

SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v B* [2008] QSC 231

PARTIES: **STATE OF QUEENSLAND**
(applicant)
v
B, by her Litigation Guardian
(respondent)

FILE NO: BS 9246/08

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 26 September 2008

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 17 September 2008

JUDGE: Wilson J

ORDERS: 1. Declaration that the termination of B's pregnancy by the therapeutic administration of the drug misoprostol would be reasonable in all the circumstances to avoid danger to B's mental health;

2. Order that B be permitted to undergo and the applicant's servants or agents be permitted to perform termination of B's pregnancy by the therapeutic administration of the said drug.

CATCHWORDS: CHILDREN – Court's inherent jurisdiction – *parens patriae* – where 12 year old girl is almost 18 weeks pregnant – where the girl is a patient of a public hospital conducted by the applicant – where the applicant sought Court's authorisation of termination of pregnancy – where continuation of pregnancy is a danger to the girl's mental health and well-being – where the girl is of less than average intelligence and maturity – where the girl and her parents wish the pregnancy to be terminated – whether the girl's parents are able to consent to the termination of the pregnancy – where it is an offence unlawfully to administer a drug or use force or any other means with intent to procure an abortion – where proposal is to administer a drug to induce labour – where there are sound medical reasons for not performing a surgical procedure – where it is the duty of every person with care of a child to take precautions reasonable in all the circumstances to avoid danger to child's health and to take action reasonable in all the circumstances to remove the child from such danger – whether danger to child's health includes danger to her mental health – whether the applicant is a person with care of

the child – whether administration of the drug in order to terminate the pregnancy would be reasonable to avoid danger to child’s mental health – whether it would be in child’s best interests for termination of her pregnancy by that means to proceed

Criminal Code Act 1899, s 224, s 226, s 286

Fountain v Alexander (1982) 150 CLR 615, referred to
Gillick v West Norfolk AHA [1986] AC 112, referred to
K v T [1983] 1 Qd R 396, considered
Marion’s Case (1992) 175 CLR 218, considered and applied
R v Gyngall [1893] 2 QB 232, cited
Re Bayliss [1985] Supreme Court of Queensland OS 326 of 1985 (Unreported, McPherson J, 24 May 1985), referred to
State of Queensland v Nolan [2002] 1 Qd R 454, considered and applied

COUNSEL: S Gallagher for the applicant
The respondent was represented by her litigation guardian,
her father
JR Hunter as amicus curiae
SOLICITORS: Minter Ellison for the applicant

[1] **WILSON J:** On 17 September 2008 I made the following orders:

1. a declaration that the termination of B’s pregnancy by the therapeutic administration of the drug misoprostol would be reasonable in all the circumstances to avoid danger to B’s mental health; and
2. an order that B be permitted to undergo and the applicant’s servants or agents be permitted to perform termination of B’s pregnancy by the therapeutic administration of the said drug.

These are my reasons for doing so.

[2] B is a 12 year old girl who is almost 18 weeks pregnant. She is a patient of a public hospital conducted by the applicant, the State of Queensland. The applicant approached the Court in its *parens patriae* jurisdiction for authorisation of the termination of B's pregnancy.

The Court's jurisdiction

[3] The history and nature of the *parens patriae* jurisdiction were succinctly described by Chesterman J in *State of Queensland v Nolan*¹ -

“[7] The jurisdiction appealed to is that which was formally vested in the Sovereign but was transferred in centuries past to the Lord Chancellor and from him personally to the Courts of

¹ [2002] 1 Qd R 454 at para [7].

Chancery and then to those courts which, like the Supreme Court, exercise the jurisdiction of that court. It is exercised to protect the person and property of subjects, particularly children who are unable to look to their own interests. The court has a wide power in relation to the welfare of infants. The dominant factor in the exercise of the jurisdiction is always what is in the best interests of the child in question. In a passage approved by Brennan J in *Marion's Case*² it was described by Lord Esher MR in *R v Gyngall*³:

‘The court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.’

The power is to be exercised for the protection of those whose plight enlivens it. See also *Fountain v Alexander*⁴.”

- [4] The court's *parens patriae* jurisdiction clearly extends to B, but it does not extend to her unborn child.⁵
- [5] The administration of medical or surgical treatment to an adult of full mental capacity may be an assault or trespass to the person and so unlawful in the absence of the patient's consent to the treatment. Under the common law a minor is capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed." Until then, in most circumstances a parent has power to consent to treatment on the minor's behalf.⁶ However, a parent does not have power to consent to some procedures: for example, the sterilisation of an intellectually disabled child (for its own sake, and not as incidental to some other treatment) requires the authorisation of the Court.⁷

Criminal Code s 224

- [6] There are potentially difficult issues of criminal responsibility whenever the question of terminating a pregnancy arises. There may also be complex moral, ethical and religious issues, but these are beyond the province of the Court to determine.
- [7] Under our criminal law anyone who unlawfully administers a drug or performs a surgical or other medical procedure intending to terminate a pregnancy commits an offence.
- [8] Section 224 of the *Criminal Code* provides –

² (1992) 175 CLR 218 at 280.

³ [1893] 2 QB 232 at 241.

⁴ (1982) 150 CLR 615 at 633.

⁵ *K v T* [1983] 1 Qd R 396 at 400–401.

⁶ *Gillick v West Norfolk AHA* [1986] AC 112; *Marion's Case* (1992) 175 CLR 218 at 236–238.

⁷ *Marion's Case* (1992) 175 CLR 218 at 253.

“224 Attempts to procure abortion

Any person who, with intent to procure the miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a crime, and is liable to imprisonment for 14 years.”

See also s 226, by which the unlawful supply of drugs or instruments to procure an abortion is an offence.

- [9] It is unlawful to administer a drug or to perform a surgical or other medical procedure intending to terminate a pregnancy unless that conduct is authorised, excused or justified by law.

The factual matrix

- [10] B's parents divorced some years ago, and the Family Court made residence and contact orders in relation to her and her siblings. Her parents share long-term responsibility for her care, welfare and development. Normally she resides with her mother and younger sibling. About three weeks ago, her mother went interstate where she is fulfilling work commitments, and her grandmother and father have been looking after her in her mother's absence.
- [11] The whereabouts of the putative father of the baby are not known, but he is thought to be in another part of Queensland.
- [12] I accept the considered opinions of the two psychiatrists and the obstetrician who have examined B that the continuation of her pregnancy would pose serious danger to her mental health and well-being, beyond the normal dangers of pregnancy and childbirth. In their opinions the termination of her pregnancy is the only way to avert that danger, and it would not be a disproportionate response to that danger.
- [13] It is proposed to administer a drug *misoprostol*, which would induce labour, resulting in the termination of the pregnancy by the expulsion of the foetus. *Misoprostol* is a man-made form of the protein prostaglandin. It would be administered to B orally in five doses over 12 hours, and the foetus would be expected to be expelled in the next 12 hours. If it were not, the procedure would be repeated. There is a less than 5% possibility that a third attempt would be required, after a week. Common side effects of the drug include nausea, vomiting, diarrhoea, hot flushes, abdominal pain and mild fever.
- [14] The risks of using alternative procedures to terminate B's pregnancy are far higher. The procedure of dilatation of the cervix and evacuation of the uterus in pregnancies beyond 14 weeks carries a higher risk of damage to the cervix or the uterus. It is generally not undertaken in public hospitals. The risks of a surgical procedure (a hysterotomy) are higher than those associated with a delivery; the morbidity rate is high, particularly in children.
- [15] B has told those who have been caring for her and those who have examined her at the hospital that she wishes to have her pregnancy terminated, and her parents both consent to that course. But in my view this is one of those cases where B is

incapable of giving informed consent to the termination of her pregnancy and it is beyond her parents' powers to do so.

- [16] B is only 12 years old. It seems unlikely that a 12 year old child of average intelligence and maturity could fully understand the significance of a termination of pregnancy, including the immediate and long term risks to herself as the mother of the baby. But I am satisfied that B is of less than average intelligence and maturity. Her father has described her intellectual capacity and emotional maturity as being similar to that of her nine year old sibling. Her obstetrician has likened her intellectual functioning to that of a child half her chronological age. A psychiatrist who has performed a mental status examination of her has said that her intellect is in the very low normal range, possibly even lower. Another psychiatrist who has examined her considers that she does have full understanding of the nature of the proposed termination, but I reject that opinion as against the weight of the evidence.
- [17] In *Marion's case*,⁸ Mason CJ, Dawson, Toohey and Gaudron JJ discussed why the parents of an intellectually disabled girl could not validly consent to her sterilisation, essentially because of the risks of their making the wrong decision and the grave consequences of their doing so. For similar reasons, B's parents should not be able to consent to the termination of her pregnancy. The Court in its role as *parens patriae* must act in the best interests of the child, B, whereas her parents may ultimately make a decision which favours other and possibly conflicting interests of the family as a whole (albeit one bifurcated by their own divorce). And, like the decision to sterilise, which was under consideration in *Marion's Case*, the medical profession might be expected to play a central role in the decision to terminate the pregnancy as well as in the procedure itself. To terminate a pregnancy is to negate the possibility of the mother ultimately giving birth to a live baby.

Unlawful conduct

- [18] The question of the lawfulness of conduct intended to terminate a pregnancy goes beyond whether consent is given by or on behalf of the mother of the unborn baby.
- [19] The Court cannot authorise what would otherwise be criminal conduct. Moreover, it would not be in B's best interests to subject her to an unlawful act, especially a criminal act.⁹
- [20] Section 282 of the *Criminal Code* provides –

“282 Surgical operations

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient's benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all circumstances of the case.”

- [21] A medical practitioner who performs a surgical operation on a pregnant woman is not criminally responsible for the death of the foetus if the operation is for the

⁸ *Marion's Case* (1992) 175 CLR 218 at 249–254.

⁹ *State of Queensland v Nolan* [2002] 1 Qd R 454 at para [10].

preservation of the mother's life: *K v T*; ¹⁰ *Re Bayliss*.¹¹ In B's case there are sound medical reasons for not performing a surgical procedure. Therefore, s 282 is not applicable here.

[22] Section 286(1) of the *Criminal Code* provides –

“286 Duty of person who has care of child

(1) It is the duty of every person who has care of a child under 16 years to —

- (a) provide the necessaries of life for the child; and
- (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child's life, health or safety; and
- (c) take the action that is reasonable in all the circumstances to remove the child from any such danger;

and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not.”

In my view, danger to a child's health includes danger to her mental health. A “person who has care of a child” is extensively, but not exhaustively, defined in subsection (2), as follows –

“(2) In this section—

person who has care of a child includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.”

Applying the approach of Chesterman J in *State of Queensland v Nolan*,¹² that definition is capable of extending to the hospital and doctors who have undertaken the care of B.

[23] In the circumstances of this case, the administration of the drug *misoprostol* in order to terminate B's pregnancy would be reasonable to avoid danger to her mental health, and so it would not be unlawful. It would be in B's best interests for termination of her pregnancy by that means to proceed.

Counsel

[24] This application came before the Court in its Applications List. B by her litigation guardian (her father) was made the respondent to the application. Her father had no

¹⁰ [1983] 1 Qd R 396 at 398.

¹¹ *Re Bayliss* [1985] Supreme Court of Queensland OS 326 of 1985 (Unreported, McPherson J, 24 May 1985), p 3.

¹² [2002] 1 Qd R 454 at para [22].

legal representation, and indicated his intention simply to concur in the submissions of the applicant's counsel.

- [25] Given the gravity of the application, its urgency, and that I was informed that this was the first time the Court had been asked to consider the lawfulness of the termination of a minor's pregnancy by the administration of a drug, it was desirable that there be a contradictor. At the Court's request, the President of the Bar Association of Queensland arranged for Mr J R Hunter of counsel to appear as an *amicus curiae*. The Court commenced to hear submissions at about 7.00 pm, and a decision was made later that evening.
- [26] I record the Court's appreciation to Mr Hunter, for his careful and dispassionate exposing of issues for its determination. His conduct exemplified the best traditions of the Bar.
- [27] I record, too, the assistance derived from the thorough preparation of the case by the applicant's counsel, Ms S Gallagher, and her instructing solicitor.