

FAMILY COURT OF AUSTRALIA

RE: TONY

[2016] FamCA 936

FAMILY LAW – CHILDREN – MEDICAL PROCEDURES – When authorisation is required – Childhood Gender Dysphoria – Where the child is 17 years of age – Where Stage 1 and Stage 2 Treatment have previously been undertaken – Where an application for Stage 3 treatment has been made unopposed – Consideration of whether the child can consent.

Family Law Act 1975 (Cth)

Secretary, Department Of Health And Community Services V JWB And Another ('Marion's case') [1992] HCA 15

Re: Quinn [2016] FamCA 617

Re: Jamie [2013] FLC 93-547

Gillick v West Norfolk & Wisbech Area Health Authority [1986] AC 112

APPLICANTS:

The Mother and the Father

RESPONDENT:

Relevant Government
Agency

FILE NUMBER: By Court Order File Number is suppressed

DATE DELIVERED:

3 November 2016

JUDGMENT OF:

Gill J

HEARING DATE:

3 November 2016

REPRESENTATION

By Court Order the names of solicitors have been suppressed

ORDERS

- (1) The Court declares that the child, Tony, born ... 1999, is competent to consent to male chest reconstruction surgery (bilateral mastectomy with free nipple grafts) for the purpose of treatment for Gender Dysphoria per the Diagnostic and Statistical Manual of Mental Disorders 2015 (DSM-5).
- (2) The full name of the child, his family members, the hospital, his medical practitioners, his school, this Court file, any expert witness, the place in Australia which these proceedings were initiated, the name of the child's parents, lawyers involved in these proceedings and any other fact or matter which may identify the child shall not be published in any way, and only anonymised.

AMENDED UNDER THE SLIP RULE, IN CHAMBERS

- (3) Only the Reasons for Judgment and Orders with cover sheets excluding:
 - (a) the Registry
 - (b) file number
 - (c) lawyers' names and details, as well as
 - (d) the parties' real names

shall be released by the Court to non-parties without further contrary Order of a Judge, it being noted that each party shall be handed one full copy of these Orders with the relevant details included to enable their execution, and one cover sheet of Reasons for Judgment that includes the file number and lawyers' names.

- (4) No person shall be permitted to search the Court file in this matter without first obtaining the leave of a Judge.
- (5) The balance of the application is dismissed.
- (6) The matter is removed from the pending cases list.

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: Tony* 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 and the Father
Applicant

And

Relevant Government Agency
Respondent

REASONS FOR JUDGMENT

1. This matter is brought before the Court on an application by the Mother and the Father, the parents of Tony. The Director-General of the relevant Government Agency has been joined as a respondent but has indicated that he does not wish to take part in the proceedings.
2. The application is in relation to a medical procedure as set out in the application filed by the parents on 26 October 2016. That surgery, or medical procedure, is in relation to Tony and is for male chest reconstruction surgery, also described as a bilateral mastectomy with free nipple grafts. The reason for that treatment is because Tony has Gender Dysphoria and identifies himself as a male.
3. The nature of the surgery is described in the affidavit that has been provided by Dr F, who is the surgeon who proposes to perform the surgery. It is described at page 17 of her affidavit and further at page 19 as being irreversible. It will have the effect that it will give Tony, at least in respect of Tony's chest, the appearance of a male.
4. What is sought in the application is firstly a declaration that Tony be declared as competent to consent for himself to the surgery, or if I am unable to form such a view, that I provide authorisation for the parents to give consent for the surgery.
5. Part 7 of the *Family Law Act 1975* (Cth) confers jurisdiction upon me in such matters. Authorisation is not required in all cases for surgery. The first question that arises is whether or not this is the sort of surgery that requires the authorisation of the Court rather than the parents simply being able to consent

because Tony is a minor. The leading authority in Australia is a case known as *Marion's case*.¹

6. The first question to be asked is whether or not the surgery that is proposed here falls into a class as set out in *Marion's case* of the sort of treatment that requires the Court intervention. The criteria set out in *Marion's case* has been understood in later cases as primarily relating to the necessity for the Court's involvement where there is a risk of a wrong decision regarding either the capacity of the child to consent or what the best interests of the child require and that there are grave consequences that flow from a wrong decision. This criterion was applied in the case of *Re Jamie*,² for example, by Justice Finn at [180] – [182]. In *Re Jamie* the criteria was applied to what is known as stage two treatment. Stage two treatment is something that has already been undergone by Tony and involves hormonal treatment which has some irreversible effects. Previously in this case, Deputy Chief Justice Faulks has found that Tony was competent to consent to that treatment. The treatment here proposed is what is sometimes called stage three treatment and that is surgery to remove breasts.
7. One of the markers of the sort of surgery that falls within *Marion's case* has been set out in *Re Jamie* as relating to the irreversibility of the treatment. Where the treatment is not reversible then that irreversibility is an indicator that it may fall within such a class. Due to the nature of the treatment, the consequences of the treatment in terms of Tony appearing as male or female, and due to the treatment being irreversible, I find that this is a form of treatment that falls within what Justice Finn described in *Re Jamie* as a medical procedure that requires authorisation. Having come to that conclusion, the next step to be undertaken is to determine whether or not Tony is competent to consent to the surgery for himself, that is, whether he has *Gillick* competence.³ The description of *Gillick* competence has been accepted by the High Court in *Marion's case* at page 237 as setting out the common law of Australia.⁴ The particular test endorsed by the majority in that case is as follows:

A minor is, according to this principle, capable of giving informed consent when he or she “achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed”.
8. If the answer to this question is yes, then, provided that there is no dispute as to the treatment taking place, then there is no further requirement for this Court to take any action. Justice Rees in *Re Quinn* dealt with the question as to when a

¹ *Secretary, Department Of Health And Community Services V JWB And Another* ('*Marion's case*') [1992] HCA 15.

² *Re: Jamie* [2013] FLC 93-547.

³ *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112.

⁴ '*Marion's case*' [1992] HCA 15 [237].

treatment may be disputed.⁵ In this instance there is no dispute. Both of Tony's parents agree that the surgery should take place, Tony desires the surgery to take place, each of the treating practitioners who has given evidence in these proceedings say that the treatment should take place, and the Director-General has declined to be heard following the receipt of all of the material.

9. This is a case in which there is no dispute as to whether or not the surgery should take place. Accordingly, if I find that Tony is able to consent to the surgery, then there will be no further step that this Court will need to take to authorise for that to occur.
10. I turn then to the evidence as it relates to the question of Tony's ability to consent.
11. Tony's mother has prepared an affidavit which was filed on 26 October 2016. She has expressed a confidence that Tony understands both the permanency and the risks of the surgery.
12. Dr P has filed an affidavit on 26 October 2016 that also refers to a previous affidavit filed on 30 September 2015. The previous affidavit was filed in relation to the stage two treatment. She is a psychiatrist who has been attending Tony. In her most recent affidavit she asserts that Tony has capacity. That is expressed at page 12 of her most recent affidavit as follows:

[Tony] is capable of understanding the risks and benefits of the procedure. He is capable of consenting to the procedure and wants the procedure.

13. Although this is somewhat sparse as to how it is that Dr P reached the conclusion, it is important to note that the context of her reaching this conclusion is the previous affidavit that she relies upon. That affidavit sets out more fulsomely the matters that go to the conclusion that she has reached in her most recent report. Firstly, in examining her material as a whole, it demonstrates that Tony comprehends what it is that the surgery is for. His motivations and aspirations are described as being inextricably connected to him being perceived and treated as a male, that is, it is certain that Tony understands that the consequence of the surgery is that he will appear more like a male specifically in relation to his chest. That is the outcome that he pursues.
14. On the question of capacity as addressed by Dr P in her previous report, she stated the following:

I deem that [Tony] is capable of making an informed decision about the treatment of testosterone. [Tony] stated to me that he has discussed the risks of taking testosterone with Dr [L] (his paediatric endocrinologist) He was able to discuss the risks of testosterone with me in a meaningful way. He was also aware of the benefits and the expected results of administration of testosterone. This includes the time frames to wait for

⁵Re: *Quinn* [2016] FamCA 617.

changes and the possibility of non response. [Tony] is aware that he is at increased risk of cardiovascular disease because he is overweight. Dr [L] has asked him to lose weight and although he is frustrated by this he has to do this he understand the necessity of this and has met with a dietician.

15. Dr P also referred to a report, and annexed a report, prepared by Dr Y. Dr Y's report was prepared on 1 July 2014. Dr Y's view was that:

[Tony] has sufficient understanding and intelligence to understand fully what is being proposed by way of hormonal treatment for the gender dysphoria. Thus he was deemed "Gillick Competent" though he was too young and not able to commence cross sex hormones til [sic] age 16.

16. I note that both the earlier report of Dr P and the report of Dr Y related to the stage two treatment. The stage two treatment has been described by Dr L, the paediatric endocrinologist, in his report of 30 September 2015, as having permanency. That is, the capacity to make decisions in respect to the hormonal treatment requires a comprehension of permanency and of change that is also necessary for a proper understanding of what is to take place here, even though what is to take place here is surgical. That is, the decision-making in relation to the hormonal treatment is analogous in terms of its requirement for understanding as to what it is required for Tony to understand here.

17. Further affidavit material was relied upon by the surgeon who is to undertake, or who is proposed to undertake, the surgery, Dr F. Dr F filed an affidavit dated 26 October 2016. The report annexed to that affidavit, at page 19, describes Tony as follows:

[Tony] presented to me as an intelligent and articulate young man who engaged fully in the interview process. He described his history of gender dysphoria to me and explained the lengths he and his family had gone to so far to receive Phase 2 treatment. [Tony] is keen to proceed with surgery and thus agreeable to the procedure.

He understood the medical implications of his transition as it pertained to his physical body- specifically the risks and the irreversible nature of surgery.

I believe [Tony] to be capable of making an informed decision about the proposed surgery.

18. Dr L, the paediatric endocrinologist, has provided two affidavits with reports annexed, the most recent being 26 October 2016, with the former 30 September 2015. In his most recent report he states in relation to Tony's competence as follows:

As I believe and the Court also determined [Tony's] Gillick competence to make the decisions regarding commencement of stage 2 (testosterone) treatment, I also believe that [Tony] is capable of understanding the risks

and benefits of removal of his breasts. This capacity includes capacity to weigh the risks and benefits of the procedure and make an informed decision regarding this treatment. As previously noted, [Tony] has engaged in sophisticated discussion around the issues of his gender identity, is living as a male, and has gained significant psychological benefit from Stage 2 treatment. [Tony] is actively seeking the removal of his breasts.

19. In the earlier report, Dr L described Tony as follows:

It is my belief that [Tony] is Gillick competent to make the decisions regarding commencement of stage 2 (testosterone) treatment. In our consultations, [Tony] has engaged in sophisticated discussion around the issues of his gender identity, fertility preservation and the long term consequences of treatment both in terms of physical and psychological health and wellbeing. [Tony] is aware that one of the options for transitioning is to do so socially without utilising [sic] hormonal treatment.

Discussion

20. As indicated, the primary application here relates to the assessment of Tony's ability to consent, which is also described as *Gillick* competence. Mere assertions from treating practitioners that a person is *Gillick* competent is, of itself, of little assistance to the Court in determining the issue. In this instance each of the treating practitioners has described their interactions with Tony, what those interactions have included and how Tony has dealt with them in terms of his capacity to interact with them. This is of assistance in assessing Tony's competence. The test as I have indicated is set out at page 237 of *Marion's case*. I repeat the test as follows:⁶

A minor is, according to this principle, capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".

21. Firstly, I note that Tony understands that what is to take place is a step towards maleness or the gaining of male appearance. He understands that it is not reversible and he embraces and desires that change. There is no doubt that he understands the effect of what is proposed, being the surgical removal of breasts so that he might have a chest that corresponds to a male appearance.
22. Secondly, Tony has discussed changes to his maleness meaningfully with treating practitioners. He has discussed the benefits of the surgery and the results of the surgery. He has previously engaged in sophisticated discussion in relation to gender identification and fertility issues. Tony has further been described as intelligent, articulate and engaged. He has demonstrated an understanding of his gender dysphoria and understood the medical implications

⁶ *'Marion's case'* [1992] HCA 15 [237].

of what it is that he seeks. He has been described as having the capacity to understand and weight, and to make an informed decision.

23. Thirdly, Tony was born in 1999. He is on the cusp of adulthood. I note what has been endorsed in *Marion's case* from *Gillick*, again at page 237 is as follows:⁷

... that parental power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacities and maturity grow and that this rate of development depends on the individual child...

24. This gives some expectation that, as a child approaches eighteen, their capacity to make such decisions increases with the parental power diminishing. Even absent that expectation, which is expressed to be subservient to an assessment of the individual child, I find that Tony has sufficient understanding and intelligence to enable him to understand fully what is proposed. That is, I find that he is *Gillick* competent and has the capacity to consent and I will declare accordingly.

I certify that the preceding twenty-four (24) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Gill delivered on 3 November 2016.

Associate:

Date: 7 November 2016

⁷ *'Marion's case'* [1992] HCA 15 [237].