

CANADA / JUDGMENT

A.M. v. Dr. F

2020 BCSC 2139

COURT

Supreme Court of British Columbia

DECIDED

17 November 2020

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2020 BCSC 2139 A.M. v. Dr. F

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M. v. Dr. F,

2020 BCSC 2139

Date: 20201117

Docket: S2011599

Registry: Vancouver

Between:

A.M.

Plaintiff

And

Dr. F, Daniel McKee and Y.Z.

Defendants

Before: The Honourable Mr. Justice Brundrett

Restriction on publication: Order sealing court file in effect. There is a publication ban imposed by orders of this court restricting the publication, broadcast or transmission of any information that could identify the names of the parties or persons referred to in these proceedings as A.M., Y.Z., W.X., Dr. G and Dr. F. This publication ban applies indefinitely unless otherwise ordered.

Oral Reasons for Judgment Re Application to Anonymize a Party

In Chambers

Counsel for the Plaintiff:

C. Linde

Counsel for the Defendants:

D. Reid

D.H. Liu

Counsel for the Attendee Y.Z.:

C.E. Hunter

A. Smith

Place and Date of Hearing:

Vancouver, B.C.

November 13 & 17, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 17, 2020

[1] THE COURT: These reasons have been edited for publication.

Introduction

[2] This is an application by the defendant family physician, whom I will refer to as "Dr. F," for two sets of orders in relation to this action.

[3] The underlying claim is a civil action in which the plaintiff mother, A.M., seeks orders, inter alia, restraining the defendant physicians from providing gender transition treatment to a child, Y.Z., including a proposed double mastectomy. Y.Z.'s gender was assigned as female at birth, but he identifies as male. Dr. F is Y.Z.'s general practitioner who was providing Y.M. with gender-affirming care.

[4] In paragraph 1 of the notice of application filed November 12, 2020, Dr. F seeks an order transferring this action to the family registry and converting the action to a petition, or alternatively, declaring the action as governed by the Supreme Court Family Rules.

[5] Second, in paragraphs 2-4 of the notice of application, Dr. F, who uses the pronouns they/them, seeks anonymization of their name in the proceedings and a publication ban on the use of their name in connection with these proceedings and any related proceedings regarding Y.Z.'s care and counselling.

- [6] Mr. Linde on behalf of A.M. objected to counsel for Y.Z. participating as a party in this application. I did not agree, and I exercised my discretion to grant standing to counsel for Y.Z. to appear on this application, which standing is supported in any event by s. 201(1)(a) of the Family Law Act, S.B.C. 2011, c. 25.
- [7] Y.Z. generally supports the application by Dr. F and the conversion of the action to a family proceeding.
- [8] Counsel for A.M. is in agreement with the first order with respect to the conversion of the action and is opposed to the second order with respect to anonymization and the publication ban.
- [9] The notice of civil claim in this matter was filed on November 3, 2020. Shortly thereafter, Madam Justice Fitzpatrick granted an ex parte injunction, putting a stop to a proposed surgery for Y.Z. that was scheduled for November 6, 2020. The ex parte order provided for anonymization of the names of A.M. and Y.Z. and a publication ban on information that would identify family members.

First Issue: Conversion of the Civil Action to a Family Action

- [10] The plaintiff's notice of civil claim is replete with references to the relief available under the Family Law Act and the Supreme Court Family Rules. Although filed as a notice of civil claim, the notice of civil claim is headed "notice of family claim" on subsequent pages.
- [11] The claim does not seek damages against the defendants. Rather it seeks certain orders, all of which appear to engage a consideration of Y.Z.'s best interests under the Family Law Act and under the Infants Act, R.S.B.C. 1996, c. 223.
- [12] I note that Rule 1-1(1) of the Supreme Court Family Rules defines a "family law case" as a proceeding in which an order is sought under the Family Law Act.
- [13] The claim also engages other provisions in s. 49 and s. 211 of the Family Law Act, which further supports qualifying this case as a family law case.
- [14] After some discussion, I gather all counsel agree that the action should be converted to a family law case.
- [15] I am therefore prepared to make the order sought in paragraph 1 of the notice of application in the form suggested by counsel; that is, the existing civil action will be converted to a petition and be transferred to the family registry.
- [16] The initiating document in the plaintiff's proceeding is to be converted into an initiating document in a family action. To more readily accomplish this, counsel have suggested and agreed that the plaintiff should re-file her notice of civil claim in the form of an initiating document in the family registry to bring the pleadings in compliance with the Supreme Court Family Rules.

- [17] The new initiating document may refer to filed affidavits in the existing proceeding, as well as any existing orders such as the sealing order. The interim injunction also remains valid.

Second Issue: Anonymization and Publication Ban

Position of the Parties

- [18] As noted, Dr. F seeks orders related to the anonymization of their name and a targeted publication ban with respect to identity as someone providing care to Y.Z. These orders sought engage the open court principle as well as the freedom of expression.
- [19] Counsel for Y.Z. is not opposed to the orders sought.
- [20] The media have been given notice of this application pursuant to Practice Direction 56. I am advised that counsel for two media outlets have had discussions with counsel for Dr. F and have assisted in focusing the nature of the orders sought. They disagree with other aspects of the order, which are being left to another day, but are not otherwise opposed.
- [21] Counsel for A.M. has expressed concerns about the breadth of the orders sought and opposes the orders for anonymity and publication ban. He notes the court's traditional reluctance with respect to anonymity and publication bans and the exceptional nature of the orders sought. He says, quite rightly, that there is a long list of authorities supporting the open court principle being of fundamental importance to a free and democratic society.
- [22] Counsel for A.M. also raises a concern about giving a special class of practitioners blanket anonymity in these types of proceedings. He submits the application is premature and points to the importance of physicians engaging in such practices being subject to public scrutiny.
- [23] Counsel for A.M. has cited various cases in which the open court principle was recognized or where an application for anonymization was denied: *JC v. Health Professions Review Board*, 2014 BCSC 372; *V.F. v. E.B.*, 2011 BCCA 238; *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45; *A v. Laurent Amyot and Conseil Scolaire Catholique Franco-Nord*, 2019 ONSC 3459; and *Vancouver Sun*.
- [24] I appreciate the concerns raised by these comments. I note, however, that the transcripts of Mr. Linde's previous statements on behalf of A.M. in the proceeding before Madam Justice Fitzpatrick indicated he expressly sought anonymization of the names of the child, the mother, and "I suppose of the doctors as well." Mr. Linde is quoted as relating his experience from a previous case that these matters are better dealt with "the least publicity." With respect, those comments seem to be at odds with his present position.
- [25] Counsel for Dr. F has noted the concerns of Madam Justice Marzari in *C.D. v. Provincial Health Services Authority*, 2019 BCSC 603 at paras. 29-31, 49-50 [C.D.], on an application to anonymize the names of treating physicians involved in the care of a transgender child.

[26] The concerns in C.D. related to public comments approving of violence or retribution against the youth's health care team and comments that drew connections between medical services provided and serious crimes. Counsel for A.M. points out that the facts in other cases are not admissible as evidence in this case. On the whole, however, the result is instructive in that Justice Marzari found that the risk of harm was significant enough that anonymization of the applicants was necessary to protect the proper administration of justice.

Applicable Legal Principles

[27] In general, the open court principle operates in proceedings in this Court. That principle provides a strong presumption that all court proceedings are conducted in the open and that the public will have access to them. An order banning publication or allowing anonymization of a litigant's name is an exceptional order: *V.F. v. E.B.*, 2010 BCSC 1870 at para. 18. The burden of displacing the open court principle lies on those who seek to restrict access to the courts and thereby limit freedom of expression: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 71.

[28] The starting point for a consideration of limiting the open court principle is the Dagenais/Mentuck framework. The Supreme Court of Canada stated the relevant test for limiting the open court principle in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53 [Sierra] as follows:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[29] In *Vancouver Sun (Re)*, 2004 SCC 43 at para. 31 [Vancouver Sun], the Supreme Court of Canada further held that the Dagenais/Mentuck framework should be applied to all discretionary judicial orders that limit the principle of openness.

Analysis

[30] Turning to the requisite test, I must first consider whether the orders sought are necessary to prevent a serious risk to an important interest in the context of litigation because reasonable alternative measures will not prevent the risk.

[31] Here, I am satisfied that, by being publicly named, the risk of harm to Dr. F, their physician-patient relationship with Y.Z., and their relationships with other patients is significant enough to justify the orders sought.

- [32] It is clear that gender-transition cases evoke strong feelings in members of society who are philosophically opposed to or upset by such matters. This case has attracted publicity already. An article published online by The Vancouver Sun and The Province identifies Dr. F by name. The comments section of that article, before it was removed by the publisher, attracted some unusually strong comments from the public, some of which appear to be ad hominem attacks directed against Dr. F.
- [33] The admittedly limited available information to date in this case reveals a pattern consistent with the similar situation in C.D., discussed above, where a youth sought permission to proceed with hormone therapy, among other treatment.
- [34] From Dr. F's evidence it is apparent that, unfortunately, animosity towards transgender individuals exists in our society. In Dr. F's experience working with transgender youth and adults, online trolling and harassment of individuals aligned with the trans community, as well as threats of violence in some cases, are not uncommon. Dr. F is concerned, reasonably in my view, that they could become a target for those who view gender-affirming treatment as innately harmful.
- [35] I consider it in the societal interest and in the best interests of the child, Y.Z., for Dr. F to be able to provide gender-affirming care to Y.Z. without safety concerns and negative intrusion of privacy into their physician-patient relationship.
- [36] As well, there are broader concerns at issue. Youth and adults with gender dysphoria appear to be vulnerable to becoming the scapegoats of ignorant online comments. Dr. F's evidence supports, and it is not a great leap of logic to infer, that those seeking gender-affirming care from a physician are at a particularly sensitive stage in their lives such that public scrutiny could have a negative effect. In addition, Dr. F expresses ancillary concerns over negative resulting effects upon other patients in their addictions and HIV practice who tend to be vulnerable and marginalized.
- [37] Given that privacy and safety concerns are at issue and the analysis focuses on the risk of serious harm to an important interest, it is not necessary, in my view, to wait until specific threats are received before a compelling basis can be made for a limited form of a publication ban.
- [38] In all the circumstances, I find that there is a real and substantial risk of harm to Dr. F's privacy and safety interests, their therapeutic relationship with S.B., and their relationships with other patients as a result of being publicly named in this proceeding. These concerns raise a public interest in confidentiality and not merely the interests of Dr. F. Thus, Dr. F has established the necessity of the orders sought in order to prevent a serious risk of harm to a number of important interests.
- [39] Another consideration is that of reasonable alternatives including whether the orders sought are the least restrictive option available to the Court in the circumstances.

- [40] The orders sought are targeted and focused. Specifically, they allow reporting on this case to occur without identifying Dr. F by name. This has already occurred to a limited extent by other media outlets.
- [41] The orders target the name of the physician, not a broad category of information. Further, the orders sought do not amount to a wider publication ban on the physician's name, or generally with respect to their name in as a physician providing gender-affirming care. Rather, the orders sought are related specifically to Dr. F's treatment of Y.Z. I find that this restriction is narrowly confined.
- [42] Having perused the nature of the orders sought, I find that they represent the least restrictive option available to the Court in the circumstances. I do not anticipate that alternative measures could prevent the risk.
- [43] I turn to the second part of the test in *Sierra*, balancing the salutary effects of the publication ban and anonymity order against the deleterious effects on the rights and interest of the parties and the public. This requires a consideration of the effects on the right to free expression, the right of the litigants to a fair trial, the public interest in open and accessible court proceedings, and the efficacy of the administration of justice.
- [44] I have considered the submission that the courts ought to be careful and not carve certain classes of individuals for special treatment. However, the nature of the proceeding here is that of a parent seeking to review a child's decision as to appropriate medical treatment. The proceeding at its core engages the private interests of the child, as well as the private interests between the litigants as guardians of the child's interests.
- [45] Further, as noted, the orders sought are quite limited in that they specifically target the name of the physician and their contact information in the interests of their privacy and safety. I am not convinced that such information is essential to any story that can still be told about this case.
- [46] Overall, I am satisfied that the salutary effects of the orders sought, including the effect on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings. The evidence in this regard is sufficiently compelling to warrant a limited restriction on freedom of the press and the open court principle.
- [47] The applicant has, therefore, satisfied both the necessity and proportionality elements of the *Dagenais/Mentuck* test for displacing the open court principle. I would thus grant the orders sought related to the anonymity and non-publication of Dr. F's name and contact information.

Conclusion

- [48] The order in paragraph 1 of the notice of application, as I said, is granted as suggested by counsel.
- [49] As I noted previously, the sealing order and other orders already in existence in these proceedings will remain in force.
- [50] The initiating document is to be re-filed in the family registry and that document can refer to the affidavits already filed in the civil proceedings.
- [51] The orders in paragraphs 2 to 4 of the notice of application are granted as sought.
- [52] The relief in paragraph 5 of the notice of application was not spoken to and will be adjourned generally.
- [53] Ms. Hunter has asked that I seize myself of further applications in this matter next week, but I am not prepared to do so at this stage.

Costs

- [54] In terms of costs, the applicant has been successful, and I would order costs against A.M. in any event of the cause.
- [55] I am not ordering that costs be made payable forthwith.
- [56] Since the pronouncement of these reasons on November 17, 2020, the family registry advised that the language in term #1 of the proposed order could not be easily implemented in terms of registry operations. As this action was commenced by a notice of civil action, the registry indicated it would have difficulty automatically "converting" the civil action into a family petition.
- [57] The approach suggested by the registry, which was also suggested by counsel at the hearing, was for counsel to commence a new proceeding with a family petition. The order would then contain a term "consolidating" the civil action and the new family action into the new family action number. This way, all pre-existing orders and documents from the civil action can be placed under and be effective under the new family action. This appears to be what was effectively agreed to by all counsel, and the order was ultimately drafted to this effect.

"Brundrett J."

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