Parents, Children and the Law

CHAPTER CONTENTS

Introduction

Australia's *Family Law Act 1975* (Cth) (Family Law Act) Part VII governs the legal approach to the relations between parents and children. The law focuses on the important responsibility of parents and other adults for the care, welfare and development of children, not any rights of adults over children. The legal concepts of custody and guardianship of children do not apply in the family law context, however, those concepts are still applicable to proceedings in the Queensland state child protection jurisdiction.

The Family Law Act emphasises the duties and responsibilities of parents. Federal Circuit and Family Court of Australia (FCFCOA) encourages agreement between parents concerning the best interests of a child. The federal government has invested in the community-based family safety risk screening, family counselling and family dispute resolution system to consolidate this approach.

The Family Law Act provides that, subject to an order of a court, each of the parents of a child has parental responsibility for that child (s 61C Family Law Act).

Every child, regardless of whether their parents are named, separated, have never married or have never lived together, is affected by the Family Law Act, as long as the child, a parent or other party to the proceedings has a sufficient connection with Australia. The child, parent or other party must be an Australian citizen or ordinarily reside or be present in Australia.

Parental Responsibilities

Parental responsibility is defined as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children (s 61B Family Law Act).

Those responsibilities are not further defined, but arise from common law principles or are provided for in other legislation. They include responsibility to:

- determine the child's long-term issues including name, religious and cultural upbringing, living arrangements and education
- discipline the child
- consent to the child's adoption
- take legal proceedings on the child's behalf.

Various statutes impose specific duties upon parents. These include the duty to:

- maintain the child (s 66C Family Law Act)
- provide the child with necessaries of life such as adequate food, clothing, medical treatment, lodging and care; take precautions that are reasonable in all circumstances to avoid danger to the child's life, health or safety; and remove child from any such danger. (ss 285, 286 Criminal Code Act 1899 (Qld) (Criminal Code))
- enrol and ensure attendance of the child at school (s 176 *Education (General Provisions) Act 2006* (Qld)).

Who has parental responsibility?

In the absence of any order by a court to the contrary, both parents have parental responsibility for the child. They are also entitled to make decisions in relation to their child.

When parents have willingly allowed another to look after their child, the parents can require the child to be returned to them.

Anyone concerned with the care, safety risk, welfare and development of a child including grandparents, other relatives and friends may apply to a court for orders relating to the child. For more information on the law on this subject see chapters Post-separation Parenting, and Spousal & Child Maintenance and Child Support.

When parents do not live together

When parents do not live together, decisions need to be made for the arrangements and continuing care of their children. Parents and other adults responsible for the care of children are encouraged to make their own arrangements, as long as these provide safety for the children and the parents, rather than go to court. Parents can either:

- agree informally
- enter into a parenting plan
- define the arrangement in consent orders that are filed in the Federal Circuit and Family Court of Australia or Magistrates Court.

When those responsible for the care of child/ren cannot agree or communicate effectively, one or more of them can request that a court with power under the Family Law Act make orders about the parenting of children.

These parenting orders address questions such as the:

- person or persons with whom a child is to live—including any shared arrangements.
- time a child is to spend with another person or other persons—can be either face-to-face, supervised
- communication a child is to have with another person or persons—can be by phone, email or letters.
- form of consultation to make a decision regarding the parental responsibility for a child
- process to be used for resolving disputes about the terms or operation of the orders.

Leaving home

Children who leave home can sometimes be forced to return, either by their parents or the state.

Applications for child protection orders

Police and the Queensland Department of Children, Youth Justice and Multicultural Affairs may investigate if a parent complains that a child under 18 years has left home. If the child is in need of protection from harm, police or an authorised officer from child safety services may bring an application for a child protection order for the child.

Such an application would be unlikely to succeed if a child under 18 years can properly support themselves, has adequate housing, is not committing or likely to commit a crime and is not in a situation that poses harm to themselves. These applications are discussed in the Child Protection chapter of the *Queensland Law Handbook*.

Parentage and Naming Children

Proof of paternity

In the absence of contrary evidence, a person is presumed to be the father if:

- a person's name is on the birth certificate as the father
- a deed acknowledging paternity is signed by both the father and mother
- a statutory declaration acknowledging paternity is made by the father
- a declaration of paternity is made by a court. To assist in the determination of paternity, a court may order a person to undergo medical parentage testing
- a person is married to the mother and they cohabitate.

However, a number of these presumptions can be rebutted (pt 3 div 3 *Status of Children Act 1978* (Qld) and ss 69P-69U Family Law Act).

Notification of births

Queensland's *Births, Deaths and Marriages Registration Act 2003* (Qld) (BDMR Act) requires notification of every birth to be forwarded to the Registrar-General of Births, Deaths and Marriages (the registrar) within two working days of the birth (s 5 BDMR Act). If the birth occurs in a hospital, this notification will be made by the hospital. If the child is born in some other place, the midwife or doctor, mother or other attendant should make the notification.

The mother and father of a child are required to lodge details of the birth of their child with the registrar within 60 days after the birth. In certain circumstances the registrar can accept an application from one parent (ss 8, 9 BDMR Act).

Birth certificates

The registrar will not certify someone as a parent unless that person signs the birth registration application, and the registrar is satisfied that that person is a parent of the child (s 10 BDMR Act). However, there are exceptions to this in certain circumstances (s 10(3) BDMR Act).

If information on the birth certificate changes, an application can be made for re-registration of the birth (s 14 BDMR Act). This includes a change from a persons' adoption was registered,

parentage is change by a parentage order or parentage is changed by a cultural recognition order and registered under this Act.

Name of the child

The child's name must be stated in the birth registration application. If only one name is stated, it is taken as being the child's surname. If the name is a prohibited name, the parents cannot agree on a name for the child or there is no name the registrar may choose one. Either parent may also apply to a Magistrates Court to decide a child's name (s 12 BDMR Act).

Change of name

Any person, including a child, may use any name they wish, provided the name is not used with the intention to defraud anyone.

A child's name can be changed by the child's parents, either by re-registration or by simply deciding to call the child by another name. The consent of each parent can be required before a name can be changed by re-registration or usage (see Changing Your Name). Under the Family Law Act, if two or more persons share parental responsibility, they are required to make the decision about a child's name jointly.

Punishment and Discipline of Children

Corporal punishment

Adults have no absolute right to punish a child.

If adults punish a child by applying force to the child, they may commit an assault. An assault is both a criminal offence and a civil wrong, giving the child the right to compensation for pain and any medical or other expenses incurred as a result. Where inappropriate or unreasonable force has been used in punishing a child, criminal sanctions may apply.

Discipline by parents

It is lawful for a parent or a person in place of a parent (e.g. a school teacher) by way of correction, management or control to discipline a child under their care by using such force as is reasonable in the circumstances (s 280 *Criminal Code Act 1899* (Qld) (Criminal Code)). Parents and other adults in loco parentis (standing in the place of parents) have the right to administer discipline to children in their care, providing it is reasonable under the circumstances.

The character and amount of discipline that may be considered reasonable will vary with the age, sex and apparent physical condition of the child. The child will receive positive guidance when necessary to help him or her to change inappropriate behaviour.

However, if a child under a child protection order is placed in the care of a person by the Department of Communities, Child Safety and Disability Services, a person must not use corporal punishment or punishment that humiliates, frightens or threatens the child in a way that is likely to cause emotional harm (s 122 *Child Protection Act 1999* (Qld)).

Children and Marriage

Marriage is the union of two people to the exclusion of all others, voluntarily entered into for life. (s 5 *Marriage Act 1961* (Cth) (Marriage Act)).

A person who is 18 years or older can marry without the consent of anyone else (s 11 Marriage Act).

A child-between 16 and 18 years of age can marry in exceptional circumstances, but either the written consent of their parent(s) or guardian(s) is required, or there must be a dispensation of this requirement by a prescribed authority.

If written consent is unreasonably withheld, a Judge or magistrate may give the necessary consent (ss 12-16 Marriage Act). Consent will only be granted in exceptional and unusual circumstances. Pregnancy is not, by itself, an exceptional or unusual circumstance, but it may be a factor of importance.

Children, Sex and Contraception

Sexual relationships

In Queensland, the age of consent for sexual behaviour is 16 years, except for consent for anal sex, which is 18 years.

A person who has sexual intercourse with a child under 16 years commits the offence of carnal knowledge of a child under 16 years. The child's consent is no defence. It is a defence to the charge if the accused can prove that they believed, on reasonable grounds, that the child was of or above the age of 16 years, provided that the child is actually over the age of 12 years (s 215 Criminal Code).

Consensual anal intercourse between adults (18 years or over) is not an offence in Queensland, but it is an offence with a person who is not an adult. The child's consent is no defence. It is a defence to the charge if the accused can prove that they believed, on reasonable grounds, that the child was of or above the age of 18 years, provided that the child is actually over the age of 12 years (s 208 Criminal Code).

It is an offence for a person to indecently deal with a boy or girl under the age of 16 years (s 210 Criminal Code). This would include indecent sexual acts.

It is an offence to sexually assault a person of any age.

Contraception and prescribed puberty inhibitors

Legislation regulates the sale, exhibition and advertising of contraceptives in Queensland. There is no age limit that applies to the access to contraception like condoms, vaginal ring, diaphragm, spermicides or getting medical advice without parental consent. Oral contraceptives and intrauterine contraceptive devices are only available from a doctor or from a chemist on presentation of a prescription from a doctor.

Puberty inhibitors or hormone blockers (Stage 1 hormone treatment) are medicines administered by a healthcare provider through injections or an implant that goes under the skin. Puberty inhibitors are used to postpone the stages of puberty in children. This is prescribed medication that has been used on children since the 1980s for slowing down puberty. This medication is prescribed so the child can reach the physical milestones associated with puberty at a steady rate and which are appropriate for their age. Once the medication is stopped, children begin puberty again as normal (more information at https://health.clevelandclinic.org/what-are-puberty-blockers/). All doctors will require the child attend supportive therapeutic counselling before and whilst the child is prescribed puberty inhibitors.

Some doctors will refuse to give contraceptive advice or prescribe oral contraceptives to unmarried minors without parental consent. Some doctors may refuse to give puberty inhibitors advice. Advice, and prescriptions for contraceptives and referrals for puberty inhibitors are usually available from offices of the Family Planning Alliance Australia.

In the decision if *Re Kelvin* [2017] 351 ALR 329, the Full Court of the Family Court held that in non-controversial cases, transgender children and their families are no longer required to seek authorisation from the court to undertake Stage 2 hormone treatment. However, it was held that where the decision to access treatment was not supported by one or both of those parents, as well as for children in state care, a court order is still required.

In the English case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, the court decided that a doctor who prescribed contraceptives to a girl under the age of 16 years did not commit an offence under legislation similar to sections in the Criminal Code. The doctor was charged with encouraging intercourse with a girl under 16 years, and aiding and abetting unlawful sexual intercourse. The court decided that, provided the child was sufficiently mature to weigh the advantages and disadvantages of the treatment, the absence of any parental consent did not render the doctor's conduct unlawful.

This English decision is not binding on Australian courts, but it is considered in *Re a Declaration Regarding Medical Treatment for "A"* [2020] QSC 389 and was discussed by the Supreme Court of Queensland when they were asked and ordered a declaration that the mother can consent to Stage 1 puberty blocking medical treatment for her child without the requirement to obtain the consent of the father of the child whose whereabouts are currently unknown. The child "A" was diagnosed with autism and was currently receiving treatment and support from a multidisciplinary team of specialists including psychologists, a psychiatrist and an endocrinologist at a specialist clinic. The treating medical practitioners, whilst she believed "A" has the capacity to understand the information provided around the proposed treatment, the practitioner does not believe that "A" fully understands what is proposed and is not persuaded that she is currently *Gillick* competent. The Supreme Court confirmed the decision of *Re Imogen* [2020] 61 Fam LR 344, and it was held that if a parent or a medical practitioner of an adolescent disputes the *Gillick* competence of an adolescent, the diagnosis of gender dysphoria or the proposed treatment for gender dysphoria, an application to the Family Court is mandatory.

Medical Treatment of Children

It is necessary for all patients to give their medical practitioner valid consent before any form of medical or surgical treatment. For consent to be valid, the person giving consent must be capable of making their own decision on what is proposed (forming a sound and reasoned judgment), which shows they understand the nature, consequences and risks of the treatment, and it must be in their best interests.

Generally, a minor does not have full legal capacity.

This was discussed in the decision of *Re Kelvin* [2017] FamCAFC 258, an application by the father concerning the administration of Stage 2 medical treatment for gender dysphoria for his then 16-year-old child, where all the health professionals, psychologist, psychiatrist and endocrinologist found Kelvin to be Gillick competent. Both parents supported the child commencing Stage 2 treatment. The full court found that the parents are not required to seek a court order before commencing Stage 2 hormone treatment, if the treating medical practitioners agree the child is *Gillick* competent to give consent, the child consents to the treatment and the parents do not object to the treatment.

A minor may, however, be able to enter into a legally binding contract for necessaries, including any necessary medical treatment (see the Consumers and Contracts chapter). To contract for medical treatment, the child must be old enough to be capable of forming a sound and reasoned judgement about the matter on which they are asked to give consent. The ability to form a sound and reasoned judgement depends on the maturity and intelligence of the patient, whether they understand the recommended treatment, and the nature and seriousness of the treatment. This was discussed in the decision of the *Re Imogen* (no. 6) [2020] FamCA 761 confirming *Re Kelvin* [2017] FamCAFC 258 where the full court found that the full court in re Jamie erred in its application of the High Court in *Department of Health and Community Services (NT) v JWB & SMB* (Marion's case) (1992) 175 CLR 218, which considered favourably the English case of Gillick (above).

Some medical practitioners take the view that a person of 16 years or older is assumed to have full capacity to consent, and therefore the consent of a parent or guardian is unnecessary. Other doctors and hospitals take a more conservative approach and assume that only a person of 18 years or over can be considered to have such capacity. Except in cases of emergency, hospital authorities generally require a parent's or guardian's consent to perform any operation where the patient is under 18 years.

The right to consent carries with it the right of the patient to choose their own doctor and the right to professional confidentiality regarding the patient's consultation with that doctor. Therefore, a minor capable of consenting to treatment has a consequent right to prevent the doctor from disclosing the nature of the treatment to a parent or guardian.

If a minor considered to be capable of giving valid consent refuses to give it, the fact that the parent or guardian has consented does not prevail, and the minor could bring an action against the doctor.

If no consent is given before treatment is performed, the patient may sue the practitioner for trespass to the person. The mere fact that the trespass has occurred gives the patient a right of action. The patient does not need to suffer any damage before they can take action against the doctor.

If the Department of Children, Youth Justice and Multicultural Affairs applies to the Childrens Court for an assessment order or a child protection order for a child, the court may authorise the medical examination or treatment of the child (ss 28(l)(b), 45(l)(b), 97 *Child Protection Act 1999* (Qld)).

Emergencies

In a medical emergency, doctors act as agents of necessity and are permitted to carry out whatever treatment is immediately required in the best interests of the patient, regardless of whether or not consent has been obtained.

An emergency occurs where a medical practitioner considers it necessary to immediately carry out a medical procedure to preserve the life or health of a patient.

Procedures requiring court consent

The High Court has determined that some medical procedures are so significant and grave in their consequences that the consent of the Family Court is required (see Marion's case). These are called special medical procedure cases. A significant type of medical procedure that this applies to is sterilisation or gender affirmation (confirmation) operations. The Queensland Civil and Administrative Tribunal can also in appropriate cases consent to the sterilisation of a child who has an impairment (ss 80C-80D *Guardianship and Administration Act 2000* (Qld)).

Blood transfusions

A parent may consent in writing to the removal of blood from a child, if a medical practitioner advises that the removal is not likely to be prejudicial to the health of the child and the child agrees to the removal (s 18 *Transplantation and Anatomy Act 1979* (Qld) (Transplantation and Anatomy Act)).

When a parent will not consent to a blood transfusion to a child, a medical practitioner may make the blood transfusion if it is necessary to preserve the life of the child and two medical practitioners concur in this view. When a second practitioner is not available, the blood transfusion may be made if the medical superintendent of a base hospital consents to the transfusion (s 20 Transplantation and Anatomy Act).

Tissue transplants

The Transplantation and Anatomy Act provides for donations of regenerative tissue by children for transplantation in certain circumstances.

Tissue can only be donated by a child if it is transplanted into the body of the child's brother, sister or parent (s 12B). Consent to removal of tissue from a child can be given by a parent of sound mind who acts on medical advice from a medical practitioner. Before the transplant can

proceed, a doctor must certify that the nature and effect of the removal has been explained to the child, and the child understands and agrees with the parent's consent (s 12C).

If a child is too young to understand the nature and effect of the proposed operation, the tissue may only be removed if certificates from three medical practitioners are obtained. The certificates must state that the:

- child is not capable of understanding the removal
- brother, sister or parent of the child is likely to die unless the tissue is transplanted
- risk to the child providing the transplant is minimal (s 12D).

Abortion

Abortion is the medical process to end pregnancy without the result of a birth.

In Queensland there are no laws that relate specifically to ending a pregnancy for mothers or minors without the result of a birth (abortion).

A doctor needs to confirm the pregnancy and gestation. A qualified health professional may administer a substance or supply a substance, or perform a surgical operation on a person or unborn child, if they, in good faith and with reasonable care and skill, are having regard to all the circumstances of a person or unborn child, or if it is an emergency and the operation or treatment is done for the preservation of the mother's life or the life of another unborn child (s 282 Criminal Code). After 22 weeks of gestation, two doctors must approve the procedure.

No definitive judicial ruling on the meaning of 'for the preservation of the mother's life' has been made.

In *Attorney-General v T* (1983) 57 ALJR 285, the High Court decided it is not possible to get a court injunction to stop a person from having an abortion.

In the Queensland Supreme Court decision of *State of Queensland v B* [2008] QSC 231 orders were made declaring that the:

- termination of a minor's pregnancy by the therapeutic administration of a drug would be reasonable in all of the circumstances to avoid danger to the minor's mental health
- minor be permitted to undergo, and the public hospital be permitted to perform, termination of the minor's pregnancy by the therapeutic administration of a drug.

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