Torkin Manes
Barristers & Solicitors

Article

Family Law

January 2020

B.C. Court of Appeal sends a clear family law message in case of transgender teen

The B.C. Court of Appeal has provided a roadmap to dealing with an issue that is becoming part of the fabric of the modern Canadian family

By Adam N. Black

In a prior article, I observed that “today’s modern family is a fascinating, complex and changing construct. As the way we form and grow a family evolves, the law must recognize and respond to the changes.”

That observation squarely applies to a recent high-profile case that came before the Court of Appeal for British Columbia, in which a transgender minor teenager sought confirmation of his decision to pursue hormone therapy.

At the heart of the dispute was a minor’s ability to consent to such a treatment, notwithstanding a parent’s opposition – in this case that of the father.

The child, AB, was assigned female at birth and, since age 11, has identified as male. At age 12, AB enrolled in school using his chosen male name and began using male pronouns. For AB, the logical and important next step was to pursue hormone therapy with the goal of causing his body to appear more masculine.

After seeing a psychologist and endocrinologist who confirmed hormone therapy was appropriate and in AB’s best interests, AB confirmed his understanding of the risks and benefits of the therapy by signing a consent form, which AB’s mother, EF, also signed.

AB’s father, CD, learned of the intended hormone therapy and confirmed his opposition. The disagreement between AB and his father quickly made its way into a B.C. courtroom and protracted litigation ensued.

AB sought a declaration that he was entitled to make his own medical decisions and that treatment for

gender dysphoria was in his best interests. Conversely, AB's father sought a declaration that the treatment should not proceed.

On Feb. 7, Justice Gregory Bowden of the British Columbia Supreme Court declared the therapy to be in AB's best interests and that AB is exclusively entitled to consent to medical treatment for gender dysphoria.

Justice Bowden further declared that AB shall "be acknowledged and referred to as male, both generally and with respect to any matters arising in (the court) proceedings, now or in the future and any references to him in relation to (the court) proceeding, now or in the future, employ only male pronouns" and that "attempting to persuade AB to abandon treatment for gender dysphoria; addressing AB by his birth name; referring to AB as a girl or with female pronouns whether to him directly or to third parties; shall be considered to be family violence."

Subsequent to Justice Bowden's decision, AB asked the court for additional assistance, given the father's seemingly relentless efforts to put information about AB in the public domain through interviews with news agencies and comments on social media. Justice Francesca Marzari of the British Columbia Supreme Court issued a protection order. According to the protection order, the father was prevented from publishing or sharing "information or documentation relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies."

The father appealed from both orders. On Jan. 10, the Court of Appeal for British Columbia released its decision.

At issue in the appeal was whether Justice Bowden had the authority to make the declarations he did. Writing for the Court of Appeal, Chief Justice Robert James Bauman and Justice Barbara Fisher concluded Justice Bowden did not have such authority. It is clear the Court of Appeal believed Justice Bowden got it right in substance but not in form, since it went on to declare that "AB's consent to that treatment is valid, and no further consent from his parents, in particular CD, is required in that regard."

The Court of Appeal also disagreed with Justice Marzari's protection order since there was no basis on which to find the father's conduct amounted to family violence, a necessary ingredient for making of a protection order. The court noted that "as concerning as CD's conduct was, however, it does not necessarily follow that such conduct equates to the kind of psychological or emotional abuse that would constitute family violence."

That said, the B.C. Court of Appeal recognized the need to protect AB from the harm caused by the father's refusal to acknowledge AB as male and the father's broad sharing of information about AB. The B.C. Court of Appeal concluded that a conduct order, rather than a protection order, was more appropriate.

In respect of imposing any limitation on the father's conduct, the Court of Appeal considered the father's rights under the Canadian Charter of Rights and Freedoms to "freedom of conscience or belief and freedom of expression, as well as his liberty right under s. 7 of the Charter to make important decisions for his child." The Court balanced these rights against AB's risk of harm and concluded the father should be restricted from "publishing information about AB's gender identity, physical and mental health, medical status or treatments" other than with his lawyer, AB's lawyer, the mother's lawyer and any medical professionals involved in AB's and CD's care. The restriction does not, however, extend to CD's family and close friends and advisors, provided they are not connected to, and will not share the information with, the media or any public forum.

The Court of Appeal's decision does not materially change the substance of the orders made by Justices Bowden and Marzari.

Through its decision, however, the B.C. Court of Appeal has provided a roadmap to dealing with an issue that is becoming part of the fabric of the modern Canadian family. The message is clear: when a child is able to form and give their consent to treatment, their decision must be respected, even if that decision is at odds with a parent's beliefs and wishes.

This article originally appeared in the National Post.

Author

Adam N. Black
Partner

Tel: 416 643 8808
ablack@torkinmanes.com

Adam is a partner at Torkin Manes and practises in all aspects of family law.

The issues raised in this publication are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.

© 2020 Torkin Manes LLP Barristers & Solicitors
151 Yonge Street, Suite 1500 | Toronto ON M5C 2W7 | Tel: 416 863 1188 | Fax: 416 863 0305
Ranked one of Ontario's Top Ten Regional Law Firms by *Canadian Lawyer Magazine*.

Torkin Manes LLP is associated worldwide with AllyLaw