

## RETHINKING *RE KELVIN*: A CHILDREN'S RIGHTS PERSPECTIVE ON THE 'GREATEST ADVANCEMENT IN TRANSGENDER RIGHTS' FOR AUSTRALIAN CHILDREN

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*Australia was, until recently, the only country in the world in which court authorisation was required for the medical treatment of children diagnosed with gender dysphoria. The decision of the Full Court of the Family Court of Australia in *Re Kelvin* (2017) 351 ALR 329 swung the pendulum of decision-making authority for transgender children's medical treatment from the Family Court back to the child and the child's parents and treating medical practitioners. The *Re Kelvin* decision was touted a victory for transgender children's rights. This article re-reads the Full Court's judgment from a children's rights perspective. It argues that the Full Court was not concerned with the rights of transgender children at all. Rather, transgender children benefit incidentally from the Full Court's decision, which was about the extent to which the Family Court should encroach upon parents' responsibility to make medical treatment decisions for their children, consistently with the latest developments in medical science.*

### I INTRODUCTION

Until the decision of the Full Court of the Family Court of Australia in *Re Kelvin*,<sup>1</sup> Australia was the only country in the world in which court authorisation was required for the medical treatment of children and young people diagnosed with gender dysphoria.<sup>2</sup> Gender dysphoria involves a person experiencing a conflict or dissonance between their self-perception of being female or male and

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1 (2017) 351 ALR 329.

2 Jacqueline K Hewitt et al, 'Hormone Treatment of Gender Identity Dysphoria in a Cohort of Children and Adolescents' (2012) 196(9) *Medical Journal of Australia* 578, 578. In this article, the terms 'child' and 'children' are used, rather than the composite phrases 'child or young person' and 'children and young people', save for where the semantic distinction is significant.

their birth sex.<sup>3</sup> The Family Court of Australia has acknowledged that the diagnosis of children with gender dysphoria in Australia has grown significantly over the past 15 years.<sup>4</sup> Gender dysphoria in children manifests in various ways, including '[a] strong desire to be of the other gender or an insistence that one is the other gender', '[a] strong dislike of one's sexual anatomy' and '[a] strong desire for the physical sex characteristics that match one's experienced gender'.<sup>5</sup> In simpler terms, children with gender dysphoria feel 'trapped' inside the wrong body.<sup>6</sup> Not all individuals who identify as transgender will exhibit gender dysphoria.<sup>7</sup> Diagnosis currently is governed by the fifth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*.<sup>8</sup> The accepted medical treatment for gender dysphoria in children occurs in two stages: the first stage is the administration of 'blockers', or puberty-suppressant hormones; the second stage is the administration of either testosterone or oestrogen, to facilitate the child's transition to the opposite sex.<sup>9</sup>

In a judgment delivered in November 2017 in the case of *Re Kelvin*,<sup>10</sup> the Full Court of the Family Court of Australia held that where a child diagnosed with gender dysphoria consents to stage two treatment, the child's treating medical practitioners agree that the child is competent to give informed consent to that treatment (that is, the child is *Gillick* competent),<sup>11</sup> and the child's parents do not object to the treatment, then the Family Court need not determine the child's competence to consent.<sup>12</sup> The decision of the Full Court in *Re Kelvin* 'sw[un]g the pendulum of decision-making authority for transgender children's medical treatment from the Family Court back to the child, the child's parents and the child's treating doctors'.<sup>13</sup> The decision was touted, as the title of this article

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3 Fiona Kelly, 'Treating the Transgendered Child: The Full Court's Decision in *Re Jamie*' (2014) 28(1) *Australian Journal of Family Law* 83, 83 ('Treating the Transgendered Child').

4 See, eg, *Re Lucas* [2016] FamCA 1129, [3] (Tree J); *Re Jamie* (2013) 278 FLR 155, 177 [99] (Bryant CJ); *Re Brodie (Special Medical Procedures)* [2008] FamCA 334, [230] (Carter J).

5 'What is Gender Dysphoria?', *American Psychiatric Association* (Web Page)

<<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>>.

6 See, eg, *Re Alex* (2004) 180 FLR 89, 105–6 [97] (Nicholson CJ); *Re Alex* (2009) 248 FLR 312, 315–16 [14] (Bryant CJ); *Re O (Special Medical Procedure)* [2010] FamCA 1153, [62] (Dessau J).

7 Timothy F Murphy, 'Adolescents and Body Modification for Gender Identity Expression' (2019) 27(4) *Medical Law Review* 623, 624.

8 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Association Publishing, 5<sup>th</sup> ed, 2013).

9 World Professional Association for Transgender Health, 'Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People' (Clinical Guidelines, 7<sup>th</sup> version, 2007) 18.

10 (2017) 351 ALR 329.

11 Deriving from the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ('*Gillick*').

12 *Re Kelvin* (2017) 351 ALR 329, 357–8 [177]–[184] (Thackray, Strickland and Murphy JJ), 366–7 [226] (Ainslie-Wallace and Ryan JJ).

13 Georgina Dimopoulos, 'Embracing Children's Right to Decisional Privacy in Proceedings under the *Family Law Act 1975* (Cth): In Children's Best Interests or a Source of Conflict?' in Shazia Nasir (ed), *RAIS Conference Proceedings: The 11<sup>th</sup> International RAIS Conference on Social Sciences* (Research Association for Interdisciplinary Studies, 2018) 129, 134–5 ('Embracing Children's Right to Decisional Privacy').

indicates, 'the greatest advancement in transgender rights for children and adolescents in Australia'.<sup>14</sup>

This article argues that, when analysed from a children's rights perspective, the Full Court was not concerned with the rights of transgender children at all. Rather, the *Re Kelvin* decision was about the extent to which the Family Court should encroach on parents' ability and responsibility to make medical treatment decisions for and on behalf of their children, consistently with the latest developments in medical science. It is argued that transgender children benefit only incidentally from the Full Court's decision, as respect for their rights is contingent upon agreement between their parents and treating medical professionals to the proposed medical treatment.

Part II contextualises the *Re Kelvin* decision, by presenting an overview of the welfare jurisdiction under section 67ZC of the *Family Law Act 1975* (Cth) ('*Family Law Act*'), and its exercise by the Family Court of Australia to authorise special medical procedures for children diagnosed with gender dysphoria. Part III offers a brief history of the *Re Kelvin* proceedings. Part IV explains the relevance and significance of children's rights to Australian family law decision-making. It articulates a children's rights approach to re-reading the Full Court's judgment, which is premised upon an interest theory of rights and buttressed by the legal and normative framework of the United Nations *Convention on the Rights of the Child 1989* ('*UNCRC*').<sup>15</sup> Part V applies the children's rights approach to expose three features of the *Re Kelvin* judgment that it is argued do not demonstrate an appreciation of, or respect for, transgender children's rights. The first is the 'invisible' rights approach that the Full Court adopted, through its emphasis on parental rights, and the noteworthy absence of any consideration of the rights of Kelvin or transgender children more broadly. Second, the judgment in *Re Kelvin*

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14 See "'Kelvin' Family Court Announcement', *The Royal Children's Hospital Melbourne* (Blog Post, 30 November 2017) <<https://blogs.rch.org.au/news/2017/11/30/kelvin-family-court-announcement/>>; @RCHMelbourne (Royal Children's Hospital Melbourne) (Twitter, 30 November 2017, 2:38pm AEST) <<https://mobile.twitter.com/rchmelbourne/status/936077045376753665>>. In support of the view that the Full Court's decision in *Re Kelvin* was a victory for transgender children's rights, see also 'Commission Welcomes *Re Kelvin* Decision', *Australian Human Rights Commission* (Web Page, 30 November 2017) <<https://humanrights.gov.au/about/news/commission-welcomes-re-kelvin-decision/>> ('This decision will improve human rights protection for young transgender people in Australia' and 'recognises [Australia's] obligations to protect and promote children's rights to health, non-discrimination, the preservation of their identity and to participate in decisions that affect them'); Kym Fraser and Matt Condello, 'Victory for Transgender Children in Recent Family Court Decision', *Clayton Utz* (Web Page, 7 December 2017) <<https://www.claytonutz.com/knowledge/2017/december/victory-for-transgender-children-in-recent-family-court-decision/>> (describing the *Re Kelvin* decision as 'a watershed moment for transgender rights' and a 'big step forward for trans rights in Australia'); Sharon Feldman and Tom Dreyfus, 'Whose Consent Is It Anyway? A Transgender Child's Right to Transition' (2017) 3 *Voices in Bioethics* ('Kelvin's case marks a significant step forward for the rights of transgender children and their parents in Australia'); Greg McAllister, 'Gender Dysphoria in Australia: The Judicial Response in *Re Kelvin*' (2018) 145 *Precedent* 40, 43 ('The decision in *Kelvin* has been welcomed by transgender and children's advocates, who believe it "will improve human rights protection for young transgender people" ... in Australia' (citations omitted)). Cf Stuart Lindsay, 'The Family Court Has Failed Gender-Dysphoric Children' (2018) 62(5) *Quadrant* 32.

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

was one written by adults, for adults. The Full Court did not embrace the potential to advance the rights of transgender children by writing a judgment *for* them, to explain the significance of the decision. The third feature is the majority's statement regarding the need for court authorisation in circumstances of 'genuine dispute or controversy' about whether medical treatment should be administered.<sup>16</sup> The children's rights perspective presented in this article provides an opportunity to rethink the alleged strides that the Full Court of the Family Court in *Re Kelvin* made in championing the rights of children diagnosed with gender dysphoria.

## II THE FAMILY COURT'S INCREASING INVOLVEMENT IN MEDICAL TREATMENT DECISION-MAKING FOR CHILDREN

Section 67ZC of the *Family Law Act* provides the legislative basis for the Family Court of Australia to grant or refuse permission for what have come to be known as 'special medical procedures'. This Part explains the Family Court's welfare jurisdiction under section 67ZC and traces the extension of that jurisdiction to medical treatment for childhood gender dysphoria.

### A The Welfare Jurisdiction under Section 67ZC of the *Family Law Act*

Part VII of the *Family Law Act* deals with children's matters, including the making of parenting orders and orders relating to the welfare of children. It recognises the primacy of the parental role in relation to children's best interests,<sup>17</sup> and embraces the assumption that 'parents are empowered at law to make decisions for the protection and benefit of the child'.<sup>18</sup> Part VII bestows parents with a 'bundle of rights',<sup>19</sup> defined in the *Family Law Act* as 'parental responsibility': 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.<sup>20</sup> Subject to any court order in force,<sup>21</sup> parental responsibility is assigned to each of the child's parents and persists until the child turns 18 years of age.<sup>22</sup> Consent to a child's medical treatment is a matter that generally lies within the bounds of parental responsibility. However, 'special medical procedures'<sup>23</sup> fall beyond that responsibility, and must be authorised by

16 *Re Kelvin* (2017) 351 ALR 329, 355 [167] (Thackray, Strickland and Murphy JJ).

17 Jane Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 3<sup>rd</sup> ed, 2009) 22, 321, 739–40 ('*Children's Rights*'); Gerald Dworkin, 'Consent, Representation, and Proxy Consent' in Willard Gaylin and Ruth Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent* (Plenum Press, 1982) 191, 204.

18 *Re Tahlia* [2017] FamCA 715, [35] (Bennett J).

19 *Re Lucy (Gender Dysphoria)* (2013) 286 FLR 327, 344 [82] (Murphy J).

20 *Family Law Act 1975* (Cth) s 61B.

21 *Ibid* s 61C(3).

22 *Ibid* s 61C(1). Parental responsibility 'has effect despite any changes in the nature of the relationships of the child's parents', such as through separation or re-partnering: at s 61C(2).

23 The term 'special medical procedure' does not have a settled meaning or legislative definition. That term was not used in the judgment of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 ('*Marion's Case*'), discussed in Part II(B) below, and it is not a term used in the *Family Law Act 1975* (Cth). In *Re Jamie* (2013) 278 FLR 155, Finn J expressed reservations about 'the usefulness of the expression "special medical procedure"' and

the Family Court pursuant to its welfare jurisdiction under section 67ZC of the *Family Law Act*. Sub-section (1) provides that, '[i]n addition to the jurisdiction that a court has under ... Part [VII] in relation to children, the court also has jurisdiction to make orders relating to the welfare of children'.<sup>24</sup> Sub-section (2) provides that, in deciding whether to make such an order, the court 'must regard the best interests of the child as the paramount consideration'.<sup>25</sup>

Akin (but not confined) to the historical *parens patriae* jurisdiction,<sup>26</sup> the welfare jurisdiction under section 67ZC of the *Family Law Act* has been concerned with identifying risks, preventing harm, and 'safeguarding children including ... where decisions are sought to be made by loving and caring parents'.<sup>27</sup> Australian judges have described the welfare jurisdiction variously as 'designed to protect against risk' and not 'to supervise parents and guardians in the exercise of their rights and responsibilities';<sup>28</sup> yet also as 'essentially supervisory of parental responsibility'.<sup>29</sup> The Family Court has observed that the welfare power bestowed on it by section 67ZC is wide, and allows for orders to be made requiring a parent to do any act necessary for the child's welfare.<sup>30</sup> However, the exercise of the welfare jurisdiction, as it has evolved and expanded, has challenged the protective role of the Family Court in relation to medical treatment for children. The ensuing sections of this Part present three seminal cases that have shaped the exercise of the Family Court's welfare jurisdiction under section 67ZC of the *Family Law Act* in the context of childhood gender dysphoria.

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considered it preferable to refer to a 'medical procedure which requires court authorisation': at 186 [153]. See also Diana Bryant, 'It's My Body, Isn't It? Children, Medical Treatment and Human Rights' (2009) 35(2) *Monash University Law Review* 193, 198.

24 *Family Law Act 1975* (Cth) s 67ZC(1).

25 *Ibid* s 67ZC(2). The High Court of Australia has held that the welfare jurisdiction conferred by section 67ZC of the *Family Law Act* is not at large; rather, it depends on another provision in part VII of the Act creating a 'matter' to which the jurisdiction conferred by section 67ZC can attach: *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 383–4 [23] (Gleeson CJ and McHugh J).

26 Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) 71 [319]. See also *Jacks v Samson* (2008) 221 FLR 307, 353 [220] (Stevenson J) ('[i]t is not in doubt that s 67ZC is regarded, subject to constitutional limitations, as devolving jurisdiction under the Act akin to the *parens patriae* jurisdiction'). Cf *Re Z* (1996) 134 FLR 40, 45 [323] (Nicholson CJ and Frederico J) ('[t]he enactment of s 67ZC gives a more specific legislative recognition of this jurisdiction as a separate jurisdiction than was previously the case, and we see no reason to necessarily limit its operation to the *parens patriae* jurisdiction').

27 *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 428 [59] (Murphy J). See also Michael King and Christine Piper, *How the Law Thinks About Children* (Arena, 2<sup>nd</sup> ed, 1995) 65.

28 *AMS v AIF* (1999) 199 CLR 160, 189 [87] (Gaudron J).

29 *Re Bernadette* (2011) 45 Fam LR 248, 259 [55] (Bryant CJ and Strickland J).

30 *W and G [No 1]* (2005) 35 Fam LR 417, 425 [59] (Carmody J), citing *In the Marriage of L and T* (1999) 25 Fam LR 590, 605 [57] (Kay, Coleman and Brown JJ). See also *Re Kelvin* (2017) 351 ALR 329, 359 [190] (Thackray, Strickland and Murphy JJ) (the Family Court's power under section 67ZC is 'broader than that of a parent or guardian', given that 'the Court is able to authorise action ... which is beyond the scope of parental authority').

### **B *Marion's Case: Delimiting the Scope of the Family Court's Welfare Jurisdiction in Special Medical Procedure Cases***

The decision of the High Court of Australia in *Secretary, Department of Health and Community Services v JWB and SMB ('Marion's Case')*<sup>31</sup> delineated the scope of the welfare jurisdiction under section 67ZC of the *Family Law Act*. The proceedings arose from an application to the Family Court by the parents of a 14-year-old girl with severe intellectual disabilities. The parents sought an order authorising the performance of two medical procedures on their child;<sup>32</sup> and in the alternative, a declaration that it was lawful for the parents themselves to consent to the performance of the procedures.<sup>33</sup>

A majority of the High Court in *Marion's Case* identified a number of 'factors involved in a decision to authorize sterilization' of a child, which suggested that 'such a decision should not come within the ordinary scope of parental power to consent to medical treatment'.<sup>34</sup> The majority held that if a child was not *Gillick* competent (that is, competent to give informed consent to the treatment), the child's parents could not consent where the proposed treatment was 'invasive', 'irreversible', and 'non-therapeutic' (that is, not 'appropriately carried out to treat some malfunction or disease').<sup>35</sup> In relation to such treatment, the majority held that Family Court authorisation was necessary, pursuant to the welfare jurisdiction under section 67ZC of the *Family Law Act*, essentially as a 'procedural safeguard'.<sup>36</sup> The majority further justified its decision to categorise sterilisation as a special case requiring court authorisation on the basis of the 'significant risk of making the wrong decision', either as to a child's present or future capacity to consent, or about the best interests of a child who cannot consent;<sup>37</sup> and the 'particularly grave' consequences of a wrong decision being made.<sup>38</sup>

### **C Gender Dysphoria as a 'Special Medical Procedure': The Case of *Re Alex***

The decision of the Family Court of Australia in *Re Alex*<sup>39</sup> extended the category of 'special medical procedures', as developed by the High Court of Australia in *Marion's Case* in relation to sterilisation, to the medical treatment of childhood gender dysphoria.<sup>40</sup> Constrained by the precedent established in *Marion's Case*,<sup>41</sup> Nicholson CJ nonetheless endeavoured to move beyond the confines of what his Honour described as a 'protective' and 'paternalistic'

31 (1992) 175 CLR 218.

32 These two medical procedures were a hysterectomy and an ovariectomy. The majority noted that the term 'sterilisation' was used throughout the High Court's judgment as 'a shorthand for these procedures in the particular circumstances': *ibid* 229 (Mason CJ, Dawson, Toohey and Gaudron JJ).

33 *Ibid*.

34 *Ibid* 249.

35 *Ibid* 250.

36 *Ibid* 249.

37 *Ibid* 250.

38 *Ibid*.

39 (2004) 180 FLR 89.

40 Dimopoulos, 'Embracing Children's Right to Decisional Privacy' (n 13) 133.

41 *Re Alex* (2004) 180 FLR 89, 116 [152] (Nicholson CJ).

jurisdiction, accepting that 'in modern thinking about children and young people', the welfare jurisdiction under section 67ZC of the *Family Law Act* 'must be understood with regard to their rights'.<sup>42</sup>

'Alex', as he was anonymised in the judgment,<sup>43</sup> was a 13-year-old young person who had been diagnosed with what was then known as 'gender identity disorder'.<sup>44</sup> Alex's legal guardian, a government department, applied to the Family Court for the authorisation of stage one and stage two treatment for Alex. This was the first application of its kind pursuant to section 67ZC of the *Family Law Act*.<sup>45</sup> The evidence did not establish that Alex was *Gillick* competent to consent to the proposed treatment.<sup>46</sup> Nicholson CJ concluded that both stage one and stage two treatment for childhood gender dysphoria amounted to a special medical procedure to which Alex's guardian could not consent.<sup>47</sup> *Re Alex*, whilst not immune to criticism,<sup>48</sup> became the seminal judgment concerning the medical treatment of children diagnosed with gender dysphoria in Australia.

#### **D 'Harsh' but 'Bound':<sup>49</sup> *Re Jamie* as an Unsuccessful Attempt to Remove the Family Court from the Medical Treatment Decision-Making Process**

Almost a decade after *Re Alex* was decided, the Full Court of the Family Court of Australia in *Re Jamie*<sup>50</sup> was asked to decide whether stage one and stage two medical treatment for gender dysphoria was still a 'special medical procedure' that attracted the Family Court's welfare jurisdiction. *Re Jamie* provided the first appellate opportunity to consider whether the law should depart from *Re Alex*.<sup>51</sup>

The Full Court in *Re Jamie* held that stage one treatment fell within the 'wide ambit of parental responsibility' that parents had when a child was not yet able to make his or her own decisions about medical treatment.<sup>52</sup> Bryant CJ justified this conclusion on the basis of the 'evolving state of medical knowledge',<sup>53</sup> and the view that, in childhood gender dysphoria cases, it was unlikely that 'parental

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42 Ibid 116 [154].

43 See *Family Law Act 1975* (Cth) s 121, which prohibits the publication of identifying details of proceedings.

44 As per the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders*: American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV* (American Psychiatric Association Publishing, 4<sup>th</sup> ed, 1994).

45 *Re Alex* (2004) 180 FLR 89, 121 [180] (Nicholson CJ).

46 Ibid 118 [168].

47 Ibid 124 [196]. The two stages of treatment were treated as a 'single treatment plan': at 122–3 [188].

48 See, eg, Rachael Wallbank, 'Re Kevin in Perspective' (2004) 9(2) *Deakin Law Review* 461, 487–93; *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 433–4 [81]–[85] (Murphy J).

49 *Re Jamie* (2013) 278 FLR 155, 184 [138] (Bryant CJ).

50 (2013) 278 FLR 155.

51 In *Re Bernadette* (2010) 244 FLR 242, the parents of a child diagnosed with gender dysphoria unsuccessfully argued before the Family Court of Australia that *Re Alex* had been wrongly decided: at 245–6 [11] (Collier J). As the parties in that case were unable to settle terms of a stated case for referral to the Full Court of the Family Court for determination, pursuant to section 94A(1) of the *Family Law Act 1975* (Cth), it remained for the trial judge to determine the issues.

52 *Re Jamie* (2013) 278 FLR 155, 178 [106]–[108] (Bryant CJ), 191 [179] (Finn J).

53 Ibid 178 [106].

interests would be anything other than the welfare of the child (as opposed to having a collateral interest in having the treatment carried out).<sup>54</sup>

In relation to stage two treatment, Bryant CJ held that court authorisation was appropriate, unless the child was *Gillick* competent.<sup>55</sup> On the more ‘vexing’ question of who should determine the question of *Gillick* competence – the child’s medical practitioners, or the Family Court – the Full Court concluded ‘with some reluctance’ that the nature of the stage two treatment required the Court to determine that question.<sup>56</sup> Bryant CJ conceded that ongoing court involvement was ‘harsh’, but considered the Full Court ‘bound by what the High Court said in *Marion’s Case*’.<sup>57</sup>

*Re Jamie* continued the line of judicial authority in medical treatment cases that displayed ‘a confident willingness to intervene in the private world of the family’.<sup>58</sup> Strickland J, one of the judges who heard and decided both the *Re Jamie* appeal and the *Re Kelvin* appeal (and notably the only judge to do so), made the extra-curial prediction that *Re Jamie* was ‘likely to act as a spur for further proceedings ... which challenge the boundaries of the current state of the law governing young people and medical treatment’, such that there was ‘every reason for confidence that the jurisprudence will develop further, and develop rapidly, following *Re Jamie*’.<sup>59</sup> Strickland J’s prediction of jurisprudential development manifested initially via widespread discontent with the Full Court’s decision in *Re Jamie*, including amongst Family Court judges,<sup>60</sup> legal academics,<sup>61</sup> and the medical profession.<sup>62</sup> Despite judicial calls for ‘an urgent need for statutory intervention ... to undo the consequences of *Re Jamie*’,<sup>63</sup> as well as the activism

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54 Ibid 178 [107].

55 Ibid 182 [129], 184–5 [140].

56 Ibid 184 [136]–[137] (Bryant CJ), 192 [182], [186], [188] (Finn J), 193 [192]–[196] (Strickland J).

57 Ibid 184 [138].

58 John Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press, 2016) 138.

59 Justice Steven Strickland, ‘To Treat or Not to Treat: Legal Responses to Transgender Young People’ (Conference Paper, Association of Family and Conciliation Courts Annual Conference, 28–31 May 2014) 72–3.

60 See, eg, *Re Martin* [2015] FamCA 1189, [27], [36], [38] (Bennett J); *Re Harley* [2016] FamCA 334, [42] (Bennett J); *Re Tahlia* [2017] FamCA 715, [4] (Bennett J); *Re Lucas* [2016] FamCA 1129, [10], [53], [71], [73] (Tree J).

61 See, eg, Kelly, ‘Treating the Transgendered Child’ (n 3) 83–4, 91; Felicity Bell, ‘Children with Gender Dysphoria and the Jurisdiction of the Family Court’ (2015) 38(2) *University of New South Wales Law Journal* 426, 430; Lisa Young, ‘Gender Identity Dysphoria Update and Developments in Property Settlement Law’ [2014] *International Survey of Family Law* 1, 5–7; 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; Katherine France, ‘Let Me Be Me: Parental Responsibility, *Gillick* Competence, and Transgender Minors’ Access to Hormone Treatments’ (2014) 4(4) *Family Law Review* 227; Malcolm K Smith, ‘The Boundaries of Parental Decision-Making and the Requirement to Obtain Court Approval for “Special Medical Procedures”: The Recent Decision of *Re Jamie* [2013] FamCAFC 110’ (2013) 33(3) *Queensland Lawyer* 182, 186.

62 See, eg, Michelle Telfer, Michelle Tollit and Debi Feldman, ‘Transformation of Health-Care and Legal Systems for the Transgender Population: The Need for Change in Australia’ (2015) 51(11) *Journal of Paediatrics and Child Health* 1051, 1052.

63 *Re Lucas* [2016] FamCA 1129, [71], [73] (Tree J).



of Georgie Stone, who was the subject of the *Re Jamie* proceedings,<sup>64</sup> legislative reform did not ensue. It remained for the Full Court in *Re Kelvin* to consider whether court authorisation was still an essential component of stage two medical treatment for childhood gender dysphoria. The next Part offers a brief overview of the *Re Kelvin* proceedings.

### III THE *RE KELVIN* PROCEEDINGS: AN OVERVIEW

#### A The Initial Family Court Proceedings

The father of a 16-year-old young person, anonymised in the judgments as Kelvin, applied to the Family Court for authorisation of stage two treatment for Kelvin's gender dysphoria. Kelvin's father sought a declaration or an order that Kelvin was *Gillick* competent to consent to the administration of that treatment; and in the alternative, that the Court authorise the administration of stage two treatment under section 67ZC of the *Family Law Act*, on the basis that it was in Kelvin's best interests.<sup>65</sup>

Accepting the evidence of Kelvin's treating medical practitioners, the trial judge was satisfied of Kelvin's *Gillick* competence and made a finding to that effect.<sup>66</sup> This might have been the end of the matter, for the finding of *Gillick* competence enabled Kelvin to commence stage two treatment immediately.<sup>67</sup> Yet Kelvin's father agreed for a special case to be stated for the Full Court's opinion. In light of the case stated, the trial judge adjourned the application for a declaration or an order authorising Kelvin's treatment pending determination by the Full Court.<sup>68</sup>

#### B The Case Stated before the Full Court of the Family Court

*Re Kelvin* came before the Full Court of the Family Court by way of a case stated by the trial judge, pursuant to section 94A(1) of the *Family Law Act*. That section enables the Full Court to hear and determine a question of law arising in proceedings before those proceedings are dealt with further. The six questions stated for the Full Court's opinion, in essence, concerned the effect of the Full

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64 Facilitated by a court order that she be able to identify herself as the young person the subject of the *Re Jamie* proceedings, Georgie Stone developed a strong media profile, which provided her with a platform from which to campaign for transgender children's rights. In her online petition that gained almost 16,000 signatures, Georgie championed the rights of 'trans teens', which she argued were 'not being protected or upheld': Georgie Stone, 'Remove Family Court of Australia from Medical Decisions for Trans Teens. Legislate Now!', *Change.org* (Web Page) <<https://www.change.org/p/parliament-of-australia-remove-family-court-of-australia-from-medical-decisions-for-trans-teens-legislate-now>>.

65 *Re Kelvin* [2017] FamCA 78, [3] (Watts J).

66 Kelvin's treating medical practitioners shared the view that Kelvin was *Gillick* competent. Their evidence was that Kelvin felt that 'his decision-making is clear'; he was 'ostensibly free of any pressure, pain or other factors that might influence his decision-making capability', and he was 'able to comprehend the nature of the treatment such that he is able to provide informed consent, according to the *Gillick* standard': *Re Kelvin* [2017] FamCA 78, [41]–[43] (Watts J).

67 *Ibid* [57].

68 *Ibid*.

Court's decision in *Re Jamie* and the role of the Family Court more generally in relation to stage two treatment for gender dysphoria and the determination of *Gillick* competence.<sup>69</sup> The fundamental issue was whether gender dysphoria should continue to be treated differently from other medical conditions, such as to require the ongoing 'filter' of court authorisation for medical treatment to commence.<sup>70</sup>

A special bench of the Full Court departed from its earlier decision in *Re Jamie*, discussed in Part II(D) above. While the majority and minority reached the same conclusion, they diverged on the issue of whether *Re Jamie* was 'plainly wrong' in its application of *Marion's Case*. The majority (Thackray, Strickland and Murphy JJ) justified its departure from *Re Jamie* on the basis of the evolution of the state of medical knowledge and 'the development in the treatment of and the understanding of [g]ender [d]ysphoria'.<sup>71</sup> The minority (Ainslie-Wallace and Ryan JJ) found the decision in *Re Jamie* to be 'plainly wrong' in its application of *Marion's Case*.<sup>72</sup> The minority considered that the Full Court in *Re Jamie*, having determined that stage two treatment was 'therapeutic', should not have applied the principles in *Marion's Case* regarding authorisation of a particularly grave 'non-therapeutic' procedure (sterilisation) for a child who was not, and would never become, *Gillick* competent.<sup>73</sup>

The Full Court in *Re Kelvin* held that, in circumstances where a child consents to stage two treatment for gender dysphoria, the child's treating medical practitioners agree that the child is *Gillick* competent to give that consent, and the parents do not object to the treatment, it was no longer mandatory to apply to the Family Court for a determination of the child's *Gillick* competence.<sup>74</sup> The Full Court thus concluded that stage two treatment for gender dysphoria can no longer be considered a 'special medical procedure' for which 'consent lies outside the bounds of parental authority and requires the imprimatur of the [Family] Court'.<sup>75</sup> However, the Full Court left open the possibility of court involvement where there is a 'genuine dispute or controversy' about whether treatment should be administered.<sup>76</sup> In light of the Full Court's answers to the questions in the case stated, the trial judge dismissed the initiating application, and made orders giving Kelvin the liberty to identify himself as the subject of the proceedings.<sup>77</sup>

On a superficial reading of the Full Court's judgment in *Re Kelvin*, based on the overview just provided, this case is a significant example of the judiciary's activist role in developing the law, and in doing so, advancing the rights of transgender children. The majority in *Re Kelvin* was critical of the legislature's inaction, remarking that it was 'disappointing that the call for legislative

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69 *Re Kelvin* (2017) 351 ALR 329, 330–1 [1], [3] (Thackray, Strickland and Murphy JJ).

70 *Ibid* 347 [119].

71 *Ibid* 355 [162].

72 *Ibid* 363–4 [208]–[209], 366 [225].

73 *Ibid* 358–9 [188]–[189] (Ainslie-Wallace and Ryan JJ). See also 363–4 [209].

74 *Ibid* 357–8 [177]–[184] (Thackray, Strickland and Murphy JJ), 366–7 [226] (Ainslie-Wallace and Ryan JJ).

75 *Ibid* 355 [164] (Thackray, Strickland and Murphy JJ).

76 *Ibid* 355 [167]. See the analysis of the 'genuine dispute or controversy' caveat in Part V(C) below.

77 See *Re Kelvin [No 2]* [2017] FamCA 1000.

intervention following *Re Jamie* went unheeded'.<sup>78</sup> The absence of legislative reform was also surprising, given the extent of vocal opposition to *Re Jamie*, described above, and the 'widespread media attention' that gender dysphoria cases tend to attract.<sup>79</sup> The next Part introduces a children's rights approach to re-reading the judgment of the Full Court in *Re Kelvin*.

#### IV A CHILDREN'S RIGHTS APPROACH TO RE-READING THE *RE KELVIN* JUDGMENT

This Part explains the contested notion of 'children's rights', and the relevance of children's rights to judicial decision-making in Australian family law. It then presents four salient features of a children's rights approach to re-reading judgments, which will be applied in Part V to support the argument that the Full Court in *Re Kelvin* was not concerned with advancing the rights of transgender children, but rather, with recalibrating the respective roles and responsibilities of parents and the Family Court in relation to transgender children's medical treatment.

##### A Children's Rights: A Still-Contested Concept

Rights are a social construct and a rhetorical tool of power that can be used to challenge the status quo and shift children from the periphery of law and society to the centre, if not completely, then at least a little closer. As Freeman has argued, '[t]he language of rights can make visible what has for too long been suppressed. It can lead to different and new stories being heard in public'.<sup>80</sup> While it is beyond the scope of this article to explore and contribute to debates about the notion of 'children's rights',<sup>81</sup> it is important to offer an understanding of this concept and its content and scope.

Definitions of children's rights refer to the 'range of civil, political, social, economic and cultural rights' relating to childhood.<sup>82</sup> Such rights are considered to define basic standards of respect, autonomy and protection for children, which serve to enable children to 'thrive in the present and develop to their fullest

78 *Re Kelvin* (2017) 351 ALR 329, 344 [104] (Thackray, Strickland and Murphy JJ).

79 The majority itself acknowledged this point in its contextual prelude to addressing the questions stated: *ibid* 346 [115].

80 Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15(1) *International Journal of Children's Rights* 5, 6 ('Why It Remains Important'). See also Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) *International Journal of Children's Rights* 177, 183 ('Not Merely Rights for Children').

81 See, eg, Ferguson, 'Not Merely Rights for Children' (n 80); John Tobin, 'Justifying Children's Rights' (2013) 21(3) *International Journal of Children's Rights* 395; Colin M Macleod, 'Are Children's Rights Important?' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 191.

82 Helen Stalford and Kathryn Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 17, 17 ('Judging Children's Rights').

potential in the future'.<sup>83</sup> Yet the idea that children can claim, exercise and secure enjoyment of rights independently of adults has not gained universal acceptance.<sup>84</sup>

The concept of capacity is fundamental to the conceptualisation of children's rights, and to the distinction between two competing theories of rights: the interest theory, and the will or choice theory.<sup>85</sup> The latter conceptualises a right as 'the protected exercise of choice',<sup>86</sup> and so denies children the status of rights bearers owing to their perceived incapacity and inability to exercise rational choice.<sup>87</sup> By contrast, the interest theory understands a right as something that protects 'a sufficiently important interest', and imposes 'duties on others, the performance of which ensures that the rights-holder can enjoy that interest'.<sup>88</sup> Under this theory, the status of being a human being is enough to entitle a child to rights;<sup>89</sup> the child's capacity is irrelevant to that entitlement.<sup>90</sup> The interest theory is the preferred theory of rights under international human rights instruments, and it is also endorsed by many scholars.<sup>91</sup>

To avoid the well-known assertion that "children's rights" is a slogan in search of a definition,<sup>92</sup> the children's rights approach advocated and applied in this article draws on the understanding and formulation of children's rights contained in the *UNCRC*. Premised upon an interest theory of rights, the children's rights approach also builds on the important work of other children's rights

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83 Ibid. Cf Ferguson, 'Not Merely Rights for Children' (n 80) 180 n 5.

84 Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27(2) *International Journal of Children's Rights* 306, 306; Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 19; Tobin, 'Justifying Children's Rights' (n 81) 395.

85 Georgina Dimopoulos, 'A Theory of Children's Decisional Privacy' (2021) *Legal Studies* (advance) 8.

86 David Archard, *Children: Rights and Childhood* (Routledge, 3<sup>rd</sup> ed, 2014) 58.

87 See, eg, Harry Brighouse, 'What Rights (If Any) Do Children Have?' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 31, 45–6; James Griffin, 'Do Children Have Rights?' in David Archard and Colin M Macleod (eds), *The Moral and Political Status of Children* (Oxford University Press, 2002) 19, 27; Onora O'Neill, 'Children's Rights and Children's Lives' (1988) 98(3) *Ethics* 445, 462–3; Laura M Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Cornell University Press, 1992); James Griffin, *On Human Rights* (Oxford University Press, 2008) 83 (arguing that infants cannot possess human rights because they are 'not normative agents'); HLA Hart, 'Are There Any Natural Rights?' (1955) 64(2) *Philosophical Review* 175, 181 ('[i]f common usage sanctions talk of the rights of ... babies it makes an idle use of the expression "a right"').

88 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 6.

89 '[T]he equal and inalienable rights of all members of the human family': *UNCRC* (n 15) Preamble para 2.

90 Fortin, *Children's Rights* (n 17) 13; Tobin, 'Justifying Children's Rights' (n 81) 403; Tom D Campbell, 'The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Clarendon Press, 1993) 1, 5.

91 See, eg, J Raz, 'Legal Rights' (1984) 4(1) *Oxford Journal of Legal Studies* 1, 5; Neil MacCormick, 'Children's Rights: A Test-Case for Theories of Right' in Neil MacCormick (ed), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press, 1982) 154; Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) pt 3 ch 7; Robert E Goodin and Diane Gibson, 'Rights, Young and Old' (1997) 17(2) *Oxford Journal of Legal Studies* 185, 188; Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, NE Simmonds and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (Oxford University Press, 1998) 7; Michael Freeman, 'The Human Rights of Children' (2010) 63(1) *Current Legal Problems* 1, 21; Tobin, 'Justifying Children's Rights' (n 81) 403.

92 Hillary Rodham, 'Children under the Law' (1973) 43(4) *Harvard Educational Review* 487, 487.

scholars.<sup>93</sup> The conception of children as vulnerable relative to adults, but having the evolving capacity for autonomy, provides the 'conceptual [foundation]' of children's rights under the *UNCRC*.<sup>94</sup> Importantly, this Convention acknowledges children as distinct rights holders, and as actors in, and shapers of, their own development. While the vision of children's rights promoted by the *UNCRC* remains subject to criticism,<sup>95</sup> the model and underlying values of this international Convention offer a sound basis for scrutinising the Family Court's involvement in the medical treatment process for children diagnosed with gender dysphoria.

### B Why the Family Court of Australia Should 'Take Children's Rights Seriously'<sup>96</sup>

Before setting out a children's rights approach to re-reading the Full Court's judgment in *Re Kelvin*, it is important to justify the relevance and significance of children's rights in the context of proceedings under part VII of the *Family Law Act*. The Family Court's growing involvement in children's medical treatment, as articulated in Part II above, reveals a judicial scepticism of 'unbridled parental autonomy',<sup>97</sup> but also an inability to embrace a paradigm that acknowledges and respects children as rights holders. Children's rights, therefore, tend to remain abstracted from day-to-day legal practice.<sup>98</sup> That court judgments contain 'limited, often distinctly disempowering approaches to children's rights' is not a characteristic unique to Australian family law, but spans jurisdictions within Australia and overseas.<sup>99</sup> This makes an emphasis on children's rights problematic, in Ferguson's view, because of the lack of a 'sufficiently workable child-centred

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- 93 See John Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33(2) *Melbourne University Law Review* 579, 584–92 ('Judging the Judges'); Jane Fortin, 'Accommodating Children's Rights in a Post *Human Rights Act* Era' (2006) 69(3) *Modern Law Review* 299, 311 ('Accommodating Children's Rights'); Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 18–21; Michael Freeman, 'The Value and Values of Children's Rights' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, 2011) 21, 27–33.
- 94 Tobin, 'Justifying Children's Rights' (n 81) 396. See also John Tobin, 'Introduction' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 1, 1–2.
- 95 For a sound discussion of such criticism, see Freeman, 'Why It Remains Important' (n 80); Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' in Michael Freeman (ed), *Children's Rights: New Issues, New Themes, New Perspectives* (Brill Nijhoff, 2018) 39; Fortin, *Children's Rights* (n 17) 45–6; Didier Reynaert, Maria Bouverne-De Bie and Stijn Vandevelde, 'Between "Believers" and "Opponents": Critical Discussions on Children's Rights' (2012) 20(1) *International Journal of Children's Rights* 155; Tobin, 'Justifying Children's Rights' (n 81) 413–32.
- 96 Freeman, 'Why It Remains Important' (n 80). See also Macleod (n 81); Jane Fortin, 'Children's Rights: Are the Courts Now Taking Them More Seriously?' (2004) 15(2) *King's Law Journal* 253; MDA Freeman, 'Taking Children's Rights Seriously' (1987) 1(4) *Children and Society* 299; Michael DA Freeman, 'Taking Children's Rights More Seriously' (1992) 6(1) *International Journal of Law and the Family* 52.
- 97 John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance and Consistent with a Child's Evolving Capacities' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 159, 174.
- 98 Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 19.
- 99 Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, 'Introducing *Children's Rights Judgments*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 1, 6.

conception of children's rights'.<sup>100</sup> Ferguson has asked, 'why should ... children's rights necessarily be better for children than regulating them through the notions of duties owed to them, or through the "welfare principle" and concomitant "best interests" assessment?'<sup>101</sup>

Although Australia has ratified the *UNCRC*, this Convention has not been incorporated into Australian law. The answer to the threshold question of why Family Court judges should 'take children's rights seriously'<sup>102</sup> derives, it is argued, from the principle of the 'best interests of the child' as 'the paramount consideration', which is the key reference point for decision-making under part VII of the *Family Law Act*.<sup>103</sup> Section 60CC of the *Family Law Act* lists the primary and additional considerations that the court must take into account in determining what is in a child's best interests.<sup>104</sup> While the *Act* does not explicitly require judges to consider the child's rights in their decision-making under part VII, the Family Court has a wide discretion to take into account 'any other fact or circumstance that the court thinks is relevant' to the best interests assessment.<sup>105</sup> This provision arguably enables the judge to consider the model of children's rights under the *UNCRC* to determine the best interests of the child in each case. Furthermore, principles of 'internal system coherence' and 'external system coherence'<sup>106</sup> mean that a decision cannot be in a child's best interests where the outcome would infringe another right under the *UNCRC*.<sup>107</sup> The Full Court of the Family Court in *In Marriage of B*<sup>108</sup> said that the *UNCRC* must be given 'special significance' for the purpose of interpreting domestic law, given its almost universal acceptance, and that this Convention 'is likely to be a fact or circumstance that the Court thinks is relevant in the absence of any inconsistent statutory provision'.<sup>109</sup>

This argument is supported by an express legislative commitment to make the *UNCRC* relevant to judicial decision-making under part VII of the *Family Law Act*. The 'additional object' of part VII is 'to give effect to the *Convention on the*

100 Ferguson, 'Not Merely Rights for Children' (n 80) 182.

101 *Ibid* 189–90.

102 See above n 96.

103 In support of this argument, see Kathryn Hollingsworth and Helen Stalford, 'Towards Children's Rights Judgments' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017) 53, 57–8, 66; Tobin, 'Judging the Judges' (n 93) 621 n 255; Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 41. See also Fortin, *Children's Rights* (n 17) 40–1; John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73, 87; Committee on the Rights of the Children, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62<sup>nd</sup> sess, UN Doc CRC/C/GC/14 (29 May 2013) 4 [6], 9 [32]; Philip Alston and Bridget Gilmour-Walsh, 'The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values' (Report, UNICEF Innocenti Studies, 1996) 9–10.

104 See *Family Law Act 1975* (Cth) ss 60CC(2), (3).

105 *Family Law Act 1975* (Cth) s 60CC(3)(m).

106 John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23(1) *Harvard Human Rights Journal* 1, 37–9.

107 Eekelaar and Tobin (n 103) 87; Committee on the Rights of the Children (n 103) 4 [6], 9 [32]; Alston and Gilmour-Walsh (n 103) 9–10.

108 (1997) 140 FLR 11.

109 *Ibid* 82 (Nicholson CJ, Fogarty and Lindenmayer JJ).

*Rights of the Child*'.<sup>110</sup> Its purpose is to confirm, in cases of ambiguity, the obligation on decision-makers to interpret part VII consistently with Australia's international obligations.<sup>111</sup> Accepting that the contents of the *UNCRC* 'are not enshrined as operative principles of law' in Australia, and that 'the Convention is applicable only to the extent that it has been incorporated by specific provisions of the *Family Law Act*',<sup>112</sup> section 60B(4) is nonetheless significant, for it embeds ideas about children's rights into the legislative framework of part VII.

### C Salient Features of a Children's Rights Judgment

This section proposes four salient features of a children's rights judgment, against which the judgment of the Full Court of the Family Court in *Re Kelvin* will be assessed in Part V below.<sup>113</sup> These features are consistent with, although differently calibrated to, the five 'primary characteristics' of a children's rights judgment presented by Hollingsworth and Stalford,<sup>114</sup> and the dimensions of a 'substantive rights approach' formulated by Tobin.<sup>115</sup> The features are not exhaustive or prescriptive; nor will they be appropriate in each case.<sup>116</sup> The ability of judges to implement them will be shaped by prevailing political agendas, the state of the law, and developments in medical science, amongst other factors, at the time that the proceedings are heard.<sup>117</sup> The practical task of the features of a children's rights judgment, however, is to facilitate the critical analysis of judgments in proceedings involving children, which '[pose] child-centered questions and [move] closer to providing child-centered perspectives on the answers'.<sup>118</sup>

Whilst the focus of this article is upon Family Court authorisation of medical treatment for children diagnosed with gender dysphoria, it is important to acknowledge that special medical procedure applications comprise but a narrow facet of the Court's jurisdiction. Most cases heard under part VII of the *Family Law Act* are post-separation parenting disputes. The children's rights approach presented in this article could apply just as robustly to such disputes. It provides an opportunity to 'reconceptualize the agenda for decision-makers',<sup>119</sup> and to bring the methodology of children's rights 'to bear on real life decision-making' in all part VII proceedings.<sup>120</sup>

110 *Family Law Act 1975* (Cth) s 60B(4).

111 Explanatory Memorandum, Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) [23].

112 *Ralton v Ralton* [2017] FamCAFC 182, [18] (Bryant CJ, Strickland and Aldridge JJ). See also *Oram v Lambert* [2019] FamCAFC 4, [156] (Ainslie-Wallace, Aldridge and Watts JJ).

113 For a brief discussion of how some of these features may apply in the context of private family law proceedings under the *Children Act 1989* (UK), see Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 22–4.

114 Hollingsworth and Stalford (n 103) 53.

115 Tobin, 'Judging the Judges' (n 93) 603–19.

116 Hollingsworth and Stalford (n 103) 53.

117 *Ibid.*

118 Barbara Bennett Woodhouse, 'Hatching the Egg: A Child-Centered Perspective on Parents' Rights' (1992) 14(6) *Cardozo Law Review* 1747, 1843 ('Hatching the Egg').

119 Eekelaar and Tobin (n 103) 79.

120 Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 21.

### 1 *Selecting and Framing: Through ‘the Eyes of Children’*<sup>121</sup>

The first feature of a children’s rights judgment is the court’s ability to frame the proceedings through ‘the eyes of children’,<sup>122</sup> and to ‘conceptualise matters concerning children in terms of their rights’.<sup>123</sup> As Baroness Hale of Richmond observed: ‘[T]his is, and always has been, a case about children, their rights and the rights of their parents ... Yet there has been no one here ... to speak on behalf of the children. ... The battle has been fought on ground selected by the adults’.<sup>124</sup>

From a conceptual perspective, the values and model of children’s rights underpinning the *UNCRC* can inform decision-making by shaping the ‘general intellectual environment’<sup>125</sup> in which Family Court judges contemplate their decision-making approach, ‘in light of the history, experience and resources’ of Australia’s family law system.<sup>126</sup> From a doctrinal perspective, as explained in Part IV(B) above, the Family Court has no express legal mandate to consider or take into account the *UNCRC* in its decision-making. However, the principle of the ‘best interests of the child’ as ‘the paramount consideration’ in decision-making under part VII of the *Family Law Act*, it has been argued, enables judges to take children’s rights into account in assessing the child’s best interests.

The willingness and ability of judges to adopt a children’s rights approach is shaped, in part, by the parties’ presentation or framing of their case.<sup>127</sup> Within an adversarial system, judges determine the issues put before them by the parties. The absence of submissions, evidence and argument by the parties in relation children’s rights may deny judges the opportunity to engage with this dimension of the proceedings, and to determine the case within a children’s rights framework.<sup>128</sup> It is notable that in gender dysphoria proceedings, even the independent children’s lawyers appointed to represent the interests of children have tended not to espouse rights based approaches. This enlivens a broader issue concerning the nature of children’s representation in Australian family law, which lies beyond the scope of this article.<sup>129</sup>

121 *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543 [6] (Baroness Hale).

122 *Ibid.*

123 Tobin, ‘Judging the Judges’ (n 93) 604–5.

124 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 271 [71]. See also *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42, 69 [49] (Baroness Hale) (‘This is another case ... which has been presented to us largely as a case about adults’ rights when in reality it is a case about children’s rights’); *E v Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, 543 [6] (Baroness Hale) (‘With the best will in the world, there is a tendency to see confrontations ... through adult eyes, and to forget these are not the eyes of children, who are simply the innocent victims of other people’s quarrels’).

125 Ronald Dworkin, *Law’s Empire* (Belknap Press, 1986) 88.

126 Patrick Parkinson and Judy Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008) 219.

127 Stalford and Hollingsworth, ‘Judging Children’s Rights’ (n 82) 44–5; Tobin, ‘Judging the Judges’ (n 93) 620.

128 Stalford and Hollingsworth, ‘Judging Children’s Rights’ (n 82) 33.

129 On this issue, see, eg, Geoff Monahan, ‘Autonomy vs Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 392; Rae Kaspiew et al, ‘Independent Children’s Lawyers Study’ (Final Report, 2<sup>nd</sup> ed, Australian Institute of Family Studies, June 2014); Nicola Ross, ‘Images of Children: Agency, Art 12 and Models for Legal Representation’ (2005) 19(2) *Australian Journal of Family Law* 94; Nicola Ross,



## 2 Court Procedures: Understanding Children's Lived Experiences

The second feature of a children's rights judgment is court procedures that enable the child to participate meaningfully in the decision-making process.<sup>130</sup> Children's right to so participate manifests in article 12(1) of the *UNCRC*, which gives children who are capable of forming a view the right to express their views freely in all matters affecting them, with those views being given due weight in accordance with the child's age and maturity; and pursuant to article 12(2), which gives children the opportunity to be heard in judicial and administrative proceedings affecting them, either directly or through a representative or appropriate body.

The Federal Circuit Court of Australia has said that to be given 'life or meaning', the right under article 12 of the *UNCRC* demands 'active engagement with the child – meeting them, explaining their options to them and giving them the opportunity to participate how and should they wish'.<sup>131</sup> A considerable body of research in the family law context, both in Australia and overseas, has explained the value of children being afforded the opportunity to express their views and to have those views taken into account in decision-making about matters that affect them.<sup>132</sup> Children themselves have emphasised the importance of 'having "someone" to listen to their views and then communicat[ing] those views so that they could inform the decision making in their case'.<sup>133</sup> However, 'research has also found that children feel marginalised by family law system processes',<sup>134</sup> and

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'Independent Children's Lawyers: Relational Approaches to Children's Representation' (2012) 26(3) *Australian Journal of Family Law* 214.

130 Freeman, 'The Human Rights of Children' (n 91) 18; Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17(1) *Law and Philosophy* 19, 42; Parkinson and Cashmore (n 126) 12; Fortin, *Children's Rights* (n 17) 234; Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 23.

131 *Duffy v Gomes* (2015) 52 Fam LR 562, 582 [106] (Judge Harman).

132 See, eg, Rachel Carson et al, 'Children and Young People in Separated Families: Family Law System Experiences and Needs' (Final Report, Australian Institute of Family Studies, 2018) 30; Parkinson and Cashmore (n 126) 4–13; Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) 364 [12.28]; Judy Cashmore, 'Children's Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children's Views' (2011) 33(4) *Children and Youth Services Review* 515; Anne Graham and Robyn Fitzgerald, 'Taking Account of the "To and Fro" of Children's Experiences in Family Law' (2006) 31(2) *Children Australia* 30; Rachel Birnbaum, 'Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes' (2017) 5(3) *Social Inclusion* 148; Rachel Birnbaum and Nicholas Bala, 'The Child's Perspective on Legal Representation: Young Adults Report on their Experiences with Child Lawyers' (2009) 25(1) *Canadian Journal of Family Law* 11; Rachel Birnbaum, Nicholas Bala and Francine Cyr, 'Children's Experiences with Family Justice Professionals in Ontario and Ohio' (2011) 25(3) *International Journal of Law, Policy and the Family* 398; Bren Neale, 'Dialogues with Children: Children, Divorce and Citizenship' (2002) 9(4) *Childhood* 455; Anne B Smith, Nicola J Taylor and Pauline Tapp, 'Rethinking Children's Involvement in Decision-Making After Parental Separation' (2003) 10(2) *Childhood* 201.

133 Carson et al (n 132) 44.

134 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 21 (citation omitted). See, eg, *ibid* 3–4, 47, 51–2, 68; Kaspiew et al (n 129) 135–6, 139; Parkinson and Cashmore (n 126) 73–4, 149–54; Lani Blackman, *Representing Children and Young People: A Lawyers' Practice Guide* (Victoria Law Foundation, 2002) 206; William J Keough, *Child Representation in Family Law* (LBC Information Services, 2000) 50–53, 61–2; Felicity Bell, 'Barriers to Empowering Children in Private Family Law Proceedings' (2016) 30(3) *International Journal of Law, Policy and the Family* 225 ('Barriers to Empowering Children'); Nicola Taylor, 'What Do We Know About Involving Children and Young

that they feel disappointed by the level and type of involvement, and perceive that their views and experiences are not sought or heard by adult decision-makers.<sup>135</sup> Children and young people have expressed a desire for ‘a bigger voice more of the time’ in family law decision-making processes that affect them.<sup>136</sup>

Procedural, legal and practical barriers to children’s participation in proceedings under part VII of the *Family Law Act* ‘distort’ the way that children’s rights are ‘argued, adjudicated and, ultimately, protected’ by adult decision-makers.<sup>137</sup> While children can initiate proceedings on their own behalf, this rarely occurs.<sup>138</sup> Children cannot give evidence or be present in court during proceedings unless the court gives leave.<sup>139</sup> Various provisions of part VII also shape the extent to which children can participate by expressing their views. In determining what is in the child’s best interests, the child’s views are the first of the ‘[a]dditional considerations’, qualified by the requirement that the court take into account any factors, such as the child’s maturity or level of understanding, that the court thinks are relevant to the weight it should give to the child’s views.<sup>140</sup> The court may inform itself of views expressed by a child by having regard to a family report;<sup>141</sup> by making an order for independent legal representation of the child’s interests;<sup>142</sup> or ‘by such other means as the court thinks appropriate’.<sup>143</sup> These provisions are counterbalanced by the requirement that nothing in part VII of the *Act* ‘permits the court or any other person to require the child to express his or her views in relation to any matter’.<sup>144</sup> Such a ‘cautious, protective approach’ to involving children in

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People in Family Law Decision Making? A Research Update’ (2006) 20(2) *Australian Journal of Family Law* 154, 173–5; Robyn Fitzgerald, ‘How are Children Heard in Family Law Proceedings in Australia?’ (2002) 6 *Southern Cross University Law Review* 177.

- 135 Australian Law Reform Commission (n 132) 364 [12.28], 365 [12.30]–[12.31]; Carson et al (n 132) 68.
- 136 Carson et al (n 132) 68, quoting Alana, aged 12–14 years. This finding is consistent with earlier research by Parkinson and Cashmore (n 126) 73–5. See also Stalford and Hollingsworth, ‘Judging Children’s Rights’ (n 82) 38; Megan M Gollop, Anne B Smith and Nicola J Taylor, ‘Children’s Involvement in Custody and Access Arrangements after Parental Separation’ (2000) 12(4) *Child and Family Law Quarterly* 383; Harriet Bretherton, ‘“Because it’s Me the Decisions Are About”: Children’s Experiences of Private Law Proceedings’ (2002) 32(6) *Family Law* 450; Carol Smart and Bren Neale, ‘“It’s My Life Too”: Children’s Perspectives on Post-Divorce Parenting’ (2000) 30 *Family Law* 163.
- 137 Stalford and Hollingsworth, ‘Judging Children’s Rights’ (n 82) 37. See also Noel Semple, ‘Whose Best Interests? Custody and Access Law and Procedure’ (2010) 38(2) *Osgoode Hall Law Journal* 287, 289 (arguing that ‘the procedure by which [custody and access] disputes are resolved primarily empowers the adult parties to the dispute’ (emphasis in original)).
- 138 *Family Law Act 1975* (Cth) s 65C(b). See, eg, *In Marriage of Pagliarella* (1993) 114 FLR 185; *Bondelmonte v Bondelmonte* [2016] FamCA 1145. See also Parkinson and Cashmore (n 126) 53–5.
- 139 *Family Law Act 1975* (Cth) s 100B(1), (2). See also Chief Justice Alastair Nicholson, ‘Children and Children’s Rights in the Context of Family Law’ (Speech, LawAsia Conference, 21 June 2003) 3–4.
- 140 *Family Law Act 1975* (Cth) s 60CC(3)(a).
- 141 *Ibid* s 62G.
- 142 *Ibid* s 68L.
- 143 *Ibid* s 60CD(2)(c).
- 144 *Ibid* s 60CE. See, in relation to children’s expression of their views in Australian family law proceedings, Parkinson and Cashmore (n 126) 68–70. See also, in relation to article 12(1) of the *UNCRC*, Laura Lundy, John Tobin and Aisling Parkes, ‘Article 12: The Right to Respect for the Views of the Child’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 397, 405; Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51<sup>st</sup> sess, UN Doc CRC/C/GC/12 (20 July 2009) 7 [22] (‘*General Comment No 12*’).

decision-making<sup>145</sup> means that judicial interpretations of the facts and evidence are necessarily adult-centric.

A children's rights approach requires that court procedures be sufficiently 'child-friendly'.<sup>146</sup> It embraces the notions of 'authentic' participation and children's 'inclusion', whereby the adult-centric system is modified to accommodate children's effective participation and values, rather than 'integration', which requires children to participate within pre-existing processes and structures.<sup>147</sup> The United Nations Committee on the Rights of the Child has emphasised that proceedings 'must be both accessible and child-appropriate', with a particular focus upon 'child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens and separate waiting rooms'.<sup>148</sup>

The decisions of the Family Court in *Re Alex* (2004),<sup>149</sup> discussed in Part II(C) above, and *Re Alex* (2009),<sup>150</sup> offer pertinent illustrations of how a 'child-centric' understanding of court procedures can effectively provide for, and respect, the rights of the child who is the subject of proceedings.<sup>151</sup> In both *Re Alex* proceedings, the judge was prepared to have a private meeting with Alex.<sup>152</sup> The initial *Re Alex* hearing was also conducted in an inquisitorial rather than an adversarial format. It 'took the form of an orderly discussion between witnesses and legal representatives' and the judge, in a private conference room setting around a table, thereby facilitating a 'dialogue' between witnesses about each other's evidence.<sup>153</sup>

In a number of gender dysphoria proceedings following *Re Alex*, judges have made an order permitting the young person in question to be present in court and/or

145 Parkinson and Cashmore (n 126) 2 n 5. See also Bell, 'Barriers to Empowering Children' (n 134) 230.

146 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 23; Hollingsworth and Stalford (n 103) 76–7. See also Helen Stalford, Liam Cairns and Jeremy Marshall, 'Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information' (2017) 5(3) *Social Inclusion* 207; Lundy, Tobin and Parkes (n 144) 401.

147 Barry Percy-Smith and Karen Malone, 'Making Children's Participation in Neighbourhood Settings Relevant to the Everyday Lives of Young People' (2001) 42 *PLA Notes* 18, 18–19. See also Jaclyn Jean Jenkins, 'Listen to Me! Empowering Youth and Courts through Increased Youth Participation in Dependency Hearings' (2008) 46(1) *Family Court Review* 163; Aoife Daly, 'The Right of Children to be Heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights' (2011) 15(3) *International Journal of Human Rights* 441; Jennifer E McIntosh, Diana Bryant and Kristen Murray, 'Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia' (2008) 46(1) *Family Court Review* 125.

148 Committee on the Rights of the Child, *General Comment No 12* (n 144) 9 [34].

149 (2004) 180 FLR 89.

150 (2009) 248 FLR 312.

151 See Tobin, 'Judging the Judges' (n 93) 608–9.

152 *Re Alex* (2004) 180 FLR 89, 94 [17], 97–8 [41]–[43] (Nicholson CJ); *Re Alex* (2009) 248 FLR 312, 333 [99] (Bryant CJ). For perspectives on the practice of judges conducting interviews or meeting with children in chambers, see Baroness Brenda Hale, 'Children's Participation in Family Law Decision Making: Lessons from Abroad' (2006) 20(2) *Australian Journal of Family Law* 119; John Caldwell, 'Common Law Judges and Judicial Interviewing' (2011) 23(1) *Child and Family Law Quarterly* 41; Fiona E Raitt, 'Judicial Discretion and Methods of Ascertaining the Views of a Child' (2004) 16(2) *Child and Family Law Quarterly* 151; Michelle Fernando, 'What Do Australian Family Law Judges Think About Meeting with Children?' (2012) 26(1) *Australian Journal of Family Law* 51; Parkinson and Cashmore (n 126) 55–8, 158–88; Fortin, *Children's Rights* (n 17) 281–4.

153 *Re Alex* (2004) 180 FLR 89, 98–9 [43] (Nicholson CJ).

have given leave for an affidavit to be filed by the young person.<sup>154</sup> Whilst it is not possible to know how the hearings in these cases have been conducted, they do suggest that judges have substantial discretion in lowering the barriers to children's participation and to enabling children's views and wishes to contribute to the decision-making process.<sup>155</sup> The feasibility of implementing child-centric procedures in the Family Court will be influenced by resourcing constraints, as well as the proclivity of the individual judge to conducting proceedings in this way.

### 3 Reasoning and Analysis: Reconciling Competing Rights and Interests and Substantive Engagement with the UNCRC

The third salient feature of a children's rights judgment is judicial reasoning that demonstrates substantive engagement with, and an internally coherent application of, the *UNCRC*, and balances the child's rights and best interests against the rights and interests of others. This requires more than token references to the *UNCRC* and an account of the rights that the judge considers are relevant to the proceedings. Article 3(1) of the *UNCRC* provides that 'the best interests of the child shall be a primary consideration' in all actions concerning children.<sup>156</sup> By contrast, part VII of the *Family Law Act* requires the Family Court to regard the child's best interests as *the paramount* consideration in deciding whether to make an order relating to the welfare of a child,<sup>157</sup> or to make a particular parenting order in relation to a child.<sup>158</sup> This minor semantic distinction is nonetheless an important one, which has received both scholarly and judicial attention.<sup>159</sup> This is because it influences the reasoning that the court adopts in resolving the issues, including how (potentially) competing rights and interests are weighed and balanced.<sup>160</sup>

The inclusion of best interests as 'a primary', rather than 'the paramount', consideration in the *UNCRC* recognises the potential for conflicts of rights to arise, as between children, their parents, and other parties.<sup>161</sup> It also suggests that, where such a conflict arises, the child's rights will not necessarily trump the rights of others. Family Court judges have acknowledged that the child's best interests are 'the paramount but not sole determinant'.<sup>162</sup> Rather, a balancing exercise is

154 See, eg, *Re Lucas* [2016] FamCA 1129, [7] (Tree J); *Re Rae* [2017] FamCA 958, [76] (Carew J); *Re Sam and Terry (Gender Dysphoria)* (2013) 49 Fam LR 417, 421 [11] (Murphy J); *Re Jamie* [2015] FamCA 455, [43]–[44] (Thornton J); *Re Leo* (2015) 52 Fam LR 533, 535 [6] (Rees J); *Re Cameron* [2015] FamCA 1113, [13] (Kent J); *Re Jordan* [2015] FamCA 175, [9] (Kent J); *Re Dylan* [2014] FamCA 969, [6] (Kent J).

155 Hollingsworth and Stalford (n 103) 78.

156 *UNCRC* (n 15) art 3(1) (emphasis added).

157 *Family Law Act 1975* (Cth) s 67ZC.

158 *Ibid* s 60CA.

159 See, eg, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166; Stalford and Hollingsworth, 'Judging Children's Rights' (n 82) 35–6; Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, 2017) 7 n 31.

160 Tobin, 'Judging the Judges' (n 93) 612.

161 *Ibid* 589.

162 *Aldridge v Keaton* (2009) 235 FLR 450, 469 [75] (Bryant CJ, Boland and Crisford JJ). See also *Lovine v Connor* [2011] FamCA 432, [33]–[35] (Mushin J) ('[b]est interests means "most important" as distinct from "sole"'); *Benson v Hughes* (1994) 123 FLR 175, 192 (Chisholm J) ('Where ... there is some clear

involved between the rights and best interests of the child, and the rights and interests of others, such as the child's parents, siblings, extended family members, and in special medical procedure cases, the child's treating medical practitioners. The court must acknowledge the relevance of these other rights and interests, and engage in a meaningful discussion about how to reconcile them with those of the child.<sup>163</sup> As Eekelaar has observed, it might be 'easier and more comforting simply to say that we are all doing what we think is best for the child', which 'encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake'.<sup>164</sup> To simply claim that a decision reached is in the 'best interests of the child', without according due attention to the other rights and interests involved, is unlikely to be a decision in the child's best interests.

The *UNCRC* is not, however, the 'be all and end all of a children's rights judgment'.<sup>165</sup> Various other sources can, and do, shape judicial understandings of children's rights approaches to decision-making. Former Chief Justice of the Family Court of Australia, Diana Bryant, has suggested that a statutory human rights instrument in Australia would '[embolden]' parties and lawyers in proceedings under part VII of the *Family Law Act* to 'direct their submissions towards how particular rights, such as a child's right to autonomy, should be taken into account'.<sup>166</sup> In the absence of a charter of human rights at the federal level in Australia, however, the *UNCRC* remains the most promising legal tool for bestowing children with formal rights recognition – albeit indirectly, given that the *UNCRC* does not create legally enforceable rights for children in Australia.

#### 4 *Communicating and Enabling: A Judgment about the Child and for the Child*

The fourth and final salient feature of a children's rights judgment focuses on the style in which the judgment is written and how it is communicated. There are two key elements: (i) the child is the focal point and the judgment shares the child's own voice and narrative;<sup>167</sup> and (ii) the judgment recognises the child (or children generally) as one of its audiences.<sup>168</sup>

##### (a) *Centralising the Child in the Judgment's Narrative*

As with any form of narration, there is no moral neutrality in the judgment writing process.<sup>169</sup> A children's rights approach is by no means naive about the

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and important other conflicting interest, it seems that the law requires the court to take into account the child's welfare but balance it against the other interest or policy').

163 Fortin, 'Accommodating Children's Rights' (n 93) 306.

164 John Eekelaar, 'Beyond the Welfare Principle' (2002) 14(3) *Child and Family Law Quarterly* 237, 248. See also Lucinda Ferguson, 'An Argument for Treating Children as a "Special Case"' in Elizabeth Brake and Lucinda Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018) 227, 227.

165 Hollingsworth and Stalford (n 103) 58.

166 Bryant (n 23) 208.

167 See Hollingsworth and Stalford (n 103) 79–81.

168 *Ibid* 82–4.

169 Peter Brooks, 'The Law as Narrative and Rhetoric' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 14, 16.

subtle ways in which the law stifles children's stories in developing its narrative. Various substantive and procedural provisions of part VII of the *Family Law Act*, summarised in Part IV(C)(2) above, frame the extent of children's participation in proceedings and the terms of that (very limited) participation. The result, as Woodhouse has recognised, is that 'the stories framed by the legal rules bear little relation to children's reality'.<sup>170</sup> The facts of a case, which are subjective in the sense that they are the product of judicial selectivity and filtering,<sup>171</sup> embody the official (legal) story of the parties' experiences. The means by which the judge presents an account of the facts can develop a narrative that centralises the experiences of the child and contextualises the child's life: a children's rights judgment tells *the child's* story.<sup>172</sup>

The use of language to humanise the child is a critical feature of a children's rights judgment.<sup>173</sup> In gender dysphoria proceedings, referring to the child consistently throughout the judgment by his or her first name, and the pronoun of his or her chosen gender, encourages readers to form an understanding of that child as a unique individual. Even a pseudonym – rather than a mere reference to 'the child' or 'the subject child' – provides validation of a child's lived experiences, and draws attention to the reality that the category of 'child' is diverse and complex. This language device also serves as a reminder to both the court and readers of the judgment that 'it is the life of a *real* child at stake'.<sup>174</sup> This is especially important in proceedings that are effectively 'test cases' exploring general legal principles, as *Re Kelvin* was. In such cases, the court, and the readers of the judgment, are liable to overlook the tangible, real impact that the decision will have on the child the subject of the proceedings, and on other children whose rights will be impacted.<sup>175</sup>

(b) *Recognising Children as an Audience of the Judgment: Child-Friendly Writing*

The second element of communicating a children's rights judgment is ensuring that the judgment is conveyed effectively to children themselves.<sup>176</sup> 'Child-friendly' judgments should capture the features of a well-written judgment, in that they should be 'concise, clear, interesting and accessible'.<sup>177</sup> Yet each judge has an

170 Woodhouse, 'Hatching the Egg' (n 118) 1836.

171 Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, 1950) 55; Graeme Austin, *Children: Stories the Law Tells* (Victoria University Press, 1994) 9.

172 Hollingsworth and Stalford (n 103) 79–80. See also Woodhouse, 'Hatching the Egg' (n 118) 1829–37; Gemma Edgar, 'Re Alex/Real Alex: Transsexual Narratives and Their Possibilities for Resistance' (2005) 23(1) *Australian Feminist Law Journal* 79.

173 Hollingsworth and Stalford (n 103) 81.

174 *Ibid* (emphasis in original).

175 *Ibid*.

176 *Ibid* 79; Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 23–4.

177 Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010) 44, 48. However, Rackley has also noted that '[e]ven the most unpersuasive and poorly written judgment still has material power. It still carries the authority of law, binds the parties and acts as precedent. A badly written judgment is still a *judgment*': at 53 (emphasis in original).

'audience' in mind when writing a judgment, and this audience might differ depending on the jurisdiction, the nature of the proceedings, and where the court is situated in the court hierarchy.<sup>178</sup> A children's rights judgment must be mindful of children as one of its audiences, and tailor its structure, language and narrative to enable children – during their childhood – to access and understand the court's reasoning and decision.<sup>179</sup>

The nature of the family law jurisdiction, being 'an area which really intrudes into people's lives',<sup>180</sup> imposes a great responsibility on judges to explain the reasons for their decisions in a clear, sensitive and cogent manner. If ascertaining a child's views in proceedings is a 'two way street', as the Family Court of Australia has described it, then 'children should be accorded the respect of having the outcome notified to them in an appropriate manner'.<sup>181</sup> A children's rights judgment should advise the child, in age-appropriate language, of how his or her views have been taken into account in the determination of the child's best interests, and if the decision does not align with the child's views, the reasons for the judge deciding contrary to those views.<sup>182</sup> Such a judgment is also a means by which children can exercise their right to freedom of expression in article 13(1) of the *UNCRC*, which includes the freedom to *seek* and *receive* information.

At the time of writing, just one judgment in proceedings under part VII of the *Family Law Act*, to the author's knowledge, has endeavoured to embrace this element of a children's rights judgment, through a letter written by the judge to the children.<sup>183</sup> The judge ordered that the letter be provided to each child when he or she turned 14 years of age, in the context of counselling or therapy.<sup>184</sup> The judge in this case recognised that:

traditional reasons for judgment are not usually written with the audience of the children in mind. The language and format of reasons are, more often than not, styled for an audience consisting of the parents, the lawyers involved in the case, and an appellate court.<sup>185</sup>

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178 Hollingsworth and Stalford (n 103) 82.

179 Ibid; Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 23. See also 'Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice' (Guidelines, Council of Europe, October 2011) 28 [49]: 'Judgments and court rulings affecting children should be duly reasoned and explained to them in language that children can understand, particularly those decisions in which the child's views and opinions have not been followed'.

180 Diana Bryant as quoted in 'Retiring Chief Justice Reflects on Thirteen Years in the Family Court', *The Law Report* (ABC Radio National, 19 September 2017) <<http://www.abc.net.au/radionational/programs/lawreport/2017-09-19/8956300>>.

181 *Karamalis v Karamalis* (2018) 57 Fam LR 588, 591 [16] (Bennett J).

182 Lundy, Tobin and Parkes (n 144) 415.

183 See *Gaylard v Cain* [2012] FMCAfam 501. For examples of child-friendly judgments in the context of family law proceedings in the UK, see *Re A (Letter to a Young Person)* [2017] EWFC 48 and *Lancashire County Council v M* [2016] EWFC 9. Stalford and Hollingsworth have observed that '[t]here is nothing particularly remarkable about [the *Re A*] decision in substance ... but the presentation of the judgment has been applauded by the legal community and children's rights advocates alike as a model of how to communicate with children': Helen Stalford and Kathryn Hollingsworth, "'This Case is About You and Your Future": Towards Judgments for Children' (2020) 83(5) *Modern Law Review* 1030, 1031 ('This Case is About You and Your Future').

184 *Gaylard v Cain* [2012] FMCAfam 501, [99] (Altobelli FM); Order of Altobelli FM in *Gaylard v Cain* (Federal Magistrates Court of Australia, WOC83/2011, 30 May 2011) [19].

185 *Gaylard v Cain* [2012] FMCAfam 501, [87] (Altobelli FM).

In the United Kingdom, Baroness Hale of Richmond, writing extra-curially, has remarked that ‘we judges could make a start by producing a version of our decision which makes sense to the person most closely affected by it’, that is, the child.<sup>186</sup> An assessment of how persuasive a judicial narrative is, however, is (almost) always made according to adult standards. There remains a tendency for adults to ‘underestimate children’s capacities’,<sup>187</sup> including their capacity to understand decisions of the Family Court that have been made about them and their lives.

The next Part of this article applies the four salient features of a children’s rights judgment to re-read the judgment of the Full Court of the Family Court in *Re Kelvin*. The ensuing analysis will advance the argument that, despite being heralded as championing the rights of transgender children, the *Re Kelvin* judgment rendered transgender children and their rights invisible.

## V RE-READING THE FULL COURT’S JUDGMENT IN *RE KELVIN*

The decision of the Full Court of the Family Court in *Re Kelvin* was lauded as a victory for transgender children’s rights.<sup>188</sup> This Part exposes three aspects of the Full Court’s judgment that it is suggested undermine this conclusion: (i) the ‘invisible’ rights approach that the Full Court adopted; (ii) the central narrative and writing style of the judgment; and (iii) the caveat that the majority imposed in requiring the Family Court to remain involved in the medical treatment process for childhood gender dysphoria ‘where there is a genuine dispute or controversy as to whether the treatment should be administered’.<sup>189</sup>

### A The Full Court’s ‘Invisible Rights’ Approach and a Judgment All About Parental Rights and Responsibilities

The judgment of the Full Court in *Re Kelvin* falls squarely within what Tobin has labelled an ‘invisible’ rights approach, the defining feature of which is ‘the failure to identify that the rights of children are relevant to the dispute before the court’.<sup>190</sup> There is not a single reference to the rights of the child in the judgment, yet there are nine references to the rights of parents.<sup>191</sup> This cursory quantitative assessment is supported by a qualitative one. There is an underlying tension in gender dysphoria proceedings between, on the one hand, protecting children, and

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186 Hale (n 152) 119.

187 Parkinson and Cashmore (n 126) 4, 197. See also Freeman, ‘The Human Rights of Children’ (n 91) 22; Tobin and Varadan (n 97) 166; Richard Chisholm, ‘Children’s Participation in Family Court Litigation’ (1999) 13(3) *Australian Journal of Family Law* 197, 217.

188 See above n 14.

189 *Re Kelvin* (2017) 351 ALR 329, 355 [167] (Thackray, Strickland and Murphy JJ).

190 Tobin, ‘Judging the Judges’ (n 93) 594.

191 See *Re Kelvin* (2017) 351 ALR 329, 340 [73], 347–8 [123], 348 [124]–[125] (Thackray, Strickland and Murphy JJ), 359 [191] (Ainslie-Wallace and Ryan JJ).



on the other, affording children autonomy and independence in decision-making.<sup>192</sup> This distinction – between protecting children, and protecting children's rights – is, however, false or at least deceptive,<sup>193</sup> because it does not change children's status. Rather, it involves 'substituting one adult decision-maker for another, rather than giving children the choice of deciding whether they like the conditions in which they find themselves'.<sup>194</sup> This 'substitution' of adult decision-makers is illustrated by the emphasis that the Full Court in *Re Kelvin* placed upon the rights of parents to make decisions about their children's medical treatment.

### ***1 The 'Right and Responsibility' of Parents to Determine Their Children's Medical Treatment***

A preliminary issue is whether it can be said that parents have 'rights', as opposed to duties or responsibilities, under the *Family Law Act*. The definition of 'parental responsibility' in section 61B of the *Family Law Act* refers to 'duties' and 'responsibilities', but also to 'authority' and 'powers'; yet the definition does not refer to 'rights'.<sup>195</sup> Whilst a deliberate and 'understandable' omission, the Full Court of the Family Court has noted that the practical effect of having no reference to parental 'rights' is negligible, 'other than to make it clear that there are no possessory rights to children'.<sup>196</sup> Parental rights are said to derive from parental duties and 'exist only so long as they are needed for the protection ... of the child'.<sup>197</sup> The majority in *Re Kelvin* observed that: 'The *right* and responsibility of parents to decide upon medical treatment for their non-*Gillick* competent children, *reflected through the prism of the children's best interests*, is the default position, not the exception'.<sup>198</sup>

The majority made repeated reference to the 'right and responsibility' of parents,<sup>199</sup> without acknowledging the differences between the two notions, particularly in terms of the dynamics of the parent-child relationship. In discussing the scope of the welfare jurisdiction under section 67ZC of the *Family Law Act*, the minority noted that '[i]n deciding to control or ignore the parental right the Court should do so only when judicially satisfied that the welfare of the child

192 MDA Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 44.

193 *Ibid* 60.

194 Michael S Wald, 'Children's Rights: A Framework for Analysis' (1979) 12(2) *University College Dublin Law Review* 255, 263.

195 See *Longford v Byrne* [2017] FCCA 762, [60] n 11 (Judge Harman) (there is 'no controversy' that the *Family Law Act* 'does not contain or provide for the rights of parents', and '[p]arents have duties and responsibilities rather than rights').

196 *In Marriage of B* (1997) 140 FLR 11, 67–68 (Nicholson CJ, Fogarty and Lindenmayer JJ). See also Seymour (n 58) 102.

197 *Gillick* [1986] AC 112, 183–4 (Lord Scarman). Cf *Dean v Deluca* [2008] FamCA 1193, [25] (Bell J) ('parents have no rights, they only have duties insofar as the children are concerned'); and *Warwick v Warwick* [2008] FamCA 388, [27] (Bell J) ('I am directed by our political masters to ensure that it is the children's right that I have to emphasise. Parents do not have any rights, they only have duties'). See also *Harrow v Eton* [2007] FamCA 812, [6] (Bell J); *Lovine v Connor* [2011] FamCA 432, [35] (Mushin J).

198 *Re Kelvin* (2017) 351 ALR 329, 347–8 [123] (Thackray, Strickland and Murphy JJ) (emphasis added). See also *Re Jamie* (2013) 278 FLR 155, 179–80 [115] (Bryant CJ).

199 *Re Kelvin* (2017) 351 ALR 329, 347–8 [123]–[125] (Thackray, Strickland and Murphy JJ).

requires that the parental right should be suspended or superseded'.<sup>200</sup> The Full Court also quoted the High Court in *Marion's Case*, discussed in Part II(B) above, regarding the 'parental power' to authorise medical treatment for a non-*Gillick* competent child. The Full Court's endorsement of this statement, which was said to involve the 'parent speaking for the child',<sup>201</sup> bears remnants of the historical *patria potestas* (parental possession) doctrine.<sup>202</sup> In making these observations, the Full Court in *Re Kelvin* conflated the child's rights and best interests with parental 'rights' and responsibilities, and conceptualised children as a mere extension of their parents.<sup>203</sup>

A children's rights approach conceptualises children as having rights and interests that are *distinct* from those of their parents and other caregivers.<sup>204</sup> The United Nations Committee on the Rights of the Child has stressed that the *UNCRC* 'requires that children, including the very youngest children, be respected as persons in their own right', and as 'active members of families, communities and societies, with their own concerns, interests and points of view'.<sup>205</sup> However, a children's rights approach does not 'abandon' children to their autonomy.<sup>206</sup> Acknowledging children's vulnerability and immaturity relative to adults, article 5 of the *UNCRC* requires that parents provide 'appropriate direction and guidance' to their children in the exercise of their rights, consistently with children's 'evolving capacities'. The evolving capacities principle refers to 'processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding'.<sup>207</sup>

This notion of evolving capacities is 'positive and enabling',<sup>208</sup> which recognises that the rights and power that parents have over their children diminish with children's growing maturity.<sup>209</sup> Importantly, the evolving capacities principle requires that parental rights be exercised 'to *guide and assist* children in the realization of their rights'.<sup>210</sup> The emphasis must be on the *child's* right to demand

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200 Ibid 359 [191] (Ainslie-Wallace and Ryan JJ).

201 *Marion's Case* (1992) 175 CLR 218, 239–40 (Mason CJ, Dawson, Toohey and Gaudron JJ), quoted in *Re Kelvin* (2017) 351 ALR 329, 347–8 [123] (Thackray, Strickland and Murphy JJ).

202 Tobin, 'Judging the Judges' (n 93) 593; Jill Elaine Hasday, *Family Law Reimagined* (Harvard University Press, 2014) 133; John Eekelaar, 'The Emergence of Children's Rights' (1986) 6(2) *Oxford Journal of Legal Studies* 161, 162; Barbara Bennett Woodhouse, "'Who Owns the Child?': *Meyer and Pierce* and the Child as Property' (1992) 33(4) *William and Mary Law Review* 995; David Archard, 'Do Parents Own Their Children?' (1993) 1(1) *International Journal of Children's Rights* 293.

203 Tobin, 'Judging the Judges' (n 93) 594.

204 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 12.

205 Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, 40<sup>th</sup> sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) 3 [5] ('*General Comment No 7*').

206 Bruce C Hafen and Jonathan O Hafen, 'Abandoning Children to Their Autonomy: The *United Nations Convention on the Rights of the Child*' (1996) 37(2) *Harvard International Law Journal* 449.

207 Committee on the Rights of the Child, *General Comment No 7* (n 205) 8 [17].

208 Ibid. See also Committee on the Rights of the Child, *General Comment No 20 (2016) on the Implementation of the Rights of the Child During Adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) 6 [18].

209 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 13.

210 John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship between Children and Parents under the CRC' in Martin D Ruck, Michele Peterson-Badali and Michael Freeman

appropriate guidance and assistance from his or her parents in the enjoyment of his or her rights, not on *parents'* right to non-interference by the state in the exercise of their parental rights, responsibilities and duties to provide that direction and guidance.<sup>211</sup> To focus on the rights of parents to make decisions for and on behalf of their child, as the Full Court did in *Re Kelvin*, sustains the conceptualisation of the passive, vulnerable, silent child. The Full Court perpetuated this conceptualisation, it is argued, through its failure to acknowledge the child's role in the medical treatment decision-making process.

## 2 *A Judgment Telling in its Omission: The Silent and Absent Child*

The Full Court's judgment in *Re Kelvin* is telling for what it does *not* say about children, arguably more than what it does. The Court's construction of the relationship between parents, children and the state in the context of medical treatment for childhood gender dysphoria rendered children all but invisible. This invisibility emerges from the majority's articulation of the stakeholders involved in the decision-making process. The majority emphasised that it was concerned to examine:

whether there is any role for the Family Court in cases where there is no dispute between *parents* of a child who has been diagnosed with Gender Dysphoria, and where there is also no dispute between the *parents* and the *medical experts* who propose the child undertake treatment for that dysphoria.<sup>212</sup>

The majority referred to special medical procedure cases as requiring court authorisation 'irrespective of unanimity on the part of parents and the medical experts'.<sup>213</sup> The majority said that in these "'special cases", the usual parental right and responsibility for deciding upon their child's care is abrogated in favour of court determination':<sup>214</sup> the child again absent from the picture. The majority also noted that in 'each and every case' in which court authorisation had been sought for a child's treatment for gender dysphoria, the decision had been informed by:

comprehensive evidence from a miscellany of medical specialists from different disciplines (for example, psychiatry, psychology, paediatrics, and endocrinology) and by evidence from parents, or those otherwise charged directly with the care, welfare and development of the child concerned.<sup>215</sup>

Starkly absent from this list of sources by which Family Court decisions in gender dysphoria cases have been informed, is any reference to the child. On the majority's formulation, the medical treatment decision-making process was one

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(eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Taylor & Francis, 2017) 53, 65 (emphasis in original). See also Jonathan Montgomery, 'Children as Property?' (1988) 51(3) *Modern Law Review* 323, 341; John Tobin and Sarah M Field, 'Article 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 554; Tobin and Varadan (n 97) 167.

211 Tobin and Varadan (n 97) 160; Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 13. Cf Ann Quennerstedt, 'Balancing the Rights of the Child and the Rights of Parents in the *Convention on the Rights of the Child*' (2009) 8(2) *Journal of Human Rights* 162, 172.

212 *Re Kelvin* (2017) 531 ALR 329, 346 [116] (Thackray, Strickland and Murphy JJ) (emphasis added).

213 *Ibid* 348 [125].

214 *Ibid*.

215 *Ibid* 346–7 [118].

defined and regulated exclusively by adults, namely, the child's parents and treating medical practitioners, and Family Court judges. There was no appreciation of the *child's* role in the process, or appreciation of the child as having rights, interests and views that might conflict with those adults, and so trigger a dispute about the proposed medical treatment.

A perfectly valid question germinates from the Full Court's invisible rights approach: given that the *Re Kelvin* decision removed the Family Court from the decision-making process for gender dysphoria treatment, which many had been advocating for following *Re Jamie*, does it even matter that the Full Court did not engage at all with children's rights? It could be argued that the outcome would have been the same, regardless. However, it does matter, for what the Full Court's approach says about the 'status and vision'<sup>216</sup> of transgender children in Australian society, who experience heightened discrimination, violence, harassment and victimisation due to their gender identity.<sup>217</sup>

## B A Judgment by Adults, for Adults

While the Full Court's decision was exalted as championing the rights of transgender children,<sup>218</sup> those very children were, it has been argued, largely invisible in the *Re Kelvin* judgment. This is, at least in part, because the matter came before the Full Court in the form of a special case stated (rather than an appeal), such that the Court's focus was on questions of law for its opinion. Kelvin thus served an instrumental purpose in reforming the law in relation to medical treatment for childhood gender dysphoria. His case was a vehicle for the Full Court to reconsider its decision in *Re Jamie*. By virtue of how the case came before the Full Court, Kelvin himself was not the focus of the Court's judgment – nor, however, were transgender children as a collective. To advance this argument, this section focuses on the central narrative of the Full Court's judgment; and then rewrites the judgment from a children's rights perspective.

### 1 The Central Narrative

The 'political potential'<sup>219</sup> of judgments in gender dysphoria proceedings to raise awareness of the perceived unjust incursion into transgender children's rights reached a pinnacle following the Full Court's decision in *Re Jamie*. As noted in Part II(D) above, activism, academic critique and judicial discontent with the Full Court's decision and reasoning in *Re Jamie*, prompted the Full Court in *Re Kelvin*

216 Tobin, 'Judging the Judges' (n 93) 595.

217 See, eg, Department of Health (Victoria), 'Transgender and Gender Diverse Health and Wellbeing' (Background Paper, 2014) 21, 24; Holly V Franson, 'The Rise of the Transgender Child: Overcoming Societal Stigma, Institutional Discrimination, and Individual Bias to Enact and Enforce Nondiscriminatory Dress Code Policies' (2013) 84(2) *University of Colorado Law Review* 497; Amanda Kennedy, 'Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transitions' (2008) 19(2) *Hastings Women's Law Journal* 281; Sonja Shield, 'The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment' (2007) 31(2) *New York University Review of Law and Social Change* 361.

218 See above n 14.

219 Rackley (n 177) 45.

to 're-shape ... the official "story"'.<sup>220</sup> However, the Full Court omitted any reference to the rights of children in its judgment, instead displaying a predictable preference for the language of children's 'welfare'<sup>221</sup> and parental rights and responsibilities.

What is most telling about the Full Court's judgment, it is argued, is the central narrative that it conveyed: this was not a judgment *about* transgender children or their rights, but about the extent of state incursion into parental decision-making, and ensuring that the law kept pace with medical science. According to the majority, the Family Court had 'always recognised ... an appropriate concern about intruding into the lives of parents' in gender dysphoria cases,<sup>222</sup> and it was 'readily apparent that the judicial understanding of Gender Dysphoria and its treatment have fallen behind the advances in medical science'.<sup>223</sup> This led to the majority's observation that '[i]t would not be heresy to suggest that, in relation to stage 2 treatment, *Re Jamie* would be decided differently today', that case having been decided 'at a particular point in time, and at a particular stage in the development of legal principle, and even more importantly of medical science'.<sup>224</sup> The judgment in *Re Kelvin* was thus about the development of the law and legal principle in line with medical developments, rather than about the rights of children diagnosed with gender dysphoria.

Had the Full Court in *Re Kelvin* adopted a children's rights approach, in accordance with the salient features set out in Part IV(C) above, then its attention would have been not on the 'attendant stress and expense' of Family Court proceedings on parents (an argument advanced by some of the parties in *Re Kelvin*),<sup>225</sup> or even on the scope of parental rights in the medical treatment context (the predominant focus of the judgment). Rather, the Full Court's attention would have been on whether removing the requirement for court authorisation, to enable a child diagnosed with gender dysphoria to commence stage two treatment, and/or removing the Family Court from the assessment of a child's *Gillick* competence, would be in the best interests of the child (Kelvin), or transgender children as a collective, taking into account the child's rights under the *UNCRC*. The interests of the child's parents would have been relevant; however, the Full Court would have directed its attention to parents' 'primary responsibility for the upbringing and development of [their] child', having their child's best interests as their basic concern.<sup>226</sup>

The Full Court in *Re Kelvin* was not obliged to take the rights of Kelvin, or of transgender children more broadly, into consideration in answering the questions for its determination. However, had the moral reasoning of the judges been

220 Ibid 46.

221 See Fortin, 'Accommodating Children's Rights' (n 93) 303–4, 306.

222 *Re Kelvin* (2017) 351 ALR 329, 346 [117] (Thackray, Strickland and Murphy JJ).

223 Ibid 353 [152].

224 Ibid 355 [165]. This observation is phrased in almost identical terms to the observation made by Strickland J in a paper presented at a 2014 oration: '*Re Jamie* is ... a decision that was made at a particular point in time and at a particular stage in the development of legal principle and medical science': Strickland (n 59) 72.

225 *Re Kelvin* (2017) 351 ALR 329, 347 [119] (Thackray, Strickland and Murphy JJ).

226 *UNCRC* (n 15) art 18(1).

informed by the values underpinning the *UNCRC*, there would have been scope for the Full Court to frame the issues in the case as being about transgender children and their rights, and to determine the questions for its opinion in a manner consistent with a children's rights approach.<sup>227</sup> The use of 'rights talk' for parents in the *Re Kelvin* judgment, particularly in light of the omission of any such discourse in relation to children, exemplifies Fortin's observation that judges 'not uncommonly analyse the rights that *adults* have, but fail to articulate those of the children'.<sup>228</sup> The next section presents a child-friendly summary of the *Re Kelvin* judgment, rewriting the judgment in a way that is consistent with a children's rights approach.

## 2 *Rewriting Re Kelvin: A Child-Friendly Version of the Full Court's Judgment*

A vital element of communicating a children's rights judgment, as explained in Part IV(C)(4)(b) above, is ensuring that children, during their childhood, are able to access and understand the court's reasoning and decision.<sup>229</sup> This is a 'child-friendly' judgment: one that has tailored its language, narrative and structure to cater for children as one of its key audiences.<sup>230</sup> In light of the Full Court's 'invisible rights' approach, discussed in Part V(A) above, it is unsurprising that children were not contemplated as an audience of the *Re Kelvin* judgment. The Full Court's inability to conceptualise the issues in the case stated in terms of children's rights meant, as a logical extension, that children's rights would not have been at the fore of the minds of the judges when drafting their judgments. As such, the Full Court did not strive to accommodate and embrace children's rights through a 'child-friendly' version of its judgment. The opportunity nonetheless existed, it is argued, for the Full Court to do so, by articulating in clear, age-appropriate<sup>231</sup> language, what the Court decided and why. This might have been achieved by writing a letter to Kelvin,<sup>232</sup> or by producing a short summary of the Full Court's decision,<sup>233</sup> as the author has endeavoured to do below:

227 See Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7(1) *International Journal of Constitutional Law* 2, 12; Dworkin, *Law's Empire* (n 125) 238–58.

228 Fortin, *Children's Rights* (n 17) 96 (emphasis in original). See also Fortin, 'Accommodating Children's Rights' (n 93) 302–3.

229 Hollingsworth and Stalford (n 103) 82.

230 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 23. Cf Stalford and Hollingsworth, who 'make the case for "judgments for children" as opposed to "child friendly judgments"': Stalford and Hollingsworth, 'This Case is About You and Your Future' (n 183) 1032.

231 See Nigel Thomas, *Children, Family and the State: Decision-Making and Child Participation* (Palgrave MacMillan, 2000) 68–9.

232 See, eg, *Gaylard v Cain* [2012] FMCAfam 501; *Re A (Letter to a Young Person)* [2017] EWFC 48.

233 See, eg, the abridged, child-friendly versions of some of the rewritten judgments in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart Publishing, 2017): Michael Freeman, 'House of Lords: *Re T (A Minor) (Wardship: Medical Treatment)*': at 256; Jo Bridgeman, 'Family Division of the High Court (England and Wales): *Re X and Y (Foreign Surrogacy)*': at 104; Anashri Pillay, 'Constitutional Court of South Africa: *The Government of the Republic of South Africa & Rs v Grootboom & Ors*': at 327–8; Laura Lundy, 'European Court of Human Rights: *Valsamis v Greece*': at 344.

This case is about a young person's right to decide who he is and who he wants to be. That young person's name is Kelvin.

Kelvin was born a girl, but he felt like a boy and wanted to be a boy. He felt like he was trapped in the wrong body. Doctors call this 'gender dysphoria'.

When Kelvin was 16 years old, his father asked the Family Court to allow Kelvin to start medical treatment. This treatment would help Kelvin's body match up with who he was: a boy.

The Family Court asked us to answer an important question: Who should decide whether Kelvin can start medical treatment? Should it be the Family Court? Or should Kelvin be able to make the decision, together with his parents and doctors?

Usually, parents can make decisions about their child's medical treatment.

But for the medical treatment that Kelvin wants, the Family Court for a long time has had to make the decision. This is because of the type of treatment, what might happen if a wrong decision is made, and the chance that Kelvin and his parents might not agree.

We have decided that Kelvin, and other young people like him, should be able to make the decision to start medical treatment themselves, with help from their parents and advice from their doctors. They should not have to go to the Family Court to be who they are.

But if a young person, their parents, or their doctors, do not agree, then we think that the Family Court should still make the decision.

The primary aim of this rewritten, child-friendly summary of the Full Court's judgment in *Re Kelvin* is to make clear that this is a case about children and their rights: the ability of children diagnosed with gender dysphoria to make decisions and choices about their own bodies and identities. The decision is not justified on the basis of advances in medical science, or (in)correct application of legal principle. Nor is the focus upon the recalibration of parental responsibilities and state duties in relation to transgender children's medical treatment. Rather, attention is drawn to the impact of the decision on the rights of Kelvin and other children and young people diagnosed with gender dysphoria.

A practical challenge for Family Court judges in producing a child-friendly version of their judgments is the diversity that exists within the concept of 'children', not only in terms of their age, but also their various capacities. Writing a judgment for a five-year-old is not the same as writing a judgment for a 15-year-old (or both, in proceedings involving or affecting children of various ages). In some cases, particularly post-separation parenting proceedings, judges will also need to be attune to the 'ethical considerations' of 'what to tell the child and when'.<sup>234</sup> In terms of its legal status, a child-friendly judgment is not akin to a

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234 Hollingsworth and Stafford (n 103) 84. This dilemma arose in *Gaylard v Cain* [2012] FMCAfam 501, [86]–[99] (Altobelli FM).

language translation; rather, its purpose is to use age-appropriate language to communicate the decision to children, which will necessitate the use of different words in the same language.<sup>235</sup> In the event of a contradiction between the child-friendly version and the main version of the judgment, the view of Hollingsworth and Stalford is accepted, that it is ‘highly unlikely’ that a child-friendly judgment produced in addition to the original judgment would be binding in law.<sup>236</sup> Rather, the child-friendly version would sit above the court’s main reasons for judgment.

Child-friendly judgments are not merely a way to communicate more effectively to children affected by a judicial decision. Such judgments have ‘a broader communicative value’: they show and tell children and adults alike that ‘the law recognises and treats [children] as rights-holders who are worthy of respect’.<sup>237</sup> In the Australian family law context, child-friendly judgments would be ‘an innovation in judicial writing’.<sup>238</sup> However, from a practical perspective, it is suggested that the production of such a judgment would not be an onerous or resource-intensive task for Family Court judges. The issue would be largely one of conceptualisation: of judges turning their minds to *children* as a primary audience of their judgments.

### C The Need for Family Court Authorisation in Circumstances of ‘Genuine Dispute or Controversy’ about a Child’s Medical Treatment

The third feature of the Full Court’s judgment in *Re Kelvin* which, it is argued, militates against the conclusion that the decision was a victory for transgender children’s rights, is the scope that the Full Court provided for ongoing court involvement in the medical treatment process for gender dysphoria. In concluding that the Full Court did not confirm its decision in *Re Jamie*, the majority in *Re Kelvin* inserted an important caveat:

we are not saying anything about the need for court authorisation where the child in question is under the care of a State Government Department. Nor, are we saying anything about the need for court authorisation where there is a *genuine dispute or controversy as to whether the treatment should be administered; eg, if the parents, or the medical professionals are unable to agree*. There is no doubt that the Court has the jurisdiction and the power to address issues such as those.<sup>239</sup>

This paragraph of the judgment is worthy of closer scrutiny, from a children’s rights perspective, for: (i) how it overlooks the role of the child in circumstances of potential conflict; and (ii) its failure to articulate how the ‘genuineness’ of a dispute or controversy that would justify Family Court intervention is to be assessed.

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235 Hollingsworth and Stalford (n 103) 83.

236 Ibid.

237 Ibid.

238 Ibid.

239 *Re Kelvin* (2017) 351 ALR 329, 355 [167] (Thackray, Strickland and Murphy JJ) (emphasis added). See also Ainslie-Wallace and Ryan JJ’s statement that ‘the principles that emerge from *Marion’s case* when applied to *Re Jamie* should have resulted in the conclusion that in relation to stage 2 treatment for Gender Dysphoria the court has no role to play *unless there is a dispute about consent or treatment*’: at 359 [189] (emphasis added).



### 1 *Overlooking the Child's Role in the Decision-Making Process*

In canvassing the possibility of a 'genuine dispute or controversy', the majority gave no credence to the *child's* role in the decision-making process in relation to his or her own medical treatment. The majority was silent on the relevance of the child's views and wishes, offering the example of disagreement between the child's parents, or the child's treating medical professionals. The judgment of Bryant CJ in *Re Jamie* provides a neat point of comparison. Her Honour stated:

If there is a dispute between the parents, *child* and treating medical practitioners, or any of them, regarding the treatment and/or whether or not the child is *Gillick* competent, the court should make an assessment about whether to authorise stage two having regard to the best interests of the child as the paramount consideration.<sup>240</sup>

That the majority in *Re Kelvin* omitted the child from its example of circumstances of 'genuine dispute or controversy' might at first blush appear a minor semantic lapse. Yet its implications – both conceptual and practical – for transgender children's rights are more significant. The majority's formulation in *Re Kelvin* suggests that it conceptualised the medical treatment decision-making process for childhood gender dysphoria as, in essence, about adult control over, and regulation of, transgender children's bodies and identities. The invisibility of the child is a recurrent theme in the Full Court's judgment.<sup>241</sup> It arguably reflects resistance to the notion that children can, and should, influence decisions that affect their lives,<sup>242</sup> as active participants in the determination of their best interests. It also underpins the problematic assumption that children's views and interests align with those of their parents.<sup>243</sup> As noted in Part V(A)(2) above, a children's rights approach conceptualises children as subjects with distinct rights and interests, who 'have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right'.<sup>244</sup>

A more redeeming interpretation of the majority's statement in *Re Kelvin* regarding the need for court authorisation, although not accepted here, is that the majority was simply acknowledging that conflicts may more commonly arise between parents and a child's treating medical professionals in relation to whether a proposed course of action is in the child's best interests.<sup>245</sup> The practical effect of the majority's statement, it is argued, is that children diagnosed with gender dysphoria benefit only incidentally from the decision in *Re Kelvin*. Their ability to access stage two treatment without the Family Court's involvement is contingent

240 *Re Jamie* (2013) 278 FLR 155, 184–5 [140(f)] (Bryant CJ) (emphasis added). See also: at 191 [179], 193 [194], and the submissions of the Australian Human Rights Commission on this point: at 166 [46], 167 [56].

241 See Part V(A)(2) above.

242 Lundy, Tobin and Parkes (n 144) 398.

243 Dimopoulos, 'A Theory of Children's Decisional Privacy' (n 85) 2, 10, 12.

244 *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, 641 [57] (Baroness Hale). See also Berry Mayall, *Towards a Sociology for Childhood: Thinking from Children's Lives* (Open University Press, 2002) 21.

245 See Rob Heywood, 'Parents and Medical Professionals: Conflict, Cooperation, and Best Interests' (2012) 20(1) *Medical Law Review* 29.

upon alignment between the views of their parents and their treating medical practitioners.

## 2 *Determining the Genuineness of a Dispute or Controversy that Would Justify Family Court Intervention*

The statement of the majority in *Re Kelvin*, regarding the Family Court's ongoing role in the medical treatment process for gender dysphoria in circumstances of 'genuine dispute or controversy', also generates unease from a children's rights perspective for the opacity with which it articulates the scope for Family Court intervention. The majority considered *who* might generate the dispute or controversy (parents, medical professionals), but was silent on what would make such a dispute or controversy a 'genuine' one that would necessitate the Family Court's involvement.

A 'grey zone' for assessing the genuineness of a dispute or controversy in this context might arise where a child clearly expresses a view that conflicts with the wishes of his or her parents, yet the child does not have sufficient maturity and understanding to enable his or her views to be conclusive on the issue.<sup>246</sup> In these circumstances, a children's rights approach would require the Family Court to articulate, consider and balance the rights and interests of various parties, including those of the child, the child's parents and the child's treating medical practitioners.

The primary interest of the child's treating medical practitioners is to be protected against the possibility of future litigation, through a declaration by the Family Court that the child is *Gillick* competent to consent to the proposed medical treatment. Nicholson CJ in *Re Alex* described 'a significant onus' placed upon the treating medical professional's assessment, because 'the professional risks liability unless satisfied that the child or young person has "a sufficient understanding and intelligence to enable him or her to understand fully what is imposed"'.<sup>247</sup> A finding by the Family Court of the child's *Gillick* competence transfers the responsibility for risk from the medical practitioner to the patient, and so refutes any challenge to the practitioner who administers medical treatment that he or she had not obtained the child's effective consent.<sup>248</sup> The Family Court has noted that it would be 'sad' and potentially an abuse of court process, if a third party sought a decision from the court regarding proposed medical treatment that was clearly within the bounds of parental responsibility, such as 'where the sole purpose of such an application was as a protection against the prospect of future litigation'.<sup>249</sup>

Issues of potential conflict and controversy in gender dysphoria proceedings, however, should not be overstated or inflated. Applications to the Family Court seeking authorisation of medical treatment for gender dysphoria prior to *Re Kelvin*

246 Tobin, 'Judging the Judges' (n 93) 614.

247 *Re Alex* (2004) 180 FLR 89, 116–17 [155] (Nicholson CJ), quoting the High Court in *Marion's Case* (1992) 175 CLR 218, 237–8 (Mason CJ, Dawson, Toohey and Gaudron JJ).

248 Seymour (n 58) 160; Priscilla Alderson, 'Younger Children's Individual Participation in "All Matters Affecting the Child"' in Barry Percy-Smith and Nigel Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge, 2010) 88, 94. See also *Re Sean* (2010) 258 FLR 192, 207 [93] (Murphy J).

249 *Re Sean* (2010) 258 FLR 192, 207 [93] (Murphy J).

rarely involved a dispute. In one case, the child's treating medical practitioners disagreed on the issue of whether the child was *Gillick* competent.<sup>250</sup> In another, the child's own evidence made it clear to the Family Court that the child's parents were opposed to the course of action that the child sought to follow in seeking treatment.<sup>251</sup> A different conflictual dynamic involved intra-parental conflict: the child's mother brought proceedings for the authorisation of stage one treatment, while the father opposed the application.<sup>252</sup> As the majority in *Re Kelvin* noted, in no stage two gender dysphoria case had contradictory evidence been forthcoming to challenge the desirability of the relevant medical treatment.<sup>253</sup> Although the majority also acknowledged that the requirement for court involvement might have itself served as a 'filter' for the cases in which stage two treatment was recommended and undertaken.<sup>254</sup>

At the time of writing, there have been two judgments published, to the author's knowledge, following *Re Kelvin* that have invoked the Family Court's jurisdiction under section 67ZC of the *Family Law Act* to authorise medical treatment for a child because of a 'genuine dispute or controversy'.<sup>255</sup> In the recent decision of the Family Court in *Re Imogen [No 6]*,<sup>256</sup> it was held that if a child's parent or treating medical practitioner disputes the child's *Gillick* competence, or a diagnosis of, or proposed treatment for, gender dysphoria, then an application to the Family Court is mandatory.<sup>257</sup> The Family Court also held that, once an application is made, the Court should make a finding about the child's *Gillick* competence; and that notwithstanding such a finding, if there is a dispute about diagnosis or treatment, the Court should determine the diagnosis and whether treatment is appropriate, and make an order under section 67ZC of the *Family Law Act*.<sup>258</sup> The impact of *Re Imogen* on future cases involving a dispute or controversy should be followed with interest.

## VI CONCLUSION

The majority in *Re Kelvin* stated that the Full Court's decision was 'not unexpected'.<sup>259</sup> It is also not surprising that the Court's decision reverberated with

250 See *Re Darryl* [2016] FamCA 720, [11]–[20] (Tree J). See also *Re Leo* (2015) 52 Fam LR 533.

251 See *Re Isaac* [2014] FamCA 1134.

252 See *Re Brodie (Special Medical Procedures: Jurisdiction)* [2007] FamCA 776; *Re Brodie (Special Medical Procedures)* [2008] FamCA 334.

253 *Re Kelvin* (2017) 351 ALR 329, 347 [119] (Thackray, Strickland and Murphy JJ). See also *Re Lucas* [2016] FamCA 1129, [68] (Tree J).

254 *Re Kelvin* (2017) 351 ALR 329, 347 [119] (Thackray, Strickland and Murphy JJ). The Family Court referred to this notion of 'genuine dispute or controversy', as expounded in *Re Kelvin*: at 355 [167] (Thackray, Strickland and Murphy JJ), in the context of determining whether it was necessary for the Family Court to make a finding that a child is *Gillick* competent before stage three treatment (surgical intervention) for gender dysphoria can commence: see *Re Matthew* [2018] FamCA 161, [39] (Rees J).

255 See *Re Ryan* [2019] FamCA 112; *Re Imogen [No 6]* (2020) 61 Fam LR 344.

256 (2020) 61 Fam LR 344.

257 *Ibid* [35] (Watts J).

258 *Ibid*.

259 *Re Kelvin* (2017) 351 ALR 329, 355 [165] (Thackray, Strickland and Murphy JJ).

positivity throughout the Australian transgender community. This article has re-read the *Re Kelvin* judgment from a children's rights perspective, exposing various problematic features that militate against the conclusion that the decision was a victory for transgender children's rights. That the Full Court adopted an invisible rights approach is evident from the absence of any reference to, and acknowledgement of, the rights of transgender children. The Full Court conceded the intrusion on family decision-making that the court authorisation requirement for stage two treatment imposed; yet it focused exclusively on parental rights and responsibilities. In doing so, the Full Court conflated children's and parents' interests, and failed to recognise children as active, rights bearing subjects who can, and must, participate in decision-making processes concerning their own medical treatment. The style and narrative of the judgment itself also reflects a missed opportunity to advance transgender children's rights, by enabling those children to read, comprehend and appreciate the decision through a child-friendly version. The majority's statement regarding the need for court authorisation in circumstances of 'genuine dispute or controversy' sustained transgender children's invisibility in the decision-making process, and suggests that the Full Court was unable to cede completely the court's role in regulating the bodies and identities of those children.

Former Chief Justice of the Family Court of Australia, Alastair Nicholson, has described children as 'a segment of the community who in the main have little political clout and rely on the moral integrity of adults for respect of their rights and protection of their interests'.<sup>260</sup> This article has argued that, ultimately, the *Re Kelvin* judgment was not *about* transgender children or their rights; nor was it written *for* them. Rather, the judgment was about the extent to which the Family Court should intervene in parental decision-making about children's medical treatment, consistently with the latest developments in medical science. Children diagnosed with gender dysphoria benefit only incidentally from the Full Court's decision. Their ability to access stage two treatment without court involvement depends upon agreement between their parents and their treating medical practitioners. The Full Court in *Re Kelvin* was presented with a prime opportunity to unsettle the status quo: not only by deciding that stage two treatment for childhood gender dysphoria was no longer a 'special medical procedure' that justified the exercise of the welfare jurisdiction under section 67ZC of the *Family Law Act*, but more importantly, by transforming the status of transgender children and young people in Australia. This article has sought to show that, through its judgment in *Re Kelvin*, the Full Court did not embrace this opportunity.

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260 Alastair Nicholson, 'Advancing Children's Rights and Interests: The Need for Better Inter-governmental Collaboration' (1996) 26 *Western Australian Law Review* 249, 249–50.