



**Law
Institute
Victoria**

Professional Development
Legal Update

Gender Issues in Family Law

Thursday 21 April 2005

Course Code: 0605.GI

Speakers:

Sally Nicholes

Tim D North SC

Sharon Johns

Victorian Bar

Chair:

John Spender

Mason Sier Turnbull

Special Medical Procedures and Medical Practitioners

The recent Family Court of Australia case of *Re Alex*¹ highlights the difficulties which may be faced by medical practitioners when a child is being considered for surgery that would involve the removal of gonads and/ or alteration of gender phenotype or identity. In this case, Chief Justice Nicholson ruled that a 13-year-old biological girl was able to commence treatment for gender dysphoria.

In *Re Alex* the child had always identified as a male, wore male clothes, used the male toilets and otherwise presented as a male. The Chief Justice found that the child was able to enrol at school using a male name, and commence administration of the oral contraceptive pill to stop menstruation immediately. He further ordered that the child, in consultation with his treating medical practitioners was able to commence irreversible hormonal treatment at a later date but prior to his 18th birthday. The proposed treatment would stimulate facial hair growth, masculinization of his voice and physique and lengthening of the clitoris.

The Chief Justice determined that this type of medical treatment fell outside the scope of parental authority and that it is necessary to obtain court approval before commencing such treatment on a child. This decision extends the category of 'special medical procedure' cases, which have traditionally focused on proposed non-therapeutic sterilization of intellectually disabled girls. He determined that the child in this case did not have sufficient understanding to consent to the treatment on his own right, given the complexities of the issues involved.

This case highlights the importance of determining whether the treatment is a special medical procedure before commencing treatment.

1. Special Medical Procedures

If a proposed treatment is a 'special medical procedure' an application must be made to the Family Court to determine whether the treatment is able to be performed on the child. Medical practitioners will be in breach of the *Family Law Act (Cth)* if they commence treatment, even in circumstances when they have obtained full parental consent to the treatment. This may leave the medical practitioner open to a civil action for performing a medical procedure without valid consent.

1.1 Diagnosis: Is it a special medical procedure?

Procedures which are not therapeutic in nature are special medical procedures.

Examples of special medical procedures include the following:

- Operations that are irreversible and sensitive procedures;
- 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 recommended treatment;
- When the procedure is considered sensitive or ethically contentious;
- When a child refuses treatment in a life-threatening situation.²
- Where a fundamental human right such as the right to procreate (or life) is interfered with

Court authorisation is required if the situation is one where there is a significant risk of making the wrong decision and the consequence of making a wrong decision is particularly grave. Surgical intervention is not the only type of procedure that falls into this category. The most common treatment considered to be a 'special medical procedure' is the proposed sterilisation of intellectually disabled girls. The court has also decided applications in the following situations:

- (a) the surgical gender reassignment of a 14 year old with a congenital disorder (*Re A*)³ **Re A⁴: Court Authorisation Required for Sex Reassignment** The application sought authorisation from the Family Court to allow a number of medical procedures to take place on a 14 year-old child, including bilateral mastectomies, a hysterectomy and oophorectomy, and also surgery which created male sexual organs. Both parents were in favour of the application. Consent to such serious treatment was found to be outside the scope of a parent's general entitlement to consent. In considering whether the medical procedure in question was "outside the scope of a parent to consent to on

¹ *Re Alex: Hormonal Treatment for Gender Identity Dysphoria*, (2004) FLC 93-175

² Family Court of Australia, "A Question of Right Treatment, *The Family Court and Special Medical Procedures for Children*", 1998, 4 to 5, 8-9

³ *Re A* (1993) FLC 92/402:

⁴ (1993) FLC 92-402

behalf of his or her child"⁵, the court acknowledged the distinction highlighted in *re Jane*⁶ between therapeutic and non-therapeutic treatment. Therapeutic procedures aim to treat a malfunction or disease, whereas non-therapeutic procedures were categorised as treatments "performed as a matter of routine for religious or social purposes"⁷. The court did provide authority for the treatment to take place)

- the performance of cardiac surgery on an 11 year old boy where parental consent was refused (*Re Michael*)⁸
- 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&CMW*)⁹

Therapeutic and Non-therapeutic treatment

In Marion's case the majority and Deane J (in his separate decision) noted that the distinction between the terms was quite difficult to draw and that there was a degree of uncertainty around them. Nevertheless, they found it necessary to rely on the distinction in making their decision (at 409 and 444)

Definitions of therapeutic and non-therapeutic sterilisation were set out by Justice Brennan in his dissenting judgment, as follows: therapeutic medical treatment has as its chief purpose 'preventing, removing or ameliorating a cosmetic deformity'; non-therapeutic medical treatment 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 his administered chiefly for other purposes' (at 423).

- for further discussion of distinction see pp3 to 5 of Notes for proposed article

⁵ *Marion's Case*, FLC at 79,171

⁶ (1989) FLC 92

⁷ *Re Jane* (1988) 12 Fam LR 622,690.

⁸ *Re Michael* (1994) FLC 92/471

⁹ *Re GWW& CMW* (1997) FLC 92/748

1.2 Is the treatment 'to cure a disease or correct a malfunction?'

In the leading special medical procedure case of Marion's Case the court determined that treatment with the purpose of curing a disease or correcting a malfunction falls within the normal scope of medical treatment and does not require court authorisation. For example if a proposed hysterectomy of a girl is to treat cancer or some other congenital disease then court approval is not required. In the event that the proposed sterilisation is to prevent menstruation or as a contraceptive measure than the court has determined that court authorisation is required. The distinction is made between therapeutic and non-therapeutic treatment.

1.3 Is treatment involving the removal of gonads and/ or alteration of gender phenotype a 'special medical procedure'?

On balance yes, as long as the treatment is not therapeutic or to treat a malfunction or disease. Although I refer to the distinction of therapeutic vs non-therapeutic treatment below; for now the courts would identify this as having the characteristic of a special medical procedure unless there were therapeutic reasons for undergoing the treatment for example the courts have distinguished in circumstances where the invasive procedure is necessary e.g. removal of the reproductive organs to cure a malignant cancer

In the case of Re Alex Chief Justice Nicholson determined that gender dysphoria is not a malfunction or a disease. His honour stated 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.

On the facts of Re Alex this treatment could not be characterised as that to cure a malfunction or a disease. The treatment sought to be sanctioned was 2 stages that His Honour chose to seen as a single package- (a) that the child be administered a combination of oestrogen and progestogen on a continuous basis until the child is 16 (reverses bible medical treatment) and (b) the child be treated with LHRH analogue and testosterone administrated either in oral form, by monthly injection or by 6 monthly subcutaneous implant" had irreversible consequences

In circumstances where a reversible treatment of a child is in specific anticipation of an irreversible medical treatment that requires authorisation of the Court it would be prudent to make an application to the Court at the outset of the clinical intervention. His Honour

distinguished from the assessment and diagnostic procedures unless such procedures may have the quality of special medical procedure attached to them.

The situation faced by the court in *Re A* was different as in that case A had been born a genetic female with an extreme degree of masculinization due to an abnormality in the adrenal gland. When the child was very young she had undergone a genital reconstruction to give her a feminine appearance and was placed on a continuous regime of hormone treatment to prevent the production of any further male hormones by the adrenal gland. During her childhood the child's parents did not adhere strictly to the recommended level of hormone treatment which lead to the further production of male hormones and the masculinization of the external genitalia. At the time of the Application to the Court the child was 14 years of age. A felt, and the experts agreed that male gender reassignment including surgery would be more appropriate. The Court determined that the proposed treatment did require Court authorisation despite the strong level of understanding of the proposed treatment displayed by the child. Proposed medical treatment would require invasive, irreversible and major surgery - serious consequences of a wrong decision including social and psychological.

The Family Court in its publication, *'The Family Court and Special Medical Procedures for Children'* provides the example of a young person born with both male and female characteristics who wishes to determine their gender by surgery as an example of a special medical procedure case.¹⁰

In the circumstance of a new born or young child born with ambiguous genitalia it can be argued that any proposed surgery or intervention will be as treatment of a malfunction or disease and therefore fall outside the scope of the Family Court's special medical procedure jurisdiction. However, there is no clear authority on this issue. In circumstances where treating practitioners are unsure as to whether the proposed treatment is for therapeutic purposes then it would be prudent to seek clarification from the Family Court. In light of *Re Alex* treatment for gender dysphoria is not considered therapeutic in nature.

¹⁰ Above n2, 9.

1.4 Two stage treatments

In *Re Alex* the court was required to consider a two stage treatment, with the first stage involving reversible treatment (administration of the contraceptive pill to suppress menstruation), and the second involving administration of irreversible hormonal treatment at a later date. In situations where the two stages of treatment are so interlinked and interdependent to be considered part of the same treatment then it is necessary to obtain court authorisation prior to commencement of the first stage of treatment. Chief Justice Nicholson stated:

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 Section 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 proceed a form of intervention unless such procedures themselves have the qualities of a special medical treatment to them.¹¹

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

If the child's proposed treatment can be classified as a 'special medical procedure', any consent given to perform the treatment by the child or the child's parents can not be relied upon by the medical practitioner and court approval must be obtained prior to commencing treatment. In situations where the proposed treatment is therapeutic in nature it may still be necessary to obtain court permission to commence the treatment if there is a dispute about the ability of the child to consent to the treatment him or herself.

The leading Australian case, which deals with special medical procedures and children, is *Marion's Case*.¹² In this case the High Court of Australia ruled that the English decision of *Gillick's Case*¹³ is to be followed in Australia. Gillick's case requires the court to consider whether a child has achieved a sufficient understanding and intelligence to enable him or her to understand fully the proposed medical treatment. This is a threshold question of

¹¹ Above, n1, [78979]

¹² *Secretary, Department of Health and Community Services v JWB and SMB* (1992) CLR 218 ("Marion's Case")

¹³ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("Gillick's Case")

consent, and the court is to consider "*whether a child, intellectually disabled or not, is capable, in law or fact, of consenting to medical treatment on his or her own behalf*".¹⁴ This test is commonly referred to as the 'mature minor' test.

In *Re Alex* Chief Justice Nicholson found that the child had a "*general understanding of what is proposed and its effect but it is quite another to conclude that he/she has sufficient maturity to fully understand the grave nature and effects of the proposed treatment*",¹⁵

In this case an expert psychologist gave evidence that although the child had an '*intellectual understanding of the treatment process including the stages of the treatment, some of the intended effects as well as the side effects of the medications and what the treatment process is for, it is not clear whether he understands the full implications of the treatment*',¹⁶

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

The child must understand the nature and consequences of the treatment or procedure and must not be influenced by the wishes of others, for example when the child's parents cannot agree and the child is caught up in the dispute.¹⁷

In cases where the child does not have "Gillick competence" and is unable to make an informed decision then the child's parents will have the authority to consent to, or refuse treatment on the child's behalf. In circumstances where it can be argued that this parental authority is not being exercised in the best interests of the child, then any person who is

¹⁴Above n8, 232

¹⁵ Above n1, [78974]

¹⁶ Ibid, [78973]

¹⁷ Above n2, 4 to 5.

concerned about the child's welfare may apply to the court seeking an order authorising appropriate treatment for the child.

If a child is 'Gillick' competent and consents to treatment then treatment is able to proceed even if the child's parents do not consent. In circumstances where there is disagreement between the child, his or her parents, or treating practitioners it is prudent for the practitioner to obtain court approval before commencing treatment.

2.1 Is the child able to refuse the proposed treatment?

There is no direct case law in Australia that I have found however we would most likely follow the UK position. In the United Kingdom the position is that a *Gillick* competent child is unable to refuse treatment, if such refusal has the effect of overriding consent given by the guardian or the court. Notwithstanding a child being "Gillick competent" a court must act in the best interests of the child as a paramount consideration and in for lifesaving treatment: UK cases *Re W* (anorexia) and *Re R* (anti-psychotic drugs) the Court overruled competent child's refusal to consent to treatment

In submissions made by the Human Rights and Equal Opportunity Commission (HREOC) in *Re Alex* it was argued that if a child is found to be competent then the court should not distinguish between a child's wishes to undertake or refuse treatment. It argued that if a child has achieved "*a sufficient understanding and intelligence to enable the child to understand fully what is proposed then this court has no further role in this matter*".TM His Honour Justice Nicholson made no findings on this matter but observed that he had doubts about the proposition put forward by HREOC. He further stated as follows:

It seems to me that there is a considerable difference between a child or young person deciding to use contraceptives as in *Gillick* and a child or young person determining upon a course that will change his or her sex. It is highly questionable whether a 13 year old could ever be regarded as having the capacity for the later, and this situation may well continue until the young person reaches maturity.¹⁹

There are no clear guidelines that will assist in determining whether a child is able to consent to or refuse medical treatment. The threshold will vary depending on the severity

¹⁸ Above n1, [78975]

¹⁹ Ibid

of the proposed treatment and the impact it will have on the child. In circumstances where a child has a general or even profound understanding of the proposed treatment it will still be prudent to seek court determination of the child's competency in cases involving controversial or significant treatments or when the child's wishes conflict with those of his or her parents or medical practitioner.

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

If the Court finds that it has jurisdiction to determine whether or not a proposed medical treatment should be undertaken on a child it will consider a check list of factors which were outlined in *Marion's Case(No2)*²⁰. The factors are as follows:

- 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 courses of treatment that are available in relation to that condition.
- The desirability of an effect of authorising 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 authorising the proposed procedure or treatment or not authorising the proposed procedure or treatment.
- The nature and degree of any risk to the child or young person of authorising the proposed procedure or treatment or not authorising the proposed procedure or treatment.
- The views (if any) expressed by the guardian(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

²⁰ Re *Marion (No 2)* (1994) FLC 92-448

or young person himself, to the proposed procedure or treatment and to any alternative procedure or treatment.

In considering these factors the Court will determine each fact or situation individually with a focus on the best interests of the particular child. The Family Law Act requires the Court to consider the following factors when determining a child's best interests pursuant to Section 68F(2). The relevant factors in the context of special medical procedures are as follows:

- Any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the Court thinks are relevant to the weight it should give to the child's wishes;
- The nature of the relationship of the child with each of the child's parents and with other persons;
- The capacity each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- The child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of aboriginal peoples or Torres Straight Islanders) and any other characteristics of the child that the Court thinks are relevant;
- Whether it would be preferable to make the Order that would be least likely to lead to the institution of further proceedings in relation to the child;
- Any other fact or circumstance that the Court thinks is relevant.

3.1 Special Medical Procedures and the Family Law Rules 2004²¹

Division 4.2.3 of the Family Law Rules 2004 outlines the procedural steps and requirements in filing an application in respect of special medical procedures in the Family Court of Australia. The Family Court has also drafted a series of guidelines²² to further assist those contemplating making an application.

²¹ *Family Law Rules, 2004* (Cth)

²² Above n2.

An application may be made by:

- a parent of the child;
- a person who has a parenting order in relation to the child;
- the child;
- the child representative;
- any other person who has an interest in the care, welfare and development of the child. This category includes medical and other professionals responsible for medical treatment of the child.²³

Evidence must be provided to satisfy the court that the proposed medical procedure is in the best interests of the child. This evidence must address the factors outlined by the court in *Marion's Case (No 2)*.²⁴ Once an application is filed the court will first list the matter before the court within 14 days of filing.²⁵ At the first return date the court is able to determine the matter or make further orders in respect of filing of documents.²⁶ In cases of extreme urgency then it is possible to seek that the matter be heard on the same day of filing, depending on the situation.

The Southern Region of the Family Court of Australia has developed a series of protocols to 'case manage' special medical procedure applications.²⁷ They provide that at first instance both Victoria Legal Aid and the Court itself is to direct all enquiries to the Office of the Public Advocate (OPA). The OPA is to meet with the enquirer and attempt to work through the issues in an more informal setting, however it has no authority to prevent an application being made to the Family Court. Once an application has been made the OPA is able to assist the enquirer to obtain medical reports and other evidence. It is also able to review the medical evidence and advise on whether it considers the procedure to be contrary to the best interests of the child. In these circumstances it will discuss with the

²³ Above n18, 4.08(1)

²⁴ Ibid, 4.09

²⁵ Ibid, 4.11

²⁶ Ibid, 4.12

²⁷ Practice Note-1/98, Family Court of Australian (Southern Region), above n2, Chapter 10.

enquirer less restrictive options. The OPA may refer the matter to the Family Court for the purposes of resolving the matter through alternative dispute resolution process.

Once an application has been filed the Family Court may make an order that a Child Representative be appointed to represent the interests of the child. The appointment will usually be funded by Victoria Legal Aid. The Child Representative must ensure that the child's wishes are known to the court, and must provide evidence as to the child's *Gillick* competency. At the first return date the OPA may seek leave to appear as 'amicus curiae' (friend of the court) in the proceedings.

In appropriate circumstances the Family Court will facilitate primary dispute resolution between the parties. However, given the requirements that court approval must be granted before a special medical procedure is carried out, a negotiated settlement can only involve non intrusive and reversible alternatives. Agreements reached during the dispute resolution process may include a decision to trial options and to access information and services, or that there is a need for the special medical procedure. However agreement between the participants does not remove the requirement for the Court to authorise the special medical procedure.

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

The performance of a special medical procedure without court authorisation will have the effect of rendering invalid any consent given by the child or the child's parents. If a child is given invasive treatment without lawful consent then the medical practitioner is open to the same actions available to adult patients who have been given treatment without their consent. These include trespass, criminal prosecution, or a complaint made to the Medical Practice Board, in Victoria, as well as exposure to civil damages claims.

In the event that a child decides to bring an action for damages he or she can make a claim pursuant to the Wrongs Act in Victoria. It is possible to bring a claim for general damages and for out of pocket expenses. It is foreseeable that a child will argue that he or she has suffered psychiatric injury as a result of the treatment. The child must prove that he or she has suffered an injury of 10% or greater severity. The child is also able to claim out of pocket expenses such as any expenses incurred to reverse the treatment or if the psychiatric injury is so severe as to limit employment opportunities, future economic loss.

The normal time limit which applies to bring an action for damages is 3 years. However, a child has a maximum of 12 years to bring a claim from the date of the injury. It is possible

to apply for an extension of time, and it is likely that an extension would be granted. The child would bring an action in the Supreme or County Courts of Victoria.

It is advisable to keep thorough notes of all discussions with the child and the child's family regarding treatment options. As soon as a practitioner becomes aware of a potential claim they should immediately notify their insurer.

In the circumstances it is very important to fully assess the ability of the child to consent to the treatment and whether the proposed treatment is such that court approval is required regardless of consent.

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 followed:

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 the 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 interests of the child.
5. Decision made by the Family Court of Australia.

6. Conclusion

Both case law and legislation place a considerable onus on medical practitioners when treating children. Consent by either the child or his or her guardian, depending on the age of the child and proposed procedure, must be obtained before commencing treatment. In

circumstances involving special medical procedures Family Court approval must be obtained notwithstanding consent.