



NAVIGATING THE STAGE 2 PROCESS

A legal toolkit for parents
of transgender children



Introduction

Under Australian law, parents can usually consent to medical treatment for their children. However, there are some forms of medical treatment, known as “special medical procedures”, to which parents cannot consent. Special medical procedures require parents to apply to the Family Court for approval before the child’s treatment can proceed.

The law says that Stage 2 hormone treatment (the use of oestrogen or testosterone) for transgender children is a special medical procedure. This brochure explains how parents can obtain Family Court approval for Stage 2 treatment and what to expect from the process. The information applies to families seeking Stage 2 treatment in all Australian states and territories.

THE LAW

Family Court involvement in approving Stage 2 treatment is mandatory. The Court must consider two questions in each case where approval for Stage 2 treatment is sought. Both questions are considered in the same hearing.

Is the child him or herself able to consent to treatment?

This is known as *Gillick* competency. For a child to be declared *Gillick* competent, he or she must have reached “a sufficient understanding and intelligence to understand fully what is proposed”. A *Gillick* competent child will be expected to understand the impact of the treatment on his or her body, the enormity of the decision being made, and the implications of the decision, particularly its irreversibility and impact on fertility. Whether a child is *Gillick* competent depends on the individual child’s maturity and intelligence, not their age. However, few children under the age of 15 will be found *Gillick* competent.

If the judge finds that the child is *Gillick* competent then the child can consent to treatment and no further Court involvement is needed.

If the judge concludes that the child is NOT *Gillick* competent, and therefore not able to consent, then it will be the Court’s decision whether Stage 2 treatment should proceed. The decision is made based on the judge’s assessment of what is in the best interests of the child. It is heavily informed by the written evidence of the medical experts and the child’s parents.

If the child is not *Gillick* competent (and therefore not able to consent him or herself) is treatment in the child’s best interests?

STEPS IN THE COURT PROCESS

The court process, from pre-trial preparation to a final order approving treatment, takes approximately eight months. This delay should be considered when choosing the most appropriate time to apply.

The pre-trial process

Your child's treating health professionals – typically the child's paediatrician and/or endocrinologist and psychiatrist – will usually tell you when your child is ready to commence Stage 2 treatment. The first stage in the process is to find a lawyer.

Finding a lawyer

It is important that your lawyer is a family law specialist, preferably with some experience with the Stage 2 court process. A growing number of family lawyers are offering their services pro bono (for free) to families seeking Stage 2 treatment orders.

A number of organisations can assist you in finding a pro bono family lawyer. Links to those organisations can be found at the end of this brochure.

Expert reports

Once you have found a lawyer, they will begin to gather the documentation needed to take your case to Court. Typically, two medical reports will be required by the Court. In most instances, those reports will be written by two psychiatrists. The child will usually need to attend at least one appointment with each psychiatrist specifically for the purpose of the report before it can be written. If the child only has one treating psychiatrist a second will need to be found. However, in several recent cases the Court has accepted reports from the child's paediatrician and treating psychiatrist, without requiring a second psychiatrist to submit a report.

Affidavit of parents (and perhaps the child)

The child's parents will usually submit an affidavit (a written document that tells the court the child's story) to the Court as part of the written material. The lawyer can help the parents draft the affidavit, though it will usually be quicker and cheaper (if the lawyer is not acting

pro bono) for parents to prepare a draft in advance. Ideas about the types of things to write about can be found by looking at previous cases. A link to a database that contains Stage 2 cases is included below. If the child wishes, he or she can also write an affidavit, but this is not necessary.

The hearing

Every hearing is slightly different. Differences may depend on the individual judge and their familiarity with gender dysphoria, and the state or territory in which your case is heard. While the law is the same in every state and territory, each Family Court registry has slightly different practices and culture.

The court process will begin with you being given a date for your child's case. It is difficult to change the date without causing significant delay. Parents usually attend the hearing. It is rare, though possible, for a child to attend. If you would like your child (or any other family member) to attend, you will need to get the permission of the judge.

On the day of your hearing, you should expect to be at court for the entire day. It is not uncommon for there to be delays and your case may start later than expected. Delays are rarely anything to do with your case, so try not to let them bother you.

When the judge enters the courtroom, you need to stand and bow. You will then be asked to sit down. The judge will be accompanied by the court clerk who manages the courtroom, and the court reporter who types a transcript of what is said in court. The Family Court is open to the public and people waiting for their case to be heard may wander into the courtroom. It is possible to ask the judge that the court be closed for your case to protect your privacy and the privacy of your child. If the court is closed, no one but the parents and their lawyer will be in the courtroom for the hearing.

A Stage 2 hearing is not adversarial, which means there is no one in the court arguing that Stage 2 treatment should not be approved. In the past, the Court would provide an Independent Children's Lawyer to represent the best interests of your child. This is very rare now and

would usually only occur if there was something unusual about your case. Parents (and the child, if attending) are not required to say anything in court.

Your lawyer will do all the talking and most of what is said will relate to the written reports and affidavits, which the judge will have read in advance.

Once the hearing is over, the judge will usually adjourn and inform you that the outcome of the case will be provided some time in the near future. Occasionally, judges will tell you the outcome of the case on the day. However, they usually take several days to prepare the written order. Once you have the court order approving treatment, you take it to the child's treating doctor who will provide a script for the hormones.

Every Stage 2 case that has been heard by the Family Court has resulted in the Court approving treatment. It would be a very rare situation where the medical experts and parents supported treatment and the Court did not.

WHAT HAPPENS IF PARENTS ARE SEPARATED OR DIVORCED?

Where parents are separated or divorced, but agree that the child should receive Stage 2 treatment, then the case can proceed as described above. If one parent doesn't support the child receiving Stage 2 treatment, then the legal situation may be slightly more complicated.

Medical staff will usually attempt to persuade the resistant parent of the risks to the child if they do not receive treatment. If the resistant parent cannot be persuaded to support treatment, the supportive parent can make the court application alone. The court will consider the views of the resistant parent, but if the child is found to be *Gillick* competent, and thus able to consent to the treatment themselves, then the views of the parent become irrelevant.

If the child is not found to be *Gillick* competent then the court will consider the resistant parent's views in deciding what is in the best interests of child. However, the medical evidence is the most important information provided to the Court and if the medical professionals recommend treatment, then it is likely to be approved.

Resources

Pro bono legal services

Justice Connect (Victoria & NSW):
Justice Connect will assist you to find a pro bono lawyer
www.justiceconnect.org.au

Inner City Legal Centre (NSW):
Specialist transgender legal advice
www.iclc.org.au

Web-based information and support

Transcend:
www.transcendsupport.com.au

Gender Help for Parents:
www.genderhelpforparents.com.au

Working it Out:
www.workingitout.org.au

Safe Schools Coalition:
www.safeschoolscoalition.org.au

Parents of gender diverse children:
Email: info@pgdc.org.au

Previous cases

Austlii:
www.austlii.edu.au/au/cth
To find cases, click on the "Family Court of Australia" link; then click on "Database Search" and type "gender dysphoria". A list of recent Stage 2 cases will appear. Click on the case name to read the judge's decision, which will include references to expert reports and affidavits written by parents.



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