# Case note: *Re Isaac* [2014] FamCA 1134 (17 December 2014)

In *Re Isaac* the issue before the court was whether Isaac was competent and capable of making an informed decision about his own medical treatment for gender dysphoria. Isaac sought a declaration (*Gillick* competent) from the court to that effect.

The court did not make a declaration or order declaring Isaac *Gillick* competent. Rather, the court made an order giving Isaac sole parental responsibility for making medical decisions for himself after finding Isaac competent of making decisions about medical treatment for gender dysphoria.

By not making a declaration of *Gillick* competence, the case has not clarified whether a child applicant, who is also the subject child of the proceedings, may seek a declaration of *Gillick* competence.

The decision has clarified, however, that there is an avenue available to a child, who is not supported by his or her parents, to be declared competent so the child can then make decisions about whether to proceed with medical treatment for gender dysphoria.

## Facts

Isaac is a 17-year-old who was born a female but for some years has identified as a male. Isaac made a direct application to the court through his Victoria Legal Aid lawyer (as opposed to an independent children’s lawyer acting on a best-interests basis), seeking stage 2 medical treatment (administration of hormone treatment) for gender dysphoria.

Stage 2 treatment is currently classified as a special medical procedure and requires court authorisation. The *Family Law Act 1975* (Cth) (‘the Act’) gives the court this power.

A special medical procedure is one to which it is considered the parents cannot consent in their normal exercise of parental responsibility, and for which an external, independent body, namely a court is required to determine whether or not it is in the child’s best interest. The requirement for court authorisation is to provide a safeguard to ensure that the child’s best interests are met[[1]](#endnote-1).

The background of special medical procedures in Australia can be found in the case of *Re Marion[[2]](#endnote-2)*. This case involved the proposed sterilisation of an intellectually disabled 14-year-old girl and established that court authorisation is required where parents are making decisions about medical treatment for a minor when the treatment is invasive, irreversible, requires major surgery, the consequences give rise to a significant risk of making the wrong decision, and a wrong decision carries particularly grave consequences.

The High Court in *Marion’s Case* observed that a legally competent person can consent to such medical treatment. Although minors are generally not considered competent, the court adopted the legal principle from *Gillick v West Norfolk* *and Wisbech Area Health Authority[[3]](#endnote-3)* (‘Gillick competent’) which can render a minor legally competent. Thus, the Family Court ‘does not have jurisdiction to make orders about the medical treatment of a minor if the court has formed the view that the young person is of sufficient maturity and understanding to give a valid consent to the procedure[[4]](#endnote-4).’

Therefore the parental power to consent to medical treatment on behalf of a child diminishes gradually as a child's capacities and maturity grow. This rate of development depends on the individual child. So the capacity of a child to give informed consent to the medical treatment in question is case specific.

## Decision

Justice Cronin agreed that Isaac’s competency and capacity to make a decision about his own medical treatment was what the court must assess.

Evidence from Isaac’s treating doctors supported a finding of *Gillick* competence. This evidence was not challenged. The court concluded, therefore, there was no reason for the court to not accept the medical evidence.

The court, however, did not make a declaration of *Gillick* competence. Rather the court made a parenting order under section 64B(2)(c) of the Act – read in conjunction with section 67ZC (the court’s welfare jurisdiction). The order gives Isaac sole parental responsibility for all medical decisions concerning himself in relation to the treatment of gender dysphoria.

### Parenting Order

Section 61C of the Act provides that each parent of a child who is not 18 years of age has parental responsibility for the child. Parental responsibility in section 61B is described as all the duties, powers, responsibilities and authority which, by law, parents have in relation to children. A decision about medical treatment would normally be a decision for a parent of a child under 18 years. However, there are a certain class of medical decisions (special medical procedures, discussed above) that are considered beyond the scope of parental responsibility and requiring court authorisation.

Section 61C, however, notes that the allocation of parental responsibility is subject to a parenting order made by the court. Under section 64B(2)(c) of the Act, the court has the power to make a parenting order allocating parental responsibility for a child.

The court in *Re Isaac* accepted that it had the power to allocate parental responsibility for a particular issue (in this case medical decisions) to any person, including persons other than the parents. It follows that in respect of certain issues, the court has the power to allocate parental responsibility to the child himself or herself.

In considering allocating parental responsibility to Isaac, the court sought to determine whether Isaac had sufficient capacity and understanding to know what he was doing in respect of this medical treatment. On the evidence presented, the court considered Isaac quite capable of making medical decisions himself.

The court, as a precondition for making a section 64B order, had regard for the best interests of the child (section 60CA). Section 61DA also required the court, when making the parenting order under section 64B, to apply a (rebuttable) presumption about the shared allocation of parental responsibility; a presumption the court rebutted in this case.

The making of a parenting order under section 64B allocated sole parental responsibility to Isaac enabling him to make decisions about his medical treatment. Justice Cronin noted that the court’s power to assess a child’s competence (to make a medical decision on their own behalf) is most likely provided under section 64B alone.

However, to be sure there is ‘little room for argument’, section 64B was read in combination with section 67ZC. Section 67ZC provides the court with jurisdiction to make orders relating to the welfare of the child. In *Re Jamie* it was the avenue used by the court to authorise the special medical treatment. In *Re Isaac*, consideration of section 67ZC when making a section 64B parenting order made clear that the court had considered Isaac’s welfare.

## Commentary

The order of sole parental responsibility suffices for Isaac to pursue stage 2 medical treatment for gender dysphoria. It has, in effect, provided Isaac with the outcome he was seeking.

In Isaac’s case, his parents were not represented at the final hearing but it was evident from the evidence presented that his parents did not support his wishes to undergo medical treatment for gender dysphoria. The decision thus demonstrates that the court will entertain a child’s direct application in the circumstances of a dispute between a child’s wishes and the parents.

For future cases, if there is evidence that supports a finding that the child is competent to make medical decisions for him/herself, seek a declaration of *Gillick* competence and, in the alternative, a parenting order under section 64B in combination with section 67ZC.

The full text of the decision can be found [on the Austlii website](on%20the%20Austlii%20website) (<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FamCA/2014/1134.html?stem=0&synonyms=0&query=re%20isaac>).

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1. Law Reform Commission of NSW, ‘Minor’s Consent to Medical Treatment’ (Issues Paper 24, 2004), 4. [↑](#endnote-ref-1)
2. *Department of Health and Community Services v JWB and SMB* 175 CLR 218. [↑](#endnote-ref-2)
3. [1986] AC 112. [↑](#endnote-ref-3)
4. D. Bryant, ‘It’s my Body, Isn’t it? Children, Medical Treatments and Human Rights’ 2009 (vol 35 no 2) *Monash University Law Review* 193, 200. [↑](#endnote-ref-4)