

The Family Court's Jurisdiction Over Procedures Conducted on Minors, by Wendy Kayler-Thomson, Forte Family Lawyers, released November/2010

Two recent cases, one dealing with gender reassignment and the other sterilisation of a disabled child, have discussed the Court's jurisdiction over certain procedures to be conducted on minors.

This presentation will review the source and scope of the Family Court's power in this regard, and through a review of cases the general approach of the Court, the role and requirements of expert evidence, and the status of the wishes of the parents and the child.

Jurisdiction

The foundation for the jurisdiction of the Family Court to make orders regarding the welfare of children has been subject to interesting discussion since the decision of the High Court in Minister for Immigration and Multicultural and Indigenous Affairs v B and Another¹ (MIMIA v B). Perhaps better known as the "children in detention" case, it involved an application by two children and their mother for orders that they be released from an immigration detention centre in South Australia. The respondent to the application was the Commonwealth Minister for Immigration and Multicultural and Indigenous Affairs. The order for release was sought pursuant to section 67ZC of the Family Law Act ("the Act"). It was argued that the continued detention of the children was harmful to their welfare.

Section 67ZC provides:

*In addition to the jurisdiction that a **court** has under this Part in relation to **children**, the **court** also has jurisdiction to make orders relating to the welfare of **children**.*

Pursuant to s. 67ZC(2), the Court must regard the best interests of the child as the paramount consideration when deciding whether to make an order for the welfare of a child.

The scope of s. 67ZC(2) was considered by the High Court in MMIA vB . The High Court found that the use of the word "jurisdiction" within s 67ZC did not necessarily mean that the Family Court was given welfare jurisdiction at large. The High Court found that s 77 of the Commonwealth Constitution gave the Commonwealth Parliament the power to make laws defining the jurisdiction of the Family Court. The Family Court may only be invested with jurisdiction that the Parliament has defined by law with respect to one of the "matters" mentioned in s 75 or s 76 of the Constitution. In the context of family law, the only "matter" would be a matter "arising under any laws made by the Parliament". The "welfare of children" is not a matter specifically mentioned in s 75 or s 76 of the Constitution. S 51 of the Constitution refers to parental rights, and the custody and guardianship of infants related to parties to a marriage. Their Honours Gleeson CJ and McHugh J found

S 67ZC ... does not itself expressly give jurisdiction in respect of a "matter": it does not refer to any substantive rights, privileges, duties or liabilities or the persons who can apply for or be made subject to an order under the section".

The High Court found that, standing alone, s 67ZC did not give the Court the jurisdiction to make the orders sought by the applicant.

The High Court found that the valid application of s 67ZC was therefore dependent upon some other provision in Part VII of the Act creating a "matter" within the meaning of the Constitution to which the jurisdiction conferred by s 67ZC can attach.

The High Court found in the children in detention case that there was nothing in Part VII of the Act to give any support for the making of an order for the release of the children from detention against the Minister.

The Chief Justice of the Family Court had cause to consider the High Court's judgement in the context of a special medical procedure case in *Re: Alex*². Her Honour found "most commonly, special medical procedure applications are brought by a parent and thus the Part VII 'matter' to which the section 67ZC jurisdiction is attached is section 61; namely the exercise of parental responsibility."³

Which Children?

The application of s. 67ZC is confined by s. 69ZH to children born of a marriage. However s 69ZH can extend the operation of s 67ZC where there has been an appropriate referral of powers from a State.

Justice Carter considered the jurisdictional basis of the Family Court making orders in relation to special medical procedures involving children who were not born to parties to a marriage in *Re Brodie (Special Medical Procedures: Jurisdiction)*⁴

Her Honour considered the difficulties created by changes in terminology to the orders made under the Act since the referral of powers by the States (excluding Western Australia) in the 1980's. For instance, the Victorian referring act⁵ referred to the Commonwealth its powers in relation to ex nuptial children, but only in the context of maintenance, custody, guardianship and access. Amendments to the Act in 1995 and 2006 removed those terms of "guardianship, custody and access" and the emphasis is now on parental responsibility rather than parental powers. Her Honour suggests that the authorisation for a special medical procedure would fall within the exercise of the "guardianship" power referred by the (in that case) Victorian Parliament.

Which Medical Procedures?

The High Court in *Department of Health and Community Services v JWB and SMB ("Marion's case")*⁶ considered what kinds of medical treatments require Court authorisation. Marion's case involved the sterilisation of an intellectually disabled 14 year old girl. The parents made the application and the question was whether parents, as guardians, had the capacity to authorise the performance of the hysterectomy operation without resort to the Court. There had been four previous Family Court decisions on the question of whether or not the Court's authority was needed before a sterilisation procedure could be carried out or whether parental consent was sufficient. The Family Court was split 2:2 in those previous cases.

The decision of the High Court in Marion's case includes a useful summary of the state of the law, as it then was, in the United Kingdom and various states in the United States of America. The High Court found

*"in our opinion features of the sterilisation procedure or, more accurately, factors involved in a decision to authorise sterilisation of another person which indicate that, in order to ensure the best protection of the interests of a child, such decisions should not come within the ordinary scope of parental power to consent to a medical treatment. Court authorisation is necessary and is, in essence, a procedural safeguard"*⁷.

The High Court clarified that sterilisation in this context was not sterilisation which is a by product of surgery appropriately carried out to treat some malfunction or disease.

The High Court found that Court authorisation is required for this kind of sterilisation procedure, "first because of a significant risk of making the wrong decision, either as to 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 the wrong decision are particularly grave"⁸.

The Family Law Rules

The Family Law Rules define a 'Medical Procedure Application' 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 disease⁹.

Rule 2.01 specifies that applications seeking final orders for a medical procedure must be instituted by filing an Initiating Application. A Medical Procedure Application can be made by 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 child¹⁰. However, if the application is not made by the parent of the child or a person who has a parenting order in relation to the child, then that person must be named as a respondent to the application¹¹.

The Family Law Rules require that the Medical Procedure Application be supported by specific evidence to satisfy the Court that the procedure is in the best interests of the child. Rule 4.09 sets out what expert evidence must be provided from either a medical, psychological or other relevant expert witness as follows:

- a. the exact nature and purpose of the proposed medical procedure;
- b. the particular condition of the child for which the procedure is required;
- c. 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;

- i. the nature and degree of any risk to the child from the procedure;
- ii. if alternative and less invasive treatment is available — the reason the procedure is recommended instead of the alternative treatments;
- iii. that the procedure is necessary for the welfare of the child;
- iv. if the child is capable of making an informed decision about the procedure — whether the child agrees to the procedure;
- v. 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;

- i. whether the child's parents or carer agree to the procedure.

Suffice to say, the evidence given by the expert witness is crucial in Medical Procedure Applications. The medical issues are usually complex and evidence is generally given by a number of experts as to both the physical and psychological issues surrounding the proposed treatment. It is essential to ensure that the expert evidence meets the requirements of the Family Law Rules. This evidence can be given in the form of an Affidavit or, if the Court permits, orally¹².

The Family Law Rules further require that the Medical Procedure Application and any other document filed with it be served on the prescribed child welfare authority. The Family Law Rules define the prescribed child welfare authority with reference to the meaning given by section 4 of the Family Law Act. The Family Law Act provides:

"prescribed child welfare authority", in relation to **abuse** of a **child**, means:

- a. if the **child** is the subject of **proceedings** under Part VII in a **State** or **Territory**--an officer of the **State** or **Territory** who is responsible for the administration of the **child welfare laws** of the **State** or **Territory**, or some other prescribed person; or
- b. if the **child** is not the subject of **proceedings** under Part VII--an officer of the **State** or **Territory** in which the **child** is located or is believed to be located who is responsible for the administration of the **child welfare laws** of the **State** or **Territory**, or some other prescribed person.

Once the Medical Procedure Application is filed, the Court must fix a hearing date before a Judge of the Family Court as soon as possible after the date of the filing and if practicable, within 14 days¹³. On the first hearing date, the Court can hear and determine the application or make procedural orders and adjourn the case to a fixed hearing date.

Status of the wishes of the parent and child

The Family Law Rules require that the expert witness evidence address whether the child's parents or carer agree to the procedure¹⁴. The Court must therefore consider the views of the parents (or carer) when deciding whether to make the orders sought. In the majority of reported cases, both parents have consented and supported the proposed procedure.

In *Re Brodie (Special Medical Procedures)*¹⁵, the child's mother brought an application that Brodie receive treatment for Gender Identity Disorder. The child's father (who lived in another state) opposed the mother's application, but did not appear at the final hearing. He had participated in the proceedings for some months and had filed an Affidavit and Response. In this matter, an Independent Children's Lawyer was appointed and a Family Report was prepared. Justice Carter observed that, at the time of the trial, the relationship between Brodie and her father was non-existent. The father's decision not to participate in the final hearing limited Her Honour's ability to take his views into account.

The expert witness must also provide evidence to the Court about the views expressed by the child. The Rules require different evidence to be provided depending upon whether the child is capable of making an informed decision about the procedure. The Court tends to place greater emphasis upon the views expressed by older children. In *Re: Sally (Special Medical Procedure)*, Justice Murphy allowed an affidavit of the 14 year old child Sally (who was the subject of the proceedings) to be filed. In some cases however, it is not possible to consider the views expressed by the child due to their age or mental capacity.

The Court will also consider the views expressed by the child as part of the determination of the child's best interest in accordance with s. 60CC of the Family Law Act.

Case law

A range of special medical procedure cases have been brought before the Family Court. The treatment sought has ranges from treatment for gender identity disorder¹⁶, gonadectomies¹⁷, hysterectomies¹⁸, bilateral mastectomies and¹⁹ bone marrow transplants²⁰ to the administration of unapproved therapeutic drugs²¹.

One of the most well known special medical procedures cases is the 2004 decision of Chief Justice Nicholson (as he then was) in *Re Alex*²². The current Chief Justice, Chief Justice Bryant, presided over the 2009 hearing involving this same child in *Re Alex (No 2)*²³.

The 2004 proceedings involved a determination as to whether Alex should undergo treatment for Gender Identity Disorder. Alex was 13 years old at the time of those proceedings, which were brought by his legal guardian. Alex's mother (with whom he was estranged) and Alex's Aunt (with whom Alex lived) were the named respondents. Alex's mother did not participate in the proceedings.

Alex was genetically female but had identified as a male for a long period of time. Evidence was given that Alex had a long-standing, unwavering and present identification as male. Authorisation was sought from the Court to commence hormonal treatment to suppress the onset of puberty and hormonal treatment to induce the characteristics of Alex's affirmed sex (testosterone administration).

The expert evidence supported the proposed treatment. Concerns were raised that Alex would self-harm, become depressed and unhappy and experience social difficulties if he could not have the treatment.

His Honour referred to his earlier decision in *Re Marion (No.2)*²⁴ which concerned the sterilisation of a disabled child. In that decision, his Honour set out a number of factors to be considered by the Court in special medical procedure cases. These factors were:

- i. the particular condition of the child which requires the procedure or treatment;*
- ii. the nature of the procedure or treatment proposed;*
- iii. the reasons for which it is proposed that the procedure or treatment be carried out;*
- iv. the alternative courses of treatment that are available in relation to that condition;*
- v. the desirability of and effect of authorising the procedure for treatment proposed rather than available alternatives;*
- vi. the physical effects on the child and the psychological and social implications for the child of:*
 - a. authorising the proposed procedure or treatment*
 - b. not authorising the proposed procedure or treatment*
- vii. the nature and degree of any risk to the child of:*
 - a. authorising the proposed procedure or treatment*
 - b. not authorising the proposed procedure or treatment*
- viii. the views (if any) expressed by:*
 - a. the guardian(s) of the child;*
 - b. a person who is entitled to the custody of the child;*
 - c. person who is responsible for the daily care and control of the child;*
 - d. the child;*

to the proposed procedure or treatment and to any alternative procedure or treatment.

His Honour determined whether the proposed treatment for Alex should be authorised in accordance with these factors.

Orders were made for Alex to undergo hormonal treatment for Gender Identity Disorder and for Alex to have on-going psychological support. His Honour reserved liberty to apply to all parties. Such liberty was exercised in 2007 when Orders were sought for Alex to undergo bilateral mastectomies.

Alex was 16 years old at the time of the second hearing which was heard by Chief Justice Bryant. Following the 2004 proceedings, Alex had commenced hormonal therapy to suppress the development of secondary female characteristics. In about 2007, he commenced testosterone treatment. Alex had already developed some breast tissue and was wearing a compression garment to hide his breasts at the time of the 2007 proceedings.

Expert evidence was sought as to:

- The appropriateness of surgery taking place before Alex turned 18;
- Alex's understanding of the surgery and its repercussions;
- Alex's views;
- The extent to which their opinions were influenced (if any) by Alex's view that he will not seek surgical alteration of his genitalia.

In summary, the expert evidence stated that it would be both cruel and distressing to Alex, as well as socially inhibiting, to prevent him from having the proposed treatment. The disadvantages of the surgery were said to be minimal.

Alex's views were taken into account by Chief Justice Bryant. Alex wanted the surgery to occur. Her Honour described Alex as a "mature, thoughtful and considered young man who has demonstrated a

high degree of insight into his condition and possesses a sound grasp of the proposed surgical procedure".

Her Honour also considered whether it was necessary for her to analyse the case following the factors identified by Nicholson CJ in *Re Marion (No. 2)*. Since that decision was handed down, the Family Law Amendment (Shared Parental Responsibility) Act 2006 had come into effect. Her Honour found that "all of the issues captured by the 'Re: Marion (No. 2) factors' are encompassed by a consideration of the matters contained in Section 60CC of the Act".

In *Re Bernadette (Special Medical Procedure)*,²⁵ Justice Collier determined an application for a child, Bernadette, to undergo phase 1 and phase 2 treatment for gender identity disorder. The application was brought by Bernadette's parents.

Bernadette began showing female behaviour from about three years of age. She was diagnosed with Gender Identity Disorder at 12 years of age, and shortly thereafter began living as a female on a private basis. Bernadette lived both publically and privately as a female a couple of months later.

Phase 1 treatment involved the administration of hormones to block the onset of puberty. Phase 2 treatment involved the administration of hormones to induce the characteristics of the affirmed sex. In this case, phase 2 treatment would involve inducing female characteristics.

Justice Collier made orders permitting both phase 1 and phase 2 treatment. The orders were actually made in 2007, but His Honour reasons for judgment were not delivered until 2010 as His Honour was asked to determine a number of questions of law. For example, His Honour was asked to decide "does the parent of a child have the authority (whether as an incidence of parental responsibility pursuant to the Family Law Act 1975 and/or otherwise) to lawfully authorise the treatment of the said child in relation to the condition of transexualism?" His Honour noted that it was the applicant's intention to obtain findings that would have a general application to other cases.

His Honour ultimately declined to answer the questions of law in a general manner, deciding that this would not be in the best interests of children. Justice Collier found that it was in the best interests of children for the Court to retain its power to determine Medical Procedure Applications.

In *Re: Angela (Special Medical Procedure)*²⁶ Justice Cronin determined an application for an 11 year old child, Angela, to have a hysterectomy. Angela had Rett Syndrome, a neurological disorder that results in severe intellectual impairment, physical impairment and epilepsy. Angela's parents sought that an order permitting the performance of a hysterectomy. Queensland Heath, acting on legal advice, required court approval before they would perform a hysterectomy as the procedure is irreversible.

Alternative medical treatment had failed to address Angela's menstrual problems. Specialist medical evidence supported the parent's application.

Justice Cronin found that it was not necessary to appoint an Independent Children's Lawyer because a comprehensive investigation had been carried out and because the Independent Children's Lawyer could only act as a contradictor. The expert witnesses had given evidence as to the disadvantages of the proposed procedure. In those circumstances, His Honour decided that it was not necessary to appoint an Independent Children's Lawyer.

His Honour found that the decision as to whether a hysterectomy should be performed was outside the realm of parental responsibility of Angela's parents because of the procedure's irreversible nature and effect. His Honour declared that the performance of a hysterectomy was in Angela's best interests and made orders authorising the performance of the procedure in Queensland.

In *Re: Sally (Special Medical Procedure)*,²⁷ Justice Murphy determined an application for a 14 year old girl, Sally, to have a gonadectomy. The application was brought by a hospital and the child's parents were the named respondents (in accordance with Rule 4.08). Sally's parents supported the

application. His Honour found that the hospital had standing as a person concerned with the care, welfare and development of the Sally.

Sally identified and lived as a girl. When she was 14 years old, medical test revealed that Sally was genetically a male. She had an XY genotype, no uterus and gonads present in her pelvis. The hospital, support by Sally and her parents, sought an order that a gonadectomy be performed to remove Sally's gonads, a procedure that was described as invasive and irreversible.

Justice Murphy gave leave for an affidavit of Sally to be filed in the proceedings. As occurred in *Re: Angela*, His Honour found that it was not necessary to appoint an Independent Children's Lawyer. His Honour was satisfied that Sally was not suffering from gender identity disorder.

In determining whether the procedure was necessary, His Honour noted that Sally could wait until she was 18 years old (in 3½ years time) and therefore legally competent to undergo the procedure. However, His Honour found that this would not be in Sally's best interests due to the likely effect this would have on Sally's physical and mental welfare. His Honour concluded that authorising the gonadectomy was in Sally's best interests.

FOOTNOTES

1. *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* (2004) 219 CLR 365
2. *Re: Alex* [2009] FamCA 1292
3. *Ibid*, at paragraph 122.
4. [2007] FamCA776
5. *Commonwealth Powers (Family Law – Children Act (1986) Vic)*
6. [1992] HCA15
7. *Ibid* paragraph 48
8. *Ibid* paragraph 49
9. *Family Law Rules, Dictionary.*
10. *Family Law Rules, Rule 4.08(1)*
11. *Family Law Rules, Rule 4.08(2)*
12. *Family Law Rules, Rule 4.09(2)*
13. *Family Law Rules, Rule 4.11.*
14. *Family Law Rules, Rule 4.09.*
15. *Re Brodie (Special Medical Procedures)* [2008] FamCA 334.
16. See for example *Re Alex: Hormonal Treatment for Gender Identity Disorder* [2004] FamCA 297, *Re Brodie (Special Medical Procedures)* [2008] FamCA 334 and *Re: Bernadette (Special Medical Procedure)* [2010] FamCA 94.
17. See for example *In the matter of the welfare of A (a child)* (1993) FLC 92-042; *Re Lesley (Special Medical Procedure)* [2008] FamCA 1226 and *Re: Sally (Special Medical Procedure)* [2010] FamCA 237.
18. See for example *In re Marion (No 2)* (1994) FLC 92-448, *Re: Angela (Special Medical Procedure)* [2010] FamCA 98.
19. See for example *Re: Alex* [2009] FamCA 1292
20. See for example *Re Inaya (Special Medical Procedure)* [2007] FamCA 638.
21. See for example *Re: Baby A* [2008] FamCA 417.
22. *Re Alex* [2004] FamCA 297.
23. *Re Alex* [2009] FamCA 1292.
24. *Re Marion (No 2)* (1994) FLC 92-448
25. *Re: Bernadette (Special Medical Procedure)* [2010] FamCA 94.
26. *Re: Angela (Special Medical Procedure)* [2010] FamCA 98
27. *Re: Sally (Special Medical Procedure)* [2010] FamCA 237.

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