



NICHOLLES

Family Lawyers

Special Procedures and Medical Practitioners

Summary

1. **Diagnosis: It is a special medical procedure?**

Examples include:

- Operations that are irreversible and sensitive procedure
- When a child's parents or guardian will not consent to a significant medical treatment or procedure regarded as necessary and appropriate:
- When the child's parents or guardian are in dispute about a significant and recommend treatment;
- When the procedure is considered sensitive or ethically contentious;
- When a child refuses treatment in a life-threatening situation.

1.1 **Is the treatment 'to cure a disease or correct a malfunction'**

Procedures which are not therapeutic in nature are special medical procedures

1.2 **Is treatment involving the removal of gonads and/or alternation of gender phenotype a 'special medical procedure'?**

No clear case law on point...on balance probably yes.

1.3 **Two stage treatments**

Need court approval for both stages if both stages form part of the same treatment.

2. **Is the child able to consent to the proposed treatment?**

Mature Minor test:

"Whether a child, intellectually disabled or not, is capable, in law or fact, of consenting to medical treatment on his or her own behalf"

In order to consent to medical treatment the child must:

- Fully understand the circumstances;
- Understand the medical treatment of procedure proposed;
- Assess the medical treatments and alternative options;
- Freely wish to undergo the operation or treatment

2.1 Is the child able to refuse the proposed treatment?

No clear guidelines...suggest that it is a stronger test if a child wishes to refuse lifesaving treatment.

3. Factors considered by the Court in determining Special Medical Procedure Cases

- The particular condition of the child or young person which requires the procedure or treatment;
- The nature of the procedure or treatment proposed;
- The reasons for which it is proposed that the procedure or treatment be carried out;
- The alternative course of treatment that are available in relation to that condition;
- The desirability of an effect of authorizing the procedure for treatment proposed rather than the available alternative;
- The physical effects on the child or young person and the psychological and social implications for the child or young person of authoring the proposed procedure or treatment or not authorizing the proposed procedure or treatment;
- The nature and degree of any risk to the child or young person of authorizing the proposed procedure or treatment or not authorizing the proposed procedure or treatment;
- The views (if any) expressed by the guardians(s) of the child or young person, a person who is entitled to the custody of the child or young person, a person who is responsible for the daily care and control of the child or young person, and the child or young person himself, to the proposed procedure or treatment and to any alternative procedure or treatment;

3.1 Special Medical Procedures an the Family Law Rules 2004

Family Court has produced guidelines to assist. Prefer that applicants contact the Office of the Public Advocate before filing application at the Family Court.

4. Consequences of Performing a Special Medical Procedure without Court authorization

At risk that procedure undertaken without consent.

Practitioner at risk of claim for General Damages and Economic loss.

Likely claim one of psychiatric injury.

Also may be liable to meet costs of any treatment to reverse procedure as well as claim for future economic loss.

5. Summary: Recommended Course of Action

In circumstances where a medical practitioner is confronted with what may be a special medical procedure the following steps should be taken:

1. Ascertain whether the child is Gillick competent, or in the case of a young child, whether the child's parents or guardians consent to the treatment. If consent is withheld then an application to the Family Court is necessary before commencing treatment.
2. Can the treatment be classified as a special medical procedure? If the answer is no, then treatment may commence. If the answer is in the affirmative then it is necessary to obtain court approval before treatment can commence.
3. Contact the Office of the Public Advocate to determine whether it can facilitate alternative dispute resolution, and to assist with provision of expert evidence.
4. Make an application at the Family Court of Australia. Usually the child's parents or the child will be the applicants in the proceedings. At the first return date a Child Representative may be appointed to represent the best interest of the child.
5. Decision made by the Family Court of Australia.