FAMILY COURT OF AUSTRALIA

RE: BERNADETTE ***[2011] FamCAFC 50***

FAMILY LAW – APPEAL – CHILDREN – SPECIAL MEDICAL PROCEDURE – JURISDICTION – Appeal against orders for treatment of transexualism/Gender Identity Disorder – application for summary dismissal of appeal – where child turned 18 years old prior to the Notice of Appeal being filed – whether the Court has jurisdiction to entertain an appeal against orders where the subject has turned 18 – whether s 67ZC is limited to the making of orders for children under the age of 18 – whether the orders sought on appeal, if made, would constitute a declaratory or advisory opinion – application for summary dismissal granted – appeal dismissed.

Acts Interpretation Act 1901 (Cth), s 15AB
Commonwealth of Australia Constitution Act (Cth), ss 51(xxii), 75, 76, 77
Family Law Act 1975 (Cth), ss 61C, 64, 64B, 65D, 65H, 67ZC, 93A

Allesch v Maunz (2002) 203 CLR 172
Australian Institute of Private Detectives v Privacy Commissioner [2004] FCA 1440
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334
CDJ v VAJ (1998) 197 CLR 172
Craig v South Australia (1995) 184 CLR 163
In Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth) (1981) 147 CLR 297
In re the Judiciary Act and the Navigation Act (1921) 29 CLR 257
King v Jones (1972) 128 CLR 221
Minister for Immigration and Multicultural and Indigenous Affairs v B and Another (2004) 219 CLR 365
National Assistance Board v Wilkinson [1952] 2 QB 648
Public Guardian v M A (1990) 14 Fam LR 46
Re Alex: Hormonal Treatment for Gender Identity Dysphoria (2004) FLC 93-175
Re L (Medical Treatment: Gillick Competency) [1998] 2 Fam Law R 810
Re McBain; Ex parte Catholic Bishops Conference & Anor (2002) 209 CLR 372
Re Woolley (2004) 210 ALR 369
Re: Sean and Russell (Special Medical Procedures) [2010] FamCA 948
SMB & JWB; Secretary, Department of Health and Community Services (1992) 175 CLR 218
T v F (1999) FLC 92-855

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 2204 UNTS 95
United Nations Convention on the Rights of the Child 1577 UNTS 3

FIRST APPELLANT:	The Father
SECOND APPELLANT:	The Mother
FIRST RESPONDENT:	Director General, Department of Community Services (New South Wales)
FIRST INTERVENOR	Bernadette
SECOND INTERVENOR:	Attorney-General for New South Wales
FILE NUMBER:	PAF 1057 of 2005
APPEAL NUMBER:	EA 20 of 2010
DATE DELIVERED:	15 March 2011
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Bryant CJ, O'Ryan & Strickland JJ
HEARING DATE:	16 September 2010 and 16 November 2010
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	19 January 2010
LOWER COURT MNC:	[2010] FamCA 94

REPRESENTATION

COUNSEL FOR THE FIRST APPELLANT:	Ms Wallbank, solicitor
SOLICITOR FOR THE FIRST APPELLANT:	Wallbanks
COUNSEL FOR THE SECOND APPELLANT:	Ms Wallbank, solicitor
SOLICITOR FOR THE SECOND APPELLANT:	Wallbanks
COUNSEL FOR THE RESPONDENT:	Mr Bourke
SOLICITOR FOR THE RESPONDENT:	NSW Crown Solicitor
COUNSEL FOR THE FIRST INTERVENOR:	Mr Bell appearing with Ms Bell
SOLICITOR FOR THE FIRST INTERVENOR:	Dettmann Longworth Lawyers
COUNSEL FOR THE SECOND INTERVENOR:	Mr Bourke
SOLICITOR FOR THE SECOND INTERVENOR:	New South Wales Attorney-General's Department

ORDERS

(1) That the Notice of Appeal filed on 19 February 2010 as amended by the Amended Notice of Appeal filed 10 November 2010 be dismissed.

(2) That there be no orders as to costs.

IT IS NOTED that publication of this judgment under the pseudonym *Re: Bernadette* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT SYDNEY

Appeal Number: EA 20 of 2010
File Number: PAF 1057 of 2005

The Father
First appellant

And

The Mother
Second appellant

And

Director General , Department of Community Services (NSW)
First respondent

And

Bernadette
First intervenor

And

Attorney-General for New South Wales
Second intervenor

REASONS FOR JUDGMENT

BRYANT CJ AND STRICKLAND J

INTRODUCTION

1. This is an application by the Director-General, Department for Community Services (NSW) ("the Director-General") for summary dismissal of an appeal brought by the Father and the Mother ("the parents"), the parents of a child known as "Bernadette", against a decision of Collier J handed down on 19 January 2010.

2. The case before the trial Judge was an application brought by Bernadette's parents seeking orders permitting treatment for transsexualism (also called Gender Identity Disorder) when medical experts refused to treat Bernadette in the absence of a court order authorising the treatment. There is no dispute between the various parties about the treatment itself, or the appropriateness of it, and indeed orders were made by consent at the conclusion of the hearing on 7 November 2007 pursuant to the provisions of s 67ZC of the *Family Law Act 1975* (Cth) ("the Act") as follows:

    (1) That the child BERNADETTE the subject child born on … January 1992 be entitled and permitted to be administered the following treatment for the condition of transsexualism:

        (a) Hormonal treatment known as phase one treatment to block the onset of puberty; and

        (b) Hormonal treatment known as phase two treatment.

    (2) Such treatment is to commence on or after … January 2008.

    (3) That in the event of a proposed change in the child's attending physicians the applicant father is to inform the Independent Children's Lawyer, the Department of Community Services and the Human Right and Equal Opportunities Commission of such changes within seven days.

    (4) That the subject child continue to receive counselling by psychiatrists Dr X and Dr Y at such frequency as is recommended by each of those psychiatrists.

3. The main issue raised by the parents before the trial Judge related to the jurisdiction of the Court to make these orders. They contended that the making of a decision about this treatment was an aspect of parental responsibility and

consequently the Court had no jurisdiction to make the orders and should not be involved.

4. On 19 January 2010 the trial Judge published his final orders and reasons, finding that the Court had jurisdiction to authorise such treatment and that it was in the best interests of Bernadette that the orders be made.

5. In January 2010, Bernadette turned 18 years of age.

6. On 19 February 2010 the parents filed a Notice of Appeal. Subsequently orders were made by consent permitting Bernadette to intervene in the proceedings.

7. Prior to hearing the appeal the Director-General, who was the first respondent to the appeal, filed an application seeking the dismissal of the appeal. That application was filed on 16 July 2010. The gravamen of the Director-General's application was:

    a) That the grounds of appeal and the orders sought in the appeal in relation to the subject child have no utility and involve the Court in an academic exercise as the child turned 18 years of age on … January 2010; and

    b) The grounds of the appeal and orders and declarations sought in the appeal in relation to "any" child or adolescent invited the Court to engage in an academic or hypothetical exercise, effectively seeking an advisory opinion.

8. Subsequently, the Director-General added a further argument in support of the dismissal of the appeal; namely that there is no "matter" for the Court to decide in this appeal arising under s 77 of the *Constitution* as there is no justiciable controversy raised in the appeal or, if there is, then there is no "matter" if the Court does not have jurisdiction to resolve the dispute given that Bernadette has now reached the age of 18 years.

9. The parents do not appeal against the orders themselves, which they sought, but rather the conclusion of the trial Judge that the treatment to be given to Bernadette for the condition of transsexualism required the involvement of the Court rather than, as they contend, the decision was capable of being made by the parents as part of their exercise of parental responsibility. In that sense, it is the findings of fact and law leading to the Court necessarily exercising its jurisdiction to make the orders that is the subject of challenge, and not the orders themselves.

10. No point was taken by the Director-General that the appeal was incompetent on this basis.

THE ISSUES AT TRIAL

11. The trial Judge was aware of the fact that, having made orders in 2005 and 2007, there was the potential for any further findings to be declaratory only. The Director-General submitted to his Honour at trial that proper questions arose for determination but ought to be limited to questions having specific application to Bernadette and her parents but his Honour should not view the issues as of general application. The proper questions arising for determination as submitted by the Director-General were:

    (a) Do the parents of [Bernadette] have authority to provide lawful consent to medical treatment, involving the administration of puberty-suppressing drugs, to arrest eh [sic] onset of [Bernadette's] puberty ("Phase 1 Treatment") in the course of the medical treatment of the condition of transsexualism (also called General Identity Disorder) without an order of the court?

    (The Director-General submits that this question be answered "No").

    (b) Do the parents of [Bernadette] have authority to provide lawful consent to medical treatment, involving the administration of puberty-suppressing drugs, in conjunction with female hormones, to induce in [Bernadette] female secondary sexual characteristics ("Phase 2 Treatment").

    (The Director-General submits that this question be answered "No").

12. The submissions of the Human Rights and Equal Opportunity Commission at trial proposed that the questions to be answered should be framed in the following terms:

    (a) Is transsexualism a condition that requires treatment (as so referred to by the majority as "malfunction or disease") and, if so,

    (b) Is the proposed treatment in this case appropriately carried out to treat the condition?

13. The parents argued before the trial Judge that:

    (a) The parent of an adolescent minor and/or such minor (provided that such a minor has a sufficient understanding and intelligence to enable him or her to understand fully what is proposed) has the authority to lawfully authorise medical treatment for that adolescent minor to arrest the onset of the minor's puberty ("Phase 1 Treatment") in the course of medical treatment of the condition of transsexualism without an order of a court.

    (b) Phase 1 Treatment for the condition of transsexualism (also called gender identity disorder) is not a "special medical treatment" as defined in s 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

(c) The parent of an adolescent minor and/or such minor (provided that such a minor has a sufficient understanding and intelligence to enable him or her to understand fully what is proposed) has the authority to lawfully authorise hormonal medical treatment for the adolescent minor to induce the secondary sexual characteristics of the adolescent minor's affirmed sex ("Phase 2 Treatment") in the course of the medical treatment of the condition of transsexualism (also called gender identity disorder) without an order of a court.

(d) Phase 2 hormonal medical treatment is not a "special medical treatment" as defined in s 175 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

14. The issues as identified by the Independent Children's Lawyer were:

11.1 Does the parent of a child [Do the parents of [Bernadette]] have the authority to lawfully authorise the treatment of the said child in relation to the treatment of transsexualism without an order of a court;

11.2 If the answer is "no", does the parent [do the parents of [Bernadette]] have the authority to lawfully authorise treatment for the child to block the onset of the child's puberty (stage 1 treatment) in the course of treatment of the condition of transsexualism without an order of a court;

11.3 Is:

(i) Stage 1 treatment for the condition of transsexualism and/or

(ii) Hormonal treatment to induce the secondary sexual characteristics of the child's affirmed sex (stage 2 treatment) for the condition of transsexualism a "special medical procedure" as identified in *Re Marion (No 2)* and for the purpose of Division 4.2.3 of the Family Law Act and Family Law Rules 2004.

11.4 Is:

(i) Stage 1 treatment for the condition of transsexualism and/or

(ii) Stage 2 treatment for the condition of transsexualism "special medical treatment" within the meaning of section 175(5) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).

11.5 Does the Family Court of Australia have the jurisdiction pursuant to the Family Law Act 1975 or otherwise to make an order:

(i) To permit and authorise the treatment of a child [Bernadette] in relation to the condition of transsexualism;

(ii) To permit and authorise the parent of a child [the parents of [Bernadette]] to lawfully authorise the treatment of the said child in relation to the condition of transsexualism.

15. His Honour noted that an unsuccessful attempt had been made to settle the terms of a Case Stated and had that attempt proved successful, the matter would have been referred to the Full Court pursuant to s 94A(1) of the Act.

16. His Honour in his findings went beyond questions posed by the Director-General. However, his Honour said at paragraph 65 of the Reasons for Judgment:

> … I am of the view that it would be unsafe to determine the questions raised as matters of general or theoretical application. The evidence that I have heard is particular to this case and this young person.

17. In essence, his Honour found that he was unable to determine the cause of transsexualism or Gender Identity Disorder from the medical evidence. His Honour found that sub-sections (1) and (2) of s 67ZC of the Act were applicable and that the decision about treatment fell outside parental responsibility. His Honour concluded that he was satisfied that it was not in the interests of every child to enable their parents or guardians to give such consent and he was satisfied that it was in the best interests of children for the Court to retain the power to authorise treatment in respect of a particular child, when treatment of this kind was contemplated. His Honour noted that it remained a matter for determination on a case-by-case basis.

18. Having found that the Court had jurisdiction to make orders, his Honour considered all of the matters in s 60CC of the Act that were relevant to the child's best interests and decided that the orders for treatment should be made final.

19. To repeat, there is no challenge to the orders his Honour made or to his Honour's finding that it was appropriate for the treatment to take place. The argument put to his Honour, and now advanced on appeal, is that in cases of this type an order of the Family Court is not required and, as a consequence, the Court has no jurisdiction to make such an order.

20. In support of their position the parents submitted to his Honour that *SMB & JWB; Secretary, Department of Health and Community Services* (1992) 175 CLR 218 ("*Marion's Case*") is authority for the following propositions:

(a) if the medical treatment is not a "special medical treatment" as defined in section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the minor has a sufficient understanding and intelligence to enable him or her to understand fully what is proposed, the minor is entitled to give consent and neither the consent of the minor's parents nor the approval of [the Family Court] is necessary;

(b) in those cases where the minor does not have a sufficient understanding and intelligence to enable him or her to understand fully what is proposed, if the medical treatment is not "special medical treatment" as defined in section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and does not involve irreversible non-therapeutic medical treatment, in that it is intended to treat some malfunction or disease, the parent/guardian of a minor is able to give consent and the approval of [the Family Court] is not necessary;

(c) if the medical treatment is a "special medical treatment" as defined in section 175 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) or is an irreversible non-therapeutic medical treatment, in that it is not intended to treat some malfunction or disease, neither the minor nor his/her parent/guardian is able to give consent.

21. As a result the parents contended to his Honour that *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* (2004) FLC 93-175, which held that Phase 1 treatment required an order of the court, was wrongly decided.

22. We acknowledge that the submissions by the parents in relation to the appeal are lengthy and detailed. However, as the matter we have to determine is a preliminary matter, the brief description of the arguments given is sufficient for this purpose.

THE DIRECTOR-GENERAL'S APPLICATION TO DISMISS THE APPEAL

23. Upon hearing the application to dismiss the appeal, the Full Court noted that a question arose as to whether the Court had any jurisdiction to entertain the appeal because Bernadette is no longer a child as she has attained the age of 18 years. This could be because the Constitutional power deriving from *placitum* (xxii) of s 51 of the *Constitution*, which gives the Federal Parliament power to make laws in "divorce or matrimonial causes and in relation thereto, parental rights, and the custody and guardianship of infants", requires that the contemporary meaning of infant is a child under 18 years of age. Alternatively, because there is no age-related definition of "child" in the Act, the relevant section of the Act pursuant to which the orders were made (s 67ZC) must be understood as operating only in relation to persons aged under 18 years.

24. As no argument was initially addressed to us on these issues we adjourned the matter for consideration and to invite intervention by the Commonwealth and State Attorneys-General if they sought to be heard on the question of whether the power to make orders under s 67ZC of the Act could be made in relation to a person who is over the age of 18 but under the age of 21 years. Only the Attorney-General for the state of New South Wales wished to intervene in the proceedings and was represented by counsel for the Director-General.

25. The parents concede in both written and oral submissions that what is sought on appeal is clarification and determination of the Court's lawful jurisdiction by way of general application, as opposed to Bernadette specifically, which they contend is an appropriate exercise of the Court's appellate jurisdiction.

26. It is our view that the Court has no jurisdiction to entertain the appeal for a variety of reasons which we now explain.

THE NATURE OF APPEALS IN SECTION 93A

27. The issue of jurisdiction arises because an appeal to the Full Court pursuant to s 93A of the Act is not an appeal *stricto sensu* but is by way of a rehearing (*CDJ v VAJ* (1998) 197 CLR 172; *Allesch v Maunz* (2002) 203 CLR 172), invoking the process whereby the Full Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time the appeal is heard (*CDJ v VAJ* (supra) per McHugh, Gummow and Callinan JJ at [111]). The Court's jurisdiction on appeal is therefore partly appellate and partly original.

28. The fundamental issue which brought the child and applicants to the Court to seek orders no longer exists. As Bernadette is an adult, she no longer requires the consent of the Court (or her parents) to any medical treatment. Thus the appeal, insofar as it relates to medical treatment of Bernadette, now seeks orders in respect of a child who has attained the age of 18 years.

THE JURISDICTION OF THE COURT TO MAKE ORDERS UNDER SECTION 67ZC IN RELATION TO A CHILD WHO IS AGED 18 YEARS

29. The first question that we intend to consider is whether the Court has jurisdiction to make orders under s 67ZC in relation to a child who has attained the age of 18 years.

30. This first requires a consideration of whether the *Constitution* permits Parliament to legislate in relation to custody and guardianship for children of 18 years of age or over. The relevant section of the *Constitution* is s 51(xxii) where "infants" is referred to. Given that at Federation it is clear that "infants" referred to persons under 21, the question now is whether it has remained the same or whether it now only refers to persons under 18.

31. In *King v Jones* (1972) 128 CLR 221 the High Court dealt with a case involving three applicants who had attained the age of 18 years but not attained the age of 21 years, who had applied to be placed on the Commonwealth electoral register for certain electoral divisions in the state of South Australia.

32. The High Court unanimously held that a person was an adult within the meaning of s 41 of the *Constitution* only upon attaining the age of 21 years.

33. The Court determined, firstly, that it was beyond question that in 1901 the legal meaning of the word "adult" was a person who ceased to be an infant and became of full age upon reaching the age of 21 years. Despite legislation in some States providing for the age of majority to be 18 years, the Court held that they would not be "adult" for the purposes of s 41. Gibbs J said (at 265):

> I agree that as a general rule it is right to say that, although words used in the Constitution should bear the meaning they had at the time of federation, which meaning does not change, their denotation must extend as new concepts develop: cf *Lansell v Lansell* [(1964) 110 CLR 353 at pp. 366, 369 and 370.] When, however, the Constitution itself contains an indication that it was intended that a word should be understood in a particular sense, and in that sense alone, effect must of course be given to the intention thus revealed.

34. While the High Court was dealing with a section of the legislation in question which necessitated a consideration of who was an adult, we think that it has parallels in respect of the question of who is an infant in s 51(xxii) of the *Constitution*.

35. It makes no difference that s 51(xxii) of the *Constitution* speaks of "infants" rather than "adults". In our view section 51(xxii) marks the outer limit of Parliament's ability to make laws concerning the custody and guardianship of children (namely, up to 21 years) but does not constrain it from making laws which confine the Court's jurisdiction to 18 years or some other age.

36. Thus it is a question of whether the provisions of the Act limit the Court's jurisdiction to making orders in relation to children under 18.

37. The Act itself contains no definition of a "child" relevant to age but particular provisions in Part VII limit the Court's jurisdiction to children under 18 years. Section 64B(2) states:

> **64B(2) [Matters dealt with by parenting order]** A parenting order may deal with one or more of the following:
>
> …
>
> (i) any other aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

38. Section 65H(1) of the Act specifically provides:

> **65H(1) [When parenting order must not be made]** A parenting order must not be made in relation to a child who:
>
> (a) is 18 or over;
>
> …

39. In addition s 65H(2) provides:

> **65H(2) [When a parenting order stops]** A parenting order in relation to a child stops being in force if the child turns 18…

40. Section 67ZC says:

> **67ZC (1) [Child welfare orders]** 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.

41. Relevantly, s 67ZC does not contain the same direct age limitation as is to be found in s 65H(1).

42. Thus the power to make orders affecting Bernadette could only arise in the following circumstances:

- if an order made under s 67ZC, the welfare power, was not a parenting order and thus not subject to the prohibition in s 65H(1) of the Act; and
- s 67ZC is not otherwise to be read as being limited to the making of orders for children under 18.

43. The Director-General submits that the orders sought regarding Bernadette fall within the definition of parenting order under s 64B(2)(i) and thus it is clear that the Court has no jurisdiction to entertain the appeal now that Bernadette has turned 18.

44. However, we do not think it is as clear as that. The orders made in Bernadette's case were not orders made under s 64B(2) but rather were made under s 67ZC in exercise of the Court's welfare power.

45. We observe that in s 67ZC the jurisdiction given to the Court is "**[i]n addition** to the jurisdiction that a court has under [Part VII]…". In *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* (2004) 219 CLR 365, the High Court considered the jurisdiction conferred by s 67ZC. Gleeson CJ and McHugh J said (at 379):

> Under the Constitution, the Family Court, as a federal court, may only be invested with jurisdiction that the Parliament has defined by a law with respect to one of the "matters" mentioned in s 75 or s 76 of the *Constitution*. In this case, the only relevant "matter" is a "matter ... arising under any laws made by the Parliament". The "welfare of children" is not a matter mentioned in s 75 or s 76 of the Constitution. Indeed, it is not a matter mentioned in s 51 of the Constitution, the chief provision which invests the federal Parliament with legislative power. Section 67ZC also 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.

However, this Court has long recognised that the requirements of s 77 of the Constitution may be satisfied even though jurisdiction in respect of a matter is defined or invested only inferentially. The inference may be drawn from the nature of a remedy granted or from other provisions in the legislation that confer rights or impose duties or liabilities on persons. Thus, in *Hooper v Hooper*, this Court held that federal jurisdiction was invested in the Supreme Courts of the States by a combination of two sections of the *Matrimonial Causes Act* 1945 (Cth), namely ss 10 and 11. The first section, s 10, authorised a person domiciled in one State but resident in another State to commence proceedings in respect of a "matrimonial cause", as defined, in the Supreme Court of the State of residence. The second section, s 11, gave that person the rights that he or she had under the law of the State of domicile. In a unanimous judgment, this Court stated:

> "A substantive "law of the Commonwealth" is thus enacted, and, whenever a "matrimonial cause" is instituted putting any of those rights in suit, there is a "matter" which "arises" under that law of the Commonwealth. And "with respect to" that "matter" State courts may be lawfully invested with federal jurisdiction under s 77(iii) of the Constitution." (footnotes omitted)

46. However, their Honours went on to say (at 380):

> In contrast, s 67ZC does not itself impose any substantive liabilities or duties or confer rights or privileges on any person. Standing alone, therefore, s 67ZC does not confer jurisdiction in respect of a "matter" arising under a law of the Parliament because it does not confer rights or impose duties on anyone. The "jurisdiction" conferred by s 67ZC is therefore not comparable with those provisions considered by this Court in *Barrett* and *Hooper*. Moreover, unless it were supported by the external affairs power or a reference from the States or was read down to refer to the parties to a marriage, it could not constitutionally confer any rights or impose any duties in respect of the welfare of children. (footnotes omitted)

47. Gleeson CJ and McHugh J also pointed out (at para 14) that the principal judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in *Marion's case*:

> …does not support a finding that s 67ZC is a source of power and also operates to confer jurisdiction for the purpose of Ch III of the Constitution. In *Marion's Case*, this Court held that the Family Court had jurisdiction under its "welfare jurisdiction" to authorise the carrying out of a sterilisation procedure upon a child of a marriage. *Marion's Case* arose out of a claim by the parents of the child for an order authorising the sterilisation. In the alternative, the parents sought a declaration that it was lawful for them to consent to the performance of those procedures. (footnotes omitted)

48. In *Marion's Case* the Court identified that the parents' claims gave rise to two main questions:

(1) Could the parents lawfully authorise the sterilization without an order of the Court?

(2) If not, did the Family Court have jurisdiction to give consent to the sterilization.

49. These questions were referred to by Gleeson CJ and McHugh J in paragraphs 16 and 17 of *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* (supra), noting that s 63E of the Act (as it then provided), "gave the parents, as guardians of the child, responsibility for the long-term welfare of the child and all the powers, rights and duties that, apart from the Act, vested by law or custom in a guardian." Their Honours said "[b]ecause the Act vested those rights, powers and duties and that responsibility in the parents, a controversy between the parents and the Secretary, as the child's representative, concerning the right of the parents to authorise her sterilisation gave rise to a 'matter' for the purpose of Ch III of the Constitution." Hence, the first of the two main questions gave rise to a "matter" within the meaning of s 77 of the *Constitution*.

50. Their Honours also recorded that the second question gave rise to such a matter because s 63E made the parents responsible for the long-term welfare of the child, and s 64 authorised the Family Court to make orders for the welfare of the child. Their Honours said (at para 17):

> At least by implication, Pt VII of the Act gave the parents the right to seek an order to advance or protect the welfare of the child. Accordingly, the second question in *Marion's Case* concerned a "right or privilege or protection given by law". It was analogous to those "matters" concerning children over which the Court of Chancery has long exercised parens patriae jurisdiction. (footnotes omitted)

51. At para 18 their Honours said:

> It is beside the point whether an application for such an order is or is not opposed, or involves or does not involve a lis inter partes in an application, such as that involved in *Marion's Case*. As Dixon CJ and McTiernan J pointed out in *R v Davison*, courts make many judicial orders that involve no lis inter partes or adjudication of rights, yet they exercise judicial power. Further, any "matter" that involves the exercise of judicial power and answers one or more of the subject matters described in s 75 or s 76 of the Constitution is necessarily a "matter" for the purpose of s 77 of the Constitution.

52. Insofar as there are limits on the powers that a Court might be able to exercise under the *parens patriae* jurisdiction, which was referred to in the joint judgment in *Marion's Case*, Gleeson CJ and McHugh J said (at para 20):

> This passage, and the last sentence in particular, should not be read, however, as suggesting that the Family Court had a welfare jurisdiction that was at

> large. Earlier, the joint judgment recognised this when their Honours said that "there are limits on that jurisdiction". The above passage should not be read, therefore, as suggesting that the Family Court's welfare jurisdiction authorises orders that are divorced from the determination of "some immediate right, duty or liability" of the parties to a controversy or that are not analogous to those exceptional orders traditionally made by courts exercising judicial power. Their Honours are hardly likely to have overlooked that there can be no conferral of federal jurisdiction unless there is a "matter" within the meaning of ss 75 and 76 of the Constitution.

53. Ultimately their Honours concluded (at para 23) "[t]he valid application of s 67ZC, therefore, is dependent upon some other provision in Pt VII of the Act creating a 'matter' within the meaning of s 75 or s 76 of the Constitution to which the jurisdiction conferred by s 67ZC can attach." Their Honours concluded (at para 52):

> By necessary implication, the Family Court may also make an order under s 67ZC that is binding on a parent. Under that section it may also make orders such as those made in *Marion's Case* or those analogous to orders traditionally made by courts exercising the parens patriae jurisdiction. Nothing in that section or in the rest of Pt VII, however, suggests that the Family Court has jurisdiction to make orders binding on third parties whenever it would advance the welfare of a child to do so. Nothing in s 67ZC, or in Pt VII generally, imposes — expressly or inferentially — any duty or liability on third parties to act in the best interests of or to advance the welfare of a child. Except where Pt VII expressly imposes obligations on third parties — for example, ss 65M, 65N and 65P — that Part is concerned with the relationship between parents and children and parents' duties in respect of their children.

54. See also the comments of Murphy J in *Re: Sean and Russell (Special Medical Procedures)* [2010] FamCA 948 at paras 66, 70, 71, 72 and 75.

55. Hence it is clear that Part VII is concerned with the relationship between parents and children and parents' duties in respect of their children or, put another way, the orders under s 67ZC, particularly in relation to the subject matter arising in *Marion's Case* and like cases (of which this is one) is essentially supervisory of parental responsibility.

56. That of course does not answer the question whether an order made under s 67ZC is a parenting order as described in s 64B(2)(i) of the Act. As this aspect was not satisfactorily argued before us we think it preferable to leave determination of this issue to a later case in which the question can be more fully explored with the benefit of argument and we express no concluded view on this.

Is section 67ZC otherwise limited to the making of orders for children under the age of 18 years?

57. In order to better consider this aspect it is necessary to trace the history of the welfare jurisdiction of the Court.

58. Before the amendments in 1983 to the Act the Court, by virtue of s 31(1) of the Act, had jurisdiction in matrimonial causes. "Matrimonial cause" was defined in s 4(1) of the Act to include:

> (c) proceedings between the parties to a marriage with respect to -
>
> (i) the maintenance of one of the parties to the marriage; or
>
> (ii) the custody, guardianship or maintenance of or access to, a child of the marriage;
>
> …
>
> (cb) proceedings by or on behalf of the child of the marriage against one or both of the parties to the marriage with respect to the maintenance of the child.

59. Section 64(1) dealt with proceedings with respect to "custody or guardianship of, or access to, a child of a marriage". There was no independent reference to *welfare* and as the Act stood before 1983 there was no general power to make orders relating to the welfare of a child. Orders were confined to those concerning custody, guardianship or access (see *Marion's Case* (supra)).

60. In 1983 amendments to the Act were made as the result of recommendations contained in the *Watson Committee Report (Wardship, Guardianship, Custody, Access and Change of Name)*, published in November 1982. Relevantly, the Act was amended to enable orders to be made for the protection of the welfare of the child of the marriage and the definition "matrimonial cause" under s 4(1) was amended to include:

> (cf) proceedings between the parties to the marriage with respect to the welfare of a child of the marriage;
>
> (cg) proceedings by or on behalf of a child of the marriage against one or both of the parties to the marriage with respect to the welfare of the child;
>
> (ch) proceedings with respect to the welfare of a child of the marriage, being proceedings to which one party to the marriage is a party…

61. In *Marion's Case* (supra) the majority (comprising Mason CJ, Dawson, Toohey and Gaudron JJ) said (at 256):

> It seems clear that the 1983 amendments were intended to, and did, confer jurisdiction on the Family Court similar to the parens patriae jurisdiction, without the formal incidents of one of the aspects of that jurisdiction, the jurisdiction to make a child a ward of court.

62. In 1987 the Act was further amended by, inter alia, repealing paragraphs (cb)-(ch) in s 4(1); that is, the definition of "matrimonial cause" which included the provisions about proceedings relating to the welfare of a child. However, the deletion in 1987 of the paragraphs of the definition of "matrimonial cause" is consistent with the aim of putting all of the provisions relating to children into one Part of the Act, namely Part VII, and with the further aim of effecting a reference of powers by four States of the Commonwealth in relation to certain ex-nuptial children.

63. Following the 1987 amendments, s 63(1) of the Act conferred jurisdiction on the Court "in relation to matters under this Part". Section 64(1) of the Act provided:

> **64(1) [factors considered]** In proceedings in relation to the custody, guardianship or welfare of, or access to, a child –
>
> …
>
> (c) … the court may make such order in respect of those matters as it considers proper, including an order until further order.

64. As to the 1987 amendments the majority in *Marion's Case* (supra) said (at 257):

> What was achieved by the amendments of 1983 and was not rescinded by the change to the Act in 1987 was a vesting in the Family Court of the substance of the parens patriae jurisdiction, of which one aspect is the wardship jurisdiction.

65. The majority also said:

> [I]t is clear that the welfare of a child of a marriage is a "matter" which arises under Pt VII for the purposes of s 63(1) and is, therefore, an independent subject which may support proceedings before the Family Court.

66. There were further amendments to the Act and in particular to Part VII in 1995. In the 1995 amendments, Division 5 of Part VII of the Act introduced the concept of a "parenting order". Division 6 dealt with parenting orders other than child maintenance orders and provided in s 65D(1) that:

> **65D(1)** In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

67. After setting out particular kinds of parenting orders the court might make, in particular a residence order, a contact order or a specific issues order, s 67ZC was inserted and provided:

> **67ZC(1) [Child welfare orders]** 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.

> **67ZC(2) [Best interests of child are paramount consideration]** In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

68. In particular, s 67ZC encapsulated in a discrete section the power that was previously contained in s 64; namely that in proceedings in relation to the welfare of a child the Court might make such order as it considered appropriate. It did so by calling it an additional jurisdiction to other jurisdiction under Part VII. For the limits on the jurisdiction of the Court under s 67ZC see *Minister for Immigration and Multicultural and Indigenous Affairs v B and Another* (supra).

69. Finally further amendments were made to the Act in 2006. In particular s 64B(2)(i) provided that:

> **64B(2) [Matters dealt with by parenting order]** A parenting order may deal with one or more of the following
>
> …
>
> (i) any other aspect of the care, **welfare** or development of the child or any other aspect of parental responsibility for a child.

70. Section 67ZC remained unchanged.

71. Any age-related constraints upon the Court's powers under s 67ZC need therefore to be considered. This question arose in *Public Guardian v M A* (1990) 14 Fam LR 46, a decision of Asche CJ sitting in the Supreme Court of the Northern Territory. His Honour makes the point, as we have done in paragraph 37, that there is no general definition of "child" or "child of the marriage" in the Act which has reference to age.

72. The position of s 67ZC in Part VII, in our view and for reasons which we will explain, limits the Court's power to make orders only in relation to children who are under 18 years.

73. Before the amendments of 1987 as previously described, there is nothing to suggest that the Court had power to make orders relating to children over 18. Part VII was originally headed "welfare and custody of children". The term "welfare" was only used in connection with conferences to discuss the welfare of a child who had not attained the age of 18 or declarations under a *decree nisi* as to the welfare of children of the marriage who had not attained the age of 18. The only other way in which the term "welfare" was used was in the general sense that in proceedings in respect of the custody or guardianship of, or access to, a child of the marriage, the welfare of the child was to be paramount consideration. As Asche CJ concluded (at 56):

> That is, there was no power to make an order for the welfare of a child unconnected with custody, guardianship or access proceedings; and custody, guardianship and access orders could not be made in respect of a child who

had attained 18, and, when made in respect of a child under 18, ceased to be in force after the child had attained that age (s 61).

74. The only argument to the contrary could be that the amendments of 1983 changed that position because the Court was then given power "in proceedings with respect to the custody, guardianship **or welfare of** or access to a child of the marriage" [our emphasis].

75. As Lord Devlin said in *National Assistance Board v Wilkinson* [1952] 2 QB 648 at 661:

> It is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.

76. No such intention appears from the second reading speech in relation to the extension of the welfare power in 1983 to indicate that it was intended to extend its provisions to children over 18. The explanation given by the Attorney-General for the Commonwealth in the second reading speech for the Bill was as follows (Commonwealth, *Parliamentary Debates*, Senate, 1 June 1983, 1098 (Gareth Evans)):

> The third way in which the Bill will expand the Act's jurisdiction concerning children is to permit proceedings concerning the welfare of a child.

77. Given that the welfare power is usually to be exercised in cases where there is some medical procedure proposed which might require the Court's consent, whether it is with or without parental responsibility, and as a child over 18 would unquestionably be "Gillick competent" (see *Re L (Medical Treatment: Gillick Competency)* [1998] 2 Fam Law R 810; *In Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297) we think the comments of Mason and Wilson JJ in *In Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (supra) are instructive (at 320-21):

> The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statue according to its terms and to legitimate aids of construction.
>
> The rules [of construction], as DC Pearce says in his Statutory Interpretation, p 14, are no more than rules of common sense, designed to achieve this object. They are not rules of law. If the judge applies the literal rule it is because it gives emphasis to the factor which in the particular case he thinks is decisive. When he considers that the statute admits of no reasonable alternative construction it is because (a) the language is intractable or (b) although the language is not intractable, the operation of the statute, read literally, is not such as to indicate that it could not have been intended by the Legislature.

> On the other hand, when the judge labels the operation of the statute 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' he assigns a ground for concluding that the Legislature could not have intended such operation and that an alternative interpretation must be preferred. But the propriety of departing from the literal interpretation is not confined to situations described by these labels. It extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute, including the policy which may be discerned from those provisions.
>
> Quite obviously questions of degree arise. If the choice is between two strongly competing interpretations, as we have said, the advantage may lie with that which produces a fairer and more convenient operation so long as it conforms to the legislative intention. If, however, one interpretation has a powerful advantage in an ordinary meaning and grammatical sense, it will only be displaced if its operation is perceived to be unintended.

78. This view is supported by reference to the referral of powers (see the various Commonwealth Powers (Family Law – Children) Acts passed in each State and Territory with the exception of Western Australia between 1986 to 1990) in which the referring States and Territories referred their powers with respect to ex-nuptial children to the Commonwealth. This was, as Asche CJ pointed out in *Public Guardian v M A* (supra), of considerable significance because all of the referring States and Territories in their referring Acts restricted the reference to children to those under the age of 18 years. As Asche CJ pointed out (at 55):

> Furthermore, if Pt VII expresses the Attorney-General's announced intention in his second reading speech that all children in the Territories and referring States are to be "subject to the same law", then it should follow that the expression "child" or "children" should refer to persons under 18. The alternative, to treat the expression "child" or "children" as referring to one group under 18 (ex-nuptial children from the referring States), and another group both over and under 18 (children of a marriage, or ex-nuptial children in the Territories) seems at the very least to create considerable untidiness and confusion; and nothing in the terms of Pt VII suggests any such distinction."

79. We agree with that reasoning and his Honour's conclusion that there is a clear implication restricting the expression to persons under 18 save where the context permits another interpretation or save where the contrary is expressly stated, as in the child maintenance provisions.

80. When s 67ZC was included in the Act, parenting orders were restricted to children under 18. The Explanatory Memorandum to the 1995 amendments said:

> The new section 67ZC provides the court with jurisdiction relating to the welfare of children in addition to the jurisdiction that the court has under Part

VII in relation to children. This jurisdiction is the *parens patriae* jurisdiction explained by the High Court in *SMB and JWB; Secretary, Department of Health and Community Services (Re Marion)* (1992) 175 CLR 218.

81. It would be strange in our view if one, and only one, aspect of decision making in relation to children, namely that which did not fall within the definition of a parenting order, would enable the Court to make orders for a child who in all other aspects would be regarded as an adult in the community. In our view, in accordance with the comments of Mason and Wilson JJ in *In Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (supra) we think that the legislative intent, evinced by reference to the language in Part VII and to the lack of any indication that the welfare power was to be exercised in a different manner from every other aspect of the powers in relation to children, is to confine the capacity of the Court to make orders both in relation to parenting orders under s 64B and the welfare power under s 67ZC to children under the age of 18 years.

82. There are further judicial pronouncements which support this interpretation. In *Marion's Case* (supra), the majority said (at 236):

> By virtue of legislation, the age of majority in all states and territories of Australia is 18 years. Every person below that age is, therefore, a minor and under the Family Law Act the powers of a guardian, generally speaking, cease at that age.

83. In addition, the wardship power and legislation in each of the states does not extend beyond the age of 18 years and in some cases ceases at the age of 16 years.

84. Further, in *Re Woolley* (2004) 210 ALR 369 McHugh J said (at 397):

> Children are presumed to be incompetent at birth and gradually to acquire legal competence for various purposes at different stages of their development until they reach the age of majority (18), in which case they are presumed to have full legal capacity.

85. And in *T v F* (1999) FLC 92-855 the Full Court comprising Nicholson CJ, Lindenmayer and Kay JJ in considering an order regarding "residence, contact, welfare or specific parenting issues" in the context of whether the Court could compel the giving of evidence in light of the provisions of the *Witness Protection Act 1994* (Cth) said (at 86,015):

> Just as the Director of a State welfare scheme or a school teacher or a medical practitioner or other person who from time to time has duties to provide for the care of a child must ultimately carry out their duties subject to directions and orders of a Court exercising FLA jurisdiction, unless they have some statutory exemption, so must the Commissioner carry out his or her duties

subject to the ultimate control that a judicial officer has concerning issues as to the welfare of any child under the age of 18 years.

86. Thus, while the term "child" in the Act is not defined as a person under the age of 18, it can be inferred that:

1. that was the intention of Parliament when one examines the Act as a whole, which repeatedly defines a child as a person under the age of 18 in other relevant sections; and

2. the ordinary and natural meaning of "child" is defined as a person under the age of 18 by reference to a number of extrinsic materials.

87. This inference is supported on the basis that, save for Division 7 of Part VII (child maintenance orders), every relevant section of the Act (see ss 4, 10D, 10H, 10J, 11C, 55A, 61C, 62G, 65H, 66L, 66T, 66VA, 66ZV, 70NEF, 72, 75, 90SF, 98A and 100B) defines a "child" as being under the age of 18 years.

88. Furthermore, s 15AB of the *Acts Interpretation Act 1901* (Cth) provides:

> **15AB Use of extrinsic material in the interpretation of an Act**
>
> (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.
>
> (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes:
>
> …
>
> (d) any treaty or other international agreement that is referred to in the Act;

89. Schedule 1 of the Act contains the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* which, under art 2, defines a "child" as a person who has not reached the age of 18. Furthermore, while not strictly captured by s 15AB(2)(d) of the *Acts Interpretation Act 1901*

(Cth), we note that art 1 of the *United Nations Convention on the Rights of the Child* also defines a "child" as a person under the age of 18.

90. We therefore conclude that s 67ZC, situated as it is within Part VII of the Act, does not enable the Court to make orders in respect of a child who is over the age of 18 years.

91. As a consequence, this Court on appeal, exercising the appellate power which is in part a re-hearing, does not have the power to make orders which relate to Bernadette as she is now 18.

92. For that reason the appeal is therefore incompetent and the application for its dismissal should succeed.

93. We also observe that the parents and Bernadette contend that the Full Court has power to review what they maintain is an error by the trial Judge in the determination of the Court's jurisdiction to make orders, notwithstanding that Bernadette, the subject of the orders, is now 18 years. Their argument is that Bernadette's age is of no relevance as the Court is concerned with correcting an error of law and nothing more.

94. They submit that in certain circumstances the Court does not have to relinquish its role (to correct error) despite the change in circumstances because the loss of parental rights complained of occurred at the time when there was no dispute about jurisdiction.

95. During the period of the adjournment of the appeal the parents and Bernadette amended the Notice of Appeal without objection. The effect of the amendments were, in the main, to remove those grounds and orders sought which related specifically to Bernadette, leaving grounds which related to jurisdictional findings in general and orders sought, being answers to general questions of relevance to other parents of children in a similar position to Bernadette.

CAN THE FULL COURT OF THE FAMILY COURT ISSUE DECLARATORY OR ADVISORY OPINIONS?

96. The Director-General submits that any retrospective declaration of the rights of Bernadette or her parents would be legally academic or hypothetical, in view of the fact that she has turned 18 and can provide her own valid consent to treatment. The Director-General also contends that there is no justiciable controversy and accordingly the Court does not have jurisdiction to determine the appeal. The Director-General argues that the law is clear that the orders sought by the parents, if made, would amount to an "advisory opinion".

97. We agree with this submission. While understanding the motivation of the parents to clarify the law for other parents, the very nature of the submission underscores the fact that it is an advisory or declaratory opinion that is being

sought and that there is no utility in making declarations or orders insofar as they relate to Bernadette.

98. The law is clear in relation to the constraint upon courts making declaratory orders whether at first instance or on appeal and we refer to *In re the Judiciary Act and the Navigation Act* (1921) 29 CLR 257 at 267; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357; *Australian Institute of Private Detectives v Privacy Commissioner* [2004] FCA 1440 in this regard. In essence, as Bernadette has now attained the age of 18 years, she is competent to consent to any medical procedure, including treatment for transsexualism. Therefore, any consideration of the correctness or otherwise of his Honour's decision, involving as it does a consideration of the relevant law, would amount to an advisory or declaratory judgment. In this case the orders sought lack utility and would not have the effect of determining an extant legal controversy. It is the function of courts to decide real disputes; not, as the authorities make clear, to "determine abstract questions of law".

99. For these various reasons, the jurisdiction of the Family Court ceased when Bernadette attained the age of 18 years.

100. In dealing with proceedings in which a medical practitioner in Victoria sought a declaration that a section of the *Infertility Treatment Act 1995* (Vic), which prohibited the provision of fertility treatment to a woman who was not married or living in a de facto relationship with a man, was invalid because it was inconsistent with the *Sex Discrimination Act 1984* (Cth), the High Court in *Re McBain; Ex parte Catholic Bishops Conference & Anor* (2002) 209 CLR 372 had to decide as a jurisdictional question whether the determination of that application constituted a "matter". Gleeson CJ said (at 396):

> The moving parties in the proceedings in this Court contend that, contrary to what was held by Sundberg J, a law of Victoria is valid. The contention may or may not be correct, but it cannot be determined by this Court as an abstract or hypothetical question divorced from any attempt to administer the law in question.

101. Hayne J further added (at 458):

> At the heart of the constitutional conception of "matter" is a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled. The "controversy" must be real and immediate. That is why it was held, in *In re Judiciary and Navigation Acts*, that "matter" means more than legal proceeding and that "there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court". Hypothetical questions give rise to no matter. Further, it has long been recognised that an important aspect of federal judicial power is that, by its exercise, a controversy between parties about some immediate right, duty or liability is quelled. [citations omitted]

102. During the course of oral argument towards the end of the appeal, counsel for Bernadette contended that, were the Court not to exercise its appellate jurisdiction, it would be amenable to prerogative writ to require it to do so. As this proposition was challenged by the Bench, counsel for the parents and Bernadette were permitted to file supplementary submissions coupled with a list of authorities in support of this contention, which had not previously been raised. It was then contended on behalf of Bernadette: –

a) that justiciable controversy should not be defined narrowly in a way that abrogates rights and/or review to argue that the decision at first instance was made incorrectly;

b) the issue is not abstract, not trifling but is real and substantial to those involved in the community. Thus it cannot be said there is no controversy;

c) the Court cannot allow an erroneous decision to stand as the first instance judgment could inform future cases if the Full Court failed to intervene; and

d) the decision would not be "advisory" because it relates to facts that actually existed. The facts upon which the decision was originally made were real and neither hypothetical nor a future possibility and thus the Court has real facts upon which to exercise appellate jurisdiction.

FURTHER SUBMISSIONS

103. Bernadette's counsel filed further submissions in which it was contended that:

a) there is scope for declaratory relief by the High Court under s 75(v) of the *Constitution* and that the High Court had previously considered whether on particular facts the Family Court of Australia or other superior courts acted beyond jurisdiction;

b) excessive constraint on jurisdiction to appeal may lead to the result that the special significance of s 75(v) identified by Dixon J in *Bank of NSW v The Commonwealth* (1948) 76 CLR 1, of which his Honour said the purpose of the inclusion of s 75(v) was "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power."; and

c) in *Craig v South Australia* (1995) 184 CLR 163 at 177 the High Court held that this included circumstances where a tribunal fell into jurisdictional error when "it mistakenly asserts or denies the existence of jurisdiction or it misapprehends or disregards the nature or limits of its functions or powers."

104. These cases, it was contended, support the proposition that original jurisdiction in the High Court would exist and that being so, it was incumbent upon the Full Court to have regard to this when considering whether to exercise jurisdiction. Finally, it was contended that the parties have standing and real interests affecting immediate rights to be determined, not issues that have not or may not occur.

105. In our view the supplementary submissions and authorities relied upon by Bernadette do not advance the matter. In *Craig v South Australia* (supra) the Court was dealing with a case where a judge in the District Court of South Australia had adjourned indefinitely the trial of a person charged with larceny because he was without, and could not procure, representation. The Full Court to whom the Crown appealed granted *certiorari* on the basis that the judge had committed a jurisdictional error. The High Court held that *certiorari* did not lie because any error which might have been demonstrated on the part of the judge would not have been jurisdictional error. In particular, the Court held that the judge possessed jurisdiction to hear and dispose of the appellant's application for a stay of proceedings. Encompassing this would be the identification and determination of relevant questions of law and fact and involving an element of discretionary judgment. In particular their Honours said (at 177):

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act.

106. It is on this passage that Bernadette relies. However, this case and the others cited in support of their contentions all involved a justiciable controversy concerning a party which involved matters affecting rights and duties of the parties. The principles in relation to prerogative writs are not in dispute. It is the application to the present case that is problematic for the applicants. The Court cannot have jurisdiction and nor can there be a justiciable controversy arising from parental responsibility for the care, welfare and development of children, once that responsibility is at an end when the child attains 18 years. Section 61C(1) in particular declares that "each of the parents of a child who is not 18 has parental responsibility for the child."

107. Once parental rights and responsibilities no longer exist, jurisdiction to determine the extent of those rights disappears as well as any supervisory role for the Court. A determination of questions which were germane to the Court's exercise of jurisdiction in relation to a child who was potentially the subject of the Court's jurisdiction but now no longer is, can only be a declaratory judgment.

108. Supplementary submissions by the parents in support of this proposition contended in essence that because the question of the Court's jurisdiction was properly before the Court at first instance, when Bernadette was under 18, notwithstanding that she is now over 18 and no parental rights are involved, the Court must be able to correct on appeal what they assert is an error by the trial Judge in finding jurisdiction existed. For reasons we have already expressed, we do not agree with this submission. In support of this contention they also asserted that the question of right to relief for want of or excess of jurisdiction was necessarily "solely dependent upon the facts and circumstances as they exist at the time of the challenge to exercise of that jurisdiction by the court below." As we have already pointed out in paragraph 27, because of the nature of appeals pursuant to s 93A, the Full Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time the appeal is heard.

109. We think it plain that the current appeal does not involve a "matter" as described and therefore does not invoke the jurisdiction of this Court. Accordingly, the application of the Director-General for summary dismissal of the appeal, filed on 16 July 2010, should succeed.

O'RYAN J

110. I have had the opportunity to read the very comprehensive reasons of the Chief Justice and Strickland J. I agree with what their Honours said as to why the appeal is incompetent and thus agree that it should be dismissed.

I certify that the preceding one hundred and ten (110) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court delivered on 15 March 2011.

Legal Associate:

Date: 15 March 2011