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NICHOLES
Family Lawyers

#31 -- October 2013 Edition

NEWSLETTER
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Legal professional "privilege" or "pitfall"?

There has been a recent surge in the number of cases in which the notion of legal professional privilege has arisen and the issue of when that privilege can be challenged and potentially waived.

Legal professional privilege automatically arises upon the creation of a "lawyer-client" relationship and protects the disclosure of particular communications between that lawyer and their client for the dominant purpose of the provision of legal advice, or with respect to legal proceedings.

The privilege encompasses documents (such as affidavits and other court material), as well as verbal and electronic communications between a lawyer and their client and can also be extended to communications between a client and a third party such as a consultant involved in the case.

Whilst legal professional privilege is a common law right that is solidified by the uniform Evidence Acts, it is possible for clients to waive their right to legal professional privilege either expressly or impliedly. Waiver of privilege can have dire ramifications for a client in the event that sensitive information (such as instructions or their lawyer's advice) falls into the hands of the opponent or another interested party.

Contents

a.Level 9, 224 Queen Street
Melbourne Victoria 3000 DX294, Melbourne
t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au

Implied waiver of privilege (the more complex of the two), occurs when a client acts in a way that is inconsistent with the maintenance of the confidentiality that the privilege seeks to protect (*Mann v Carnell (1999) 201 CLR 1*). This occurs when a party directly or indirectly puts into issue the substance of privileged communications, or by the partial disclosure of privileged material. However, there is no general rule as to what types of statements or actions amount to an implicit waiver of privilege and thus each case will turn on its own facts.

Typically, however, a voluntary disclosure by a client of the essence, content or conclusions of their instructions to their lawyer or the legal advice obtained by them will result in a waiver of privilege in circumstances where that disclosure was for the purpose of seeking an advantage in their case. This is on the basis that it would be "unfair" for that client to be able to "pick and choose" what information was divulged to the other side in circumstances where the remainder of the protected information was not as favourable to that client (*Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101).

In the case of *Macquarie Bank Limited & B and Anor* [2006] FamCA 1052, Justice Le Poer Trench identified the following matters that may need to be considered when ascertaining whether an implied waiver of legal professional privilege has occurred:

1. There must be an identified issue clearly requiring determination by the Court.
2. The evidence relied on by a party must have a relevant disclosure of communications which would normally be the subject of legal professional privilege.
3. Waiver of legal professional privilege may arise as a result of a passage in a pleading or an affidavit, oral evidence in a hearing or through the contents of a document provided by one party to another whether as part of a formal discovery process or not.
4. The disclosure of the communication may be made as part of the evidence in support of the case being relied upon by the party who is entitled to claim legal professional privilege in relation to that communication.
5. The disclosure must be seen as relevant or potentially relevant to an issue to be determined by the Court.
6. The disclosure must illustrate conduct which shows inconsistency between a party seeking to maintain legal professional privilege in relation to some communications pertaining to or touching upon an issue in the case but not others relating to the same issue. For a waiver to be found, the Court must determine that it would be unfair to a party to allow the inconsistency to stand.

Therefore, it is dangerous to assume that all lawyer-client communications will be free from the perils of disclosure

should an application be made by an opponent to inspect confidential documents, files or communications on the basis that waiver of legal professional privilege has occurred.

Special Medical Procedures in Family Law-What has changed?

What is a Special Medical Procedure?

The court can make parenting orders under Part VII of the *Family Law Act* 1975 ("the Act") which are commonly known as "special medical procedures". This involves the court making decisions about whether or not it is in the best interests of the child to undergo a particular medical procedure.

The landmark High Court decision regarding special medical procedures is Marion's case, which involved the sterilisation of an intellectually disabled child. Other procedures which have fallen under the special medical procedure umbrella include treatment for childhood Gender Identity Disorder and Disorders of Sexual Development.

On 31 July 2013, the Full Court of the Family Court delivered its long awaited judgment in Re *Jamie* which examined the Court's role in authorising stages of treatment in cases of Gender Identity Disorder.

Who can make an application on behalf of the child?

Under rule 4.08 of the Family Law Rules 2004 any of the following persons may make a special medical procedure Application in relation to a child:

- a parent of the child;
- a person who has a parenting order in relation to the child;
- the child;
- the independent children's lawyer; or
- any other person concerned with the care, welfare and development of the child.

Relevant legal principles

It is generally within the bounds of parental responsibility for parents to be able to consent to medical treatment on behalf of their child. There are however certain "special medical procedures", which fall outside parental responsibility and require determination by the court (Secretary, *Department of Health and Community Services the JWB and SMB* [1992] HCA 15 ("Marion's case").

Section 67ZC of the Act provides that the court has jurisdiction to make orders relating to the welfare of children and that the court must have regard to the best interests of the child as the paramount consideration.

The procedure to be followed is set out in Chapter IV, Division 4.2.3 of the Family Law Rules. When a special medical procedure Application is filed, evidence must be given to satisfy the court that the proposed medical procedure is in the best interests of the child.

Rule 4.09(2) provides that evidence must be included from a "medical, psychological or other relevant expert" to establish:

- the exact nature and purpose of the proposed medical procedure;
- the particular condition of the child for which the procedure is required;
- the likely long-term physical, social and psychological effects on the child:

  (i) if the procedure is carried out; and

  (ii) if the procedure is not carried out;
- the nature and degree of any risk to the child from the procedure;
- if alternative and less invasive treatment is available--the reason the procedure is recommended instead of the alternative treatments;
- that the procedure is necessary for the welfare of the child;
- if the child is capable of making an informed decision about the procedure--whether the child agrees to the procedure;
- if the child is incapable of making an informed decision about the procedure--that the child:

  (i) is currently incapable of making an informed decision; and

  (ii) is unlikely to develop sufficiently to be able to make an informed decision within the time in which the procedure should be carried out, or within the foreseeable future;
- whether the child's parents or carer agree to the procedure.

Is Treatment for Childhood Gender Identity Disorder a Special Medical Procedure?

Treatment for Gender Identity Disorder ("GID") has in the past been characterised as a special medical procedure and required court authorisation. GID is a psychological condition identified in DSM-IV (and the new DSM-5, published May 2013). The treatment commonly sought for children with GID (of children either born a male, to live in the affirmed sex as a female or born female, to live in the affirmed sex as a male) consists of 2 stages. Firstly, the administration of puberty-suppressant hormones (stage 1) and secondly, the administration of oestrogen or testosterone (stage 2). In the past, both stages have been viewed as a "staged clinical program [that] should be seen as part of a single package" (Re *Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297 at 186) and that court authorisation for parental consent was required for both stage 1 and 2 of the treatment plan.

The significant feature of stage 1 treatment is that it is reversible in nature, so that if the child changes his or her mind in the future the treatment can essentially be reversed. Treatment for stage 2 treatment is, however irreversible.

The Full Court of the Family Court decision in Re Jamie [2013] FamCAFC 110 ("*Re Jamie*")

The first issue on appeal was whether childhood identity disorder is a special medical procedure which displaces parental responsibility and requires a determination by the court.

The Full Court determined that if the child, parents and treating medical practitioners agree to the commencement of stage 1 treatment, court authorisation is not required. Further, if a child is not yet able to make decisions about the treatment then the authorisation falls within the "wide ambit of parental responsibility" [at paragraph 108].

This decision means that families will no longer have to seek orders from the Family Court of Australia for stage 1 treatment for their children, provided no special circumstances exist.

The third ground of appeal was whether stage 2 treatment for gender identity disorder should be subject of a further application to the court prior to its commencement. The Full Court specifically dealt with the issue of "*Gillick* competency" and who should be able to determine same. This is a term used to decide whether a child 16 years or younger is able to consent to his or her own medical treatment, even though his or her parents are not in agreement.

In Gillick, it was held that "as a matter of law the parental right to determine whether or not a minor child below the age of 16 will have medical treatment terminates of and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. It will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law. Until the child achieves the capacity to consent, the parental right to make the decision continues, save only in exceptional circumstances" [*Gillick* at paragraph 112].

In *Re Jamie* it was held that the Court is required to determine Gillick competency and once this is established the child can seek stage 2 treatment and no parental consent is needed. If the Court does not find that the child is Gillick competent, then Court authorisation for parental consent is required.

The Full Court in *Re Jamie* held that it was bound by the High Court in Marion's case that Court authorisation for irreversible medical treatment is required where there is a significant risk of the wrong decision being made as to the child's capacity to consent to the treatment and where the consequences of such a wrong decision are particularly grave [at paragraph 134]. Here the Court was referring to the fact that stage 2 treatment is irreversible, unlike stage 1,

which means court authorisation is still required for stage 2 treatment for GID.

Dad or Donor?

The Family Court of Australia declares sperm donor to be a "parent" for the purposes of the Family Law Act 1975.

Nicholes Family Lawyers recently represented the Applicant sperm donor in Family Court of Australia case, *Groth & Banks [2013]*, where it was successfully argued that it was in the best interest of the child for the Applicant to be declared a "parent" of the child born as a result of artificial insemination procedures for the purposes of the *Family Law Act 1975*.

The Applicant, who agreed to donate sperm to his former partner on the basis that he would be involved in the child's life as a father, was found to be the progenitor and parent of the child due to the specific facts of the case and the inherent inconsistencies between the Commonwealth *Family Law Act 1975* and the Victorian *Status of Children Act 1974* in circumstances where a single woman conceives a child using donor sperm.

Groth & Banks [2013] not only reinforces that the "best interests of the child" is the paramount consideration in Family Court of Australia cases; it also solidifies that children have the right to a relationship with both of their parents despite whether their parents are a heterosexual couple, a same sex couple, separated parents or have entered into a co-parenting arrangement in relation to donor conceived children.

Informal Property Agreements: Not Worth the Paper They're Written On

When an agreement is reached between parties to a marriage or de facto relationship in relation to the division of their assets, it is extremely important that it be formally documented, either by way of consent orders or a Binding Financial Agreement. Informal property settlements, even those that have been recorded in writing, signed by the parties, and even acted upon, are not binding on the courts or on either party.

This means that a party to such a settlement is not protected from a property settlement claim by the other party. While there are time limits on bringing property applications following a divorce or relationship, breakdown it is possible to bring applications out of time in some

circumstances, and there is no time limit in circumstances where a married couple has separated but not divorced.

Once a property settlement application is made, it is likely that the court will take the fact that there has been an informal settlement, and the terms of that settlement, into account in determining whether to make orders adjusting the parties' property interests and if so, what orders to make, particularly if the settlement has been implemented and relied on by one or both parties.

However, the court is not bound by an informal agreement entered into by the parties, and there is no guarantee that a similar outcome will result from a court application, particularly if the informal agreement does not closely resemble the outcome that would otherwise have been ordered by the court.

Further, although post-separation events (such as the acquisition of significant wealth by one of the parties) may be given particular weight in the court's determination, the outcome ordered by the court will be based on the circumstances that exist at the time of the trial, not at the time of the separation. In addition, assets that were in existence at the time of separation will be valued as at the date of the trial.

For example, if a married couple separates and at the time of separation, their main asset is a house worth $400,000 with equity of $200,000, they might decide that the wife will pay the husband $100,000, being half the equity, and that that the wife will retain the property. Acting on this agreement, the husband transfers his share of the house into the wife's name, accepts the funds, and they each go their separate ways. Ten years later, when the now-unencumbered house is worth $1 million and the husband has fallen on hard times, there is nothing to stop him bringing an application for a further share of the now-substantial property pool. The wife is then at risk of having to make a substantial further payment to the husband. Had the settlement reached between the parties at the time of separation been properly formalised, the husband would not be able to make a claim against the wife.

To protect against these risks, it is crucial that all property settlements, regardless of how amicably they may have been reached, are properly formalised.

New Sexual Discrimination Act Becomes Law

Australia is the first Jurisdiction to introduce a separate ground of discrimination on the basis of intersex status. On 26 June 2013 the *Sex Discrimination Act (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013 received Royal Assent and successfully became Australian Law.

People who are intersex may face many of the same issues that are sought to be addressed through the introduction of the ground of gender identity. However, including the separate ground of intersex recognises that whether a person is intersex is a biological characteristic and not an identity. There is substantial evidence demonstrating that discrimination against LGBTI people occurs in the community. This discrimination occurs in a range of areas of public life, including work, accommodation and the provision of goods and services. This range of conduct is highly detrimental to LGBTI people, manifesting barriers to how they carry out their day-to-day lives. The purpose of this Act is to foster a more inclusive society by prohibiting unlawful discrimination against LGBTI people and promoting attitudinal change in Australia.

The Act will not extend the traditional exemption for religious organisations to cover the new ground of intersex status. During consultation, religious bodies raised doctrinal concerns about the grounds of sexual orientation and gender identity. However, no such concerns were raised in relation to 'intersex status'. As a physical characteristic, intersex status is seen as conceptually different according to the Church. No religious organisation identified how intersex status could cause injury to the religious susceptibilities of its adherents. Consequently, prohibiting discrimination on the basis of intersex status will not limit the right to freedom of thought, conscience and religion or belief and therefore the exemption was not extended.

The new Act also has also addressed other areas of discrimination in the community. The Act extends the existing ground of 'marital status' to 'marital or relationship status' to provide protection from discrimination for same-sex de facto couples not offered under the previous discrimination scheme. The Act will also ensure that no provider of aged care services with Commonwealth funding can discriminate. This includes religious organisations (Although such providers can continue to preference people of their faith).

As the Act is very new and there is a twelve month grace period, it is yet to be utilized, however hopefully it is a step in the right direction to lower the rate of sexual discrimination across the community.

What if a child is taken from Australia to a non-Hague Convention country?

If a child is removed or retained from Australia in another country by a parent, then an Application may be able to be made under the Convention on the Civil Aspects of International

Child Abduction ("the Hague Convention") if the other country is a signatory of the Hague Convention.

However, if a child is taken from Australia to a non-Hague Convention country, there are a number of matters to consider as follows:

1. Has the child been taken to Egypt or Lebanon? If so, there are bilateral agreements in place in these countries which may be of assistance in seeking a return of a child to Australia.

2. Has the child been taken to Papua New Guinea ("PNG")? If so, PNG is the only country that is not a Convention country but is a prescribed jurisdiction country, meaning Australian Parenting Orders can be registered and thereafter enforced in PNG.

3. Does the parent remaining in Australia have Orders in place in Australia in relation to parenting matters, conferring upon them rights in relation to time and/or parental responsibility? If so, the parent remaining in Australia may be able to:

    - Seek enforcement through the Australian Courts and, failing compliance, bring contempt proceedings. There may be criminal consequences for the removing parent. Whether or not this assists with recovering the child will depend on the relationship between the Australia and the other country in respect of arrangements for extradition of criminals. There are a number of countries with whom Australia has such extradition treaties who do not have bilateral agreements in relation to child abduction with Australia, and are neither Convention countries nor prescribed jurisdictions.

    - Seek registration of the Australian Order in a Court of the Country where the child has been taken, if that Country is:

        - A prescribed jurisdiction for the purposes of Regulation 23 of the Family Law Regulations; or

        - A signatory to the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* ("Child Protection Convention").

If there are no avenues available in relation to the above, then due consideration should be given to finding a lawyer in the country to which the child has been removed.

The International Academy of Matrimonial Lawyers ("IAML") website contains a list of IAML members which can be sorted by Country and even states within Countries. Alternatively, International Social Services ("ISS") may be able to assist the parent remaining in Australia.

The Australian Government may

also provide consular and legal financial assistance in certain overseas child abduction cases.

Bilateral agreements with Egypt and Lebanon

As mentioned above, Australia has entered into 2 bilateral agreements with Egypt and Lebanon respectively.

The agreement with Egypt is called the *Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding Cooperation on Protecting the Welfare of Children*. The agreement came into force in 2002. It is essentially an agreement between Egypt and Australia to facilitate alternative dispute resolution and the efficient exchange of documents. It is not an agreement that one country will register and enforce Court Orders made in the other country (which would be in the same vein as the prescribed jurisdictions referred to below) nor is it an agreement to return children from one country to the other for determination of substantial parenting proceedings there (which would be in the same vein as the Convention).

The agreement with Lebanon is called the *Agreement between Australia and the Republic of Lebanon regarding Cooperation on Protecting the Welfare of Children*. The agreement came into force in 2010. It is very similar to the Egypt agreement and is therefore essentially an agreement between Lebanon and Australia to facilitate alternative dispute resolution and the efficient exchange of documents.

Because both agreements prescribe private alternative dispute resolution mechanisms, outside of the Court systems of the respective countries, there is a dearth of information about how the agreements are working in practice.

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a.Level 9, 224 Queen Street
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t.+61 3 96704122 f.+61 3 96705122 w.nicholeslaw.com.au