

FAMILY COURT OF AUSTRALIA

RE: LUCAS

[2016] FamCA 1129

FAMILY LAW – MEDICAL PROCEDURES – Gender dysphoria – *Gillick* competence – where all parties agree the child is *Gillick* competent – where despite no dispute about it, the child needs the court’s permission

FAMILY LAW – LAW REFORM – *Re Jamie* – where the proposed therapeutic treatment is within ordinary parental responsibility – where no court involvement is required – where there is a need for reform – where there is a need for statutory intervention in order to undo the effects of *Re Jamie*

Gillick v West Norfolk AHA [1968] AC 112

Re Alex (2004) 180 FLR 89

Re Darryl [2016] FamCA 720

Re Jamie (2013) 278 FLR 155

Re Martin [2015] FamCA 1189

Secretary, Department of Health & Community Services v JWB & SMB (“Marion’s Case”) (1991-1992) 175 CLR 218

Felicity Bell “Children with Gender Dysphoria and the Jurisdiction of the Family Court” (2015) 38(2) *UNSW Law Journal* 246

APPLICANTS:

The Father and the Mother

RESPONDENT:

The Department

FILE NUMBER: By Court Order File Number is suppressed

DATE DELIVERED:

22 December 2016

JUDGMENT OF:

Tree J

HEARING DATE:

17 November 2016

REPRESENTATION

By Court Order the names of counsel and solicitors have been suppressed

ORDERS

THE COURT FINDS AND IT IS DECLARED THAT:

1. Lucas born ... 1999 is competent to consent to the administration of stage two treatment for the condition called Gender Dysphoria in Adolescents and Adults.

AND IT IS FURTHER ORDERED THAT:

2. The full name of Lucas, his family members, his hospital, his medical practitioners, his school, this court's file number, the State of Australia in which the proceedings were initiated, the name of Lucas's mother and father and any other fact or matter which may identify Lucas shall not be published in any way.
3. 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. That Lucas be at liberty to identify himself as the subject of this application and as the child the subject of this decision if he 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 Lucas have leave to publish to Lucas's treating health practitioners a copy of these orders which are not anonymised.
6. Further to Orders 5 and 6 above, each of the parties to these proceedings, and Lucas himself, 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 in this matter without first obtaining leave of a judge.

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

FAMILY COURT OF AUSTRALIA

FILE NUMBER: By Court Order File Number is suppressed

The Father and the Mother
Applicants

And

The Department
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. Lucas, the 17 year old youth the subject of these proceedings, wants to commence taking testosterone so as to develop as male. His parents fervently support his wish. Unanimously, his counsellors, doctors and specialists all agree the treatment should start now. The respondent Department does not express a contrary view – in fact no one, on the material before me, does.
2. And yet before he can commence stage two treatment for his Gender Dysphoria, because he is not yet 18 years old, Lucas needs this Court's permission to do so, accepting that the permission is, in this case, in the guise of a finding that he is *Gillick* competent. As to that, Lucas, his parents and his therapists all agree he is so competent, and yet again, notwithstanding there is no dispute about it, he needs a finding to that effect before he can embark upon the only course of treatment available for his condition.
3. Not so long ago, these sorts of applications were a rarity; now they are commonplace and the number of them being made rapidly increasing.
4. As if the general turmoil and challenges which being a teenager in our modern world generates are not enough, the additional burden of requiring an already vulnerable and highly – marginalised group to individually litigate to vindicate their identity seems inhumane. No other group of adolescents is required to do so. Having already traversed a far more difficult path than many of their peers, it can only serve to further increase their burden.
5. Take this case for instance. Lucas lives in a regional city. His is the first such application to be made by a child living there. He was referred by his counsellor to a capital city medical specialist, who advised the usual process of

bringing the application. Somehow his parents accessed *pro bono* legal assistance, however there was still the task of preparing the application and affidavits – in this case, six of them. The parents' affidavits, which record their most intimate reactions to the unexpected revelation by their child, disclose things adults are rarely forced to expose to the scrutiny of others.

6. Moreover, above all else, and notwithstanding (presumably likely) advice that the application would probably succeed, there remained the prospect that it may not, or that its resolution would be delayed if there was some deficiency in the material.
7. Come the day of the hearing, the tension in the courtroom was palpable. In this case, I permitted Lucas to be present in court. Also present were his parents, and at the back of the court were a number of other people, whom I assume to be family members and friends. The parents, who brought the application, were represented by robed Queen's Counsel and junior counsel, instructed in person by their solicitor.
8. As is my practice, at an early stage I intimated that I intended to accede to the application. Lucas's face relaxed into relief, and his mother, who was sitting at the bar table next to him, flashed him a quick, but revealing, smile. Lucas's father commenced to openly weep (as did at least one of the people in the gallery) and remained doing so for the balance of the hearing. A tremendous burden was lifting.
9. At the conclusion of the hearing, Lucas, his family and friends were in tears. They hugged each other in celebration of the fact that Lucas could now physically be the person he knows himself to be.
10. What other section of our youth is required to endure such an ordeal to attain the corporeal manifestation of their identity? What purpose is there in making them and their loved ones do so, particularly at such a fraught time of their lives? There is no clear answer to those questions, as I shall shortly discuss. Other than, perhaps, the process being some dubious self-affirming rite of passage, it plainly is of no benefit to the child, or anyone else for that matter. Indeed, considering that this court's ordinary task is largely to make decisions reflecting children's best interests, the mandatory ordeal which Gender Dysphoria youth must endure to access the only available treatment for their condition, seems to be anything but in their best interests.
11. At the hearing on 17 November 2016, some two weeks after the application was filed, I pronounced orders as sought, but reserved my reasons. These are those reasons.

THE FACTS

Lucas's journey so far

12. Given that the sole issue for the court's determination, at least initially, is the very slender one of whether or not the child in question is *Gillick* competent, normally I would not recite any facts beyond those strictly pertaining to that issue, although as I shall discuss, understandably the affidavits filed in support of such applications are often far greater in their compass.
13. But this is not an ordinary case, since I intend to use these reasons to volunteer some thoughts about such cases generally. It therefore seems apposite that the factual context which generates that opportunity, and desire, should be explained in a little more detail than usual.
14. Lucas is presently 17 years of age. He has three siblings.
15. A statement prepared by Lucas for these proceedings was annexed to his mother's affidavit. It records:

I first remember cutting my hair short when I was four years old. I loved having short hair and I loved how I looked with short hair. I remember going to kindergarten for the first time and being so comfortable with myself. That sense of being comfortable with myself continued up until the point where I was continually asked the question "are you a boy or a girl?" When I was first asked this question I couldn't have been more than five years old. I didn't know the answer. I knew I had more guy friends than girls. I knew I liked more masculine activities than my female counterparts. But my parents and people around me thought and presumed I was a girl. So that was my answer. I hated my answer every time I said the words.

I remember the day in Prep in 2005 where I was forced to wear a dress to school because there were no clean pants for me to wear that day. That day I had to get up in front of the class and point something out and it was photographed. I didn't want to be seen in a dress. I remember crying in front of the whole class because I felt so uncomfortable.

16. Also annexed to the mother's affidavit were a series of photographs of Lucas through his childhood. One of them appears to relate to this day, in that it shows a clearly unhappy Lucas in a school dress. Against this photograph the mother has noted "I remember this day so vividly. And it is one thing that made me so sad when [Lucas] told me of his gender identity. This dress was the only uniform we had clean, and we made him wear it. He cried for an hour and I couldn't understand what the big deal was. It was just a dress! But it wasn't. It was asking him to pretend to be someone he wasn't, and I wish I would have known it more then so I could have supported him better earlier."
17. Lucas's statement continues:

One of my earliest memories is lying in bed at night and praying to god to make me a boy. I will never forget that night. I was six years old and had my drums in my room beside me. My religion teacher had made it clear that if you asked god for something he delivers it, and I hoped that was true. I woke the next day being utterly confused. I realised nothing had changed and I lost hope.

18. Interestingly, Lucas has advised his parents that, even from a young age, he has always been a male person in his dreams.
19. In 2010, when Lucas was in grade five, his parents separated, but did not need recourse to litigation to reach agreement as to their children's parenting.
20. Puberty commenced sometime later. Lucas's statement continues:

... Puberty was torture. I grew breasts and gained a figure. I remember getting my first menstrual cycle and crying for a week and not going to school. I hated it, and at first I just thought that what every other person felt when they hit puberty. But then I talked to a girl who went through puberty at the same time as me who said she really liked the way her body looked, and how she felt comfortable and happy with the changes happening to her. I began to realise that my level of discomfort and anxiousness with the female parts of my body wasn't normal. I didn't feel I could ignore those feelings anymore. I didn't want to keep trying to be something I wasn't.

21. The mother's affidavit at [31] says:

During the onset of puberty, while [Lucas's] anger was directed outwards, so much of it was towards his own body. He hated having breasts and hunched over a lot saying that it was so unfair that his breasts were bigger than his sister's. He was always a bit horrified when his period came. He was no longer the person we had known when younger...

22. Both his mother and father relate that at this time Lucas became very angry for no clearly identifiable reason, and that the anger was directed at everyone, but especially towards himself.
23. At about this time Lucas came across a YouTube video created by a transgender person, relating their experiences. Lucas's statement records:

He was saying all the things that as an eleven year old I had been thinking and feeling. I cried with relief. Because somebody actually knew how I was feeling and I had a new understanding of myself. Some of the confusion and frustration and anxiety was easy to deal with knowing there are other people in the world who felt like me.

It was like a light had been turned on in my mind. I knew I was a transgender man, and I knew I didn't want to be called my birth name. But

I was also scared and didn't know what to do. I was scared of how people would treat me if they found out who I was. I was scared what it meant to really be myself. I was worried about what that understanding meant for my life.

24. Although with the benefit of hindsight both of Lucas's parents now deeply regret it, from year eight he attended an all-girls school. Lucas's statement records:

... At this school I was made to wear a skirt for four days a week. I was constantly getting into trouble with my homeroom teacher for wearing my sports uniform. I experienced so much discomfort while wearing a skirt for the years I attended [P School]. I hated being grouped with girls; I hated being seen as a girl. I hated that people thought I was a girl. I hated how my body was. I hated how I felt my life was going nowhere and that I had no purpose. In year eight, in 2013, I knew what transgender was; I knew I was transgender but I had no idea about what medically transitioning meant...

25. Lucas then began to seriously research online his condition and the treatment of it. He found great confidence building from that material.

26. His statement continues:

At this point in time I was 13 and was just building self-acceptance and confidence in the fact I was transgender. Over the year between turning 13 and 14 (2013) I was coming to terms with myself, and building the confidence to come out to family and friends. In the months leading up to my 14th birthday [in] 2013, I was still attending the all-girls' Catholic School where I had some very close friends, these friends were the first people I told that I am a transgender man. Their reactions were exactly what I needed: to feel supported and accepted. Their reactions were pure acceptance. Luckily my friends already had an understanding as to what being transgender was and how to be respectful of someone who is transgender. This supportiveness has continued through the years. After coming out to my friends I told them to just keep referring to me as [a female name] and she/her/hers due to the fear I had at the time of the school finding out I was transgender and being kicked out.

I remember bringing up some examples of trans men in conversations to mum for the first time, saying I watched a video and it was really interesting, just see what mum's reaction would be. To see if she would accept me.

After building up all my courage, in the month of May of 2014 I asked my mother to come into my room. I sat her down and before I could start talking I started crying, I was so scared and worried that she would hate me

that I was so overwhelmed. The only words I could get out were “mum...I... I think I’m” and luckily after that mum just said “you think you are transgender?”... My mother has been and was nothing but supportive and accepting...

27. His mother immediately booked an appointment to see a medical practitioner at the local sexual health clinic and Lucas commenced counselling.

28. His statement continues:

After [the doctor] agreed with me about the fact I was a transgender man, we decided that the next step was to tell my father. My father is a kind, forgiving and accepting man, unfortunately at the age of 14 I didn’t realise this. I thought that he was stubborn, stuck in traditionalist ways. [The doctor], my mother and I came to the conclusion it was best to write him a letter and email it to him. This letter talked about my journey, finding out I was transgender, talking about what transgender was. So one night [16 June 2014] at my mother’s house, I emailed the letter to him, and waited for his response. When he contacted me I remember him being nothing but accepting and heartbroken that I felt I couldn’t tell him. Between then and now my father has been nothing than accepting and supportive and I safely say he is and always will be my biggest supporter in pretty much everything I do. I am so grateful to have my parents and my friends support throughout my transition.

29. Now is the appropriate time to record that, as a Judge in a court which is frequently given the unenviable task of choosing the least worst parent, it is refreshing in the extreme to come across separated parents who have been able to put aside their differences, amicably achieve the co-parenting of their children, and come together to support Lucas at such a critical stage of his life. Remarkably, not only are they are joint applicants in this proceeding, but they sat together at the bar table, and provided support to each other during the hearing. Although Lucas already knows it, he is indeed extremely fortunate to have such exemplary parents.

30. One of the photographs of Lucas annexed to the mother’s affidavit was taken in July 2014, when he was aged 14, and had “come out” to both of his parents. The photograph is of a beaming, radiant boy. Under the heading “that’s our boy” his mother has noted “[i]dentifying as [Lucas]. His energy is so different now. He is more relaxed and less anxious. He is happy to be seen in public. He is just happy.”

31. In August 2014 Lucas was referred to a specialist psychiatrist in the state’s capital city. He diagnosed Lucas as having Gender Dysphoria. After that diagnosis, Lucas and his parents decided it was a good time to tell his younger brothers. They organised a formal family meeting. I cannot help but recount Lucas’s statement as to what ensued:

Before coming out to them I expected confusion, and denial but hopefully eventual acceptance. So the day came in August 2014 we all were gathered in my living room, my father, mother, sister, brothers and my father's fiancé... We told [E] and [Y] straightforwardly and their reactions were pure confusion as to why we had a family meeting about something so obvious. [E] just said "ok, love you [Lucas]. Can I go back to my room now?" [Y's] reaction was "oh yeah, well that makes sense." And he gave me a hug...

32. Sometime thereafter the parents agreed that Lucas would be withdrawn from the all-girls school. He then commenced distance education, which he remains engaged in to this day. Lucas's statement records:

It was emotionally exhausting to go to school every day and pretend to be a girl when I am not. I was so happy to be able to leave that environment where I had to hide and be mis-gendered. I was finally able to not worry about Dysphoria with going to school and just being able to focus on doing well in school. I felt a freedom I had never had after leaving [P School], I felt light like a weight had been lifted.

33. He then sought endocrinologist assistance, and had his "first shot" of hormone blockers on 22 December 2014. His statement continues:

Going on hormone blockers my big excitement was around not having my period. After three months on hormone blockers my period had stopped. That feeling of not having to deal with constant dysphoria for a week each month was so freeing that I felt like I could fly.

34. Since that time Lucas has continued to blossom. Significantly, in June of this year, he was asked by the local Sexual Health Clinic to be part of a team that presented on transgender awareness and respectful medical treatment at the local Hospital, where as a 16 year old, he spoke in front of approximately 100 doctors about his experiences.

35. In July and August of this year he obtained a work experience placement at a University in the Student Support Office for five days, which saw him work on the development of a LGBTQI inclusion policy, but remarkably, led to him now being paid to work on a project with a team of academic researchers, developing multi-media resources that detail respectful and practical ways to speak to, and about, LGBTQI people for an anti-bullying website.

36. Lucas intends to resume mainstream schooling for his final year in 2017. He will attend a co-educational school, and by then believes, with the effects of stage two treatment, he will be a pubescent male. After finishing high school, his plan is to become a lawyer, and pursue a career in human rights.

Likely effect on Lucas if stage two treatment not commenced

37. In evidence before me was an affidavit of a psychiatrist, Dr S, who dealt with this issue. He said at [54]:

In my opinion, if testosterone treatment is not provided to [Lucas], he is likely to continue to experience ongoing Gender Dysphoria with its associated mental health issues, such as a significant risk of low mood, anxiety and social anxiety, and social isolation, and possible even suicidal and self-harming behaviours.

38. To like effect was the evidence of another doctor, Dr M, who is the Clinical Director of Sexual Health Services at the local Hospital. At paragraph 20 of his affidavit he concluded:

In my opinion, [Lucas] will suffer significant anxiety, depression and dysphoria more likely associated with increasing anger and disgust over his physical state if the proposed treatment is not provided. This would need to be managed until he is 18 years of age (when he could consent himself to the treatment). This would consume enormous resources and would be detrimental to [Lucas's] welfare.

39. Not dissimilar was the evidence of Lucas's endocrinologist, Dr T. He said that he "observed that Lucas was suffering psychological distress as a result of his Gender Dysphoria." His affidavit continued:

I feel very strongly that [Lucas's] welfare depends on his ability to progress to the next phase of his transition.

If the procedure is not carried out, physically, [Lucas] will remain pre-pubertal and he will continue to need Lucrin Depots. This will lead to further social isolation and a deteriorating psychological state which may include worsening depression and anxiety with poor self-esteem. There is also a risk of psychological distress and self-harm. This is because [Lucas's] psychical appearance will not reflect his psychological identity.

40. To like effect was the opinion of Lucas's psychologist, Ms L. At paragraph 13 of her affidavit she said:

If [Lucas] is unable to access cross-sex hormones (or such treatment as delayed), I believe that [Lucas's] mental health will be negatively affected and his anxiety would increase to distressing levels as a result of not being able to fully transition and remaining in his current physical state. I have arrived at this opinion after assessing and working with [Lucas] for approximately 2.5 years.

41. I am therefore well satisfied that if Lucas does not shortly commence stage two treatment, there will be a significant and adverse psychological impact on him.

Likely effects on Lucas if he does commence stage two treatment

42. Again the four treaters expressed opinions as to this matter. Dr S said:

Given the improvement in [Lucas's] mental health issues since he began living as a male, it is my view that hormone treatment with testosterone will further reduce the risk of future mental health problems.

43. Dr M said:

Some recent evidence ... suggests that socially transgender children who are supported in their gender identity have developed mentally normal levels of depression and minimal elevations and anxiety. This suggests that psycho pathology is not inevitable within this group, however, transgender children have notably lower rates of internalising psycho pathology than previously reported among children with gender identity dysphoria living as their natal sex.

44. Dr T said:

Socially, being able to transition into male puberty will allow [Lucas] to re-engage with mainstream school and allow him to regain social interactions with his peers. As [Lucas's] body starts to change with testosterone treatment, he will more likely to fit in with his peer group as he will be in a similar physical developmental level to the rest of the boys his age. This is likely to increase his self-esteem and confidence.

45. Finally Ms L said:

If [Lucas] is able to access cross-sex hormone treatment, in my opinion it will lessen [Lucas's] psychological distress including his depression and anxiety which are associated with his gender dysphoria as it will allow him to fully transition to a male, which is in accordance with his unwavering desire over my 2.5 years of regular sessions with him.

46. Again, in the light of this evidence, the only conclusion I can reach is that if Lucas does commence stage two treatment, it will improve his psychological health in a significant way.

RELEVANT LEGAL PRINCIPLES

47. 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.

48. 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 LUCAS *GILLICK* COMPETENT

49. The evidence amply supports findings that Lucas:
- Has high intellect, sound insight and judgment, and has language skills within the average to above average range;
 - Has a long standing history of symptoms consistent with Gender Dysphoria, commencing from a time well prior to puberty;
 - Has a history of anxiety, depression and Gender Dysphoria. Principally it seems derived from the loathing of his pubescent female body, which symptoms have significantly abated with the commencement of stage one treatment and transitioning to male, with the support of his parents, family and friends;
 - Is well aware of the effects testosterone will have on his body in the long term, and the impact on his fertility;
 - Believes, and has done so for some years now, that the positives of improved psychological health and more masculine body outweigh the loss of fertility;
 - Has now been unwavering in his desire to transition to male for some years;
 - Is fully aware of the risks associated with stage two treatment as detailed in the affidavits.
50. However perhaps the best demonstration of his maturity, insight and judgment is to be found in the statement authored by him attached to the mother’s affidavit. It speaks volumes as to those matters. No aspect of it is suggestive of any lack of understanding of what is proposed; it may be said that much of his adolescent life has been spent contemplating precisely this treatment. Moreover, the statement does not suggest any flippant approach, or that he is prone to impulsivity, in making serious decisions. Further, given his fervent desire over many years, and the fact that he has now experienced living in the world as a male for some considerable period, it cannot be said that he is unaware of the effects of the course which he proposes to take.
51. There can be no doubt that Lucas has sufficient understanding and intelligence to enable him to fully understand what is proposed. He is *Gillick* competent.

SOME FURTHER OBSERVATIONS

This is an appropriate case to make comment

52. Strictly speaking, the finding of *Gillick* competence absolves me from the need to further consider the matters raised by the application. However as I have already indicated, this seems an appropriate case to set out some thinking as to whether the law ought demand that people such as Lucas and their families mount and succeed in an application such as that which I have just disposed of, in order to avail themselves of appropriate therapy.
53. Given that there is presently no conflict¹ in the authorities dealing with the law relevant to such applications, and particularly mandating the requirement to bring such an application, it might be thought that to go on and make any further observations is overly self-indulgent. Particularly, the law as espoused in *Re Jamie* is clear and unequivocal, and I am plainly bound by it. Any observations I make will not effect any change. However I would not wish my compliance with *Re Jamie* to be seen as some form of endorsement of it.
54. This is the appropriate to case to venture those thoughts, because somewhat remarkably, in his statement, Lucas himself raised complaint in relation to the need to so progress. In that statement he said:

Australia is the only country in the world to have the Family Court process for children under the age of 18 to be able to access cross-hormone treatment. This process is obsolete, there are processes within countries like the USA, or Switzerland, that are more effective, less time consuming and less expensive. I am lucky that I am a patient person who understands that even this system is flawed, it still is a system I must go through. This process of medically transitioning has taken over two years, which is a ridiculous amount of time for any person no matter their age to wait for something so essential to their wellbeing. The suicide rates within the gender community always is at a high due to the external discrimination and marginalisation the community faces. The Family Court process only adds to this in a turmoil. There have been times over the last two years where Dysphoria, frustration and hopelessness has made me feel like I didn't have control over decision making for my own body and own life. But this frustration and hopelessness is what I have to go through to reach my goal of going on cross-hormone treatment before 18...

55. If that is the experience of the ultimate beneficiaries of the exercise of the court's discretion, then it seems to me that I am obliged to speak out to explain the reasons why, if I were free to determine the matter for myself, I would conclude that such applications were unnecessary.

¹Although single judge criticism of *Re Jamie* was made by Bennett J in *Re Martin* [2015] FamCA 1189.

56. At the outset I should record that much of what I am about to articulate arises from a most thoughtful article by Felicity Bell “Children with Gender Dysphoria and the Jurisdiction of the Family Court” (2015) 38(2) *UNSW Law Journal* 426 (“Bell”). I should also state my appreciation for the extremely helpful written submissions provided by counsel in this case.

Why did *Re Jamie* require court application

57. *Re Jamie* concluded that stage two treatment required a court to determine the question of *Gillick* competence because of what the High Court said in *Marion’s Case* (*supra*). Specifically Bryant CJ said:

[137] With some reluctance I conclude that the nature of the treatment at stage two requires that the court determines *Gillick* competence. In *Marion’s Case*, the majority held that court authorisation was required first because of the significant risk of making the wrong decision as to a child’s capacity to consent, and second because the consequences of a wrong decision are particularly grave.

[138] It seems harsh to require parents to be subject to the expense of making application to the court with the attended expense, stress and possible delay when the doctors and parents are in agreement but I consider myself bound by what the High Court said in *Marion’s Case*.

58. To like effect Finn J said:

[185] I am extremely reluctant to impose upon the child and her parents the costs and stress of further court proceedings, particularly when the court may ultimately reach the same decision to which the child and her parents had already reached with the child’s doctors.

[186] Nevertheless, I have concluded that at least the question of a child’s capacity to consent to treatment which has the irreversible effects of stage two treatment must remain a question for the court. I have reached this conclusion because of the requirement by the High Court majority in *Marion’s Case* for court authorisation for irreversible medical treatment in circumstances where there is a significant risk of the wrong decision being made as the child’s capacity to consent to the treatment and where the consequences of such a wrong decision are particularly grave, as they would be in this case.

59. Strickland J, who agreed with both the Chief Justice and Finn J, continued:

[195] In relation to stage two treatment, I agree that the therapeutic benefits of the treatment need to be weighed against the risks involved and the consequences which arise out of the treatment being irreversible, but that given the nature of the changes that will result from the child that treatment should require court authorisation. This would not be the case though where the child is able to give consent to the proposed treatment.

[196] Whether the child is able to fully understand and give informed consent to stage two treatment, and thus court authorisation is not required, is a threshold issue that the court must decide. This is because of the requirement by the High Court majority in *Marion's Case* that it is for the court to authorise medical treatment that is irreversible 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.

What did *Marion's Case* decide

60. *Marion's Case* involved an application to sterilise a child with an intellectual disability. Plainly it did not deal with, or indeed even mention, stage two treatment for Gender Dysphoria. In its decision, the High Court drew a distinction between so called "therapeutic" and "non-therapeutic" sterilisation. At p 250 Mason CJ, Dawson, Toohey and Gaudron JJ said:

...But first it is necessary to make clear that, in speaking of sterilisation in this context, we are not referring to sterilisation which is a by-product of surgery appropriately carried out to treat some malfunction or disease. We hesitate to use the expressions "therapeutic" or "non-therapeutic," because of their uncertainty. But it is necessary to make the distinction, however unclear the dividing line may be.

As a starting point, sterilisation requires invasive, irreversible and major surgery. But so do, for example, an appendectomy and some cosmetic surgery, both of which, in our opinion, come within the ordinary scope of a parent to consent to. However, other factors exist which have the combined effect of marking out the decision to authorise sterilisation as a special case. Court authorisation is required, first, because of the significant risk of making the wrong decision, either as to a 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 a wrong decision are particularly grave.

61. However, importantly, at 253, their Honours' reiterated:

... This is not a case where sterilisation is an incidental result of surgery performed to cure a disease or correct some malfunction...

62. In my view, those passages provide support for the proposition that in the case of a therapeutic procedure, neither the gravity of the consequences of a wrong decision, nor the prospect of making a wrong decision in the first place, mandates court authorisation as a precondition for the procedure.

Discussion

63. In *Re Jamie*, the Full Court plainly was of the view that a stage one treatment for Gender Dysphoria is therapeutic: see for example, Bryant CJ at [98]. In this

respect, the court did not follow the previous decision of Nicholson CJ in *Re Alex* (2004) 180 FLR 89. The reason why stage one treatment did not require court authorisation was because it was an appropriate therapeutic response to a condition.

64. Having determined that stage one treatment was therapeutic, it is curious that the Full Court then considered questions of irreversibility and the like, in relation to stage two. As I have observed there is no apparent mandate in *Marion's Case* for doing so. Such considerations only arise in relation to non-therapeutic treatments, of which sterilisation consequent upon profound intellectual disability is an obvious example.

65. I respectfully agree with the observation of Bell at 446 that:

Such an analysis of *Marion's Case* overlooks the fact that the High Court was concerned only with what was found to be a non-therapeutic procedure. In the Family Court's interpretation, the concept of "irreversible" treatment seems to be substituted for "non-therapeutic" treatment.

66. As I have indicated, it was the alleged binding nature of *Marion's Case* which was the express reason advanced by all three judges in *Re Jamie* as to why they were compelled to hold that stage two treatment required a court's determination of, at least initially, *Gillick* competence. With the greatest of respect to those who discern such a compulsion in *Marion's Case*, I regret that it eludes me. Indeed, were I free to decide the matter for myself, I would hold that if the proposed treatment is therapeutic, what *Marion's Case* compels is the conclusion that the decision about its administration is within ordinary parental responsibility, and hence no court involvement of any kind is required.

67. Invasiveness, irreversibility, or the prospect of a wrong decision with grave consequences, should not require judicial supervision of the parents' decision making about therapeutic treatment for their children.

68. Moreover, it is difficult to discern any sound policy reason which would otherwise support the outcome of *Re Jamie*, at least where there is no dispute as to any relevant factual matter. Whilst the doctors in question may derive some comfort from any erroneous decision being nonetheless authorised by the court, and likewise the parents, such matters deserve little weight. Further, the exercise of a judicial discretion, absent controversy, plainly does not quell one, and is more in the nature of an administrative sanctioning. There is rarely, if ever, any contradictor in these cases, and to insist upon one would be only to increase the unpleasantness of the process. Further, since almost inevitably the evidence before the court only demonstrates *Gillick* competence,² how the court could conclude to the contrary seems unclear.

²Although see *Re Darryl* [2016] FamCA 720.

69. Moreover, although the court in *Re Jamie* seemed to think that the material filed in support of such applications need only be brief, the prospect that *Gillick* competence might not be established means that nigh invariably material demonstrating that the proposed treatment is nonetheless in the child's best interests is filed as well.
70. It is pertinent to note that, at least on my researches, in the last five years, none of the applications in relation to stage two treatment of Gender Dysphoria which have come before this court, have been refused. True it is that some have been resolved, not on the basis of *Gillick* competence, but rather by the fall-back position of whether or not the treatment is nonetheless in the best interests of the child, however the simple fact remains that the applications have invariably been granted.
71. Therefore in my view, not only is the decision of *Re Jamie* open to serious doubt, given that it is said that the outcome was required by *Marion's Case*, but further, the practical consequences of the decision do not appear to serve any sound policy objective either.

The need for reform

72. The difficulty is that it is unlikely that *Re Jamie* will be revisited in the near future, simply because as I have indicated, the court invariably accedes to the applications.
73. Therefore, in my view, there is an urgent need for statutory intervention in order to undo the consequences of *Re Jamie*. The sooner that children such as Lucas and their families do not have to endure the ordeal of litigation in order to get on with their lives, the better.

I certify that the preceding seventy three (73) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 22 December 2016.

Associate:

Date: 22 December 2016