlier referred from the judgment of Brennan J, his Honour's judgment read as a whole, and a reading of the plurality's judgment as a whole[58] present, in my view, a much wider ambit for ordinary parental/guardian consent than that which can be given for treatment solely to address "disease" or to

correct some "malfunction" (albeit that those expressions are used within the judgments in *Marion's Case*). The ambit might also become wider as a result of, as Nicholson CJ said, "... the march of science overtak[ing] the perimeters of the settled law".[59]

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[58] Particularly the conclusions set out at 404.

[59] At [198].

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95. It is of some importance, in my view, that Brennan J in *Marion's Case* referred to treatment "...administered for the chief purpose of preventing, removing or ameliorating ... a psychiatric disorder" as falling within the ordinary ambit of parental consent, provided such treatment is "...appropriate for and proportionate to the purpose for which it is administered."[60] Here, there is no doubt on the evidence before me that the child is suffering from, and has in all likelihood suffered for a considerable period of time from, a significant and potentially very debilitating "psychiatric disorder" relating to what the DSM-V terms "Gender Dysphoria".

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[60] At 419.

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96. The child has been treated with therapy and has also received some pharmaceutical treatment, the latter as a means of suppressing menstruation so as to alleviate his distress. The child's therapeutic treatment reached a point in late 2011 where his treating psychologist considered it necessary for the child to consult an endocrinologist with a view to assessing "other options" for his treatment. The treatment the subject of the application before the Court comes, then, at the conclusion of a prolonged period of conservative treatment comprising primarily psychological treatment and (very recently) the pharmaceutical suppression of menses.

97. I am persuaded on the whole of the evidence before me, that the proposed treatment will significantly alleviate the child's current psychological difficulties. Moreover, to the extent that those psychological difficulties are founded in normal pubertal changes which will now not only occur, but accelerate, I am entirely persuaded that the current treatment is also an appropriate and viable treatment so as to prevent those changes which, in turn, are likely on the

evidence before me, to exacerbate the psychological issues which the child confronts.

98. I consider it extremely important that the current proposed treatment is reversible in the sense I have earlier described. I also consider it extremely important that the treatment is designed to, as it were, hold things in abeyance until such time as the child has reached a level of intellectual and emotional maturity such that "Gillick-competence" can comfortably be assumed or, alternatively, he can make such decisions as might be made as an adult.

99. Taking all of those factors together, I am satisfied that the treatment proposed, namely LHRH Analogue Therapy is "...appropriate for and proportionate to the purpose" of treating the child's Gender Dysphoria and that it is intended to be administered "for the chief purpose of preventing, removing or ameliorating ... a psychiatric disorder."

100. Consequently, I do not consider that the nature of the treatment *of itself* falls into the category of case that requires the authorisation of this Court.

Should an Order be Made if Authorisation is not Required?

101. Counsel for the applicant properly refers me to what the former Chief Justice said in *Re Alex* at [200] :

> 200. Speaking more generally, it seems to me that where a reversible treatment in respect of a child or young person is in specific anticipation of an irreversible special medical treatment that requires authorisation by this Court, it would usually be prudent for an application to be made under s 67ZC of the Act at the outset of the clinical intervention. In saying this I am not, however, referring to the assessment and diagnostic procedures that may precede a form of intervention unless such procedures themselves have the qualities of a special medical treatment to them.

102. Counsel argues that there are a number of parents, guardians, treating medical practitioners, health authorities and the like – including, it might be said, the Director-General in cases where she has guardianship of a child – who have acted in accordance with the cautionary words used by the former Chief Justice at paragraph [200] of his Honour's judgment. It is argued that this is particularly so in light of the fact that as the former Chief Justice said, there are no cases decided in respect of "special medical procedures" by the High Court since the decision in *Marion's Case* . Thus, it is argued, the Court should be cautious about suggesting anything that might be regarded as a change in approach. There is, as it seems to me, considerable force in that argument.

103. The order sought is premised upon authorisation being *required*. If, as I have found, jurisdiction is properly invoked, it does not follow that, if authorisation is not required, *no* order should be made. If jurisdiction has properly been invoked, the Court should proceed to hear and determine the issues properly brought before it within jurisdiction. As I have earlier sought to make clear, 67ZC attaches to a matter within Part VII (specifically, parental responsibility). Orders relating to parental responsibility can, and if appropriate should, be made with the child's best interests as the ultimate determinant.

104. As it seems to me, there may well be good reasons why a declaration in relation to a specific aspect of the powers and responsibilities of a parent or guardian should be made if doing so is in the subject child's best interests. That is, there may be features of a decision in respect of medical treatment other than *required* authorisation that render it in a child's best interests for an order to be made even where authorisation is not required. It is by no means fanciful that a person concerned appropriately with the care, welfare and development of a child might have proper concerns that a decision of a parent or guardian about a medical procedure is contrary to a child's best interests. Factual situations such as those referred to by the former Chief Justice in *Re Jane* [61] provide examples.

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[61] *In re Jane* (1989) FLC 92-007 at 77,256 : "...surgical removal of a girl' s clitoris for religious or quasi-cultural reasons..." "...the sterilisation of a perfectly healthy girl for misguided, albeit sincere, reasons" "...parental consent to the donation of healthy organs such as a kidney from one sibling to another."

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105. I said in *Re: Sean and Russell* [62]:

> ... If the jurisdiction is properly invoked and the orders sought are within power, the best interests of the children is the determinant of whether orders should be made and, if so, their terms. It seems to me that the determination of an issue (indeed, here, an important issue) about parental responsibility and (again, importantly) where its limits might lie, can be said to be in the best interests of the children. That there might be resultant "benefits" to others is beside the point.

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[62] At [107]

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106. The point sought to be made is that, quite apart from the interests of, for example, those who indemnify medical practitioners, health authorities and the like, there may be proper and understandable reasons why those seeking to act cautiously and properly in a child's best interests might seek to have clarified a matter which, at least in their minds, is attended by doubt. The potential for a significant penumbra to surround the "special cases" to which the High Court refers leads to the possibility that reasonable minds might differ as to whether a proposed treatment or procedure falls within the category of "special cases" where authorisation is required or into the much larger other group of cases where parental or guardian consent can be given.

107. That might be thought all the more so in circumstances such as the present, where a person exercises guardianship rights and responsibilities by reference to a Statute and in the exercise of a public function for which they are accountable publicly.

108. Reasons of those types provide, in my view, a proper basis for making orders in circumstances where the Court's jurisdiction is properly invoked and authorisation is sought even if not required. The determinant is whether such an order is in the child's best interests.

109. I am persuaded that, in the circumstances of this case, I should make an order – in the form of a declaration – if I am satisfied that the proposed treatment *and* the making of such an order is in the child's best interests.

The Child's Best Interests?

110. Some of the issues earlier discussed, including the reference to the child's condition and the distress it causes him are, of course, relevant to a decision about his best interests. By reason of my determination that authorisation is not required, compliance with r 4.09 is not strictly required. The Rules' requirements provide pointers, however, to what matters might inform the discretion as to whether making an order is in the child's best interests.

111. I have already referred to evidence relating to the exact nature and purpose of the proposed medical procedure and its effects. In that context, I have referred to the treatment's reversibility and to it effectively establishing a hiatus in pubertal development. I accept that, if the child's current desires are taken to their natural conclusion at some later time, the current treatment can be seen as but the first stage in an ongoing process ultimately leading to very significant surgical intervention. However, in my view, for the reasons earlier given, it is possible to plainly distinguish this treatment from any such later treatment which might occur at a later time.

112. The report from Dr C indicates that the injections are painful. Dr C also refers to the potential for there to be an ultimate reduction in the height that the child

might achieve in adulthood, but, as I read the report, that is by no means a certain side effect. Apart from that just mentioned, there is no other side effect of the treatment.

113. The "likely long-term physical, social and psychological effects on the child if the procedure is carried out" have also just been referred to in the context of the current treatment being the first of what *may* ultimately be a complete change of sex. Again, I emphasise the reversibility of the treatment the subject of the application and the fact that it is, in effect, a hiatus. Again, I emphasise the fact that if the Lucrin treatment stops, the child's normal pubertal development will, thereafter, continue.

114. In the context of considering "likely long-term physical, social and psychological effects" on the child, it is important, in my view, to again emphasise the nature of the treatment. More broadly, there is clearly evidence before me of the likely *current* psychological effects on the child if the treatment is *not* carried out. Dr B says in his report dated 16 April 2013:

> It is important to state that the natural course of Gender Dysphoria, untreated, is that psychological stress increases over time, as the person becomes more and more disillusioned with their morphology which does not match their mindset of their assumed appropriate gender.
>
> Untreated Gender Dysphoria *invariably* progresses to *immense* disillusionment and then, to chronic depression which can often progress to major depression with significant suicidal risk.[63]

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[63] Emphasis added.

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115. I have previously referred to the absence of evidence in relation to less invasive treatment but I have earlier outlined the nature of the conservative therapeutic treatment received by the child to date and the fact that this treatment lead to a referral to the specialists to whose opinions I have earlier made reference and whose recommendations effectively found the present application.

116. Counsel for the applicant properly notes potential for there to be an exception to that emanating from Mr L. But, importantly, it is not known what his final view is in light of the fact that the situation which the child confronts is significantly different to that when Mr L saw him and, in particular, the fact that menstruation has commenced. Further, Mr L was of the view that the child should be referred to an endocrinologist with a view to exploring other

treatment options. That opinion strongly suggests that, whilst not entirely satisfied that the child was suffering from Gender Dysphoria, treatment beyond counselling was necessary.

117. I am entirely persuaded by the unanimous medical evidence before me that the treatment the subject of the application is in the child's best interests.

118. The child's views have already been outlined. The child is 13 years of age and is described in the evidence as being "of age appropriate intelligence" and as possessing "insight [that] is appropriate for his age" and "insight with respect to gender [being] far advanced for his age"[64].

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[64] Report of Dr B, above n 2, p 11.

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119. I have little doubt that the views that he expresses are mature with the caveat that he is, it is accepted, not Gillick-competent. In respect of an issue for which the long-term ramifications both psychically and psychologically, should his current views remain, are as large as that under consideration, there is likely to be room for further maturity and development in his views (whatever they might ultimately end up being).

120. Importantly, as it seems to me, the child's erstwhile views have, for some time, manifested themselves in him aligning himself as a male, dressing as a male and evidencing a desire socially and at school to be treated as a male.

121. Here there are, in my view, sound reasons for concluding that the proposed treatment is in the child's best interests.

122. It is possible I think to argue that the making of an order where one is not required as a matter of law, satisfies the needs or "best interests" of others more than the child – some current or future medical practitioners or a health authority may benefit from certainty as might the Director-General.

123. Yet, it is not necessarily the case that those interests are wholly disconnected from the child's best interests. He, too, benefits, at least indirectly from certainty being given to those who have responsibilities – legal and moral, ethical and parental – for him. Certainty allows all of those concerned in his care to provide a degree of certainty *for the child* into the short and medium-term future. Where the difficulties which the child confronts are essentially psychological this is not, in my view, a minor matter.

Privacy and Anonymisation

124. For reasons explained at the time, I permitted a limited number of persons, all of whom I determined were important to the child's support, to be present

during the proceedings. While I have not the slightest doubt that each and all of those persons would act entirely properly in ensuring the child's privacy, I did so upon indicating that I would make "the usual orders" preserving the child's anonymity and receiving an undertaking that both s 121 of the Act and the specific orders to which reference was made would be explained by counsel for the applicant to those persons, including the consequences that might follow for breach.

125. I consider it appropriate to make orders of the type made almost universally in cases of this type protecting not only the child's name but also de-identifying the medical practitioners, lawyers and others engaged with the case.

I certify that the preceding one hundred and twenty-five (125) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Murphy delivered on 12 July 2013.

Associate:

Date: 12 July 2013

Cited by:

RE: KELVIN [2017] FamCAFC 258 (30 November 2017) (Thackray, Strickland, Ainslie-Wallace, Ryan & Murphy JJ)

66. Similarly, the Court has power to make a declaration, on the application of a parent, that a child is *Gillick* competent to consent to proposed treatment. As the Attorney-General identifies, there are three sources for that power, namely s 67ZC, the Court's general powers conferred by s 34(1) of the Act (see *R v Ross-Jones; Ex Parte Beaumont* (1979) 141 CLR 504 at 509 per Gibbs J), and the Court's power to make "parenting orders" (s 65D(1) and s 64B(2)(i)) (see *Re: Sarah* [2014] FamCA 208 at [30] – [43] ; *Re Sean and Russell (Special Medical Procedures)* (2010) 44 Fam LR 210 at [96] – [108] ; *Re Lucy (Gender Dysphoria)* (2013) 49 Fam LR 540

RE: JADEN [2017] FamCA 269 (02 May 2017) (Carew J)

Re Lucy (Gender Dysphoria) [2013] FamCA 518
Re: Lucas [2016] FamCA 1129
Re: Mackenzie [2016] FamCA 610
Secretary, Department of Health and Community Services v JWB and SMB (Marion's case) (1992) 175 CLR 218
In the marriage of Smith (1979) FLC 90-642

RE: JADEN [2017] FamCA 269 (02 May 2017) (Carew J)

19. Murphy J considered the issue of jurisdiction in a case involving Jaden in 2013 [5]

via

[5] Reported in anonymised form as *Re Lucy (Gender Dysphoria)* [2013] FamCA 518

RE: DYLAN [2014] FamCA 969 (05 November 2014) (Kent J)

4. Usually parents can authorise and consent to medical treatment for their child. Here there is no dispute as between the parents as to the appropriateness of the proposed medical treatment for Dylan. However, some types of medical treatment or medical procedures fall outside the scope of parental responsibility and require authorisation by this Court pursuant to its welfare jurisdiction as contained in s 67ZC of the Act . [1]

via

[1] See, for example, *Secretary, Department of Health and Community Services v JWB and SMB* (" *Mario n's Case* ") (1992) 175 CLR 218 ; *Re: Jamie* (2013) FLC 93-547; *Re: Lucy (Gender Dysphoria)* (2013) 49 Fam LR 540 ; *Re: Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417; *Re: Shane* [2013] FamCA 864 – Stage 2 treatment for child not *Gillick* -competent.

RE: SHANE (GENDER DYSPHORIA) [2013] FamCA 864 (05 November 2013) (Murphy J)

5. As the recent decision of the Full Court in *Re: Jamie* [2013] FamCAFC 110 makes plain (see, also, *Re: Lucy (Gender Dysphoria)* [2013] FamCA 518

RE: SAM AND TERRY (GENDER DYSPHORIA) [2013] FamCA 563 (31 July 2013) (Justice Murphy)

60. An integral part of that role is to preserve a child's right to later make for themselves important decisions including, crucially, the broader right to become the adult that he or she wishes. The recognition of that can be seen in the Court ordering that treatment not take place so as to preserve a later Gillick-competent or adult decision by the child (see, for example, *Re Jodie* [2013] FamCA 62, *Re Jamie (Special medical procedure)* [2011] FamCA 248, *Re Brodie (Special Medical Procedure)* [2008] FamCA 334). Those same factors can also see distinctions being made by the Court in respect of the nature of the proposed treatment or procedure which is authorised and, in particular, whether the proposed treatment is reversible or not (see, for example, *Re Alex: Hormonal Treatment for Gender Identity Disorder* [20 04] FamCA 297 and *Re Lucy (Gender Dysphoria)* [2013] FamCA 518

RE: JAMIE [2013] FamCAFC 110 (31 July 2013) (Bryant CJ, Finn & Strickland JJ)
Procedure) [2011] FamCA 63 , *Re Jodie* [2013] FamCA 62, *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 .