FAMILY COURT OF AUSTRALIA

RE: DARRYL ***[2016] FamCA 720***

FAMILY LAW – CHILDREN – Medical Procedure – where child wishes to undergo irreversible stage two treatment for gender dysphoria – where applicant is the X Hospital – where the respondents are the child's parents – where the parents support the application – where phase two treatment requires court authorisation unless the child is *Gillick* competent – where first approach under *Re Jamie* requires a best interest determination and second approach does not – where court is not obliged to undertake a best interests consideration – where treating psychologist and medical practitioner are of the view the child is *Gillick* competent however where psychiatrist was not of that view – where psychiatrist in her opinion to fully understand what is proposed requires a fully developed brain and personality – where psychiatrist's evidence was the brain continues to develop until the age of 25 – where *Gillick* test has express intention of application to children not adults – where child is *Gillick* competent – where orders relating to confidentiality are made.

Family Law Act 1975 (Cth) s 121(9)

Gillick v West Norfolk AHA [1968] AC 112
Re Jamie (2013) 278 FLR 155
Secretary, Department of Health and Community Services v JWB & SMB ("Marion's Case") (1991-1992) 175 CLR 218

APPLICANT:	X Hospital
RESPONDENTS:	The Mother and the Father
OTHER:	The relevant Government Department

FILE NUMBER: By Court Order File Number is suppressed

DATE DELIVERED:	26 August 2016
JUDGMENT OF:	Tree J
HEARING DATE:	12 August 2016

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

ORDERS

THE COURT FINDS AND IT IS DECLARED THAT:

1. The child Darryl 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 ORDERED THAT:

2. (a) The full name of Darryl, 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were initiated, the name of Darryl's mother and father and any other fact or matter which may identify Darryl shall not be published in any way; and

   (b) only anonymised reasons for judgment and orders (with cover sheets excluding the Registry, file number and lawyer names and details as well as the parties' real names) shall be released by the court to non-parties without further contrary order of a judge.

3. 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 Darryl have leave to publish to Darryl's treating practitioners a copy of these orders which are not anonymised pursuant to order 2 hereof.

4. 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: Darryl* 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

X Hospital
Applicant

And

The Mother and the Father
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. On 12 August 2016, I found and declared that Darryl, born in 1999 and hence presently 17 years and five months of age was competent to consent to undergoing irreversible stage two treatment for gender dysphoria. I also made some ancillary orders as to publication, anonymization and the like. These are my reasons for so ordering.

2. The applicant in these proceedings is the X Hospital. The respondents are Darryl's parents, although they support the application. Also served with the application was the Secretary of the relevant Government Department, who appeared and did not oppose the application.

RELEVANT LEGAL PRINCIPLES

3. Relevant to this application are the following uncontroversial 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.

4. 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.

5. However the law is less clear as to what the court's role is where there is a dispute in relation to whether or not the child is *Gillick* competent. The leading authority is again *Re Jamie*. In that case the court espoused two, and perhaps three conflicting answers. The first is contained in the judgment of Bryant CJ, and is to the effect that "if there is a dispute between the parents, child and treating medical practitioners, or any of them, regarding the treatment and/or whether or not the child is *Gillick* competent, the court should make an assessment about whether to authorise stage two having regard to the best interests of the child as the paramount consideration…" : at [140](f).

6. The second approach was espoused by Finn J in the following terms at [188]:

> If the court was completely satisfied of the child's capacity to consent to state two treatment, it would be unnecessary for it to have to authorise the treatment. That could be left to the child. But if the court had any doubt about that capacity, then it would have to determine for itself the question of whether the stage two treatment should be authorised.

7. Plainly these approaches are not consistent: the approach of Bryant CJ is to require a best interests determination if there is a dispute on the evidence; the Finn J approach does not require a best interests consideration in such circumstances unless the court is in any doubt about the *Gillick* capacity, or arguably, even absent a conflict of evidence, otherwise has doubt about that capacity.

8. The approach of the third judge in *Re Jamie*, Strickland J, does not assist in resolving that conflict. Although at [192] his Honour agreed "with the outcomes proposed by both of my colleagues and generally for the reasons set out by each of them," he did not advert to the conflict between them identified above. Moreover, at [195] his Honour may have propounded a third test, because there he indicated that court authorisation would not be required "where the child is able to give consent to the proposed treatment."

9. Subsequent cases do not seem to have provided any further clarification in relation to this point. Fortunately, as shall later be seen, although at first sight the evidence in this case did contain conflict between the relevant medical practitioners as to whether Darryl was *Gillick* competent or not, the way in which the oral evidence unfolded absolved me from needing to attempt to try and establish more definitively the circumstances in which a court may be obliged to determine whether the procedure should be authorised, as distinct from permitting the child to consent.

THE MATERIAL

10. The applicant relied upon the following material:

- An affidavit of Ms D ("D") a psychologist in the employment of the applicant in its X Sexual Health Service, who in that capacity had been involved in the care of Darryl since 23 June 2015;
- An affidavit of Dr N ("N"), filed 4 August 2016 a consultant psychiatrist at the applicant's hospital, who became involved in the care of Darryl in 2013 when in her previous position as Registrar at applicant's Child and Youth Mental Health Clinic, and had later involvement when retained to specifically undertake a *Gillick* competence assessment of Darryl at the request of Ms D;
- An affidavit of Dr H ("H") filed 5 August 2016 she being a medical practitioner qualified as a sexual health physician and who, as a part-time visiting medical officer with the X Sexual Health Clinic, has been seeing Darryl as a patient since 10 July 2014 on referral from Ms D;
- An affidavit of Darryl himself, sworn 11 August 2016 which was filed by leave given pursuant to s 102B of the *Family Law Act*, which importantly was drafted by Darryl himself and not subsequently altered by the applicant's solicitors save for punctuation, corrections and the like;
- An affidavit of Darryl's father filed 11 August 2016 ("Father"); and
- An affidavit of Darryl's mother filed 11 August 2016 ("Mother").

THE CONTROVERSY ABOUT *GILLICK* COMPETENCE

11. Ms D was of the view that Darryl is *Gillick* competent (D at [53]) as was Dr H (H at [19]). However Dr N was not of that view. At N [65]-[69] she said as follows:

> 65. I am satisfied that [Darryl] has fully participated in the decision to commence the proposed treatment. I believe that [Darryl] is fully informed of the current benefits and risks of hormone treatment of reversible and irreversible hormone therapy.
>
> 66. However, I note that the *Gillick* competency is defined as understanding fully the nature and effects not only of commencing hormone treatment, but also of irreversible, lifelong hormone therapy.
>
> 67. There are a considerable number of serious medical conditions that can be exacerbated by cross-sex hormone therapy. These are described in the following chapters of 'Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline.'
>
> A. Hormone Therapy for Transsexual Adults, note page 17; and
>
> B. Adverse Outcome Prevention and Long-Term Care, note page 22.

> 68. Therefore, given the irreversible, lifelong nature of Phase 2 hormone treatment, and the grave possible medical consequences of long term hormone treatment, I do not believe that [Darryl] has the competency to consent to irreversible treatment, i.e. he has not achieved an understanding of the long term medical consequences to enable him to understand fully what is proposed. Indeed, given the grave consequences, I am not persuaded that most minors would be in the position to fully understand the implications of irreversible hormone treatment over the entire lifespan.
>
> 69. I therefore do not believe [Darryl] has achieved sufficient understanding to enable him to fully understand what is proposed; I am not persuaded that he is *Gillick* competent to commence irreversible hormone therapy.

12. Dr N also gave oral evidence before me. In that evidence she initially differentiated between informed consent on the one hand, and *Gillick* competence on the other. She said that her working definition of informed consent was "having the capacity and capability of understanding the nature of and effect of decisions in relation to a matter, and being freely able to decide and communicate that decision." On the other hand, whilst she adopted the uncontroversial recitation of *Gillick* competence as approved in *Marion's Case*, she went on to say that in her opinion, in order to *understand fully* what is proposed, a person would need to have a fully developed brain and personality. Her evidence was that a person's brain continues to develop until about the age of 25, and their personality may continue to develop even for a period of time thereafter. She conceded that therefore she would not be prepared to accept that anybody was *Gillick* competent until at least the age of 25, and hence no child could ever be found by the court to be *Gillick* competent. That said, she was of the view that Darryl was capable of giving fully informed consent to the proposed stage two treatment.

13. It is interesting in the context of this conflict to consider the background to the development of the *Gillick* test. In *Gillick* itself the court was considering a child under the age of 16. Axiomatically therefore, the test then propounded was crafted with the express intention of being of application to children, not adults. Likewise, in *Marion's Case*, the High Court was concerned with a 12 year old girl. However more substantial guidance is to be derived from *Marion's Case* in the sentence and footnote which appears at 237-8, where the court said "This approach, [ie the *Gillick* competency test] though lacking the certainty of a fixed age rule, accords with experience and psychology." The footnote to that sentence reads as follows:

> The psychological model developed by *Piaget (Piaget & Inhelder*, *the Psychology of the Child* (1969)), one of the leading theorists in this area, suggests that the capacity to make an intelligent choice, involving the ability to consider different options and their consequences, generally

appears in a child somewhere between the ages of 11 and 14. But again, even this is a generalisation. There is no guarantee that any particular child, at 14, is capable of giving informed consent nor that any particular 10 year old cannot: see *Morgan "Controlling Minors' Fertility", Monash University Law Review* Vol.12 (1986) 161.

14. Therefore I do not accept that the words "understand fully" requires a child to have achieved the maximum understanding which later years may give them when their brain and personality are fully developed. Rather, what is required is as the High Court said in the footnote recited above, namely, "the capacity to make an intelligent choice, involving the ability to consider different options and their consequences."

15. In opining that Darryl was capable of giving fully informed consent, in my view Dr N was in fact addressing the proper test for *Gillick* competence. Notwithstanding her opinion that Darryl was not *Gillick* competent, I am satisfied that a proper construction of her evidence, when viewed through the prism of the proper *Gillick* test, in fact shows her opinion is consistent with those of Ms D and Dr H. Hence there is in this case, upon proper analysis, no controversy about *Gillick* competence. Whatever *Re Jamie* may mandate as the proper approach for a court where there is legitimate controversy as to *Gillick* competence, I am satisfied that a court is not obliged to undertake a best interests based consideration to determine whether or not authorisation for stage two treatment should be made, if upon proper analysis, the controversy is a false one.

IS DARRYL *GILLICK* COMPETENT

16. The evidence amply supports findings that Darryl:

(a) Is of average intelligence: D at [50];

(b) Has a long standing history of symptoms consistent with Gender Dysphoria from as early as eight years of age: D at[14]; N at [7]-[14]; Darryl at [2]-[3];

(c) Has a considerable history of depression and self-harming behaviours as an adolescent, although his psychological wellbeing has improved significantly since stage one treatment and transitioning to male: D at [34]; N at [15]; Darryl at [3], [12] and [14]; Father at [2]-[4]; Mother at [2]-[8];

(d) Is well aware of the effects testosterone will have on his body in the long-term, and the impact on his fertility, however feels that the positives of improved psychological health and a more masculine body outweigh the loss of fertility: D at [24]; H at [16]; Darryl at [13]; Father at [5]; Mother at [11]-[12];

(e) Has been unwavering in his desire to transition to male, and it was assessed by Ms D as being "extremely unlikely that this will change in the future": D at [33];

(f) Has been made fully aware of the risks associated with stage two treatment (including lability, agitation and aggression, heart disease and stroke, high blood pressure, liver inflammation, increase in sex drive, depression, anxiety, psychosis, change in cholesterol levels, increase in number of red blood cells and acne: D at [40]; H at [15]; Darryl at [13]; Father at [6] and [7]; Mother at [11] and [15]. However as to lability, agitation and aggression, he has been assessed as low risk: D at [40] and N at [48] and as to the other risks, Dr H points out that they are "all potential risks of the commonly prescribed oral contraceptive pill": H at [15].

17. Against those findings, there can be no doubt that Darryl has achieved a sufficient understanding and intelligence to enable him to understand fully what is proposed.

18. However there are two pieces of material authored by Darryl himself which would make any other finding practically impossible. The first is a letter which he wrote to his parents as long ago as 30 May 2015. In that he disclosed to them for the first time that he was transgender. Even accepting that he did have assistance in writing that letter, it speaks of a person of great maturity, insight and sensitivity.

19. The second is his affidavit which I gave leave to the applicant to rely upon. As I have previously observed, I was told and accept that it was written by him without external assistance, and was not edited by the applicant's solicitors as to any matter of substance. Again it speaks of a painful journey through a troubled adolescence, which at the end of 2014 led to the realisation by Darryl that he was transgender. It speaks of a person who has painstakingly considered their predicament and researched it extensively, both online and by engaging with other transgender youth, before arriving at a considered decision. However given that Darryl is now 17 years and five months old, that he is able to write such an insightful, revealing and logical affidavit should perhaps not be much of a surprise: in seven months' time he will be an adult.

20. I am completely satisfied that Darryl is *Gillick* competent.

CONCLUSION

21. At the hearing on 12 August 2016 I indicated to the parties that I was satisfied that Darryl was *Gillick* competent and made orders finding and declaring that, together with the usual ancillary orders in relation to non-publication and the like. However I reserved my reasons, together with the right to make any further orders consequent upon my deliberations about the conflict between the

evidence of Dr N and the other expert witnesses. Particularly I had in mind that it may have been necessary to also make an order authorising the treatment, however as these reasons have made plain, it has transpired that there is no necessity or desirability to do so. I should however conclude, for the sake of completeness, that the expert evidence as to the desirability or necessity of treatment contained no conflict, with all three health practitioners unanimously of the view that the stage two treatment was in Darryl's best interests.

I certify that the preceding twenty one (21) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Tree delivered on 26 August 2016.

Associate:

Date: 26 August 2016