

FAMILY COURT OF AUSTRALIA

RE: KAITLIN

[2017] FamCA 83

FAMILY LAW – MEDICAL PROCEDURES – Gender dysphoria – *Gillick* competence – where the child is found and declared *Gillick* competent – where child has not undergone stage one treatment – where this case illustrates that the irreversibility of therapeutic treatment does not provide a sound, logical basis for requiring court authorisation for stage two treatment.

Family Law Act 1975 (Cth) s 121(9)
Family Law Rules 2004 (Cth) rr 4.09, 4.10

Gillick v West Norfolk AHA [1968] AC 112
Re Jamie (2013) 278 FLR 155
Re Lucas [2016] FamCA 1129
Secretary, Department of Health & Community Services v JWM & SMB (“*Marion’s Case*”) (1991-1992) 175 CLR 218

The Honourable Justice Strickland, “To Treat or Not to Treat: Legal Responses to Transgender Young People Revisited” delivered to the Association of Family and Conciliation Courts Chapter Conference, August 2015.

APPLICANT:	The Mother
RESPONDENT:	The Father
FILE NUMBER:	By Court Order File Number is suppressed
DATE DELIVERED:	22 February 2017
JUDGMENT OF:	Tree J
HEARING DATE:	16 February 2017

REPRESENTATION

By Court Order the solicitors’ names have been suppressed

ORDERS

1. To the extent that they are applicable, compliance with Family Law Rule 4.09 and 4.10 is dispensed with.
2. The child Kaitlin (born male name X) on ... 2000 is found and declared to be competent to consent to the administration of Stage Two treatment for the condition called Gender Dysphoria in Adolescents and Adults.
3. Save as otherwise provided in these orders:
 - (a) The full names of Kaitlin (and her former name X), her family members, her hospital, medical practitioners, schools, employers, this Court's file number, the State ..., the name of the parents, lawyer and any other fact or matter that may identify Kaitlin, shall not be published in any way; and
 - (b) Only anonymised reasons for judgment and orders (with cover sheets excluding the Registry, file number and lawyer names and details as well as the parties' real names) shall be released by the court to non-parties without further contrary order of a judge.
4. Kaitlin be at liberty to identify herself as the subject of this Application and as the child subject of this decision if she may choose.
5. To the extent that the exception provided for in s 121(9) of the *Family Law Act 1975* (Cth) does not otherwise authorise it, the mother and father and Kaitlin have leave to publish to Kaitlin's treating health practitioners a copy of these orders which are not anonymised.
6. Further to Order 4 and 5 above, each of the parties to the proceedings and Kaitlin herself shall be at liberty to collect by hand a full copy of the orders and any reasons for judgment published hereunder with all of the identifying details.
7. No person be permitted to search the court file of this matter without first obtaining leave of a judge.

Note: The form of the order is subject to the entry of the order in the Court's records.

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

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA

FILE NUMBER: By Court Order File Number is suppressed

The Mother
Applicant

And

The Father
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 16 February 2017 I found and declared that Kaitlin (born male name X in 2000, and hence presently 16 years and four months of age) was competent to consent to undergoing irreversible stage two treatment for Gender Dysphoria. Additionally, some ancillary orders made in relation to non-publication and the like. These are my reasons for so ordering.
2. At the outset I should make it plain that Kaitlin is in a markedly different situation to the majority of children who seek the court's permission to undertake stage two treatment, as she has not undergone stage one treatment, which comprises hormone blocking, because she suffers from hypopituitarism, in consequence of which her body is incapable of naturally producing testosterone, or indeed, many other hormones.

THE MATERIAL BEFORE ME

3. The applicant (Kaitlin's mother) relied upon the following material:
 - An affidavit of herself filed 23 January 2017 ("mother"), to which was annexed a statement of Kaitlin;
 - An affidavit of Dr W ("W"), who has been Kaitlin's specialist paediatrician since July 2002;
 - An affidavit of Dr N ("N"), a paediatric endocrinologist, who has been treating Kaitlin since November 2014;
 - An affidavit of Ms D ("D"). Ms D is a psychologist who has been involved in the care of Kaitlin since August 2014;

- An affidavit of Dr E (“E”). Dr E is a consultant psychiatrist and Kaitlin was referred to her by Dr W in about July 2016.

BACKGROUND FACTS

4. I have already noted that Kaitlin was born male, and was soon diagnosed as suffering from a number of conditions, including pituitary gland dysfunction. It seems as though for all of her life she has been prescribed growth hormones.
5. Kaitlin’s statement, annexed to her mother’s affidavit, speaks to her having identified as female from a very early age. She has always resented being characterised as male, and for instance, has always disliked being required to use male toilets at school.
6. At about age 12 or 13 she was prescribed testosterone in order to commence puberty. However because she identified as female, her initial expectation was that the hormones would “make everything right, make my breasts grow and I thought I would have a period within the month.” When it became apparent to her that indeed that was not the effect of testosterone, she immediately stopped ingesting the tablets, although she did not initially tell either her mother or Dr W.
7. In 2014 Kaitlin identified in herself that she was transgender; according to Kaitlin, by that time most people who met her believed her to be a young woman anyway. Indeed one day, a girl at Kaitlin’s school asked Kaitlin’s mother “if her daughter could come over to her house.” Kaitlin recalls that her mother was not impressed about that, and later that day took Kaitlin to see Dr W. In that consultation Kaitlin disclosed that she was not taking the testosterone that had been prescribed, and said that she was not doing so because “I was not happy with what the testosterone was going to do to my body.”
8. From that point on Kaitlin’s mother has accepted Kaitlin identifies as female, not male, and the long course of legally changing her name to Kaitlin and identifying as female to friends and family commenced.
9. As at the time of the hearing before me, Kaitlin was in year 11 at high school, where she is enrolled, and presents, as female.
10. Finally I should note that in consequence of her pituitary condition, even if she had continued to take testosterone, she would have remained infertile. Dr N opined that Kaitlin “would need complex fertility treatment to produce sperm for pregnancy.”

RELEVANT LEGAL PRINCIPLES

11. Relevant to this application are the following uncontroversial (in the sense that I am plainly bound by them) propositions of law derived from the Full Court decision of *Re Jamie* (2013) 278 FLR 155 at [140] per Bryant CJ:

- In relation to stage two treatment, as it is presently described, court authorisation for parental consent will remain appropriate unless the child concerned is *Gillick* competent;
- If the child is *Gillick* competent, then the child can consent to the treatment;
- The question of whether a child is *Gillick* competent, even where the treating doctors and their parents agree, is a matter to be determined by the court.

12. It also uncontroversial that *Gillick* competence is established if the child in question “achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed”: see *Gillick v West Norfolk AHA* [1968] AC 112 at 183-184 and *Secretary, Department of Health & Community Services v JWB & SMB (“Marion’s Case”)* (1991-1992) 175 CLR 218 at 237.

IS KAITLIN *GILLICK* COMPETENT

13. The evidence supports findings that Kaitlin:

- Has average intelligence and language skills (D paragraph 47, E paragraph 75);
- Has a longstanding history of symptoms consistent with Gender Dysphoria commencing from a time well prior to puberty (Kaitlin’s statement annexed her mother’s affidavit, W paragraph 20, D paragraphs 13 and 14 and E paragraphs 29, and 34-36);
- Is well aware of the effects estrogen will have on her body in the long term (W paragraph 27, Mother paragraph 16, D paragraph 21 and E paragraph 76);
- Believes that developing as a pubescent female is best for her (Kaitlin’s statement paragraphs 13, 16, 17 and 19, D paragraph 21);
- Has been unwavering in her desire to develop as a female for a number of years and indeed has never wished to develop as male;
- Is well aware of the potential adverse risks which Stage Two treatment may have upon her (Kaitlin’s statement paragraph 13, E paragraph 81, D paragraph 25).

14. Further, all but one of the therapists and medical practitioners who swore affidavits are of the view that Kaitlin has achieved sufficient understanding of what is proposed so as to make an informed decision to commence treatment with estrogen: E paragraph 81; W paragraph 27; D paragraph 50. Dr N did not venture an opinion in relation to this question, and did not address the topic in her affidavit.

15. The material satisfies me that Kaitlin is *Gillick* competent.

16. If I am wrong as to that, then the material is unanimous in concluding that the benefits of the proposed treatment so significantly outweigh any risks associated with it, that it is in Kaitlin's best interests to undergo the treatment now rather than await turning 18: W paragraph 28, E paragraph 81, D paragraph 44 and N paragraphs 22 and 23. I accept that evidence and so find.
17. Finally, I should note Dr E's opinion – which I accept – that:

Given the intensity, consistency and persistence with which [Kaitlin] has expressed her female identity I believe it to be extremely unlikely that [Kaitlin] would want to change to be living like a male later in life.

SOME ADDITIONAL OBSERVATIONS

18. This case provides an interesting prism through which to consider *Re Jamie*. As I observed in *Re Lucas* [2016] FamCA 1129 at [65], it appears as though the irreversible nature of stage two treatment for Gender Dysphoria was the critical fact which underpinned the Full Court's view that court authorisation in some form was required prior to its administration. I am fortified in that analysis by the extra judicial observations of Strickland J (one of the Full Court judges in *Re Jamie*) in his paper entitled "To Treat or Not to Treat: Legal Responses to Transgender Young People Revisited" delivered to the Association of Family and Conciliation Courts Australian Chapter Conference in August 2015, in which his honour observed:

Stage One treatment for Gender Dysphoria is therapeutic in nature and is fully reversible. Court authorisation for Stage One treatment is not required unless ... Stage Two treatment for Gender Dysphoria is therapeutic in nature but has irreversible features. Court authorisation for Stage Two treatment is required...

19. This case affords an interesting perspective on *Re Jamie* because for all of her life, Kaitlin has taken hormones as part of a therapeutic regime to treat her pituitary disorder, the effects of which hormones were irreversible. Moreover, because her body was unable to produce, amongst many other hormones, testosterone, in order to undergo puberty at all she was required to take either testosterone or estrogen. It would seem fanciful to suggest that court authorisation was required before Kaitlin could be prescribed testosterone by Dr W in 2014. And yet the effect of that testosterone would have been to irreversibly see her develop as a pubescent male. Precisely why court authorisation for the administration of estrogen is then said to be required by *Re Jamie* is difficult to explain. True it is that the effects of its administration will be irreversible over time, but not in any conceptually different way to the irreversible effects of the administration of testosterone.

20. It seems to me that this case well illustrates that the irreversibility of therapeutic treatment does not provide a sound, logical basis for requiring court authorisation for stage two treatment for Gender Dysphoria.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 22 February 2017.

Associate:

Date: 22 February 2017