IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A.B. v. C.D. and E.F.,*
2019 BCSC 254

Date: 20190227
Docket: E190334
Registry: Vancouver

Between:

A.B.

Claimant

And

C.D. and E.F.

Respondent

- and -

Docket: S191565
Registry: Vancouver

Between:

C.D.

Petitioner

And

Provincial Health Services Authority (BC Children's Hospital)
E.F., G.H., I.J.,
British Columbia Ministry of Education,
Delta School District,
Elementary School Counselors and Officials (John and/or Jane Doe 1, 2, 3)
High School Counselors and Officials (John and/or Jane Doe 1, 2. 3)
barbara findlay

Respondents

Restriction on publication: A publication ban has been imposed by orders of this Court restricting the publication, broadcast or transmission of any information that could identify the parties referred to in these proceedings as "A.B.", "C.D.", and "E.F."; and also restricting the publication of the names of the parties and witnesses referred to by their initials or as "G.H." or "I.J." in relation to these proceedings and any related proceedings regarding A.B. This publication ban applies indefinitely unless otherwise ordered

Corrected Judgment: The cover page has been changed and the style of proceedings and paragraphs 2, 18, 55, 57, 66 and 68 have been amended to anonymize names of parties to comply with 2019 BCSC 603

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for Claimant:	b. findlay, Q.C. K. Scorer
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Counsel for E.F.:	J. Lithwick
Counsel for barbara findlay:	C.E. Hunter, Q.C.
Counsel for G.H.:	J. Meadows D. Liu
Counsel for British Columbia Ministry of Education and Attorney General of British Columbia	R. Danay
Counsel for National Post Newspaper and Vancouver Sun Newspaper:	R. Anderson, Q.C. S.A. Dawson
Place and Date of Hearing:	Vancouver, B.C. February 19 and 20, 2019
Place and Date of Judgment:	Vancouver, B.C. February 27, 2019

Introduction

[1] Three applications are before the court.

[2] The first is by "A.B." who was born on October 18, 2004. He is described as a transgender boy who was assigned female at birth. He has commenced proceedings by Notice of Family Claim and now applies for various orders under the *Family Law Act*, S.B.C. 2011, c. 25, the most important one being that the court find it to be in his best interests to undergo medical treatment for gender dysphoria including hormone treatments.

[3] The second application is by C.D., who is A.B.'s father. He has filed a Petition and now seeks an interlocutory injunction until April 5, 2019, when the Petition may be heard, by way of an order extending an injunction granted by the Provincial Court of B.C. that restrains gender transition treatments for A.B. until February 19, 2019. The order by the Provincial Court has been extended by this court until this decision is released.

[4] The third application is for an order anonymizing the names of some of the parties in these proceedings and counsel for A.B. and an order banning the publication of anything that could lead to the identification of the parties. A.B.'s mother is referred to in these reasons as "E.F."

[5] These reasons reflect the brevity of the submissions made to the Court and the need for this decision to be released expeditiously.

Procedural Matters

[6] A.B. and C.D. obtained orders under Rule 10-9 of the Supreme Court Family Rules that their applications could be brought on short notice.

[7] A.B. seeks final orders in a defended family law case which was commenced by the filing of a notice of family claim. Rule 10-11 provides that such an applicant must apply for the orders sought by way of a summary trial application under

Rule 11-3. While that has not been expressly done, I have proceeded on the assumption that A.B.'s application is for judgment under that Rule.

[8] Both A.B. and C.D. rely on expert opinions that have been filed with their applications. While the expertise of the authors of the opinions is apparent from the material filed, their reports (in the form of affidavits) have not complied with all of the requirements of Rule 13-6. None of the parties objected to the admission of the expert opinions based on such non-compliance. I have accepted the expert opinions under Rule 11-3 (5) and find them to be admissible even though they do not conform with Rule 13-6(1).

[9] While the parties have not conformed strictly with the rules, none of the ten lawyers present in the courtroom raised any objection to the procedures followed.

[10] Keeping in mind the object of the Supreme Court Family Rules, it is my view that any procedural irregularities in these proceedings should not trump the important substantive issues that must be decided.

Background

[11] A.B. was born on October 18, 2004. Since age 11, A.B. has gender identified as a male. He informed his school counsellor of that when he was 12 years old and in Grade 7.

[12] He is presently enrolled in Grade 9 at high school under his chosen male name and is referred to by his teachers and peers as a boy and with male pronouns. He has transitioned socially to being a boy. To respect his gender identity, in this decision, the court will refer to A.B. using male pronouns.

[13] With his mother's help, A.B. sought medical assistance to allow him to begin a physical transition to a boy. He was seen by I.J., a registered psychologist experienced in treating children with gender dysphoria, on a number of occasions.

[14] I.J. provided an assessment in February 2018 and a further assessment and treatment plan on April 30, 2018. He concluded that A.B. met the diagnostic criteria

in adolescents of DSM V and diagnosed him with gender dysphoria. Simply stated, gender dysphoria is a condition where an individual experiences significant distress as a result of the gender they were assigned at birth.

[15] The following is a summary of I.J.'s findings:

> [A.B.] has been persistently and consistently identifying himself as male. He presented with a marked incongruence between his affirmed gender and his assigned sex. This has affected his social emotional development and daily functioning. [A.B.] presents with a strong desire to be viewed, perceived, and treated as male in all his daily activities. He also expressed a strong desire to get rid of his female sex characteristics and alternatively, get more male sex characteristics someday in the future. With these presented symptoms, [A.B.] meets the diagnostic criteria of gender dysphoria in adolescents.
>
> [A.B.] appears to meet the WPATH's SOC 7 treatment recommendation for hormone treatment. With his significant gender dysphoria, I believe he would be a good candidate for this treatment. I would like to recommend [A.B.] to see the endocrinology and diabetes unit at the BCCH, to further determine if he is an appropriate candidate for this treatment.

[16] Following I.J.'s recommendation that A.B. be seen at BC Children's Hospital ("BCCH"), C.D. took A.B. to his family physician and he was referred to the Gender Clinic at BCCH on June 11, 2018.

[17] In his affidavit, D.M., a pediatric endocrinologist and medical director of the BCCH Gender Clinic says that he has seen over 300 children and youth who had issues regarding their gender identity and he has been involved in the treatment of those issues. As a result of the increasing number of patients with gender issues, the Gender Clinic was established to assist and treat them. The clinic is formally within the Department of Endocrinology but a coordinated cross-disciplinary approach is taken in relation to gender issues. The clinic is guided in its care by the World Professional Association for Transgender Health and the Endocrine Society 2017 Clinical Practice Guidelines. He states further that the resources of the Gender Clinic allow a full, detailed and careful assessment of the appropriate treatment that is in the best interests of the child.

[18] At BCCH, A.B. was seen by G.H., a physician and specialist in the field of pediatric endocrinology, on August 14, 2018.

[19] Following G.H.'s assessment of A.B. he concluded that hormone therapy appeared reasonable and in A.B.'s best interests. In his affidavit of February 9, 2019, G.H. states that he discussed with A.B. and his mother the nature, consequences and foreseeable risks and benefits of testosterone hormone therapy. A.B. and his mother signed a detailed form entitled, "Informed Consent Form – Testosterone Therapy for Gender Dysphoria".

[20] G.H. deferred the initiation of testosterone therapy to allow time for C.D. to be presented with information about the therapy at the Gender Clinic. On August 19, 2018, C.D. emailed the Gender Clinic and advised that he did not consent to the testosterone therapy for A.B.

[21] A social worker at the Gender Clinic made numerous attempts to schedule C.D. for a meeting with G.H. but was not successful.

[22] G.H. wrote to C.D. on December 1, 2018 advising that his consent was not required as A.B. was capable of consenting to the treatment.

[23] On December 14, 2018, C.D. commenced proceedings in the Provincial Court of B.C. and a hearing was scheduled for January 14, 2019. The hearing proceeded without notice to A.B. On January 14, 2019, the Provincial Court ordered that gender transition treatment of A.B. be suspended until January 28, 2019. On January 28, 2019, the Provincial Court extended the restraining order until February 19, 2019 to allow C.D. to commence proceedings in the Supreme Court.

[24] On January 8, 2019, G.H. consulted with A.B. and his mother. A.B. informed him that he was having "bad dysphoria" and worsening discomfort with his physical body as other boys his age were progressing through puberty. A.B. also informed him that he had attempted suicide in March 2018. I.J. and A.B.'s mother expressed their view to G.H. that A.B.'s suicide attempt was linked to his gender dysphoria.

[25] G.H. expresses the view that the delay of hormone treatment is not a neutral option because A.B. is experiencing ongoing and unnecessary suffering and continued gender dysphoria. He opines that when youth are provided with affirming

hormone therapy they may have an improvement of gender dysphoria and relief from other co-morbid mental issues. He says that they are also less likely to suffer from harassment and victimizations by others.

[26] Significantly, G.H. expresses his concern that continued delay in hormone treatment will place A.B. at risk of suicide.

[27] On February 4, 2019, a team of professionals at the BCCH met to discuss A.B.'s care. The team included G.H., A.V., director of PHSA Ethics Services, D.M., A.S., acting Division Head of Endocrinology and Diabetes and several members of the hospital's gender nursing team. The team concluded that another capacity assessment should be done and that A.B. should continue to be evaluated for hormone therapy pending a decision of this court.

[28] G.H. referred A.B. to A.C., a psychiatrist in the mental health department of BCCH, to obtain her assessment of his capacity for informed consent regarding testosterone treatment.

[29] A.C. and P.N. met with A.B. both alone and then with his mother on February 7, 2019. A.C. concluded that A.B. had the capacity for informed consent. A summary of A.C.'s impression is as follows:

> [A.B.] is a 14 year old youth who has demonstrated capacity for informed consent regarding testosterone treatment. He has an understanding of gender dysphoria, the side effects and risks of the proposed treatment of testosterone, the proposed alternatives and he is able to demonstrate a reasonable appreciation for the consequences of the treatment. His cognitive abilities are judged to be intact and appropriate for his developmental stage. There is no indication on mental status examination or by his answers that his decision is influenced by depression, anxiety or psychosis. He does not describe any systemic influences that are unduly affecting his decision to pursue testosterone treatment.

[30] I.J. and G.H., have also assessed A.B. as competent to consent to the hormone treatment proposed for him.

[31] In his affidavit of February 16, 2019, D.M. states that, based on his review of A.B.'s charts and his knowledge of the medical professionals involved in his care,

there is no medical basis to disagree with the assessments by I.J. or G.H. and they have followed the appropriate guidelines in reaching their conclusions. He states further that in the case of a child who is dealing with gender identity issues and who has previously attempted suicide, "…there is a significant risk of further attempts – and possibly even completion – if treatment is delayed".

[32] In A.B.'s affidavit of February 14, 2019, he states that he consents to the treatment recommended by G.H. and is desperate to start the treatment. He says that every day his body develops more "female-ness" and he looks less and less like a boy. He says this causes him distress and sets him up for bullying and harassment.

[33] In her affidavits, A.B.'s mother states that she has serious concerns for A.B.'s well-being if he has to wait to begin treatment for his gender dysphoria. She says, "If his treatment is put on hold, I am terrified that A.B. will conclude there is no hope and will take his life."

[34] A.B.'s father is opposed to the commencement of hormone treatment for his son at this time. He seeks the continuation of an injunction to restrain the administration of testosterone injections, puberty blocking drugs and related medical and preparative interventions until April 5, 2019 at which time he proposes that his petition and the position of the respondents could be heard.

[35] In essence, the father wants the opportunity for a more fulsome hearing to shed more scientific light onto the implications of gender transition treatment for his adolescent child.

[36] A.B.'s father filed an affidavit with the court on February 11, 2019. He refers to a written agreement between him and A.B.'s mother under the *Family Law Act*. Paragraph 1 of that agreement provides that each parent will exercise all parental responsibilities with respect to A.B., "…subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical dental and other health-related treatments for the child".

[37] In support of his position A.B.'s father filed an affidavit of Quentin L. Van Meter, MD, of Atlanta, Georgia. He is a medical doctor specializing in pediatric endocrinology. Dr. Van Meter states that his affidavit is in support of an interim injunction. He comments on the harmful psychological and physical effects of gender transitioning on children and other matters. While he states that he has had the opportunity to review the facts of "this case" and was asked to respond to certain topics, it is not clear what he was asked nor does he make any mention of A.B. or the opinions expressed by his medical advisors.

[38] A.B.'s father also attaches an affidavit of Miriam Grossman of Airmont, New York. Dr. Grossman is a psychiatrist with a sub-specialty in the field of child and adolescent psychiatry. Her affidavit was sworn on June 11, 2018 and filed in the Court of Queen's Bench in Alberta in relation to another case where A.B.'s father says similar issues were considered by that court.

[39] I take the father's position to be that the affidavits of those medical professionals are examples of the additional light that could be shed on the question of the appropriate treatment for a young person suffering from gender dysphoria and they support his position that A.B. should not undergo further treatment at this time.

Analysis

[40] The orders sought by A.B. are supported by the Provincial Health Services Authority (BCCH), A.B.'s mother, G.H., A.B.'s treating physician, I.J., a psychologist at BCCH and D.M., the medical director of the Gender Clinic at BCCH.

[41] C.D. opposes the orders sought by A.B.

[42] C.D. and E.F. are separated and engaged in matrimonial proceedings.

[43] There is some evidence that indicates the A.B.'s father is somewhat disingenuous in seeking to present more scientific evidence relating to gender transition treatment. Rather, some evidence suggests that he has been delaying

proceedings as a way of preventing his son from obtaining the gender transition treatment that he seeks.

[44] After informing the clinic at BCCH on August 19, 2018 that he was opposed to the proposed hormone therapy, notwithstanding the consent signed by A.B., the treatment was postponed. The clinic's social worker then tried on numerous occasions to arrange a meeting between A.B.'s father and G.H.. In response to one of the requests by the social worker, A.B.'s father wrote on October 22, 2018 that he could not meet because of scheduled hip surgery. He also said that while he did not agree with the proposed hormone therapy he had decided that he would not try and block the medical treatment and would honour that decision moving forward. The social worker was again unsuccessful in arranging a meeting with the father. On December 1, 2018 the clinic wrote to the father indicating that they would commence the treatment after December 15, 2018 as A.B. had the exclusive right to consent to it. The father then commenced proceedings in the Provincial Court.

[45] In the Provincial Court on January 28, 2019, the father argued that the matter could not be heard that day and that he needed to commence proceedings in the Supreme Court under the *Infants Act*. The Provincial Court then ordered a continuation of the injunction described earlier in these reasons

[46] Between January 28, 2019 and February 6, 2019 the father did not commence proceedings in this court.

[47] On February 7, 2019, A.B. initiated proceedings under the *Family Law Act* seeking the treatment that he believes he urgently needs. The father filed a response but no evidence in relation to A.B.'s claim.

[48] On February 14, 2019, A.B.'s father filed a petition in court naming 9 respondents including the Ministry of Education for B.C., the Provincial Health Services Authority (BCCH) and elementary and high school counselors and officials.

[49] I give the affidavit evidence of Dr. Van Meter and Dr. Grossman little weight. While they are both experts in their fields, and express views that indicate risks

associated with transition treatment, neither of them comment on the particular facts of A.B.'s case which include his risk of attempting suicide. C.D. has had at least since August 14, 2018 to muster medical opinions that pertain specifically to A.B. and the proposed treatment but has done no more than provide the general opinions of two American doctors. Their views are of such a generic nature that they are of little use in evaluating the best interests of A.B.

[50] Having said that, it still remains to consider whether further delay to allow the father time to obtain more opinions is in the best interests of A.B.

[51] In my view it is not.

[52] The totality of the evidence regarding A.B.'s medical needs including the opinions of I.J., G.H., D.M., and A.C., leads me to conclude that his hormone treatment should not be delayed further.

[53] The risks to A.B. of further delay have also been clearly identified by D.M. and A.B.'s mother both of whom are concerned that having previously attempted suicide, further delay may result in him attempting it again.

[54] While A.B.'s father does not consent to the treatment, I am satisfied that A.B.'s consent is sufficient for the treatment to proceed.

[55] Section 17 of the *Infants Act*, R.S.B.C. 1996, c. 223 provides:

> 17. (1) In this section:
>
> "health care" means anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health related purpose, and includes a course of health care;
>
> "health care provider" includes a person licensed, certified or registered in British Columbia to provide health care.
>
> (2) Subject to subsection (3), an infant may consent to health care whether or not that health care would, in the absence of consent, constitute a trespass to the infant's person, and if an infant provides that consent, the consent is effective and it is not necessary to obtain a consent to the health care from the infant's parent or guardian.

> (3) A request for or consent, agreement or acquiescence to health care by an infant does not constitute consent to the health care for the purposes of subsection (2) unless the health care provider providing the health care
>
> > (a) has explained to the infant and has been satisfied that the infant understands the nature and consequences and the reasonably foreseeable benefits and risks of the health care, and
> >
> > (b) has made reasonable efforts to determine and has concluded that the health care is in the infant's best interests.

[56] Having considered the form of consent signed by A.B. and the evidence of I.J., G.H. and A.C., I am satisfied that A.B.'s health care providers have explained to A.B. the nature and consequences as well as the foreseeable benefits and risks of the treatment recommended by them, that A.B. understands those explanations and the health care providers have concluded that such health care is in A.B.'s best interests.

[57] As the father is seeking injunctive relief, I have considered the principles enunciated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[58] In view of the established law regarding the right of a mature minor to consent to medical treatment and the assessments of a number of physicians that A.B. has capacity to consent as well as the evidence of his health care providers that the proposed treatment is in A.B.'s best interests, there is no serious question to be tried.

[59] At the second stage of the RJR test, the inquiry is whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm. A.B.'s father has not demonstrated that a refusal to grant the injunction would adversely affect or irreparably harm him.

[60] As to the third stage, I accept G.H.'s evidence that delaying hormone therapy for A.B. is not a neutral option as he is experiencing ongoing and unnecessary suffering from gender dysphoria. In my view the balance of convenience clearly favours A.B.

Publication Ban

[61] The parties and the intervenor on behalf of the National Post and Vancouver Sun all agree that the names of the young person and his father and mother should be anonymized with initials and that there shall be no publication of any information which would tend to identify them.

[62] The parties also seek an order initializing the names of a number of the health care providers at BCCH, a social worker at BCCH who has been involved in this case and counsel for A.B.

[63] The individuals who seek anonymity have expressed concern for their privacy and safety. It is submitted that this concern arises because of strongly held views by those who oppose gender transitions especially when they involve children.

[64] The courts of Canada are presumptively open. There were many individuals in the gallery of the court during these proceedings exemplifying this principle.

[65] The burden of displacing the open court principle lies on those who seek to restrict access and thereby limit freedom of expression.

[66] Because the presumption is so strong and so highly valued in our society, a judge must have a convincing evidentiary basis for issuing a ban: *R. v. Mentuck*, [2001] 3 S.C.R. 442.

[67] In *Mentuck*, where a one-year ban on the identification of undercover police officers was upheld, Iacobucci J. stated at para. 32:

> 32. A publication ban should only be ordered when:
>
> (a) such an order is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[68] In *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567 [*Bragg Communications Inc.*] the Supreme Court of Canada held that a 15 year-old girl could proceed anonymously in her application against an internet provider for an order requiring the disclosure of a particular IP user. The decision is based in part of the inherent vulnerability of children and the Court's view that in the absence of evidence of a direct, harmful consequence to any individual applicant a court may conclude that there is objectively discernable harm. In that case the court said that it was reasonable and logical to accept that cyber bullying could result from the disclosure of the girl's name.

[69] In *A.B. v. Canada (Attorney General)*, 2016 ONSC 1571, McEwen J. granted confidentiality orders, including a publication ban to protect the identity of physicians and other healthcare providers in an application for physician-assisted death. He stated that the physicians desire to keep their identities private because of personal and professional implications was "...entirely reasonable … given the publicity and controversy surrounding physician-assisted death." He also accepted the submission that physicians might be less likely to provide assistance to terminally ill patients if their identities were known.

[70] While the reasoning in *Bragg Communications Inc*. and *A.B. v. Canada (Attorney General)* clearly applies to A.B., and, indirectly, to her mother and father, I am not persuaded that it should be extended to the professionals at BCCH who were involved in his care or to A.B.'s counsel. There is no evidence of a direct, harmful consequence to any of those individuals if their name is disclosed in relation to these proceedings. Nor do I consider those individuals to be vulnerable persons such as the girl in *Bragg Communications Inc*. or A.B.

Summary of Orders:

1. It is declared under s. 37 of the *Family Law Act* that it is in the best interests of A.B. that:
    (a) he receive the medical treatment for gender dysphoria recommended by the Gender Clinic at BCCH;

(b) he be acknowledged and referred to as male, both generally and with respect to any matters arising in these proceedings, now or in the future and any references to him in relation to this proceeding, now or in the future, employ only male pronouns;

(c) he be identified, both generally and in these proceedings by the name he has currently chosen, notwithstanding that his birth certificate presently identifies him under a different name.

2. It is declared under the *Family Law Act* that:
   (a) A.B. is exclusively entitled to consent to medical treatment for gender dysphoria and to take any necessary legal proceedings in relation to such medical treatment;
   (b) Pursuant to para. 201(2)(b), A.B. is permitted to bring this application under the *Family Law Act* and to bring or defend any further or future proceedings concerning his gender identity;
   (c) Attempting to persuade A.B. to abandon treatment for gender dysphoria; addressing A.B. by his birth name; referring to A.B. as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence under s. 38 of the *Family Law Act*.
3. A.B. is permitted to apply to change his legal name from that on his birth certificate to his chosen name and the consent of his mother or father for such change is not required.
4. A.B. is permitted to apply to change his gender pursuant to s. 27 of the *Vital Statistics Act*, without the consent of his father or mother.
5. In these proceedings, including all applications associated with the proceedings, the names of the applicant young person, his father and his mother shall be anonymized. The applicant young person shall be referred to as A.B., his father shall be referred to as C.D. and his mother shall be referred to as E.F.
6. The publication by any person of any information that may disclose the identities of A.B., his father or his mother is prohibited.
7. The application by C.D. is dismissed.

[71] Costs are awarded to A.B. at Scale B.

"Bowden J."