

RE ALEX: ADOLESCENT GENDER IDENTITY DISORDER AND THE FAMILY COURT OF AUSTRALIA

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['People with gender identity disorder live with a conviction that their physical anatomy is incompatible with their true gender role. They have an overwhelming desire to live and function in the opposite biological sex'.¹ The manifestation of the disorder in children and adolescents is dominated by secrecy, confusion and shame. The purpose of this article is to promote discussion amongst the legal fraternity of the difficult issues confronting the Family Court of Australia when asked to make decisions with life-altering ramifications for the young and vulnerable.]

Truth and Justice are all one, for Trust is but Justice in our knowledge,
and Justice is but Truth in our practice.²

I INTRODUCTION

Medical and scientific understanding of the aetiology of gender identity disorder has been greatly advanced in recent years. The prevailing opinion is that neither nature nor nurture alone is the answer to a person's sense of self and it is clear that

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¹ United Kingdom Home Office, Report of the Interdepartmental Working Group on Transsexual People, April 2000. Available on-line at: <<http://www.pfc.org.uk/workgrp/wgrp-all.htm>>

² John Milton, *Eikonoklastes* (1649).

both are involved in producing the complex child we call “boy” or “girl”.³ The physical distinction between “male” and “female” is not absolute. The modern view is that individuals are regarded as a continuum with female sex characteristics at one extreme and male at the other.⁴ The process of becoming a boy or girl (man or woman) is a multi-step process; each step a consequence of the one preceding it and itself a critical phase in further development.⁵ If a phase is missed there is no back-tracking and there may be an impact on the complex mix of factors that ultimately determines the sexual identity of the child; the gonadal, genital, chromosomal, neurological, psychological, social and cultural considerations identified by Chisholm J in *Re Kevin*.⁶

The many and complex issues of gender identity disorder in an adolescent were canvassed and analysed in a judgment brought down by Nicholson CJ of the Family Court of Australia on 13 April 2004. In the matter of *Re Alex*,⁷ an application was made to the court for authorisation of a sequence of treatments comprising first, reversible hormonal therapies until age 16, second, irreversible hormonal therapies until age 18 and, finally, surgery, to effect a change in phenotypic sex as an adult. The first step proposed was the administration of a form of contraceptive pill containing oestrogen and progesterone to suppress Alex’s menses. His Honour agreed.

II BACKGROUND TO THE MATTER OF *RE ALEX*

Alex, the only child of his parents’ marriage, was born outside Australia.⁸ He presented as a female infant with no apparent ambiguity in external or internal sexual characteristics and with normal female (XX) chromosomes. Alex lived with his mother and father until age five or six. The relationship he had with his mother was a sad one by any standard. He felt rejected by his mother and referred to her as ‘...affectionless and harsh’.⁹ His relationship with his father, however, was characterised by closeness and affection. Describing this relationship, Alex said it was ‘...like best friends; he told me if he was sad and I told him how I felt’.¹⁰ He shared a bed with his father and bathed and showered with him. No evidence was given, or suggestion made, of any sexual impropriety in this relationship.

³ Evidence of Dr “C” in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] FamCA 297 (*Re Alex*).

⁴ *Amicus curiae* brief of the Harry Benjamin International Gender Dysphoria Association in *D’Elonta (Stokes) v Angelone et al* [2004] CA #7.99-CV-00642 US District Court of Western Virginia.

⁵ Louis Gooren, ‘Expert Witness Statement’ submitted in evidence to the Family Division of the UK High Court of Justice in *Bellinger v Bellinger* [1999] Case No. 69 of 1999.

⁶ *Re Kevin (Validity of Marriage of a Transsexual)* [2001] FamCA 1074, [329].

⁷ *Re Alex* [2004] FamCA 297.

⁸ A suppression order under s 97(2) of the *Family Law Act 1975* (Cth) ensured that neither the parties nor the witnesses could be identified thus ensuring Alex’s privacy was protected. It was agreed by His Honour, the parties, legal representatives and witnesses that the male pronoun should be used to refer to Alex throughout the proceedings in line with Alex’s stated wishes; *Ibid* [17].

⁹ *Ibid* [51].

¹⁰ *Ibid* [55].

When he was five or six years old, his father died. The traumatic impact on Alex can be gauged from an affidavit filed by a consulting medical practitioner stating:

[Alex] related the process of [his] father's death with great distress; saying that [he] still vividly remembers the events around his death. [He] thought something had "blown up in [the father's] head" and [the father] died on the way to hospital. [Alex] could not see his body for some three days afterwards and still has vivid flashbacks to events around his death. [The father] frequently enters [Alex's] nocturnal dreams.

[Alex] said [his father] was gentle "like a girl". He was "a good man, he'd speak to people like a man and my mum's family loved him so much". At times [Alex] felt that [his father] hadn't died and that [his father] was just sleeping. At times [he] speaks to [his father] although he knows [his father] is not able to respond. It feels like "[father's] smiling in my mind."¹¹

Alex arrived in 2000 after his mother married a man who sponsored them to Australia.¹² He was distressed by his mother's second marriage and evidence was given that he felt angry with his mother and rejected by his stepfather whom he believed had turned his mother against him.¹³ This feeling of rejection was borne out when, some nine months after the family's arrival, Alex was made the subject of a care order by a Children's Court under a child welfare law.¹⁴ The order appointed the relevant Government Department as his guardian and this department was the applicant in the matter. At this stage Alex was living with his paternal aunt, who is supportive of him. He continues to do so.

The main circumstances leading to the order were (taken from the judgment in *Re Alex*):

- The mother and step-father has [sic] taken six months before enrolling Alex in an English Language School.
- Alex presented as very aggressive to students and had assaulted peers.
- The mother had said that Alex had tried to kill his step-brother by running into him with his bicycle and had poked something into the younger child's ear until it bled.
- At home, Alex slept in his own bedroom while the mother and the younger two children slept in a locked separate bedroom to prevent Alex from entering.

¹¹ Evidence of Professor "P", Ibid [56].

¹² Ibid [59].

¹³ Ibid [58].

¹⁴ Ibid [62].

- The mother had said that there is no love between her and Alex and his step-father had said that there was no relationship with Alex and did not see Alex as important.
- The mother has said that Alex threatened to kill his step-siblings and that she wanted Alex out of the home.
- The mother had said that in their country of origin, she had asked the authorities to take Alex away but they refused.¹⁵

The reports submitted to the Children's Court also detailed evidence of concerns that Alex was asserting his maleness:

[Alex] presents as very masculine and wears boy's clothes. The mother has said that [Alex] has told her that he wants to be a boy and the school state [sic] that [he] has used the boy's toilets at school.¹⁶

The conflict between Alex and his mother was made manifest in her refusal to see him or be any way involved in decisions regarding where and how Alex should live, his safety or well-being. In evidence before the Children's Court, it was suggested by Dr "J" that this long-standing relationship breakdown had been exacerbated by Alex's incomplete mourning of his father's death. Dr "J" also believed that, in fearing that Alex was a follower of the devil and would kill family members, his mother was exhibiting a paranoia about him.¹⁷

III THE ASSUMPTION OF JURISDICTION BY THE FAMILY COURT OF AUSTRALIA

The issue of Alex's medical treatment was referred to the Family Court of Australia as a matter pertaining to the welfare of the child and orders were sought under s 67ZC of the *Family Law Act 1975* (Cth) (the Act).¹⁸

As Mushin J pointed out in *Re A*,¹⁹ the majority of the High Court of Australia in *Marion's case*

...made it clear that the 1983 amendments to the Family Law Act vested in the Family Court "the substance of the *parens patriae* jurisdiction."²⁰

¹⁵ *Ibid* [63].

¹⁶ Evidence of Mrs "R", *Ibid* [64].

¹⁷ *Ibid* [66].

¹⁸ *Ibid* [6].

¹⁹ [1993] 16 FLR 715.

²⁰ *Secretary, Department of Health and Community Services v JMB and SMB (Marion's Case)* (1992) 15 Fam LR 392, 415.

Under its *parens patriae* power, the Family Court of Australia has jurisdiction to authorise certain medical procedures where a child is incapable of consenting to medical treatment.²¹ Whether the proposed treatment or intervention is outside the scope of a parent to consent to on behalf of his or her child, is dependant on the nature of the medical treatment.²² Court authorisation for medical treatment is required where there is a significant risk of making the wrong decision, either as to a child's present or future capacity to consent, or consequences of a wrong decision are particularly grave.²³ It is an established principle that a minor is capable of giving informed consent to medical treatment when he or she achieves a sufficient understanding and intelligence to enable him or her to fully understand what is proposed.²⁴ Alex was 13 years of age and the proposed treatments were a type of 'special medical procedure' such that His Honour held neither Alex as a minor, nor the applicant as guardian, could give consent.

Whereas His Honour was mindful of the depth of maturity of Alex and the consistency of his stated wishes, he found, given all the circumstances in this case:

...the evidence does not establish that Alex has the capacity to decide for himself whether to consent to the proposed treatment. It is one thing for a child or young person to have a general understanding of what is proposed and its effect, but it is quite another to conclude that he/she has sufficient maturity to fully understand the grave nature and effects of the treatment.²⁵

IV NATURE OF THE PROCEEDINGS IN THE FAMILY COURT OF AUSTRALIA

In *Re Alex*, Nicholson CJ adopted a commonsense approach to the conduct of proceedings. After appointing a Child Representative, he adhered to convention only in so far as the evidence-in-chief was mostly received by way of affidavit. The sequence of hearings, however, was conducted in a "round table"²⁶ inquisitorial format that, in His Honour's words:

...often took the form of an orderly discussion between witnesses and legal representatives (including, sometimes, instructing solicitors) and myself.²⁷

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Gillicks v West Norfolk AHA* [1986] AC 112. See also Eithne Mills, *Family Law: Butterworths Tutorial Series* (2001) 88-90.

²⁵ *Re Alex* [2004] Fam CA 297, [168].

²⁶ *Ibid* [43].

²⁷ Although the evidence of the medical experts was by affidavit, the evidence of the school principals was *viva voce*.

His Honour believed this format:

...enhanced the depth and richness of the evidence, and thereby better served the aim of an outcome which will be in Alex's best interests.²⁸

It was noteworthy, but not without precedent²⁹ that, at the request of Alex, and with the encouragement of all the parties, Nicholson CJ met privately with Alex in chambers and gave him every opportunity to express his own views as to his future treatment and care.³⁰

His Honour's adoption of this approach was not without criticism, however; the tenor of some of which may be gauged from the following:

...Alex is a profoundly betrayed girl, in a perfectly normal girl's body, who seems to have been so traumatised by the grotesque behaviour of her parents and stepfather that she feels only a sex-change can now make her happy. And for a court to agree with this poor abandoned girl's fantasy after an odd court hearing that seems to have minimised the chance of anyone objecting is deeply troubling...³¹

I have read Chief Justice Alastair Nicholson's judgment and it alone proves to me Alex was not born in the wrong body at all.³²

I think [the panel of medical experts] was set up by the Department. You can't get six medical experts with such agreement unless somebody sets it up.³³

[The doctors who supported the proposal] should be seen as products of their time and the ideological biases of male dominance... Feminists like myself envisage a time beyond gender when there is no correct way to behave according to body shape...³⁴

²⁸ *Re Alex* [2004] Fam CA 297, [41].

²⁹ *In the Marriage of Schmidt* (979) 5 Fam LR 421.

³⁰ This is specifically provided for in Article 12 of the United Nations' *Convention on the Rights of the Child*.

³¹ Andrew Bolt, 'A Girl Betrayed', *Herald Sun* (Melbourne), 16 April 2004, 3.

³² Nicolas Tont-Fillipini, 'Row Erupts Over Teenage Sex Change Court Ruling', *7.30 Report*, Australian Broadcasting Corporation Television, 14 April 2004.

³³ Sheila Jeffreys, 'Sex Change Urged by Gender Bias', *The Australian*, 19 April 2004, 9.

³⁴ Andrew Bolt, 'Why I think Sex-Change "Alex" is a Profoundly Betrayed Young Woman', *The Sunday Mail* (Brisbane), 18 April 2004, 14.

The disrespect of at least one of these commentators for the court was palpable:

Unlike Nicholson, I didn't hear all the evidence... but Nicholson's judgment scares me...³⁵

Even the Prime Minister hinted at some sort of legal intervention. Indicating he would seek advice in the matter, he said:

I guess I share the reaction of a lot of Australians that is this the sort of thing a court should be doing?³⁶

Contradicting these detractors, however, an editorial in *The Age* demonstrated a considerably greater understanding of the dilemma faced by the Chief Justice in reaching a decision that would allay the distress so apparent in Alex:

Adolescent unhappiness, by definition, is not measured by an adult perspective on life and sometimes what an adolescent may think of as unbearable would not seem so to an adult. But, precisely for that reason, anyone who must deal with an adolescent's misery needs to consider very carefully what the consequences of disregarding it may be.³⁷

V EVIDENCE AS TO ALEX'S GENDER IDENTITY

Nicholson CJ considered evidence from medical specialists of wide-ranging expertise, not only those who had direct dealings with Alex,³⁸ but also others located overseas to whom the history, diagnosis and treatment recommendations were provided for further consideration.³⁹ His Honour also heard evidence from others close to Alex.⁴⁰ This led His Honour to make interim orders permitting Alex to commence the first stage of hormonal treatment, reversible oestrogen and progestogen therapy, a course of treatment he found to be in Alex's best interests.⁴¹ There was a sense of urgency behind this because Alex was shortly to start at a new high school in his male gender and had expressed his concerns that the presence of periods and an increasingly feminised body would greatly distress and disadvantage him.⁴²

³⁵ Tont-Fillipini, above n 32

³⁶ 'PM may Intervene in Sex-Change Case', *The Mercury* (Hobart), 16 April 2004, 22.

³⁷ Editorial, 'The Court, A Child and a Change of Gender', *The Age* (Melbourne), 15 April 2004, 12.

³⁸ Professor "P" (Assoc Prof of Psychiatry), Professor "W" (Assoc Prof of Paediatrics), Dr "N" (Consultant Child Psychiatrist), Dr "G" (Paediatric and Adolescent Gynaecologist), Dr "J" (Psychiatrist) and Mr "T" (probationary psychologist and counsellor).

³⁹ Dr "C" (Consultant Child and Adolescent Psychiatrist, UK).

⁴⁰ Ms "R" (Caseworker), Mr "H" (Primary School Head), Mr "D" (Secondary School Head) and Alex's aunt.

⁴¹ *Re Alex* [2004] FamCA 297, [49].

⁴² *Ibid* [46]-[47].

It was common ground that Alex had a long-standing, unwavering and present identification as a male.⁴³ He behaved as a boy and demonstrated his maleness, *inter alia*, by refusing to use female toilets or line up with the girls at school.⁴⁴ He wore boy's clothes and engaged in rough play.⁴⁵ There were real fears that Alex may be driven to self-harm in the event that he was unable to fully express his gender identity.

Mr "H", the Primary School Principal said:

[Alex] was in my office and [he] was definitely quite distraught and wanting to kill [himself] because nobody was taking this whole thing seriously about the gender.⁴⁶

In like vein, Ms "R" reported Alex's difficulty in managing his depression and aggression:

We had to put him in a placement... because he was actually threatening to kill himself and saying he would rather be dead and didn't want to live this way, that he wasn't a girl and didn't want to be a girl. I felt very seriously that he actually meant that.⁴⁷

Dr "N" stated:

Alex would be intolerant of, and resistant to, behavioural treatment aimed at reversing his male gender identification and behaviour.⁴⁸

Prof "P" recounted:

[Alex] has presented a consistent account of the development of [his] own gender identity to myself and to many other professionals involved in [his] care. [He] says [he] has always thought of [himself] as a boy even though [he] had apparently limited understanding of the human body when first seen in the current context... [he] said that [he] grew up in [his] first years of life believing that [he] was a boy.⁴⁹

All the expert deponents concurred that Alex exhibited classic symptoms of gender identity disorder.⁵⁰

⁴³ Ibid [80] and [87].

⁴⁴ Ibid [84].

⁴⁵ Ibid [85]-[87].

⁴⁶ Ibid [74].

⁴⁷ Ibid [75].

⁴⁸ Ibid [83].

⁴⁹ Ibid [93].

⁵⁰ Evidence of Prof "P", Ibid [98]; evidence of Dr "N", Ibid [99]; and evidence of Dr "C", Ibid [111].

VI CONCLUSION

His Honour's findings in *Re Alex* were many and far-reaching. In simple terms, the Chief Justice decided that it was in the best interests of Alex that the court should confirm its interim order authorising the commencement of a course of Microgynon '50', an oral contraceptive pill containing both oestrogen and progesterone to be taken continuously in order to suppress menses. His Honour further ordered that the matter be adjourned until 6 months before Alex's 16th birthday at which time further submissions would be considered in relation to the commencement of irreversible hormonal therapies comprising testosterone and LRHR analogue to suppress the release of gonadotrophins from the pituitary gland. Any decision to seek surgical affirmation is for Alex alone and must wait until his 18th birthday.⁵¹

Nicholson CJ was mindful of the depth of Alex's conviction of himself as a male. In Alex's short life he had lost so much: his father; his country; his mother's love; and, ultimately, his family and home. As if this were not sufficient impediment to his happiness, Alex suffered the extreme distress brought about by a physical body that contradicted his gender identity. There was nothing the Chief Justice could do to restore his family, but what His Honour tried to achieve, by every means possible, was to bring Alex peace with regard to the incongruence between his phenotype and male identity. His Honour had no power to look into the future, however, as retired Family Court Judge, Hon Travis Lindenmayer said:

Family Court judges are legally obliged to hear cases such as Alex's precisely because there is a grave risk that a wrong and irreversible decision might be made. As with a good parent faced with hard choices, only time will tell if this judge was right. If Alex had been refused treatment and committed suicide, there would still be questions and criticisms, just very different ones.⁵²

And death is absolutely irreversible.

⁵¹ The age at which a person is an adult under both the *Family Law Act 1975* and the UN Convention on the Rights of the Child.

⁵² 'How a Judge Rescued Alex', *Herald Sun* (Melbourne), 27 April 2004, 18.