Family Court of Australia - Full Court

Covington & Covington [2021] FamCAFC 52 (16 April 2021)

Last Updated: 3 May 2021

FAMILY COURT OF AUSTRALIA

COVINGTON & COVINGTON **[*2021] FamCAFC 52***

FAMILY LAW – APPLICATION IN AN APPEAL – Stay – Application to stay an appeal pending determination by the High Court of Australia of an application to remove the appeal to that court pursuant to s 40 of the *Judiciary Act 1903* (Cth) – None of the principles applicable to a stay application addressed by the applicant – The applicant mother contended that her consent to orders providing for the child to be vaccinated was withdrawn and thus those orders have no legal effect – In the absence of consent the orders contravene the prohibition on civil conscription provided for in s 51(xxiiiA) of the Constitution – No merit in these contentions – Application dismissed.

FAMILY LAW – COSTS – Respondent father and Independent Children's Lawyer sought costs against the applicant mother – Applicant mother wholly unsuccessful – Where making a costs order in favour of the Independent Children's Lawyer would cause the applicant mother to suffer financial hardship – Independent Children's Lawyer's application for costs dismissed – Applicant mother to pay the costs of the respondent father.

Commonwealth of Australia Constitution Act s 51(xxiiiA)

Family Law Act 1975 (Cth) s 65, s 67ZC, s 117

Judiciary Act 1903 (Cth) s 40

Victorian Public Health (No Jab, No Play) Act 2008 (Vic)

Allan and Ors & Allan and Ors [2014] FamCAFC 162; (2014) FLC 93-606

Covington & Covington [2020] FamCA 1064

Covington & Covington *(No. 2)* [2021] FamCA 24

Covington *v* ***Covington*** *& Anor* (High Court of Australia, Steward J, 12 April 2021)

D & D (No. 2) [2010] FLC 93-435; [2010] FamCAFC 63

Mains & Redden [2011] FLC 93-478; [2011] FamCAFC 184

Re Kelvin (2017) FLC 93-809; [2017] FamCAFC 258

Wong v the Commonwealth (2009) 236 CLR 573; [2009] HCA 3

APPLICANT:	Ms **Covington**
RESPONDENT:	Mr **Covington**
INDEPENDENT CHILDREN'S LAWYER:	MMH Lawyers

FILE NUMBER:	MLC	9008	of	2019
APPEAL NUMBER:	SOA	2	of	2021

DATE DELIVERED:	16 April 2021
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney by video link to Melbourne
JUDGMENT OF:	Strickland, Ryan & Aldridge JJ
HEARING DATE:	15 April 2021
LOWER COURT JURISDICTION:	Family Court of Australia
LOWER COURT JUDGMENT DATE:	11 December 2020
LOWER COURT MNC:	[2020] FamCA 1064

REPRESENTATION

THE APPLICANT:	Self-represented with Mr P as McKenzie Friend
COUNSEL FOR THE RESPONDENT:	Ms Mallett
SOLICITOR FOR THE RESPONDENT:	Coulter Roache Lawyers Pty Ltd
SOLICITOR ADVOCATE FOR THE INDEPENDENT CHILDREN'S LAWYER	Mr Harper
SOLICITOR FOR THE INDEPENDENT CHILDREN'S LAWYER	MMH Lawyers

ORDERS 15 APRIL 2021

(1) Leave be granted to Ms Mann to appear on behalf of the B Hospital as *amicus curiae* for today's hearing.

(2) Leave be granted to Mr P to act as McKenzie Friend to the applicant mother for today's hearing.

(3) The Application in an Appeal filed on 13 April 2021 be dismissed.

ORDERS 16 APRIL 2021

(1) The oral application for costs made by the Independent Children's Lawyer be dismissed.

(2) The mother pay the costs of the father of and incidental to the Application in an Appeal fixed in the sum of $3,287.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym ***Covington & Covington*** has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT MELBOURNE

Appeal Number: SOA 2 of 2021

File Number: MLC 9008 of 2019

Ms ⇦ Covington ⇨

Applicant

And

Mr ⇦ Covington ⇨

Respondent

And

Independent Children's Lawyer

REASONS FOR JUDGMENT

INTRODUCTION

1. On 15 April 2021 this Court made certain orders, including dismissing the Application in an Appeal filed on 13 April 2021.

2. Because of the importance of the issues involved, we indicated to the parties that we would be delivering our reasons for judgment on 16 April 2021. These are those reasons for judgment.

3. The application before the Court is an Application in an Appeal filed by Ms **Covington** ("the mother") on 13 April 2021, seeking the following orders:

1. 'FULL FAMILY COURT' STAY OF APPEAL UNTIL THE HIGH COURT OF AUSTRALIA HEARS AND PRESIDES THE EX PARTE APPLICATION TO MOVE THAT PART OF THE MATTER CONCERNED WITH THE COMMONWEALTH OF AUSTRALIA CNSTITUTION ACT SECTION 51(xxiiiA) RIGHTS DEFENCE RAISED. (HCA FILE NUMBER ...)
2. 'Full Court" Interlocutory Injunction seeking cessation of threatened vaccination of my daughter Z in April 2021 as recommended by High Court of Australia justice Steward J. Orders of 12 April 2021

> [File .../... page 8 para 13 refer] link (http://www..../pdf) whereby the s 51 (xxiiiA) rights defence Application for Removal is currently before the High Court for Constitutional Interpretation, a grant of power that the Family Court does not possess.

3. 'Full Court' Stay of Family Court Orders of **Covington** V. **Covington** of 11 December 2021 until the High Court of Australia determines the s51 (xxiiiA) rights defence now before it for Constitutional Interpretation.

> (As per the original)

4. In relation to that application, the mother filed three affidavits, two on 13 April 2021 and one on 14 April 2021. However, at the hearing of the application the mother advised that she relied on only one of the affidavits filed on 13 April 2021, namely the one which comprised 11 pages. The affidavit relied upon though was not an affidavit deposing to facts, but was an affidavit comprising submissions in support of the Application in an Appeal.
5. Further, in relation to the affidavit filed on 14 April 2021, it sought that the hearing of the Application in an Appeal be brought forward from 15 April 2021 to 14 April 2021, as a result of certain interim orders made by a judge of the Family Court of Australia on 13 April 2021. The gravamen of those orders was for the child to live with her father for a period so that vaccinations (as per orders made on 3 December 2020) could be administered without any further delay or unnecessary distress to the child. However, this Court was unable to accommodate that request, having already listed the application on 15 April 2021 on an urgent basis, at the request of the mother.
6. Other orders sought in that affidavit filed on 14 April 2021 were directed to the orders made by his Honour on 13 April 2021, but there being no appeal against those orders, the relief sought could not be granted.
7. The application is opposed by Mr **Covington** ("the father") and the Independent Children's Lawyer ("the ICL").
8. This Court gave leave to Ms Mann to appear on behalf of the B Hospital as *amicus curiae* at the hearing.
9. Ms Mann informed the Court that because of correspondence received from the mother's McKenzie Friend (Mr P), and the timing of this hearing, the vaccination of the child which was to take place yesterday morning, was deferred to await the outcome of the mother's application. More will be said about the correspondence from the McKenzie Friend.
10. Mr P was given leave to assist the mother in the hearing as her McKenzie Friend.

RELEVANT BACKGROUND

11. The substantive proceedings before the Court below have concerned the parenting arrangements for the one child of the relationship between the parties, and who was born in 2010.
12. The trial of those proceedings commenced before his Honour on 30 November 2020, but on the fourth day of the trial, the parties reached agreement as to all matters, and on 3 December 2020 his Honour made orders by consent which provided for the parties to have equal shared parental responsibility for the child, for the child to live with the mother, and to spend time with the father. Relevant to the application now before this Court, the following orders were also made by consent:

Immunisation/Vaccination

22. Within seven (7) days of the date of these orders, [t]he father shall make an appointment with a paediatrician at the B Immunisation Service ("the paediatric appointment") for the purposes of Z receiving vaccinations as recommended by the paediatrician on such dates and times and in accordance with a schedule as recommended by the paediatrician.
23. The mother and father shall each be permitted to attend the paediatric appointment and shall take Z with them as recommended by the B Immunisation Service.
24. The mother and father shall ensure that they are calm and co-operative during any attendance at the B Immunisation Service and ensure that any questions or concerns that they may have are raised in appropriate setting and that Z is not exposed to any conflict or distress by either of them.
25. For the purpose of the orders herein related to immunisations/ vaccination, the following shall apply:

(a) the mother and father shall not discuss the issue of vaccinations with Z until such time as the Independent Children's Lawyer has met with Z in accordance with order 37 herein;

(b) the father shall provide a copy of the report completed by Associate Professor D (together with any further recommendations provided in evidence, if any) and a copy of these orders to the B Immunisation Service;

(c) following the Independent Children's Lawyer's explanation of these orders to Z, both parties are to use their best endeavours to support Z in attending the appointment with the B Immunisation Service and any subsequent vaccination appointments;

(d) unless agreed otherwise in writing, the parenting orders herein be suspended for twenty-four (24) hours immediately prior and following any paediatric (or vaccination) appointment and Z spend time with the father twenty-four (24) hours prior to the paediatrician's (or vaccination) appointment and be returned to the mother twenty-four (24) hours following the appointment; and

(e) unless agreed otherwise in writing, the father will take Z to any vaccination appointment but the mother be permitted to meet them at the appointment and accompany Z during the appointment to provide comfort and support.

26. Z receive all future vaccinations and anti-venom treatments as recommended by a paediatrician or treating medical professional nominated by the father as and when they are

recommended to occur by such paediatrician or treating medical professional.

13. On 7 December 2020 the court received a communication from the mother's McKenzie Friend advising that the mother "withdraws her consent given (in her view) under duress, coercion and pressure". Subsequently, on 8 December 2020 the mother advised the court that "the sole issue I am withdrawing my consent for is vaccinations for [the child]".

14. The basis for that withdrawal of consent was said to be that although the orders had been pronounced in court, they had not yet been uploaded to the Commonwealth Courts Portal.

15. His Honour listed the matter for mention on 11 December 2020, and unsurprisingly, held that the orders were made when pronounced in court, and the fact that they had not been formally entered on the Commonwealth Courts Portal did not serve to undermine their force (***Covington & Covington*** **(*"Covington*** *"*) [2020] FamCA 1064 at [23]).

16. In addressing that issue, his Honour described the manner in which the mother consented to orders being made on 3 December 2020 (***Covington*** at [8]-[12]). Stated broadly, before his Honour pronounced the orders by consent, counsel for the father raised a concern as to whether the mother fully and properly understood the proposed orders. In response to that enquiry, counsel who appeared for the mother at trial indicated that she had "questioned the mother closely about that" and she was satisfied that the mother was "on board". It is apparent that the mother was present during these exchanges but said nothing to contradict counsel's statement that the orders were made with her consent. The ICL appointed to represent the child's best interests also agreed that the proposed orders should be made and, in circumstances where the proposed orders were consistent with expert opinion given in the case, his Honour, very properly, pronounced the orders in court.

17. Further, on the application of the father, on 11 December 2020 his Honour varied certain of the orders made on 3 December 2020 as follows:

> (1) Order 23 of the Final Orders made by consent on 3 December 2020 (the Final Orders) be varied to read as follows: The father shall be permitted to attend the paediatric appointment and shall take Z with him as recommended by the B Immunisation Service.
>
> (2) Order 24 of the Final Orders be varied to read as follows: The father shall ensure that he is calm and co-operative during any attendance at the B Immunisation Service and ensure that any questions or concerns that he may have are raised in an appropriate setting and that Z is not exposed to any conflict or distress.
>
> (3) Order 25(e) of the Final Orders be varied to read as follows: unless agreed otherwise in writing, the father will take Z to any vaccination appointment.
>
> (4) Notation D of the Final Orders be discharged.
>
> (5) Unless otherwise agreed in writing, the Mother be restrained from attending any and all paediatric appointments/appointments with a general practitioner made for the purposes of having Z immunised or vaccinated.

18. On 5 January 2021 the mother filed a Notice of Appeal appealing against the orders made by his Honour on 11 December 2020.

19. On 14 January 2021 the mother filed an Application in a Case seeking a stay of the orders made on 11 December 2020. That application was heard and determined by his Honour on 27 January 2021, and his Honour dismissed the application and made further orders to give effect to certain of the orders made on 3 December 2020, including the following order:

> ***Vaccinations***
>
> 3. The mother be restrained by injunction from contacting any medical practitioner, or their servants and agents, attended by Z for the purpose of giving effect to Orders 22 to 27 of the Final Orders.

20. In summary, his Honour dismissed the application because he considered that vaccination was in the best interests of the child, and because the mother's appeal was "most unlikely to succeed" (***Covington & Covington*** *(No. 2)* [2021] FamCA 24) ("***Covington*** *(No. 2)"*) at [23]). His Honour further opined that a constitutional point which was raised by the mother, and to which we will be referring later in these reasons, was "wholly misconceived" (***Covington*** *(No. 2)* at [23]). And finally, his Honour found that the mother's claim that she had not consented to the orders made on 3 December 2020 flew "in the face of the evidence she gave to the Court during the trial" (***Covington*** *(No. 2)* at [23]).

21. On 24 February 2021 the mother filed a Notice of Appeal against certain of the orders made on 27 January 2021. However, that appeal was subsequently deemed abandoned, and thus there is no appeal on foot against those orders.

22. On 26 February 2021 the mother filed an application in the High Court of Australia seeking an order pursuant to s 40 of the *Judiciary Act 1903* (Cth), removing the appeal against the orders made on 11 December 2020 to the High Court of Australia, asserting that there was a question in that cause involving the interpretation of the Constitution, and specifically s 51(xxiiiA) of that Act.

23. That application is opposed by the father.

24. On 8 April 2021 the mother filed an application in the High Court of Australia seeking an interlocutory injunction restraining the vaccination of the child pending determination of the application for removal of the appeal to the High Court of Australia. That application was apparently prompted by notice being given that the vaccinations of the child would commence on 15 April 2021 at the B Hospital.

25. That application was heard and determined by Steward J on 12 April 2021. His Honour found that the application lacked merit, and his Honour also found that the application was misconceived, because the injunction sought was really in the nature of a stay of the orders made in respect of the child's vaccination (***Covington*** *v.* ***Covington*** *& Anor ("****Covington*** *& Anor")* (High Court of Australia, Steward J, 12 April 2021 at [11]). His Honour dismissed the application.

26. Then, as referred to above, on 13 April 2021 the mother filed the application that is before this Court.

DISCUSSION

27. Although there were three orders sought in the Application in an Appeal, there can be no basis for this Court to make the second or third orders sought.

28. With the third order, that seeks a stay from this Court of the orders made by his Honour on 11 December 2020 until the High Court of Australia determines the issue raised in the application to remove the appeal to the High Court of Australia. However, his Honour has already dismissed an application to stay those orders, and there is no appeal before this Court against that order.

Further, the application to the High Court of Australia is to remove the appeal to that court, and it is only in that context that this Court is able to consider an application to stay, and it can only be an application to stay the appeal, not the orders the subject of the appeal.

29. With the second order sought, that is misconceived, and this Court is not able to make that order. This is an intermediate court of appeal, and in respect of which the only matter before it is the mother's appeal against the orders made on 11 December 2020 varying paragraphs 23, 24 and 25(e) of the orders made on 3 December 2020.

30. Further, as can be seen, it is in effect suggested by the mother that Steward J "recommended" that this Court make the injunction sought. However, that misrepresents what his Honour in fact said. To repeat, his Honour found no merit in the interlocutory injunction sought, and also found that it was misconceived because it was really in the nature of an application to stay the orders. In that context his Honour expressed the view (***Covington*** *& Anor* at [12]) that any stay should first be sought from this Court before such an application could be sought in the High Court of Australia.

31. That leaves the application for the first order which is in its terms an application to stay the appeal pending the determination by the High Court of Australia of the application to remove the appeal to that court.

32. The first point that we make is that although the plain intent of the mother is to challenge the order made by his Honour for the child to be vaccinated, she has only appealed against the orders made on 11 December 2020, and not the order providing for the vaccination to occur, namely paragraphs 22 and 26 of the orders made on 3 December 2020.

33. For that reason alone the application is misconceived. However, even if there was an appeal on foot which directly challenged the orders made by consent on 3 December 2020 providing for the child to be vaccinated, the outcome would be the same, namely it would have no merit and should be dismissed.

34. In *Allan and Ors & Allan and Ors* [2014] FamCAFC 162; (2014) FLC 93-606 the Full Court explained the approach to an appeal against orders made by consent as follows:

63. The fact that an order is made by consent does not, of course, make the order of any different nature from an order made otherwise. The order derives its force from the circumstance that it is a valid order made by the court in question, not from the agreement of the parties. Therefore, save for an important qualification, an order made by consent may be the subject of an appeal in the same way as any other order (see *Gilbert v Estate of Gilbert* [1989] FamCA 95; (1990) FLC 92-125 at 77-839).

64. However, the "important qualification" referred to in *Gilbert* is of present significance: the correctness of an order may not be appealed on its merits by a party who consented to the order. Rather, that party's right of appeal is limited to vitiating grounds, such as fraud, mistake, fresh evidence, or the absence of jurisdiction.

35. The second point to be made is that the mother asserts that she acted under "duress, coercion and pressure" when giving consent to the orders made on 3 December 2020. However, nowhere in the grounds of appeal set out in the Notice of Appeal filed on 5 January 2021, does the mother make this assertion. The only reference to "consent" is in the fourth ground of appeal, but that ground does not suggest that her consent was given as a result of "duress, coercion and pressure". It raises an issue of procedural fairness.

36. The third point is that there are well settled principles which apply to an application seeking an order for a stay, and they were conveniently referred to by his Honour in ***Covington*** *(No. 2)* as follows:

11. Counsel for the father submits that, consistently, with settled authority, the onus is on the mother to show that there is merit in her appeal. It is submitted on behalf of the father that being in receipt of final orders he should be able to act, forthwith, on the basis of those orders. It is contended that to permit the mother to have a stay of these orders would be to undermine the Court's process. The father relies on *Aldridge & Keaton (Stay Appeal)* [2009] FamCAFC 106, and the well-known principles in relation to the granting of stays essayed at paragraph [18]. These include the following:

1. the onus to establish a proper basis for the stay is on the applicant for the stay. However it is not necessary for the applicant to demonstrate any "special" or "exceptional" circumstances;
2. a person who has obtained a judgment is entitled to the benefit of that judgment;

100. a person who has obtained a judgment is entitled to presume the judgment is correct;

4. the mere filing of an appeal is insufficient to grant a stay;
5. the bone fides of the applicant;
6. a stay may be granted on terms that are fair to all parties - this may involve a court weighing the balance of convenience and the competing rights of the parties;
7. a weighing of the risk that an appeal may be rendered nugatory if a stay is not granted - this will be a substantial factor in determining whether it will be appropriate to grant a stay;
8. some preliminary assessment of the strength of the proposed appeal - whether the appellant has an arguable case;
9. the desirability of limiting the frequency of any change in a child's living arrangements;
10. the period of time in which the appeal can be heard and whether existing satisfactory arrangements may support the granting of the stay for a short period of time;

And I observe significantly in this case:

11. the best interests in the child, the subject of the proceedings are a significant consideration.

37. None of those principles were addressed by the mother in any of her documents filed in relation to the application now before this Court. In any event, it is our view that none of those principles would require that the stay application be granted. Indeed, the last principle speaks to the opposite being the case.

38. In any event, the contention of the mother in support of the application for a stay is that although the orders of 3 December 2020 were made by consent, she subsequently withdrew her consent, and therefore the relevant order "has no basis in law any longer, and is thus null and void" (paragraph 2 mother's affidavit filed on 13 April 2021).

39. Further, it is said that "the Family Law Court only has the power to make a binding **order upon the mutual consent of the parties** (emphasis added). If there is no mutual consent by the parties any order made by the Family Law Court has no legal effect because it would contravene the prohibition on civil conscription provided in s 51(xxiiiA) which is binding on all the Courts and Judges" (paragraph 12 mother's affidavit filed on 13 April 2021).

40. As can be seen, that brings in the constitutional point raised in the application to remove the appeal to the High Court of Australia.

41. These contentions are entirely without foundation.

42. The Family Court of Australia has the jurisdiction to make an order providing for a child to be vaccinated (*Mains & Redden* [2011] FamCAFC 184, and if necessary see *Re Kelvin* [2017] FamCAFC 258; (2017) FLC 93-809).

43. That jurisdiction is not dependent on whether or not the parties consent. Section 65 of the *Family Law Act 1975* (Cth) ("the Act") provides that in proceedings for a parenting order a court may make such parenting order as it thinks proper (alternatively or additionally see s 67ZC of that Act), and that order can be validly made even if there is no consent.

44. In this case, consent was given and the order was made on that basis. The fact that the mother sought to subsequently withdraw her consent does not in any way invalidate the order, or change its binding effect. The order stands as an order of the Court for which it had the jurisdiction to make.

45. As for the constitutional point, we can do no better than record what Steward J said in dismissing the mother's application for an interlocutory injunction, namely:

7. The constitutional point would appear to rely upon the carve out for "civil conscription" in s 51(xxiiiA) of the *Constitution*, which is in the following terms:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
>
> ...
>
> the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, *medical and dental services (but not so as to authorize any form of civil conscription)*, benefits to students and family allowances:
>
> (emphasis added)

8. The mother alleges that this paragraph confers a constitutional freedom of some kind from compulsory vaccination. Her application for removal, which characterises the freedom as a constitutional "right", is very difficult to follow and is, with great respect, assertive in nature. Her contention is not supported by any authority and would appear to have very slim prospects of success. In *General Practitioners Society v The Commonwealth* [1980] HCA 30; (1980) 145 CLR 532, Gibbs J (as his Honour then was) observed that the phrase "civil conscription" applied to medical and dental services and "refers to any sort of compulsion to engage in practice as a doctor or a dentist or to perform particular medical or dental services" (*General Practitioners Society v The Commonwealth* [1980] HCA 30; (1980) 145 CLR 532 at 557). Earlier in his Honour's reasons, Gibbs J explained the term "civil conscription" in the following way (*General Practitioners Society supra*):

> The word 'conscription', in the sense that seems to be most apposite for present purposes, means the compulsory enlistment of men (or women) for military (including naval or air force) service. The expression 'civil conscription' appears to mean the calling up of persons for compulsory service other than military service.

9. As it is directed at preventing the conscription of a doctor or dentist to perform compulsory medical or dental services, the carve out for civil conscription in para (xxiiiA) would appear to have nothing at all to do with the power of the Family Court to make orders by consent for the

vaccination of the daughter. Further, it is not suggested in any way that the doctor who might perform that vaccination will do so compulsorily pursuant to some Act of Parliament.

46. We agree with his Honour.

47. Furthermore, the mother would appear to recognise in her affidavit relied upon that what s 51(xxiiiA) prohibits, is legislation that authorises any form of civil conscription.

48. However, here there is an order that the child be vaccinated; and therefore the only legislation that could be in play is the Act. Thus, the mother would have to persuade the High Court of Australia that that Act, and presumably s 65, and maybe s 67ZC, is the relevant legislation that is caught by the prohibition in s 51(xxiiiA). However, nowhere does the mother make that submission, and indeed, in our view, it is a submission that could not be made.

49. What the mother does do in her affidavit is suggest that the relevant legislation which is caught by s 51(xxiiiA) here is the *Victorian Public Health (No Jab, No Play) Act 2008*, and as a result that Act is invalid.

50. However, the first point to make is that that is a Victorian Act, and not Commonwealth legislation, when only the latter would be caught by s 51(xxiiiA).

51. Secondly, and obviously, the order was not made under the Victorian Act; it was made under the *Family Law Act 1975* (Cth), and thirdly, the vaccinations once given, will be given pursuant to the orders made by his Honour.

52. The mother suggested in oral submissions that this Court had more material before it than was before Steward J. We assume that that is referring to the reliance before this Court on the High Court decision of *Wong v The Commonwealth* (2009) 236 CLR 573. However, that decision can give no comfort to the mother. It does not provide a basis for the application of s 51(xxiiiA) to the proceedings here.

53. In summary then, we are not persuaded that there is any merit in the constitutional issue relied on to have the appeal removed to the High Court of Australia. Thus, we dismissed the Application in an Appeal filed on 13 April 2021.

54. Before concluding these reasons, as referred to above, we need to refer to an email sent yesterday by the mother's McKenzie Friend to the doctor at the B Hospital who was to vaccinate the child. The gravamen of the email is, if the vaccinations proceeded, the doctor would be committing an assault and battery. The email further advised that the mother did not consent to the vaccinations and therefore they should not take place.

55. *Prima facie*, we view that as a breach of paragraph 3 of the order made by his Honour on 21 January 2021. The mother suggested that the email was sent in response to a communication by the doctor to the McKenzie Friend. However, as his Honour explained in his reasons for judgment given in support of the orders dated 13 April 2021, "Orders have been made in this Court to facilitate the vaccination of the child. The vaccination of the child is, in these circumstances, entirely lawful. The mother's contention that somehow for the vaccinations to proceed would be an assault and battery and in breach of the patient-doctor relationship is entirely misconceived, erroneous, and must be rejected" [at 14]. We agree

56. The point in raising this matter now is to remind the mother and her agents of the injunction made by his Honour, restraining any communication with any medical practitioner attended by the child for the purpose of giving effect to the orders made by his Honour.

COSTS

57. Having dismissed the Application in an Appeal filed by the mother, the father and the ICL each sought an order for costs.

58. The amount sought by the father on a party/party basis is $3,287 primarily comprising counsel fees. The amount sought by the ICL is $1,610 being the fee for the attendance at the hearing at legal aid rates.

59. The basis of each application was the circumstance that the mother has been wholly unsuccessful in the proceedings.

60. Pursuant to s 117(2) of the Act a costs order can be made if there are circumstances that justify such an order, and in considering that issue, the factors in s 117(2A) need to be addressed.

61. In our view, the circumstance identified by the father and the ICL is sufficient to justify an order for costs being made, namely the lack of success of the Application in an Appeal (s 117(2A)(e)).

62. The mother opposes any order for costs pointing to her poor financial circumstances. She is unemployed and receives Centrelink benefits. She has no savings and she has no assets except a motor vehicle.

63. As a result of the mother's financial circumstances, we are satisfied that making an order for costs in favour of the ICL would cause the mother to suffer financial hardship, and thus it is not open to this Court to make an order in favour of the ICL (s 117(4)(b)). We note that that was readily conceded by the ICL in the event that we found that the mother would suffer financial hardship.

64. However, the situation is quite different in relation to the father. There is ample Full Court authority to the effect that impecuniosity cannot be a bar to an order for costs being made in an appeal, where there is a circumstance that justifies an order being made (*D & D (Costs) (No. 2)* (2010) FLC 93-435).

65. We also note the submissions of the father that this is just one of a number of unsuccessful applications made by the mother in this matter, and although costs orders have been made, they have not been complied with, and the father has incurred significant legal costs in responding to the various unsuccessful applications filed by the mother.

66. Thus, the further orders of the Court will be as follows:

1. The oral application for costs made by the Independent Children's Lawyer be dismissed.

2. The mother pay the costs of the father of and incidental to the Application in an Appeal fixed in the sum of $3,287.

I certify that the preceding sixty-six (66) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Strickland, Ryan & Aldridge JJ) delivered on 16 April 2021.

Associate:

Date: 16 April 2021