MATURE MINORS AND PARENTING DISPUTES IN AUSTRALIA: ENGAGING WITH THE DEBATE ON BEST INTERESTS V AUTONOMY

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Australia lags behind other jurisdictions in considering the relevance of a mature minor's decision-making capacity to parenting disputes. Gillick competency, as it is known, is routinely discussed in the case of medical decision-making, however is ignored when it comes to parenting decisions concerning very mature minors. This article explores this failure and in particular considers: (a) the jurisdiction of the court to determine a matter when a child is competent; (b) the extent to which the courts are entitled to ignore a child's competency, based on their best interests; (c) to the extent a court should, but does not, consider a child's competency, why they do not; and (d) the arguments for overriding, or not, competency where there is a discretion. The article concludes that the court needs to reconsider this area of law, highlighting that this would play a part in the larger project of giving due recognition to children's rights in parenting proceedings.

I INTRODUCTION

Once upon a time, reported Australian parenting disputes rarely dealt with very mature children: lawyers knew there was no point going to trial as the courts let older children 'vote with their feet'. Indeed, until 1983 children over 14 were all but entitled to decide their custodial fate under the original version of the *Family Law Act 1975* (Cth) ('*FLA*').[1]

Roda & Roda [No 2] ('*Roda*'),[2] however, is an example of a recent case involving a mature minor that did reach trial – twice. By the time of the second trial, the child, Tom,[3] was 17. Tom was living with his mother and a keen and

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1 *Family Law Act 1975* (Cth) s 64(1)(b) ('*FLA*'), later amended by *Family Law Amendment Act 1983* (Cth) s 29(b).

2 [2015] FamCA 727 ('*Roda*').

3 'Tom' is referred to as 'T' in the report. However, in keeping with the comments of Lady Hale in 'Openness and Privacy in Family Proceedings' (Speech, Sir Nicholas War Memorial Lecture, 10 May

talented ice hockey player. In 2014, Tom's mother had obtained court permission, against his father's wishes, to send Tom to Canada to a specialist academy on a scholarship for 10 months to further his ice hockey training. Tom now wished to return to Canada to finish his schooling there and continue with a scholarship. Tom's mother was supportive and prepared to finance the trip. Tom's father, however, would not agree, so he opposed the fresh application on the basis that he believed Tom would obtain a higher secondary school leaving score at the academically selective school Tom was attending in Australia, and because the father had a two-year-old child and he wanted to foster Tom's relationship with his half-sibling. Tom had coped well with the earlier trip overseas, performed very well in both schools, and was described by the judge as 'impressive', 'very mature', 'highly organised' and 'highly motivated'. Tom had had little contact with his father in the year preceding the second trial. The court ultimately approved Tom relocating to Canada for his studies on the basis of a review of Tom's best interests.

These parents had an order for equal shared parental responsibility – that is, joint responsibility in relation to major long-term issues,[4] which includes education. However, while it is normally assumed that parental responsibility for a child ends at 18 (and parenting orders have no effect beyond that age),[5] as a matter of common law, parental authority diminishes as the capacity of a child to decide matters for themselves develops.[6] Thus, a child can be competent to decide a matter for themselves before they turn 18 (as is well established in relation to medical treatment). While one can understand the technical necessity of the mother in this case having to make an application to change Tom's school and send him out of the country where the father opposed the plan,[7] it is difficult to understand how the father (who was admittedly unrepresented) thought his opposition would bear fruit. More importantly, however, cases such as this raise a question about the judicial preference for applying a best interests test, as opposed to determining whether the decision of the 'child' ought to be respected, on the basis of them having achieved the necessary competency to take such a decision. This article argues that another way to resolve this case would have been to find Tom competent to decide the matter and to respect his decision.[8] Indeed, the arguments made in this article lead to the conclusion that the court was obliged to consider this possibility, but failed to do so.

Another recent example of a mature minor's decision-making capacity having been ignored in favour of a best interests determination is seen in *Downey & Mair*

2018) 14 <https://www.supremecourt.uk/docs/speech-180510.pdf>, I have given 'T' a pseudonym to avoid the dehumanising practice of referring to him by an initial.

4 'Equal shared parental responsibility' was previously known as guardianship: *FLA* as amended by *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) sch 1.

5 *FLA* ss 65H(1)(a), (2).

6 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ('*Gillick*'); *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's Case*').

7 See *FLA* s 65Y(2)(b).

8 The Court could, for example, have made an order removing parental responsibility from both parents in respect of the relevant matters.

('*Downey*').[9] This case involved a young woman (let us call her 'Alex')[10], nearly 15, who was strongly opposed to having contact with her violent father. Alex was described by the family consultant as mature beyond her years, articulate, thoughtful, and resilient, and as having expressed her views carefully.[11] Expert evidence confirmed Alex suffered emotionally when she had contact with her father. As her father had said it was important – to him – to communicate and spend time with his daughter, a child-inclusive mediation session was organised, but the father failed to participate. While the court ultimately restrained the father from having any contact with Alex, the decision was based on Alex's best interests, not on her rational and reasonable decision not to see him.[12]

While the approach in these cases may appear at first blush to be legally appropriate, what the judicial officers in these cases failed to consider was whether these mature minors were, in fact, legally competent to take the decision for themselves, and the implications of such a finding. Unlike some other jurisdictions, the question of a child's competency is rarely, if ever, discussed in Australian parenting decisions. And yet, there is clear law to the effect that a child's right to decide is only limited by parental authority *until such time as* the child attains competency; this is commonly referred to as '*Gillick* competency'.[13] Thus, parental authority ceases when a child achieves competency in relation to a particular matter. However, Australian family courts[14] have generally proceeded on the erroneous view that *Gillick* competency only applies when the dispute concerns a medical procedure. Further, they have adopted the view that a child's wishes, regardless of age, are *always* subject to the court's view of their best interests. Having taken these positions, the courts have not seen it as necessary to explore

9 [2017] FCCA 665 ('*Downey*').

10 Referred to as 'X' in the decision.

11 *Downey* [2017] FCCA 665, [81], [84], [86] (Harland J).

12 For further examples where wishes, rather than decision-making autonomy, were used to justify a decision, see *Croft & Croft* [2017] FCCA 588, where the strongly held wishes of a mature 15-year-old as to where he wished to live were acceded to on the basis of his best interests and that he would likely 'vote with his feet' if ignored. There was mention of the right of children to be heard in this decision, but not their right to decide. See also *Goudarzi & Bagheri* [2018] FamCA 217, where the 'child' was 17 and five months at trial; *Whitehall & Warren* [2017] FamCA 283, where the Court commended neither parent for seeking orders about the 17-year-old whose wishes were clear, and where the Court gave effect to the wishes of a 16-year-old boy to live with his father (though there were also protection issues for a younger female child in relation to that 16-year-old); *Godwin & Glass* [2017] FCCA 1695, where twins who were nearly 17 wished to live with different parents; *Zeferelli & Hogan* [2018] FamCA 149, [94]–[95] (Forrest J). For a decision where it was accepted that a 17-year-old child's wishes were considered to be 'dispositive of the proceedings' but without reference to *Gillick* competence, see *Casswell & Moeser* [2017] FamCA 806, [32] (Austin J). See also *Bryan & Sloan* [2019] FamCA 962, where Austin J at [68] acceded to the wishes of a child who was almost 16, noting the child was 'now of an age and level of maturity which practically forecloses orders that bind him to live or spend time with the mother against his wishes'. See also *Gadhavi & Gadhavi* [2019] FamCA 326, [55] where Johnston J noted the impact of the age of a 16-year-old not wishing to spend time with a violent father. See also *Coles & Coles* [2019] FamCA 367, [23] per Henderson J in respect of a 15-year-old girl's wishes to have no contact with her father due to his severely controlling behaviour.

13 After the House of Lords decision in *Gillick* [1986] AC 112.

14 Note, while there is a federal Family Court of Australia, other courts have jurisdiction to hear family law matters.

the issue of the impact of a child's *Gillick* competency on their role – indeed, jurisdiction – to make a parenting order contrary to a competent child's wishes.

There are two possible jurisdictional bases for making an order concerning a child under the *FLA*: section 65D (parenting orders power) and section 67ZC (the welfare power). This article argues first, that the two jurisdictional bases for making an order concerning a child operate differently. Second, that there is no jurisdiction under section 65D to make orders about matters outside of parental authority. Third, that consequently, section 65D does not permit a court to make an order contrary to a *Gillick*-competent child's wishes. Fourth, that only the welfare power (section 67ZC) provides jurisdiction to override a *Gillick*-competent child's wishes. And fifth, that in exercising the welfare power, the best interests principle should be applied consistently with the general operation of the *parens patriae* jurisdiction, such that a competent minor's decision will only be overridden where not doing so would expose the child to a serious risk of harm.

In support of these arguments, the article traces the historical context of a number of the relevant provisions to provide an alternative understanding of their operation to that routinely adopted by the Australian family courts. To tease out these arguments in full, the article considers in detail the jurisdiction of Australian family courts to determine a matter when a child is competent, the extent to which the courts are entitled to ignore a child's competency based on their best interests, the extent to which a court should, but does not, consider a child's competency and why, and the arguments for and against overriding competency where there is a discretion.

In addition to concluding that Australian family courts should be applying the law differently, this article highlights the failure of Australian family courts to give due recognition to the right of decision-making autonomy of competent children. While the question of the competency of mature minors in parenting matters may seem an issue of limited significance, this article concludes that the reverse is in fact the case.

II THE QUESTION OF JURISDICTION

A The Courts' Current and Historical Sources of Power

The broader question of when, in a legal setting, a best interests test *should* give way to an approach that accords with a child's decision-making autonomy is not new – nor easily resolved.[15] In addition to the question of what the law should

15 See, eg, John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8(1) *International Journal of Law and the Family* 42; Nigel Thomas and Claire O'Kane, 'When Children's Wishes and Feelings Clash with Their "Best Interests"' (1998) 6(1) *The International Journal of Children's Rights* 137; Carl M Rogers and Lawrence S Wrightsman, 'Attitudes Towards Children's Rights: Nurturance or Self-Determination?' (1978) 34(2) *Journal of Social Issues* 59; Gillian Schofield and June Thoburn, *Child Protection: The Voice of the Child in Decision-Making* (Institute for Public Policy Research, 1996); John Seymour, 'An "Uncontrollable" Child: A Case Study in Children's and Parents' Rights' (1992) 6(1) *International Journal of Law and the Family* 98; Pip Trowse, 'Refusal of Medical Treatment: A Child's Prerogative?' (2010) 10(2) *Queensland University of Technology Law and Justice Journal* 191.

do is the question of what current Australian law requires, and indeed permits. This article argues that neither question has been afforded sufficient consideration in Australian family law. In a jurisdiction dominated by a best interests model, and lacking any human rights legislation, children's decision-making autonomy is routinely overlooked by Australian family courts in parenting disputes,[16] and generally only surfaces when a court is considering approval for 'special medical procedures'[17] for children and exercising what is often referred to as the 'welfare power'. The latter is analogous to, but more limited than, the *parens patriae* jurisdiction of superior courts.[18] Moreover, this issue has not been given any proper consideration by legislators in recent decades, despite parenting law reform having repeatedly been on the government's agenda.

As previously mentioned, Australian family courts have two relevant sources of power when making orders affecting children. Section 65D empowers the court to make 'such parenting order as it thinks proper' when determining a parenting order application. In addition to this jurisdiction, section 67ZC(1) gives the court power 'to make orders relating to the welfare of children'. As we shall see, these provisions are not co-extensive, though there is considerable overlap in the matters that can be dealt with under each source of power.

When a court steps in, usually at the behest of parents,[19] and makes a parenting order under section 65D to resolve an issue in dispute, the court stands in the shoes of the parents to exercise their parental responsibility.[20] This is precisely what a parenting order is – something that the parents would otherwise decide if they could agree. This has been reflected in the way the relevant provisions have been worded since the enactment of the *FLA* (which has undergone considerable amendment over that time). The current version of section 64B(1) says that a 'parenting order' must relate to the matters set out in section 64B(2). Section 64B(2) then lists the elements that one would normally expect to be encompassed by parental responsibility. However, the final paragraph in that section is very broadly worded, referring to 'any aspect of the care, *welfare* or development of the child or any other aspect of parental responsibility for a child'.[21] The *FLA* does not define 'parental authority', but it is no doubt a sub-set of 'parental responsibility'[22] (the term generally used in the *FLA*), which is defined in section 61B to be 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. On a plain reading of the current version of section 64B(2), it appears to extend the courts' jurisdiction beyond parental authority to *any* aspect

16 See above n 12.

17 See the discussion following as to what constitutes a special medical procedure.

18 *Marion's Case* (1992) 175 CLR 218; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 ('*MIMIA v B*').

19 Under Australian law, however, an application for a parenting order can be made by anyone concerned with the welfare of the child: *FLA* s 65C(c).

20 See John Seymour, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21(1) *Federal Law Review* 1, 15 ('The Role of the Family Court'). For a further discussion, see John Seymour, '*Parens Patriae* and Wardship Powers: Their Nature and Origins' (1994) 14(2) *Oxford Journal of Legal Studies* 159.

21 *FLA* s 64B(2)(i) (emphasis added).

22 Parental responsibility is undoubtedly wider in scope, as it encompasses obligations as well as authority.

of a child's welfare (that is, it appears to encompass a type of *parens patriae* jurisdiction).

However, there is a strong argument that this is not the correct interpretation of the breadth of section 64B(2). Historically, the provisions dealing with parenting orders did not include any reference to a child's 'welfare'. It was only in 1983, when the federal government gave the Family Court of Australia a *parens patriae* jurisdiction, that the term 'welfare' was included in what was then section 64(1) (which already dealt with parenting orders, at that time known as custody and guardianship).[23] Before 1983, there was no doubt the parenting order provisions as they stood at that time were limited to enabling the court to reorder parental authority.[24]

Thus, in 1992, Seymour argued that the Australian family courts' power to make *parenting orders* was limited to those matters within parental authority.[25] From a constitutional viewpoint, Seymour concluded that '[t]he nature and extent of the jurisdiction which the Family Court may exercise over the children of a marriage cannot be precisely defined. All that can be said is that it is broad, *but not unlimited*'.[26]

The addition of the word 'welfare' to section 64(1) at that time, Seymour concluded, extended the Court's jurisdiction such that the Court had two sources of power, which, while overlapping, were not co-extensive.[27] Unlike the power to make parenting orders, the *parens patriae* power was described in *Marion's Case* as having, in theory, no limits (though still having to be exercised in accordance with principle).[28]

Subsequently, and supporting Seymour's interpretation of the legislative intent, the welfare and parenting order powers were separated when part VII was significantly amended by the *Family Law (Reform) Act 1995* (Cth). Section 67ZC (the 'welfare power' provision) was introduced, making clear that this new section provided *additional* jurisdiction in respect of children beyond the making of parenting orders. Under this version of the provisions, the distinction between the parenting orders power and the welfare power was clear, with section 64B(2) defining a parenting order as one dealing with (emphasis added):

> (a) the person or persons with whom a child is to live;
>
> …
>
> (e) contact between a child and another person or other persons;
>
> (f) maintenance of a child; [and]
>
> …
>
> (i) any other aspect of *parental responsibility* for a child.

When Part VII was substantially rewritten in 2006, section 67ZC remained unchanged. The parenting order provisions, however, were altered to their current

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23 Seymour, 'The Role of the Family Court' (n 20), 11–12; Dorothy Kovacs, 'Proceedings in Relation to Children in the Post Cross-Vesting Era' (2000) 28(1) *Federal Law Review* 105, 111.

24 Seymour, 'The Role of the Family Court' (n 20), 11–12.

25 Ibid.

26 Ibid 7 (emphasis added).

27 *Marion's Case* (1992) 175 CLR 218, 235–6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

28 Ibid 258.

form, including to say that a parenting order may deal with 'any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child'.[29] Despite this rewording, there is no indication this was intended to extend the power to make parenting orders to include the full scope of the welfare power. Rather, as the Explanatory Memorandum makes clear, the redrafting of section 64B(2) was patently about clarifying the variety of parenting orders that can be made and the ability to make facilitative orders, with the aim that orders are framed appropriately and flexibly to avoid the need for parents to return to court.[30] Therefore, there is a strong argument that section 65D empowers the court to make orders about *any* matter within parental responsibility, as well as orders ancillary thereto. It is a long bow to draw to interpret the provision as, in effect, replicating the welfare power; if that were the intention, then section 67ZC could have been excised at that point.

If this is the case, then to determine a matter falling outside parental responsibility, the court *must* rely on its welfare power for jurisdiction, which clearly extends beyond the metes and bounds of parental responsibility. If a mature minor is competent to take a decision for him or herself, then that matter no longer falls within parental responsibility – in other words, the parent does not have the authority to take that decision on behalf of the child. Thus, the court cannot stand in the shoes of the parent and exercise parental responsibility under section 65D, but rather must utilise the welfare power if it wishes to override the competent minor's wishes.

However, does it matter which power is being relied upon? While the power to make parenting orders and the welfare power are both subject to the child's best interests, they are not co-extensive and serve different purposes. Thus, it is entirely possible that, even if the court has the power to override a competent child's wishes utilising the welfare power, the operation of the best interests principle may vary in that context. Before exploring what difference the source of power makes in respect of the exercise of discretion, it is instructive to consider the United Nations *Convention on the Rights of the Child* ('*CRC*'),[31] as it is so often relied upon as having informed these Australian provisions.

B United Nations *Convention on the Rights of the Child*

In relation to the question at hand, there are three important points to take from the *CRC*. First, article 3(1) states that a child's best interests shall be 'a' – not 'the' – primary consideration in 'all actions concerning children … [when] undertaken by … courts of law'. Second, article 12(1) states that children capable of forming their own views should be given the opportunity to express those views freely in all matters affecting them, their views to be given appropriate weight according to their age and maturity. Third, article 5 highlights that, while states parties should

29 *FLA* s 64B(2)(i).

30 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) 34, [173] <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr2494_ems_e0842726-37c3-4f68-bf72-b301d3aec897%22>.

31 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

respect parental obligations, rights and duties to provide 'direction and guidance in the exercise by the child' of their Convention rights, those parental rights, duties and obligations are to be exercised in a 'manner consistent with the *evolving capacities* of the child' (emphasis added).

When read together, these articles recognise that a best interests model does not dominate all decisions concerning children, and that due accord should be given to children's evolving capacity to decide for themselves matters that affect them.

However, like many similar jurisdictions, Australian family courts have been given the power to determine child-related disputes in a legal framework that dictates the best interests of the child as 'the' primary consideration in both parenting and welfare matters.[32] It is often said that this gives effect to the terms of the *CRC*, but this is not strictly accurate. The *FLA*'s formulation is important in the context of the question of children's autonomy, as it appears, at first blush, to provide a statutory basis for preferring a best interests approach over an autonomy-based one. The wording of the *FLA* appears to make the right of the child to take the decision *always subject to* the child's best interests, as determined by the court.

However, there is another way of viewing this. If, as is argued here, the power to make a parenting order is limited to matters *within* parental responsibility, then a mandatory best interests approach makes sense precisely because it will not affect the rights of competent mature minors to make decisions for themselves. That is, elevating the best interests of the child to *the* dominant consideration is appropriate when dealing with incompetent children; it would not be appropriate where a child is *Gillick*-competent, which is consistent with an interpretation of section 65D as only applying to matters within parental responsibility.

This interpretation is also supported by the historical context of the provisions. As noted above, the original version of the *FLA* had another relevant provision not found today, the then section 64(1)(b): '[W]here the child has attained the age of 14 years, the court shall not make an order under this Part contrary to the wishes of the child unless the court is satisfied that, by reason of special circumstances, it is necessary to do so'.

Thus, enshrining a child's best interests as 'the' paramount consideration in the making of a parenting order when the *FLA* was first enacted, was not intended to result in the views of mature minors being overridden, except in 'special circumstances'. As the provision concerning children over 14 did not survive beyond the 1983 amendments to the *FLA*, the scope of what might amount to 'special circumstances' was not well developed.[33] Three and a half decades ago, when the change occurred, the notion of special circumstances had a narrow focus. The Parliamentary Joint Select Committee on the Family Law Act, which

32 *FLA* ss 60CA, 67ZC(2).

33 See, eg, *In the Marriage of Todd [No 2]* (1976) 25 FLR 260, 267 where Watson J suggested 'real moral danger' might suffice; *In the Marriage of Schmidt* (1979) 28 ALR 84, 90 where the risk of the mother's sexuality was raised, with Evatt CJ finding that special circumstances would involve some risk to the child, either moral, physical or emotional; *In the Marriage of EJ and N Boman [No 2]* [1981] FamCA 63, [9] where the Court was of the view that expert advice against splitting of the care of children where they wished to live with different parents might amount to a special circumstance.

recommended the deletion of this sub-section, said that special circumstances required it being shown 'that the parent whom the child has chosen is positively unfit or incapable of exercising custody … or that the child's will has been overborne'.[34] The Committee had roughly equal numbers of submissions in favour of (a) reducing the age a child could decide; (b) increasing the age; (c) deleting the age-specific provision; and (d) not binding the court to the child's wishes alone. The evidence at that time led the Committee to conclude that the section as then drafted placed too much emphasis on the wishes of children 14 and over, and recommended that any provision dealing with the weight to be given to children's wishes should not make specific reference to any age.[35]

The result of deleting this section was that the mandatory best interests determinant thereafter appeared to apply to all children, regardless of age. Being a few years prior to the decision in *Gillick*, there was no detailed consideration of the limits of parental responsibility and the rights of mature minors to decide matters for themselves; however, that situation has since been clarified. Thus, it can be argued that an interpretation that limits the power to make parenting orders to matters within parental responsibility is consistent with the history of this legislation and the *CRC*, and clearly open on the wording of the statute.

Moreover, this interpretation is not undermined by the *FLA* requiring children's views be taken into account in determining their best interests[36] (though Australian family courts almost never elect to hear directly from children, as they might,[37] and so a child's views are almost invariably heard through the medium of a third party adult).[38] This is consistent with the *CRC* and appropriate regardless of a child's age.

However, as detailed below, the courts have taken the view in parenting matters – supported by the assumed statutory paramountcy of the child's best interests and the provision making children's views one 'consideration' amongst many others – that *no view* of a child can *ever* override a contrary decision based on their best interests. This is despite article 5 highlighting the importance of any decision-maker standing in the shoes of parents to factor in a child's decision-making *capacity*. While the *FLA* refers to a child's views, it is now silent on the specific matter of the child's *capacity* to decide matters for themselves; however, the case law fills the gap as it were, by ending parental authority when a child attains competency in relation to a matter.

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34 Joint Select Committee on the Family Law Act, *Family Law in Australia: Report of the Joint Select Committee on the Family Law Act* (Australian Government Publishing Service, 1980), [4.29].

35 Ibid [4.33]–[4.44].

36 *FLA* s 60CC(3)(a).

37 Michelle Fernando, 'Proposed Guidelines for Judges Meeting with Children in Family Law Proceedings' (2012) 2(4) *Family Law Review* 213; Michelle Fernando, 'What do Australian Family Law Judges Think About Meeting with Children?' (2012) 26(1) *Australian Journal of Family Law* 51; Robyn Fitzgerald and Anne Graham, 'The Changing Status of Children Within Family Law from Vision to Reality?' (2011) 20(2) *Griffith Law Review* 421.

38 Normally either a family consultant (a psychologist/social worker attached to the court who specialises in parenting matters) or an Independent Children's Lawyer (a best interests advocate appointed by a court for a child).

Thus, while the *CRC* recognises that a child's best interests are not the sole relevant consideration in deciding a matter about a child, and that parental authority should be exercised in a way consistent with a child's decision-making capacities, this is not directly reflected in the *FLA*. However, an interpretation that limits the power to make parenting orders to matters within parental responsibility remains open and consistent with the *CRC*. Let us consider further, then, how the court has interpreted the relevant sections of the *FLA*.

III *GILLICK* AND AUSTRALIAN FAMILY LAW

A The Decision and Its Australian Implementation

To consider further the legal rights of Australian children to decision-making autonomy, we must consider in more depth the well-known House of Lords case of *Gillick v West Norfolk and Wisbech Area Health Authority* ('*Gillick*').[39] This involved the question of whether doctors could prescribe contraceptives to minor (under the age of 16) young women, absent parental consent (whether due to a lack of knowledge on the part of the parent, or a parental objection). As the answer to the question turned on the ability of the child to consent to treatment, *Gillick* raised squarely the question of where parental authority ends. This oft-cited quote of Scarman LJ summarises the legal conclusion on this point: 'It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision'.[40]

That is, parental authority *ceases* in relation to 'the matter requiring decision' when a child achieves competency,[41] which may occur before a child turns 18. *Gillick* was largely adopted in Australia by the High Court, in what is known as *Marion's Case*.[42] Notably, *Gillick* places no limit on the nature of the 'matter' that a child might be competent to decide.

It is only when a child is *Gillick*-competent in relation to an issue that the question of whether parents or courts retain any decision-making authority on the matter arises. It follows that, if parents do not have authority to override a *Gillick*-competent child's decision on a matter, then there is no legal basis for them to seek a *parenting* order in relation to the matter and, arguably, equally no basis on which the court can make a parenting order. Of course, the question of whether a child has achieved *Gillick* competency is one that may be in dispute between parents and the child in question, and so requires court resolution.

Where both parents agree as to a child's *Gillick* competency to take a decision different from the decision they would make for the child (for example, to terminate a pregnancy), then in the normal course of events, one would not expect

39 [1986] AC 112.

40 Ibid 186.

41 Competency will be a matter of fact, based on the particular issue at hand, and the particular child – that is, does the child in question have sufficient intelligence and maturity to be able to understand the decision and its consequences?

42 *Marion's Case* (1992) 175 CLR 218.

a court to be involved. Moreover, if a *Gillick*-competent child and both parents agree on a decision (for example, to undertake a high-risk treatment for cancer), then it is hard to see any role for a court. However, Australian law recognises a category of 'special medical procedures' that lie outside parental authority. That is, a parent cannot make a decision about a special medical procedure on behalf of their child, competent or not. This was the central issue in *Marion's Case*, which considered whether parents had the authority to consent to the non-therapeutic sterilisation of their intellectually disabled daughter (who was patently not *Gillick*-competent). The High Court held that taking such a decision was *not* within parental authority, basing its conclusion on the following factors: (a) the non-therapeutic nature of the treatment; (b) the procedure involved major, invasive and irreversible surgery; (c) there was a significant risk of the parents making a wrong decision either as to the child's capacity to consent or whether it was in the child's best interests to have the surgery (in part because of a risk of a conflict of interest between child and parent(s)); and (d) the particularly grave consequences of a wrong decision given the procedure involved.

In such cases, and where a child is unquestionably not *Gillick*-competent, court authority for the procedure *must* be obtained, as this is a matter outside parental authority. The court has the power to make this decision not because of its power to make parenting orders (which I argue is limited to exercising parental authority), but under section 67ZC of the *FLA* – the so-called welfare power – which the High Court has said is analogous to, though more limited than, the *parens patriae* jurisdiction of superior courts. While section 67ZC does not bestow an unlimited jurisdiction in relation to children (and so could not be used to justify a family court ordering the removal of a child from detention), it clearly provides a broader jurisdiction than section 65D to deal with issues arising out of the relationship between children and their parents.[43]

An obvious example of another treatment that would fall within the classification of a special medical procedure (and thus require court authorisation) is the harvesting of an organ from a healthy, but incompetent, child to donate to a needy sibling ('sibling saviour' cases). Such an operation is not therapeutic, may involve a conflict of interest between a child and their parents, as well as being major with the chance of serious adverse consequences. However, over time Australian medical practitioners became concerned as to whether other treatments and procedures might be captured, and thus their potential liability if the parents were not legally entitled to consent on the child's behalf. As a result, applications for court consent have been brought in relation to treatments that are patently therapeutic.[44] The most common, and controversial, treatment considered by family courts has been for gender dysphoria. Initially the Family Court concluded

43 *MIMIA v B* (2004) 219 CLR 365, especially [51]–[53] (Gleeson CJ and McHugh J), [105] (Gummow, Hayne and Heydon JJ). Note the jurisdiction under part VII to make parenting orders and s 67ZC overlap: see *Re Z* (1996) 134 FLR 40, 45–60 (Nicholson CJ and Frederico J).

44 See, eg, *Baby D [No 2]* (2011) 258 FLR 290 (the removal of a tube from a baby's trachea); *Re Baby A* [2008] FamCA 417 (the administration of an unapproved drug to a baby with a fatal condition); *Re Sean and Russell (Special Medical Procedures)* (2010) 258 FLR 192 (gonadectomy on boy suffering from rare condition).

that any treatment for this condition required court authorisation (ie, it was a special medical procedure). Given that the treatment for gender dysphoria is therapeutic, this was challenged in the Full Family Court of Australia in *Re Jamie*.[45] As many noted,[46] the Full Court's decision in this case was problematic, as, while it recognised that Stage 2 treatment (which involves irreversible treatment) is therapeutic, the Court concluded that court authorisation was required if the child was not *Gillick*-competent.[47] In other words, it was a special medical procedure. Further, while the Full Court recognised that *Gillick*-competent children could consent to the treatment, it went on to hold that only the court could determine the child's *Gillick*-competency – even in circumstances where there was no parental or medical dispute as to competency. It was immediately difficult to see how this decision fitted within the test laid down by the High Court in *Marion's Case*, which is about *non-therapeutic* procedures[48] and says nothing about a necessity for court intervention to determine a child's competency when it is not in dispute.

Having been roundly criticised, the principles deriving from this decision were recently reviewed in a case stated to the Full Court: *Re Kelvin*.[49] The Full Court did not confirm its decision in *Re Jamie* and it is now clear that court authority is not required for Stage 2 treatment for a child who is agreed to be *Gillick*-competent, and nor is the court required to determine competency.[50]

However, *Re Jamie* and *Re Kelvin* raise interesting questions. First, these decisions are both limited to a situation where the parents and child are in agreement about the treatment.[51] Thus, despite comments as to the applicability of *Gillick*[52] and the importance of recognising the right of a child to provide their own, autonomous, consent, the Court in these cases suggested that if the parents do not agree with their *Gillick*-competent child or each other, then the matter should be determined by a court on the basis of the child's best interests.[53] This is contrary to

45 (2013) 278 FLR 155.

46 Lisa Young, 'Australia: Gender Identity Dysphoria Update and Developments in Property Settlement Law' in Bill Atkin (ed), *The International Survey of Family Law* (Jordan Publishing, 2014) 1, 5–7 ('Gender Identity Dysphoria'); Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28(1) *Australian Journal of Family Law* 83; Fiona Kelly, 'Australian Children Living with Gender Dysphoria: Does the Family Court Have a Role to Play?' (2014) 22(1) *Journal of Law and Medicine* 105; Felicity Bell, 'Children with Gender Dysphoria and the Jurisdiction of the Family Court' (2015) 38(2) *University of New South Wales Law Journal* 426. See also the comments of Bennett J in *Re Martin* [2015] FamCA 1189, [27]–[38]; *Re Harley* [2016] FamCA 334, [42] (Bennett J) on the correctness of the decision in *Re Jamie* (2013) 278 FLR 155.

47 Confusingly, Stage 1 treatment was held to be therapeutic and therefore not a special medical procedure.

48 Lisa Young et al, *Family Law in Australia* (LexisNexis Butterworths, 9th ed, 2016) [8.33].

49 (2017) 327 FLR 15.

50 However, the reasoning of the majority and minority are very different, with the minority making it crystal clear that in their view the Full Court misapplied *Marion's Case* and there is no scope for court authorisation of therapeutic treatments for *Gillick*-competent children. The majority decision seems to leave open the door for a court to find it has authority to decide a matter where the nature of the treatment is not proportionate to the therapeutic need: *Re Kelvin* [2017] FamCAFC 258, [133] (Thackray, Strickland and Murphy JJ).

51 *Re Jamie* (2013) 278 FLR 155, 184 [140]; *Re Kelvin* (2017) 327 FLR 15, 32–3 [116], 42 [167] (Thackray, Strickland and Murphy JJ), 45 [189] (Ainslie-Wallace and Ryan JJ).

52 *Re Jamie* (2013) 278 FLR 155, 183–4 [134]–[135] (Bryant CJ).

53 Ibid 184 [140] (Bryant CJ); *Re Kelvin* (2017) 327 FLR 15 [167] (Thackray, Strickland and Murphy JJ).

Gillick, which centred on the direct conflict between parents and their children as to treatment. Thus, gender dysphoria cases are significant because, despite recent case law, they continue to reflect a broader underlying failure by the courts to recognise and respect decisions of mature, competent minors, and fail to engage more deeply with the question of the right of mature minors to decision-making autonomy.

Second, when one compares decision-making in medical and parenting cases, one has to ask how it can be that a *Gillick*-competent child can decide whether they will undergo radical surgery to treat gender dysphoria, and yet another mature child's competency will not even be considered if the decision relates, for example, to where they wish to live or be schooled, or whether they wish to see a parent, including one who has abused them. The obvious, but inadequate, answer to this question is that medical treatment requires the consent of the patient, and so this is the focus in medical decision-making. However, all decision-making turns on consent. An adult will not be forced to live with or see another person against their will (ie, without their consent). So too, the question of a mature minor's capacity to decide a matter for themselves is at the heart of, and applies equally to, all areas of decision-making concerning a child.

Returning to the central question of power, we have seen that a matter may fall outside of parental authority because it is a special medical procedure *or* because the child is *Gillick*-competent in relation to the matter. Clearly, if there is a special medical procedure involved, then the welfare power should be invoked. Additionally, it is argued that section 67ZC should be invoked where the matter is not a special medical procedure, but involves a *Gillick*-competent child (as that competence ousts parental authority). This raises the question of whether the difference in power relied upon makes, or should make, a difference to the outcome. In particular, if it is accepted that a parent – and thus a court under section 65D – has no parental authority to override a *Gillick*-competent child's decision, does section 67ZC provide that power?

B Does Section 67ZC Give the Court Power to Override a Competent Child's Decision?

As noted above, the welfare power was added to the family courts' powers to make parenting orders in 1983.[54] The High Court in *Marion's Case* reiterated that the *parens patriae* power goes as far as is necessary to protect the *incompetent*:

> [I]t belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.[55]

This jurisdiction is for the protection of 'infants' and 'lunatics', and extends as far as is necessary for their protection and education, though must still be exercised 'in accordance with principle'.[56] Trowse has argued that where a child is *Gillick*-

54 Family Law Amendment Act 1983 (Cth).

55 *Marion's Case* (1992) 175 CLR 218, 258, quoting *Wellesley v Duke of Beaufort* (1827) 38 ER 236, 243 (Lord Eldon LC).

56 Ibid, citing *Wellesley v Wellesley* (1828) 4 ER 1078, 1083 (Lord Redesdale), 1085 (Lord Manners).

competent in relation to a matter, the *parens patriae* jurisdiction should not apply as the child is no longer in effect an infant in need of protection in relation to the matter at hand.[57] However, as Trowse acknowledges, the case law does not support this conclusion.[58]

As in other jurisdictions,[59] Australian case law supports the proposition that, utilising the *parens patriae* jurisdiction (and thus the welfare power under the *FLA*), the court can, if it chooses, override a competent child's decision.[60] Just as for parenting orders, the paramount consideration in making an order under section 67ZC is the child's best interests. So, a court might decide to override a competent child's decision because of the harm the child might suffer as a result of their decision: a competent child's determined path of self-destruction might be averted through a welfare order.[61] One can understand why the court adopts this position, despite it being paternalistic. If this is the current legal position in respect of the welfare power, and if (contrary to the argument put in this article) the family court *does* have the power to make parenting orders even where a child had achieved *Gillick* competency (ie, there is jurisdiction under section 65D), then one would expect the same principles would apply to the exercise of both sources of power.

When, then, will a court exercise its *parens patriae* power to override the decision of a competent minor? As Trowse highlights, courts rarely exercise this right of veto,[62] and where they do, they are all cases that involve serious risks to the child if an order overriding their wishes is not made. Conversely, the strongly held views of mature minors in parenting disputes – whether as to where they go to school or whether they see their parent during the remaining period of their minority (remembering this may not be long) – could hardly be said to fall in the same category as, for example, a situation where a child is refusing to eat or to accept life-saving surgery where the alternative is death. There would be a great many matters, therefore, that a child might decide that do not fall into a category where a court order is required to protect them from serious harm to themselves. And yet, as discussed further below, in such situations the Australian family courts never overtly determine the matter on the basis of the child's autonomous right to decide for themselves. Whereas overriding a competent child's decision in welfare matters is seen to be a choice of last resort, the same is not true in Australian parenting disputes. The question then becomes why courts are so willing to ignore competency in parenting matters. To consider this question, the article turns next to consider the case law to date on the relevance of *Gillick* competency to Australian parenting disputes.

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57 Trowse (n 15) 211.

58 Ibid 192, 196, 200, 202.

59 *South Glamorgan County Council v W and B* [1993] 1 FLR 574; *Re K, W and H (Minors) (Medical Treatment)* [1993] 1 FLR 854.

60 See the discussion in Trowse (n 15).

61 See Jane Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69(3) *The Modern Law Review* 299.

62 Trowse (n 15) 198–9. Trowse notes that often the courts have expressed doubt as to competency, or relied on legislation in support of the veto.

C The Application of the *Gillick* Principle in Parenting Proceedings

A search of the main Australian database of family court decisions using the search term 'Gillick'[63] reveals how rare it is for the family courts to consider *Gillick* competency outside of special medical procedure applications.[64] It seems that because the notion of *Gillick* competency was developed in the context of medical treatment, the Family Court has routinely, and incorrectly, approached the principle as if it only applies in such cases. In *P v P*,[65] the Full Court of the Family Court was considering the role of Independent Children's Lawyers[66] and said that '[s]o far as sterilisation and other *parens patriae* cases are concerned … [a] primary duty is to establish whether the child in question is "*Gillick* competent" … because neither the parent nor the separate representative can consent to the procedure if the child is not'.[67] More directly,[68] in *Vale & Vale [No 3]*,[69] a case essentially about interim parenting arrangements, Hogan J said

> [t]he mother … asserted that the children were 'headed towards' *Gillick* competence. I do not accept … that there is any place in these parenting proceedings for the application of *Gillick* competence, which, broadly speaking, relates to the capacity of a child to make an informed decision about medical procedures.[70]

Given the absence of discussion of *Gillick* in parenting judgments involving mature minors, Hogan J's view is likely widespread amongst the judiciary. No doubt this approach derives, in part, from simply following early Full Court statements emphasising that the best interests of a child *always* override the child's wishes, regardless of the child's competency. In the 1995 case of *In Marriage of*

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63 On 23 August 2018, the site austlii.edu.au was used to search case law of the courts identified below in n 63 using the search term 'Gillick'.

64 Federal Circuit Court: *Ho-Yuan Chien v Minister for Immigration and Citizenship* [2013] FCAFC 124 (decision concerning whether a child should be joined to an application by his father to revoke citizenship of a child allegedly obtained by fraud); *Oldham & Avis* (2017) 321 FLR 265 (same-sex de facto property dispute where Harman J made an incidental reference to *Gillick*). Family Court of Western Australia: one gender dysphoria case. Federal Magistrates Court (Family Law) (the court preceding the Federal Circuit Court): four decisions, three of which were by the same judge who routinely footnotes *Gillick* when discussing children's wishes, and one decision concerning a question of jurisdiction in relation to the making of a parenting order in favour of a third party. Family Court of Australia: 120 decisions, most of which involved medical decisions (the vast bulk of those being recent applications about competency in gender dysphoria cases) and some other cases either involving medical procedures or where general references are made to the *Gillick* principle, with no consideration of the *Gillick* competency of a child the subject of the parenting proceedings (however, in *Bondelmonte & Bondelmonte* (2016) 259 CLR 662, the Court did consider the *Gillick* competency of two children in relation to the appointment of a case guardian). Full Family Court of Australia: four decisions, three about gender dysphoria treatment and one mention in relation to a child's capacity to consent to parentage testing. High Court of Australia: seven cases, none of which involved a parenting dispute and the question of a child's competency. See also above n 12 regarding parenting decisions involving very mature minors.

65 (1995) 126 FLR 245.

66 Court-appointed lawyers who advocate for the child's best interests: *FLA* pt VII div 10.

67 *P v P* (1995) 126 FLR 245, 280.

68 See also *Grollo & Bilson [No 2]* [2017] FamCA 440, [92] where Cronin J speaks as if *Gillick* applies only to medical decision-making.

69 [2016] FamCA 626.

70 Ibid [71]. See also the comment of Cronin J, discussed below at Part III(D), suggesting *Gillick* only relates to medical matters in *Oakshott & Fraser* [2017] FamCA 124, [14].

Harrison and Woollard,[71] the Full Court said, after referring to *Gillick* as a useful 'analogy':

> [W]here a court is concerned with the welfare of a child *no question of 'self-determination' by a mature child can arise*. In the ultimate, whether by a statute or at common law, whilst the wishes of children are important and should be given real and not token weight the court is still required to determine the matter in the child's best interests and that may in some circumstances involve the rejection of the wishes of the child.[72]

This conclusion was reached because the Full Court held that *Gillick* is a principle directed only at 'parental rights … and [does] not have the same direct application when the question is the application by a court of its welfare or best interests jurisdiction'.[73] However, their Honours did not explore the extent to which parental authority, or a child's competency (as discussed in *Gillick* and *Marion's Case*), was relevant to jurisdiction. Moreover, *Marion's Case* squarely considered the jurisdiction of the court where a parent lacks the authority to decide a parenting matter in respect of a child. *Marion's Case* concerned a child who was not *Gillick*-competent, but that does not mean the principles are to be ignored where a child is competent, particularly as the High Court endorsed *Gillick* in reaching their decision and *Gillick* directly addressed the question of the effect of a minor's competency on parental authority. It was thus directed towards both competent and incompetent minors.

Superior Australian case law (which long precedes Hogan J's statement about the application of *Gillick* to parenting orders) also confirms that the implications of *Gillick* extend far beyond mere questions of parental rights, and beyond the confines of parental decision-making: *Gillick* is a decision of general application to the question of a mature minor's competency to take decisions for themselves. In *Re Woolley; Ex parte M276/2003*,[74] Gleeson CJ recognised that a person under 18 could be *Gillick*-competent and thus able to request removal from Australia (independent of any parental view) under section 198 of the *Migration Act 1958* (Cth) ('*Migration Act*').[75] Relying on *Gillick*, the High Court further acknowledged the rights of mature minors to pursue their rights under the *Migration Act* in *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*.[76]

In *J v Lieschke*,[77] Wilson J further recognised the possibility of a *Gillick*-competent minor being able, independent of its parents, to arrange for representation in a neglect case. Indeed, the question of a minor's right to legal representation provides a perfect example of the broader application of the *Gillick* principle, as has been routinely recognised in other jurisdictions. Indeed, this has even been acknowledged in the Family Court. In *Bondelmonte & Bondelmonte*,[78] Watts J found that two boys aged 15 and 17 were *Gillick*-competent and thus

71 (1995) 126 FLR 159.
72 Ibid 173 (Fogarty and Kay JJ) (emphasis added).
73 Ibid 172.
74 (2004) 225 CLR 1.
75 Ibid 15–16, [30] (Gleeson CJ).
76 (2004) 210 ALR 190, 208 [72] (Kirby J).
77 (1987) 162 CLR 447, 452.
78 (2016) 259 CLR 662, 667–9 [6]–[16] (Kiefel, Bell, Keane, Nettle and Gordon JJ).

capable of instructing a lawyer on their own behalves (as opposed to relying on a case guardian). His Honour noted the significant difference of instructing their own lawyer as opposed to the best interests representation that an Independent Children's Lawyer[79] would provide.[80]

Thus, the suggestion (or perhaps implicit presumption) that *Gillick* is somehow limited to medical matters is patently not correct. Indeed, there has been some limited obiter mention of the possibility of *Gillick* operating in parenting disputes. In *AMS v AIF*,[81] Kirby J noted the following, citing *Gillick* as a footnote:

> Although some criticisms of the terms of the injunction were raised during argument, such as the indefinite duration of the order, the mother advanced no challenge on such grounds accepting that, if the circumstances changed, she could seek variation and that the order would cease when the child reached eighteen years or, possibly, sufficient maturity to make decisions for himself.[82]

In the 2004 case of *W & G*,[83] Carmody J said the following:

> [P]arental authority over a child wanes as he or she grows older and marches inexorably towards majority. … In *Re W (a Minor)* Lord Donaldson MR observed that a decision by a child who has sufficient capacity to come to a conclusion on a particular matter affecting him or herself must be respected by a child's parent whether they agree with it or not even if it is irrational or unreasonable. … Accordingly, subject to the best interest principle and the court's supervisory jurisdiction, a child may choose who to have contact with, notwithstanding parental opposition, wherever he or she has sufficient maturity, understanding and intelligence to make a decision on that matter.[84]

While Carmody J was clear the child's autonomy was not absolute, neither he nor Kirby J analysed in any detail the implications of a child's competency.[85]

The relevance of *Gillick* beyond medical matters, and in parenting disputes in particular, is evident in the case law of both the United Kingdom ('UK') and

79 For a discussion of the appointment of Independent Children's Lawyers in family law matters, see Young, 'Gender Identity Dysphoria' (n 46) [8.75] ff.

80 In fact, as the application for the children to intervene was dependent on their uncle's application to be appointed their case guardian, and as that latter application failed, the boys were not independently represented in later proceedings.

81 (1999) 199 CLR 160.

82 Ibid 203–4 [135]

83 [2004] FamCA 427.

84 Ibid [112], [114], [116] (citations omitted). The case involved an application concerning revealing to a child their biological father's identity as a precursor to contact.

85 For a case where the trial judge apparently discharged orders in relation to two very mature minors who did not wish to see their father, thus leaving them to make the choice, see *P and L* [2006] FamCA 947. It is not clear from the Full Court's references to the trial decision whether any mention was made of *Gillick*.

Canada.[86] For example, in the UK decision of *Mabon v Mabon*,[87] there were six children, all of whom had intervened in a parenting dispute via a case guardian. However, the three eldest children (aged 17, 15 and 13) later sought to be independently represented. They successfully appealed the trial judge's refusal to permit this, with the Court of Appeal finding that this paternalistic approach of the lower court failed to recognise their competency and autonomy.

Herring has noted that, in the UK, the state of the law is that a parenting order is unlikely to be made against the wishes of a competent child, though it is open for the court to do so if the child's welfare demands it due to *exceptional* circumstances, usually involving the child's protection.[88]

In Canada, the question of a child's *Gillick* competency has been discussed in relation to a parent accessing private information in relation to their child,[89] and in the context of children being legally represented.[90] Justice Kerans, in the leading case of *JSC v Wren* ('*Wren*'),[91] summarised the impact of the adoption of *Gillick* in Canada on parental rights and judicial discretion thus:

> Parental rights (and obligations) clearly do exist and they do not wholly disappear until the age of majority. The modern law, however, is that the courts will exercise increasing restraint in that regard as a child grows to and through adolescence.[92]

Wren centred on the question of whether a 16-year-old girl could consent to an abortion despite her parents' objection; on appeal the girl's right to decide was upheld. As was noted in *MacKinnon v Harrison* this, in turn, raised the question of the court's role in preventing third parties from interfering with parent/al authority where a mature minor was acting without parental consent.[93] This confirms the broad significance of *Gillick* to issues of children's decision-making autonomy. *MacKinnon v Harrison* was in fact a parenting dispute involving a 15-year-old girl who was adamant that she wished to live with her mother and remain at her long-standing school. The Court questioned why the trial judge had not

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86 See, eg, *Re Roddy (A Child) (Identification: Restriction on Publication)* (2004) 2 FLR 950 (concerning a child's right to decide whether to waive her right to privacy and have personal matters about her published); *Green v Adams [No 2]* (2017) FLR 1423 (concerning a child's competency to give a witness statement in child support proceedings); *In re W (A Child) (Secure Accommodation Order)* [2016] 4 WLR 159 (concerning a child's competency to consent to a secure accommodation order under s 25 of the *Children Act 1989* (UK)); *Re LC (International Abduction: Child's Objection to Return)* [2013] EWCA Civ 1058 (concerning a child's right to determine their habitual residence). For the United Kingdom ('UK') in relation to parenting disputes, see, eg, *O (A Child)* [2012] EWCA Civ 1576 (where it was accepted there would be parenting disputes where it may be appropriate for a *Gillick*-competent child to intervene with their own representation); *Re PC (Change of Surname)* (1997) 2 FLR 730 (obiter comment about the rights of competent children to determine their own name).

87 (2005) 2 FLR 1011.

88 Jonathan Herring, *Family Law* (Pearson Education, 3rd ed, 2007) 463.

89 *Reviews 3353 & H0307 of Orders F2005–017 & H2005–001* (Office of the Information and Privacy Commissioner of Alberta, Commissioner Work, 19 June 2006) <https://www.oipc.ab.ca/media/124882/F2005-017_H2005-001Order.pdf>.

90 Gareau v Superintendent of Family and Child Services for British Columbia (1986) 5 BCLR (2d) 352.

91 (1987) 35 DLR (4th) 419.

92 Ibid [13].

93 2011 ABCA 283, [16] (Conrad JA for the Court).

assessed the child's capacity to make her own decisions.[94] Interestingly, the Court went on to say:

> In our view, this is a case where the court should have exercised restraint in ordering this child to a different school and a different home. Surely if a court can exercise restraint in dealing with a 16-year-old girl in a case with a more serious personal issue as existed in *Wren*, then it should exercise restraint on the facts and circumstances of this case. Moreover, in *Wren* both parents were in agreement as to what should occur and the court still refused to enforce their wishes. In this case, the mother supports the daughter's position, and does not want her sent away for her final two years of high school. … Just as AT is old enough to make decisions about her home and school, she is also old enough to make decisions about when and where to see her father.[95]

The Supreme Court of Canada in *AC v Manitoba (Director of Child and Family Services)*[96] (a case about medical decision-making) went to some lengths to consider the implications of *Gillick* and subsequent UK case law to adolescent decision-making:

> [N]one of these cases asserted that a 'mature minor' should be treated as an adult for all decisional treatment purposes … a child's '*Gillick* competence' or 'mature minor' status at common law will not necessarily prevent the court from overriding that child's wishes in situations where the child's life is threatened. In such cases, the court may exercise its *parens patriae* jurisdiction to authorize treatment based on an assessment of what would be most conducive to the child's welfare, with the child's views carrying increasing weight in the analysis as his or her maturity increases. … What is clear from the above survey of Canadian and international jurisprudence is that while courts have readily embraced the concept of granting adolescents a degree of autonomy that is reflective of their evolving maturity, they have generally not seen the 'mature minor' doctrine as dictating guaranteed outcomes, particularly where the consequences for the young person are catastrophic.[97]

This international jurisprudence both confirms the relevance of *Gillick* generally (and beyond medical matters), as well reiterating that caution should be exercised in overriding a *Gillick*-competent child's wishes, including in parenting disputes.

D Should the Court Override the Wishes of a *Gillick*-Competent Child in Parenting Proceedings?

The Australian reality, as shown above, is that *Gillick* is rarely, if ever, considered in parenting disputes, so naturally the question of the circumstances under which a *Gillick*-competent child's wishes should be overridden has not been considered. In the recent case of *Oakshott & Fraser*,[98] Cronin J noted that section 65D says that, in proceedings for a parenting order, the court may make such parenting order 'as it thinks *proper*' (emphasis added). His Honour said the following (the case concerned the time-sharing arrangements of care for a 10-year-old boy):

94 Ibid [18].
95 Ibid [19], [21].
96 [2009] 2 RCS 181.
97 Ibid [56], [69] (Abella J).
98 [2017] FamCA 124.

> Another consideration which arises out of the use in the Act of the word 'proper' is that the child is 10 years old so, although orders are intended to resolve conflict between parents for his childhood years, common sense dictates that as [sic] grows older and more mature, he will significantly influence (if not dictate) what times he will spend with the various adults regardless of court-ordered solutions. There is no better indication of that than in respect of medical issues … in the House of Lords decision in *Gillick* …[99]

Justice Cronin is suggesting that it may not be proper to make a parenting order for an older child. The terms of section 65D thus, arguably, invite the courts to consider *first* whether *any* order at all is proper. If no order is proper, because a child is *Gillick*-competent as to the matter in dispute, then that is the end of the matter. If an order is proper, then any such order must have the child's best interests as the paramount consideration.

Australian family courts have been grappling with a similar question in respect of property disputes. Section 79(2) of the *FLA* provides that the court 'shall not make … [a property division] … order … unless it is satisfied that, in all the circumstances, it is just and equitable to make the order'. The High Court has held that the first step of a court when considering an application for property settlement is to consider whether, given the existing property entitlements, it is just and equitable to make *any* property order at all,[100] before then going on to consider what order should be made. The terms of section 65D similarly suggest there is scope for an initial consideration of the making of parenting orders when dealing with a potentially *Gillick*-competent child who has a strong view on the matter (about them) that is in dispute. Even if a court has the power to make an order, and even if the statute requires the court to decide the matter on the basis of the child's best interests, the question becomes whether it is 'proper' to make an order that conflicts with a *Gillick*-competent child's views. In deciding when it will be proper to do that, it is instructive to consider whether there should be a different approach to this question in parenting matters from that adopted in other welfare matters and, if so, why. In other words, why would a test of exceptionality not apply to parenting disputes where a child is *Gillick*-competent, as is the case in the *parens patriae* jurisdiction?

Of course, if one adopted a purely child's rights-focused approach, then one might argue there is never justification for overriding the views of a competent child, no matter the consequences. Trowse has argued precisely this in relation to medical decisions.[101] Her arguments might be summarised in four parts: first, the *parens patriae* jurisdiction is inappropriately invoked in such cases, as the child is not incompetent having been found to be *Gillick*-competent (the jurisdiction question); second, having full legal competence, the balance between autonomy and respecting autonomy should favour autonomy (the rights argument, though not argued this way); third, as a result of the need to determine *Gillick* competence, these children will be better informed than most in terms of their understanding of the risks involved – to deny them autonomy is to require more of them than adults (the discrimination argument); and fourth, respecting a competent child's

99 Ibid [14].
100 *Stanford v Stanford* (2012) 247 CLR 108, 120 [37] (French CJ, Hayne, Kiefel and Bell JJ).
101 Trowse (n 15) 210–11.

autonomy is in the child's best interests in that the child is best placed to determine that (the best interests argument).

More recently, Daly has built a comprehensive case for what she calls a 'children's autonomy principle', which should

> in legal decisions in which the best interest of the child is the primary consideration, give children a right to choose – if they wish – how they are involved (process autonomy) and the outcome (outcome autonomy) unless it is likely that significant harm will arise from their wishes.[102]

This would, Daly argues, move the debate beyond a mere right to be heard within a best interests model, which deprives children of the right to make choices and achieve the ideal that all people should have the personal freedom to the fullest extent possible. Daly argues in favour of a concept that extends beyond competent children and creates a general presumption in favour of children's wishes; thus, her analysis at times accounts for factors that are not necessarily relevant where a child is competent (eg, the countervailing best interests of another child). Daly rightly critiques an approach limited to competence due to its indeterminacy;[103] autonomy can be avoided simply by finding a lack of competence. Daly also explores what might constitute 'significant harm' which would justify overriding the wishes of a child, suggesting the harm must be 'exceptional rather than … commonplace'[104] – though, again, her analysis is shaped by the fact she is looking at a broader category of children.

Alternatively, one could argue that the courts should show the same reluctance to override decisions of competent minors when making parenting orders as it does when making welfare orders about medical decisions and the like. That is, absent a risk of serious harm to a child, the competent child's views should be respected.

One almost does not need to spell out the attractions of the two different approaches. Respecting the decision-making autonomy of mature minors has its appeal, and thus its supporters, as does the approach that seeks to protect a determined minor from a path of self-destruction. It is not the purpose of this article to support either approach in particular, though this author prefers an approach that protects a child from serious harm. Certainly, though, the family courts should not ignore the implications of a child's *Gillick* competency in parenting matters; indeed, it is argued here the law does not permit them to do so. The failure to consider *Gillick* competency in parenting disputes seriously compromises children's rights. The mere fact that Australia has no human rights legislation and the Full Court has said that children's rights are not enforceable under the *FLA*[105] is no reason to ride roughshod over children's rights of autonomous decision-making.

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102 Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, 2018) 434 (emphasis omitted).

103 Ibid 147 ff.

104 Ibid 368, quoting *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, 2064 [51] (Hedley J).

105 *In Marriage of B* (1997) 140 FLR 11, 89.

IV THE WAY FORWARD: RECOGNISING CHILDREN'S RIGHTS

The Family Court's failure to grapple with the significance of *Gillick* to matters other than medical decisions is out of step with other jurisdictions and is problematic given the clear state of Australian law on *Gillick* competency. This is implicitly recognised at times, but not fully explored in family law jurisprudence. In relation to possible legislative change in this regard, the Australian Law Reform Commission recently engaged in a significant exercise of reviewing family law generally, and the terms of reference permitted consideration of this issue. However, neither the Discussion Paper nor the Final Report mentioned *Gillick*,[106] and in discussing section 67ZC referred only to the question of medical decision-making. As for development of the case law, the Full Family Court of Australia has been exhorted by the High Court to develop legitimate guidelines to aid with the exercise of discretion,[107] and this is an avenue for providing some structure in this area.

Before turning to the process the courts should adopt, and the wider implications of this article, it is worth pausing to consider the circumstances that have might have given rise to the need to consider this particular issue more closely in recent times. Two factors may have increased the likelihood of cases involving mature minors with strong views reaching court. The first is the dramatic rise in litigants in person in family courts over recent decades. Lawyers may well be inclined to encourage litigants in such cases who are arguing against the wishes of very mature minors to concede the point, predicting the court (even if it does not apply *Gillick*) will place considerable weight on the child's views; a self-represented litigant may be more likely to proceed in the absence of legal counsel. In combination with the increase in self-representation is the shift in part VII to focusing on the importance of parent/child relationships through the primary considerations.[108] So, where a child is refusing contact with a violent parent, as in *Downey*, that parent (particularly if self-represented) may have a view that the *FLA* enshrines some principle that promotes contact at all costs. It is well documented that the shared parenting changes to part VII led to considerable misunderstanding,[109] and this may have generated a sense of parental entitlement to contact. Thus, it is possible that these factors, to some extent in combination, have resulted in cases getting to trial that might not have in the past. Again, this

106 Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, October 2018) <https://www.alrc.gov.au/sites/default/files/dp86_review_of_the_family_law_system_4.pdf>; Australian Family Law Reform Commission, *Family Law for the Future: An Inquiry into Family Law* (ALRC Report No 135, March 2019) <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_report_135.pdf>.

107 *Norbis v Norbis* (1986) 161 CLR 513, 520, 523–4 (Mason and Deane JJ), 533–4 (Wilson and Dawson JJ), 536–9 (Brennan J).

108 *FLA* s 60CC(2).

109 See Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009); Richard Chisholm, *Family Courts Violence Review* (Report, 27 November 2009); Belinda Fehlberg, Christine Millward and Monica Campo, 'Shared Post-Separation Parenting: Pathways and Outcomes for Parents' (2011) 86(1) *Family Matters* 33.

may have contributed to the lack of developed jurisprudence in this area as, in the past, cases of this type were extremely uncommon, and they are still not routine.

Given the small numbers of such cases, one might question whether it matters that a best interests test is used in favour of recognising the autonomy of mature children. Indeed, when this article was first presented at the 7th World Congress on Family Law and Children's Rights,[110] a judicial officer in the audience asked that very question, noting that the decisions in *Roda* and *Downey* were right in the end – so what did it matter? Ironically, Baroness Hale had opened that same Congress with a paper titled 'Are Children Human?', complaining about a legal failure, including by judges, to see children as 'real human beings'.[111] In addition to the obvious rights-based response to the judge's question, one might turn the query on its head: what is the problem with recognising the right of mature minors to decide matters for themselves in parenting cases? After all, the 'children' in *Downey* and *Roda* 'got it right' too.

This article argues that the correct approach for courts when faced with such a case is first to determine competency, and second to determine whether it is proper to make an order. If an order is appropriate that is contrary to a competent child's wishes, that decision should be based on a determination that adopting the child's views would pose a serious risk of harm to the child. If that threshold is not met, then the child's views should be endorsed. If there is a sufficiently serious risk of harm to the child, then the matter must be decided based on the court's view of what best serves the interests of the child. Further, in the absence of any additional statutory direction on this point, this should be the subject of a legitimate guideline. That is, courts would have to apply this guideline, unless they were able to justify on the particular facts of the case why it was appropriate not to do so.[112] If this occurred, from a pragmatic point of view the likelihood of a court respecting a mature minor's right to take a decision – particularly where the decision would not expose the child to a risk of harm – could reduce litigation. In that sense, an uncertain best interests decision, requiring more extensive evidence, could be narrowed to a consideration of a child's competency, which may be easier to resolve pre-trial.

At a more fundamental level, recognising the decision-making rights of mature minors advances the larger project of ensuring that children's rights in parenting proceedings are accorded appropriate status. Over recent decades, we have seen reforms in both process and substance that have ameliorated an historical failure of the family law legal system in this regard, not the least of which was the inclusion of section 60B(4), stating that one of the objects of part VII is to give effect to the *CRC*. To take one other obvious example, there is the (relatively recent) inclusion of a specific provision in the *FLA* requiring the court, in making a parenting order, to take account of a child's right to enjoy their indigenous culture: section 60CC(3)(h). Having said this, there remain areas where criticism

110 Held in Dublin, 4–7 June 2017.

111 Fiona Gartland, 'Court Chief Criticises Judgments Noting Children as "Soulless Initials"' *The Irish Times* (online, 5 June 2017) <https://www.irishtimes.com/news/crime-and-law/court-chief-criticises-judgments-noting-children-as-soulless-initials-1.3108429>.

112 *Hoffman v Hoffman* (2014) 51 Fam LR 568.

continues: as noted above, there is the reticence of judicial officers to speak directly with children, and the question of whether *Gillick*-competent children undergoing treatment for gender dysphoria lose their autonomy to consent where their parents disagree with the treatment (which rather undermines the point of being competent).

As Baroness Hale's paper attests, we arguably have a long way to go before we could claim that we do treat children as fully human in parenting matters. The failure to recognise the decision-making autonomy of mature, competent minors in parenting matters is a significant violation of children's rights. Conversely, a recognition of competency (which would be a radical change from the current state of affairs) has the potential to recast the way Australian family courts engage with disputes involving children more generally, requiring a deeper appreciation of children's rights. At the very least, therefore, this article argues that judicial officers have lost their way legally on this point; at its highest, this article suggests that reconsidering this matter may open the door for a more fundamental shift in the way family courts facilitate the advancement of the rights of children.