FAMILY COURT OF AUSTRALIA

RE ISAAC ***[2014] FamCA 1134***

FAMILY LAW – CHILDREN – Gender dysphoria – Competence to make decision found.

Family Law Act 1975 (Cth)

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112
Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218

APPLICANT: Isaac

FILE NUMBER: By Court Order File Number is suppressed

DATE DELIVERED: 17 December 2014

JUDGMENT OF: Cronin J

REPRESENTATION

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

ORDERS

1. That ISAAC have sole parental responsibility for all medical decisions concerning himself.

2. That the following names shall not be published in any way such as to identify the applicant child:

   [DETAILS REMOVED]

3. That the following details shall not be published in any way:

   - The Court's file number;
   - Any reasons for judgment other than the anonymised version;
   - The orders of the Court other than those anonymised.

4. That no person shall be permitted to search the court file without first obtaining leave of a judge of the Family Court of Australia.

5. That other than anonymised reasons for judgment and order, no documents shall be released by the Court to non-parties without leave of a judge save as set out hereafter.

6. That the applicant shall be at liberty to provide a copy of the unanonymised orders of the Court and the unanonymised reasons for judgment to the relevant health professionals responsible for his care.

7. That the service of a copy of the anonymised or unanonymised versions of the orders and reasons for judgment upon the respondent shall be a matter for the applicant.

8. That the reasons for judgment this day be published as soon as practicable.

9. That henceforth, the reasons for judgment and the orders shall be anonymised under the name of "Re Isaac".

10. Certify

11. That the application filed 27 November 2014 is otherwise dismissed.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Re Isaac* 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

Isaac
Applicant

REASONS FOR JUDGMENT

1. The Court is asked to determine whether Isaac (not his real name) is competent to make his own decisions about a medical procedure and treatment for Gender Dysphoria. On [an earlier date], I granted the applicant's application and said that I would give reasons. These are those reasons.

2. The applicant, who was born a female but has for some years now identified himself as a male, has turned 17 years of age. All of the medical experts say that he is competent to make decisions about the treatment that he wishes to undertake to resolve his identity difficulties.

PROCEDURE AND EVIDENCE

3. The application was filed on behalf of Isaac by his lawyers. In that application, Isaac sought orders that can be summarised as:

    - A declaration that he is "Gillick competent" to consent to treatment for Gender Identity Dysphoria;
    - The case be provided complete anonymity;
    - No-one be able to search the file without leave of a Judge of this Court; and
    - He be able to serve orders on people involved with his proposed "treatment".

4. The application named Isaac's parents as respondents. They do not live in Australia. It was made clear to the Court by Isaac's own evidence that his parents were opposed to the course of action that he wishes to follow. Such is

the nature of his relationship with his parents at the moment that Isaac is living in what he described as refuge accommodation.

5. When the application was initially listed before me, counsel appeared for the applicant. Just after the case commenced, a solicitor announced (and subsequently filed the appropriate notice of address for service) that he was acting for the parents. Discussions took place during which I gave the solicitor an opportunity to obtain instructions from his clients who he told me were overseas. He then indicated that his clients wanted him to appear and cross-examine the consultant adolescent and child psychiatrist who had been examining Isaac. The solicitor was unable to say (or was at least unclear about) what he wanted to cross-examine the expert about. He said that there was no dispute about the witness's expertise but he was instructed to ask about whether he had considered all of the relevant matters. I reminded the practitioner about Division 12A of the *Family Law Act 1975* (Cth) ("the Act") and specifically the control which the Court had over questioning in proceedings and that in order to help focus the proceedings, it was desirable to know whether the capacity of Isaac was in issue. I did not get a satisfactory response.

6. Two days later, the solicitor filed a Notice of Ceasing to Act. That notice, addressed by him to the parents, said that the hearing was listed for [listed date]. Notwithstanding the Court was informed that the parents lived overseas, an address in Melbourne was provided. I understand that address is that of Isaac's aunt.

7. On the listed date, there was no appearance by or on behalf of the parents. There was also no application made for any adjournment of the application and no other document was filed by or on behalf of the parents.

8. I am satisfied that procedural fairness has been provided to the parents. They indicated through their former solicitor that they knew what the application was about. Reference was made by the solicitor to cultural issues of concern and that they were still the responsible parents for Isaac but beyond that, it was hard to gain a sense of their position. It must be questionable for them to adopt a

position of desiring to fulfil their parental responsibilities when, on any view of the evidence, their 17 year old child has been distant from their care and living under his own efforts.

9. I am therefore satisfied that the application should proceed on an unchallenged basis.

10. Questions also arose about notice being given to the relevant State welfare authorities and the appointment of an independent children's lawyer. In respect of the former, counsel advised that in response to being notified of Isaac's application, no one else wished to be heard. I contemplated the appointment of an independent children's lawyer but having regard to the age of Isaac and the Court's responsibility to determine competence, the role of such a person would be limited. Section 68LA of the Act requires the appointed independent children's lawyer to form an independent view of what is in a child's best interests and then so act. If the issue is the determination of competence to make decisions about medical treatment for gender dysphoria, the best interests principle is still relevant but must be more about maturity and understanding. Section 68LA(5) requires such a lawyer *inter alia* to endeavour to minimise trauma to the child but also draw to the Court's attention various reports. The applicant had done the latter himself. Importantly, an independent children's lawyer is obligated to ensure that a child's views are put before the Court. Where the child is the applicant and his views are articulated by an adolescent psychiatrist, it is hard to see how the role of an independent children's lawyer could add much. I determined therefore not to make such an appointment.

11. I was ably assisted by counsel for Isaac who was not only across the evidence that was relied upon but also the legal questions associated with the exercise of the Court's power to contemplate the orders sought by Isaac.

12. In an affidavit affirmed by Isaac on [date] and which is the unchallenged evidence because the parents have no doubt understood the facts to be as they were put, he said:

- He was born overseas and came to Australia in 2009 on a student visa whereupon he began living with members of his external family. His parents remained overseas;
- He identified as a female until the age of 14 but felt strange through puberty to the extent that he began self-harming. Anatomical development and menses were a problem for him and he obtained contraceptive medication to try to stop it;
- In 2012, he began appearing in public as a male about which his parents were unhappy. They described him as “inappropriate” and in the case of his father, his view was that he was humiliated and ashamed by what Isaac was doing. Isaac’s father blamed the Australian environment and said he was bringing shame on the family. His family treat him as being sick;
- Isaac’s parents booked airline tickets for him to travel to his parents’ Asian country in June 2014. His parents told him, amongst other things, that he had to have therapy. He described his mother as indicating that an uncle could “kill that ghost” in his body and he expressed concern about being sexually abused. He was petrified of travelling to his parents and consequently obtained an Airport Watch List Order to prevent departure from Australia. He also considered that many people in his parents’ country know about him and have now ostracised him;
- He described his hatred for his body and the wearing of a binding to compress his breasts. He also endeavoured to wear boys’ clothing at school but the school resisted; and
- His response was to get assistance and that is seen in the evidence of the experts.

THE NATURE OF ISAAC'S CONDITION

13. Since August 2013, Isaac has been receiving specialist medical care after his community general practitioner and youth worker referred him to the Hospital Gender Clinic.

14. There is unanimous expert evidence that Isaac meets the DSM-5 diagnostic criteria for gender dysphoria. There are six factors listed in that DSM category and to be classified as having gender dysphoria, the patient has to satisfy two out of the six. Since August 2013, Isaac has seen an Associate Professor, a consultant child and adolescent psychiatrist, on approximately 25 occasions. The Associate Professor has assessed Isaac as meeting all of the six criteria for a formal diagnosis of gender dysphoria in adolescents and adults. Dr B provided a second psychiatric opinion and confirmed the diagnosis in the absence of any significant mental health disorder. The Associate Professor has assessed Isaac as not displaying "any features of mental disorder".

15. Dr F, an adolescent physician, has also seen Isaac on 11 occasions in relation to his condition. Dr F proposes to treat Isaac by administering testosterone to masculinise his body ("stage two treatment"). The exact form of testosterone used and method of administration will be individualised for Isaac. Isaac will concurrently be treated with Zoladex until the testosterone dose is sufficient to block the female hormones.

16. Dr F stated that the "likely long term physical, social and psychological effects on the child" if the stage two treatment was carried out were:

    (a) Development of hair in the pubic area, armpits and on the beard area of the face;

    (b) Changes in facial shape and appearance;

    (c) Irreversible changing of the voice, due to growth of the larynx and lengthening of the vocal cords;

    (d) Muscle development;

    (e) Increased oil production by the skin, which may result in acne;

(f) Growth of the clitoris and an increased number of erections;

(g) Stopping the development of ova in the ovaries, with loss of fertility. This effect is reversible if the testosterone treatment is stopped; and

(h) Stimulation of bone mineral density.

Dr F also noted that Testosterone also affects behaviour by stimulating more assertiveness (sometimes aggression) and sexual desire.

17. It was Dr F's view that if the treatment was not carried out, Isaac's emotional state would be likely to deteriorate severely and there would be an increased risk of self-harm. Isaac's physical appearance would also remain feminine with menstruation continuing, which Dr F considered would likely be intolerable for Isaac.

18. As discussed below, the issue for this Court is whether or not Isaac is competent and capable of making the decision about his own medical treatment. There have been a number of cases about medical treatment requiring court authorization starting with *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ("Marion's Case") where Mason CJ, Dawson, Toohey and Gaudron JJ observed at 234 that:

> Sterilisation comes within the category of medical treatment to which a legally competent person can consent.

19. If one accepts that sterilization is a serious medical operation but a legally competent person can consent to it, then so many other medical treatments of a similar nature must fall into the same category. For a child and normally therefore a person not competent to consent, their Honours were concerned about the parents making decisions as parents where: first, the treatment was invasive, irreversible and major surgery; secondly, its consequences gave rise to a significant risk of making the wrong decision, either as to a child's present or future capacity to consent; and thirdly, the consequences of a wrong decision were particularly grave.

20. The focus must therefore be on the question of the competency of the child first. To that end, the issue of "Gillick competence" arises. The term *Gillick* comes from the English case *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 where the issue of competence and capacity of a child to make a decision was set out. In *Marion's Case,* the High Court said that the view of the House of Lords in *Gillick* represented the common law in Australia. The House of Lords view was that parental power to consent to medical treatment on behalf of a child diminished gradually as the child's capacities and maturity grew and that this rate of development depended on the individual child. Thus, the capacity of a child to give informed consent to the respective medical treatment depended on the rate of development of each individual. That is what the Court here must assess.

GILLICK COMPETENCE?

21. The evidence of Isaac's treating doctors unanimously supports a finding that Isaac is *Gillick* competent. The first expert was the Associate Professor. He has extensive qualifications in psychiatry and is the co-author of a number of papers on gender identity.

22. The Associate Professor's evidence is that Isaac had the insight and maturity to understand the nature of the proposed treatment. He thought that Isaac was aware of the perceived positive changes that would result with his bodily development: that his muscle bulk would increase; that his voice would change; that he would have a masculine pattern of body hair; and that his bone density would increase. He was also aware that commencing testosterone would not of itself reduce the size of his breasts, but he told the Associate Professor that he would like to seek surgery at some time in the future.

23. The Associate Professor opined that Isaac was aware that testosterone treatment will affect the development of his ovaries and that he will not produce ova (eggs) from his ovaries whilst on testosterone treatment.

24. In respect of Isaac's maturity and understanding about the proposed treatment on his body, the Associate Professor noted that Isaac had additionally had

detailed discussions with Dr F and Dr Y about the impact of hormone treatment on his body and subsequently on fertility. Isaac had been able to express his opinion very clearly and directly. He understood that commencing testosterone treatment was not a totally irreversible one, but with the intensity and persistence of his body dysphoria he could not conceive of a time when he would want to have a feminine body.

25. Dr F is a paediatrician who examined Isaac and thought he was competent to make decisions regarding the commencement of the stage two treatment. She described him as highly intelligent and resourceful both in general terms for his own wellbeing, and also in relation to his gender dysphoria. He had been very resourceful in gaining knowledge of hormonal treatment options and their physiological effects. He had consistently engaged in sophisticated discussion around the issues of his gender identity, options for medical treatments and long term consequences of treatment in terms of physical and psychological health and wellbeing. He was able to engage in detailed discussions of options for fertility preservation. He had sought appropriate clarification and asked relevant questions when he needed to.

26. Dr F thought Isaac understood the benefits and possible side effects of the treatment including the possibility of experiencing regret in the context of irreversible physical changes from testosterone treatment.

27. Dr F said that Isaac articulated that living without the treatment would be intolerable for him as the incongruence between his gender identity and his physical appearance caused him significant distress. He had asked relevant questions and engaged in sophisticated discussion regarding treatment.

28. Dr F opined that Isaac understood the short, medium and long term effects of the treatment and understood the risks involved, including the risk of regret and the risk of reduction in fertility.

29. Dr Y is Isaac’s treating paediatric and adolescent gynaecologist and has treated him since October 2014. She had discussed with Isaac fertility preservation prior to consideration of cross-hormone treatment.

30. She opined that Isaac understood the consequences of cross-hormone treatment on fertility, and the risks and benefits of the different options for fertility preservation.

31. The evidence of all three experts in this case was not challenged. It will be remembered that the parents of Isaac had access to the relevant materials. The solicitor who had appeared at the first mention of the case indicated that there was dispute with one of the professionals yet despite the opportunity to challenge the evidence, nothing further was heard from them. There is therefore no reason for the Court not to accept that evidence.

THE APPROACH TO THE DETERMINATION

32. The power to inquire into and make an order about competence lies in both ss 67ZC and 64B of the Act because the assessment of competence has to be judged against the issue that the child is wanting to decide. That is, this decision about treatment would normally be expected to be a decision for a parent of a child under 18 years depending upon whether or not the "treatment" was so serious that the consent was removed from the parents or alternatively where the parents and the child were in conflict over the treatment.

33. Counsel for Isaac pointed to ss 67ZC and 64B in tandem to give the Court the power on the basis that this was really about parental responsibility. If the child is in that period of life where there is a transition from childhood to adult status and that is when the decision needs to be made, the Court needs a process or vehicle by which it deals with the question. The Court's role in a case of this nature is limited to determining competence in respect of this issue as distinct from parenting responsibility generally. It is conceivable that general parenting responsibility could and perhaps in this case, should, be given to Isaac where his parents live overseas and he is largely self-reliant. It is not necessary to deal with that wider question. The only issue is whether or not Isaac has sufficient capacity and understanding to know what he is doing in respect of this treatment. The process to determine that question is a little obscure but the answer lies in Part VII of the Act.

34. Parental responsibility in s 61B of the Act is described as in relation to a child:

> [A]ll the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

35. Section 61C provides that:

> Each of the parents of a child who is not 18 has parental responsibility for the child.

36. Section 61C(3) provides that, the parental responsibility to which I have just referred:

> has effect subject to any order of a court for the time being in force[…].

37. The sorts of orders that the court can make are set out in s 64B. Section 64B provides that:

> A parenting order is an order under [Part VII of the Act] […] dealing with a matter mentioned in subsection (2)[.]

38. Section 64B(2) sets out a whole raft of things that may be dealt with relating to the care, welfare and development of a child. One of those provisions is the allocation of parental responsibility for a child.

39. If the court has, as I accept it does, the power to give parental responsibility for a particular issue to any person, including persons other than the parents, it must follow that in respect of certain issues, the court has the power to give parental responsibility to the child himself or herself.

40. Even if that were not correct, s 64(2)(i) says that a parenting order may deal with:

> any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

41. Section 60CA provides that in deciding whether to make a **particular** parenting order in relation to a child, the court must **regard** the best interests of the child as the paramount consideration (emphasis is mine). In so determining what is in the child's best interests, the Court must (by s 60CC(1)) **consider** the matters set out in ss 60CC(2) and (3). To consider them must mean that the Court looks at each and decides whether it is relevant to the determination.

42. In this case, there is no evidence that would enable me to find that the parents of Isaac are acting in any parenting capacity. They have distanced themselves from him and are critical of his way of life and decisions. They do not currently provide him with financial or emotional support. Isaac does not seek that assistance and is self-reliant.

43. All of the factors in s 60CC which are determinative of the best interests of a child are not helpful in this case. Once those factors have been considered, the Court is left with the fact that it still must make a parenting order based upon the best interests of the child anyway.

    Importantly, there is no controversy that that question would be answered by a consideration of any of the s 60CC matters because the parents have chosen not to participate.

44. On the evidence, it is clear that it is in the best interests of Isaac for there to be made a parenting order limited to that contemplated in s 64B(2)(c) of the Act.

45. Section 61DA requires the Court when making a parenting order to apply a presumption about the allocation of parental responsibility. The parents did not make an appearance despite them being fully aware that the orders sought concerned an aspect of parental responsibility. The presumption may be rebutted in circumstances where it is not in the interests for the child for the parents to have equal shared parental responsibility. In circumstances where the parents disagree with their child who has been assessed by three experts as being competent to make the relevant decision, the matters mentioned by the High Court in *Marion's Case* and indeed in *Gillick*, point to the fact that Isaac is in that transition phase from childhood to adulthood and that he does not need his parents' protection or permission.

46. In discussion with counsel, I raised the question of whether this transition period was relevant in these sorts of cases bearing in mind that in Australia, the Act provides that parents have those responsibilities until their child turns 18 except in circumstances of adoption or marriage. I do not think that is a problem here in any event for three reasons. First, Isaac has shown that he can

make decisions for himself. Secondly, in my view, s 64B(2) contemplates a non-parent being so involved. Finally, I see no reason why that responsibility cannot be given to a capable child.

47. Counsel submitted that the two sections (ss 67ZC and 64B) should be read together in case there was a suggestion that the Court was required to make a decision about a medical treatment to which the parents could not consent because of the determination in *Marion's Case*. In my view, the issue is about the Court having the power to assess competence and whilst it is conceivable that s 64B alone provides that power, in combination with s 67ZC, there is little room for an argument.

48. As I consider Isaac is quite capable of making medical decisions, it is in his best interests to have the responsibility and as such, the presumption in s 61DA(4) is rebutted.

49. To the extent that Isaac sought a declaration about his competence, my view is that the order of sole responsibility suffices. Thus, on the basis of the expert evidence, I am satisfied that Isaac is competent to make all decisions about any treatment in relation to gender dysphoria.

I certify that the preceding Forty Nine (49) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 17 December 2014.

Associate:

Date: 17 December 2014