SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DALTON J

No 8524 of 2013

[2013] QSC 334

RE: [SUPPRESSED]

BRISBANE

[SUPPRESSED]

JUDGMENT

[SUPPRESSED]

These are edited reasons for a decision which I gave when a matter came before me in the applications list earlier this year. The case raises questions which are important substantively. It also raises the important principle that our justice system is a public one. I have taken the unusual step of editing the reasons before they are made public because the interests of the child at the centre of the case require that. I have attempted to minimise this editing, and to show where it has occurred in the text which follows. The reasons as delivered (ex tempore) are on the Court file but I have made an order that the material on the Court file is not to be inspected without leave of a judge of this Court. What follows are the edited reasons.

HER HONOUR: This is a matter brought by a tertiary hospital in relation to a child patient, A, aged well below the age of majority. The application is brought in the parens patriae jurisdiction of the court. A is pregnant in circumstances which I will come to in some detail, and the hospital brought an application in relation to the termination of that pregnancy, primarily on the basis that A lacks capacity to consent to the operation herself, having regard to the test in *Gillick* which was adopted by our High Court in *Marion's case*.

The issues in this matter are quite similar to those in *State of Queensland v B* [2008] QSC 231, and I gratefully adopt the law set out in that case by Justice Margaret Wilson. She sets out some cases as to the parens patriae jurisdiction. She also sets out the undoubtedly correct proposition that the Court, in its parens patriae jurisdiction in a case such as this, acts to protect the interests of the child, A, and the parens patriae jurisdiction does not extend to the unborn child or foetus which, in Queensland at least, does not have an existence at law. The Court of Appeal set out principles relating to the parens patriae jurisdiction in *Christensen*, and I'll give the Butterworth citation, BC 9904473. Particularly at paragraph 19 of that case, the Court of Appeal emphasised that the jurisdiction is to be exercised in the – along the lines that the paramount consideration is the welfare of the child, and when the jurisdiction is invoked, it must be clear on the material that the order sought is positively in the interests of the child or other person within the Court's protection.

In relation to those principles, I will just note – or record – that counsel appearing amicus curiae for the Attorney-General raised in argument that the person named as the father of the foetus ought to be heard on the application before me. He too is a child and the circumstances of the conception as related by A to hospital staff are such that they would amount to at least one quite serious crime. In those circumstances it seemed to me that the father, properly advised, would have been very unlikely to have taken part in the proceedings had he been afforded the opportunity to do so. Secondly, bearing in mind the purpose of my jurisdiction, which was for A's protection, it seemed to me that he could say very little of direct relevance to the matters before me. He could have given evidence which, in some indirect way, bore on the circumstances surrounding A's life in the family home, however it seemed to me that, in all the circumstances, that was of such marginal relevance, having regard to A's welfare, that I did not delay these proceedings in order to give him the opportunity to be heard.

Lastly, on the parens patriae jurisdiction, I would refer to the case of *DOCS v Y* [1999] NSWSC 644. That case contains a particularly useful discussion of the

parens patriae jurisdiction but as well is a case where, quite acutely, the ability of the Court to act against the wishes of a child's parents was raised, and it is clear that the Court has the ability to act, even if the child's parents oppose action, although of course, that would be an extraordinary thing to do and require clear evidence, as there was in that case. That became relevant on the facts before me because of an odd factual circumstance which, to some extent, was resolved as the hearing continued. The child A is an orphan. She resides with relatives. The material, certainly at the commencement of the application before me, showed that one of those relatives was overseas, had not been informed of the pregnancy, and that the female members of the family were taking some quite elaborate steps to ensure that he did not find out about the pregnancy, and of course did not find out about this application, so that the people in loco parentis were not, it seemed to me, both informed of the application.

Yesterday evening, one of the persons in loco parentis told me that she had, in fact, told the other person in loco parentis, who remains overseas, of the pregnancy, and that he supported the termination of the pregnancy. As I say, that issue therefore evaporated to some extent, but notwithstanding that complication, my view was that I had power to act in A's interests, even if one of her guardians – and I use that term loosely – was not aware of the application, as long as there were good reasons for doing so.

Some parts of the criminal law are relevant to this application, and again I am grateful because they are set out by Justice Wilson in *State of Queensland v B*. They are sections 224, attempts to procure abortion, and 282. The terms of section 282 were changed after the case in *State of Queensland v B* to make it abundantly clear that section provides protection, not only for surgical operations, but also for medical treatment falling short of surgery. While dealing with the criminal law I should note, as was correctly recorded in *State of Queensland v B* at paragraph 19, that the Court cannot authorise what would otherwise be criminal conduct.

A has had a great deal of trouble in her young life. To detail it in these edited reasons would potentially identify her, so I do not. The upshot of it is that she must necessarily be psychologically vulnerable to mental illness in the future, and her relationship with those relatives with whom she lives is much more important to her than it would be were she not psychologically vulnerable.

The facts of the matter raise wider concerns as to the safety of the child A. I'm not dealing with those concerns, and I note that the hospital has quite appropriately reported them to the Department of Child Safety and police, and that both those agencies have made enquiries. There is apparently an allocated officer of the Department of Child Safety who is allocated to A's case, although the understanding of the witnesses before me was that no further action was being taken by that department at this time. On the other hand it seems that the police are investigating, and the evidence before me was that they have asked to receive the products of termination after that termination takes place.

The child A realised that she was pregnant. She did not immediately go to her relatives, but presented to a general practitioner and then confided in a teacher at school who gave her information as to how to contact other agencies including Children by Choice. It seems that she rather feared her relatives' reaction and came to them sometime after this. The evidence from the doctors who have seen A at the hospital is that the termination ought to take place, and I will come to that in some detail. The relatives who are in loco parentis both support the termination. A herself says that she supports the termination, and more will be said about her ability to make an informed decision in this regard.

The hospital was the applicant in this matter. Appearing as amicus curiae was counsel briefed on behalf of the Attorney-General, and I am grateful for his exploration of both factual and legal matters with witnesses when they attended to give evidence. Also in attendance for part of the application were A and one of the relatives in loco parentis. As the hearing continued, this relative raised her own inability to stay due to other important commitments. So about 7 o'clock last night the relative and A departed. She was given the opportunity to, and did, express her views to the Court, although rather in short compass. I think, in general, her inability to attend for the whole of the proceeding is symptomatic of a flavour I have from the evidence anyway, that this family is a family struggling to meet its commitments in all sorts of ways.

At present the child A is 14 weeks and 5 or 6 days pregnant. The medical evidence was that a surgical termination really should occur before she was 16 weeks pregnant, and the hospital has scheduled a termination for 11 o'clock this morning. I resumed hearing the matter at 7am this morning and made orders around 8.30 that the termination take place.

I'll turn to discuss the medical evidence which was before me. Dr Z was an expert in maternal and foetal medicine. She is the surgeon who will perform the termination. She gave evidence that she explained the risks of the operation to the child A. She quite frankly said that she gave what I might call a soft explanation of the risks to the child, but that she fully explained the risks to the relative in loco parentis. She also gave evidence that she discussed the result of the termination with the child A, and again I rather take it that explanation was less explicit than it would have been to an older person. I was interested in this issue as the affidavit material before me did not unambiguously show that the child was aware of exactly what a termination was. Dr Z was convinced that A understood what a termination was, and so was Dr Y, a child and adolescent psychiatrist, whose evidence I shall come to later. While this issue was explored sensitively and therefore, perhaps, by implication rather than expressly with the child A, I am satisfied she did understand what the procedure of termination would result in – that is, that it would result in death of the foetus.

Dr Y gave evidence that the child A has some understanding that there will be trauma to her in the future, or issues that she needs to deal with in the future

resulting from a termination now, and she obviously has some understanding of that, because she's made statements such as she will "work it out with the Church" when she's older, but Dr Z also gave evidence that she had explained to A that there would be some long-lasting effects of the termination – that is, some psychologically long-lasting effects.

Dr Z's evidence was that she preferred a surgical solution rather than a medical solution. This seems sensible so far as I can judge. She said that a child as young as A would be distressed by having going through a labour which would be induced by a medical solution. Not only that, but the drug used to induce labour may not work at all, and if it does work, may take up to five days to begin working, so that period is itself a traumatic time of uncertainty for the patient. Dr Z explained that there was significant risks of the child attempting to carry this pregnancy to term because of her very young age. In particular premature labour was very likely, putting both the mother and the foetus at risk. If a baby were born prematurely, it would suffer from multiple medical problems as a result of its premature birth. As well, even if the child were able to carry the pregnancy to full term, she would be because of her very young age, much more subject to complications of pregnancy such as high blood pressure etcetera than a woman of normal child-bearing age.

Dr X, who is a director of child and adolescent psychiatry at the hospital gave evidence of his assessment of the child. He noted that she is very young for her age – that is, he thought she was cognitively immature, and one example he gave was that she showed relatively little distress about the matters which he had to speak to her about, which he attributed to her child-like, or naïve, understanding of the problems confronting her. His view, and Dr Y's view, was that the child was not *Gillick* competent, per se – that is, she just did not have sufficient understanding of the procedure involved to consent. He also thought that her competence to consent was necessarily compromised by her young age and her awareness of the very strong views held, particularly by one of her relatives, that her pregnancy should be terminated.

Dr X thought that because of A's very young age, the physical effects of the pregnancy would be very difficult for her to cope with. He discussed the difficulties with her peers at school and the risk of ostracisation and rejection because of pregnancy. The effects are particularly magnified in the case of this child, in terms of her vulnerability to psychiatric illness in the future. One significant risk factor for her is the very troubled life she has led to date. Again I cannot publish details of these matters without risking identifying A. These factors predispose her, in any event, to mental illness. Relevantly Dr X thought that A very much prioritises school and her attendance at school as something which is very important for her to attend and do well at. A said to him, and in fact she said to Dr Z, that she couldn't possibly attend school if she were pregnant and she couldn't attend school if she'd had a baby.

Whether, in fact, those things are true, I think it shows an emotional orientation and understanding of the possibility of the peer rejection, and the disruption that that would have to her.

Very much part of A's thinking was that if it were discovered by the wider community – that is, outside the household in which she lives, that she were pregnant, her family would be ostracised. Again I cannot publish details as to this, without risking identifying A, but I accept it as a reasonable belief, ie., I think it may prove to be correct. Dr X was very clear that good family support and wider support in a community – protective networks I think he referred to –would be very important as protective against mental illness in the future for the child A. He also made the point which I think is a compelling one, that a child of her age will particularly feel the full brunt of stresses such as rejection and ostracism from a community without fully understanding the reasons why, or having mechanisms to cope.

One matter which concerned me, particularly on the affidavit material from the medical practitioners, was the idea that the child A and one of her relatives had, that somehow the fact of the pregnancy and the termination could be kept a secret both from other relatives and from the wider community, and that the psychiatrists, I feared, rather accepted that in some way this could occur, so that the risks of ostracism were minimised. See the affidavit of Dr X and see other material showing, for example, in Ms Ws' affidavit that the family were trying to concoct a secret plan to have A taken to the hospital on some pretext so that the termination could be carried out. Dr X and Dr Y, in fact, were quite clear in their evidence that they did not proceed on this assumption and that they realised that not only would the other relatives come to learn of the pregnancy and termination, but because of the involvement of the police, almost inevitably, so would the wider community. Notwithstanding that, their views as to the substantial risk to the child, A's, mental health if the pregnancy was not terminated remained.

Really, those matters seem quite compelling to me. This child has had a very traumatic past history which predisposes her to mental illness. She has, at present, a new and somewhat precarious life in a family which is not her nuclear family and which takes a very strong view that she ought to have a termination. For her to oppose that and carry the child to full term would cause great stress within the family, and there are hints in the material that it may not be possible for her even to continue living in that family in those circumstances. As well as that, Dr Y in particular referred to the fact that the possibly traumatic circumstances of the child's conception would be something which would be re-emphasised and reiterated should the child carry the pregnancy to its full term and have a baby at the end of that, whether that baby was then adopted or kept within the family.

The relative's view was quite dogmatically that the baby could not be kept within the family. An additional factor which I decline to publish, because it may identify A, bears significantly on this.

I accept the evidence of the doctors which, as I say, was I thought very usefully explored by Mr Parrott as amicus curiae and, in particular, he explored and discussed with the doctors options other than termination and the type of support and the type of scenarios that would be necessary if the pregnancy wasn't terminated. As I say, I found this discussion very useful. It tested, in a way, the unanimous views of the medical professionals. Nonetheless, having regard to the medical evidence before me, it seemed quite clearly in the best interests of the child, A, that a termination of the pregnancy take place and for that reason, I made orders earlier this morning permitting that to be done and declaring that it was reasonable in the interests of her physical and mental health.

At the commencement at the hearing of this matter, I made an order that no person publish any details of the court hearing until further order. It is very important that matters such as this be heard in as open and public a way as possible. It would be quite wrong for a legal system to contemplate these types of proceedings happening in secret. The difficulty which I see in this case is that the child, A, is very vulnerable as will appear from my reasons and that her interests need to be protected in any publication of the proceedings. I'm going to hear counsel as to what publication ought to be made in relation to the matter. It's a matter, I'm afraid, where the circumstances most relevant to my reasons for decision are circumstances which almost necessarily betray the identity of the child. However, having dealt with the main application itself as a special matter in the applications list, with some urgency, I propose to deal with those questions at a more leisurely pace and I'll now hear counsel as to how that should happen.