
CANADA / JUDGMENT

Bell v. Hagger

2009 BCSC 327

COURT

Supreme Court of British Columbia

DECIDED

11 March 2009

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2009 BCSC 327 Bell v. Hagger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bell v. Hagger,

2009 BCSC 327

Date: 20090311

Docket: 98 3512

Registry: Victoria

In the Matter of the Patients Property Act,

R.S.B.C. 1996, Chapter 349

Between:

Angela Jeanne Bell

Petitioner

And:

David Hagger

Respondent

Re:

Martin David Hagger

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

R.S. Gill

David Hagger:

In Person

Date and Place of Hearing:

20090202-20090203

Victoria, B.C.

- [1] The petitioner and respondent are the mother and father respectively of an adult child named Martin. Martin is severely autistic and mentally disabled. Martin lives in a group home that is operated under contract with the Vancouver Island Health Authority, the Ministry of Children and Family Development, and Community Living B.C.
- [2] By earlier court order, the respondent has limited and conditional access to his son. Originally, the petitioner and respondent were co-committees of Martin.
- [3] In July 2002, following a contested hearing, Quijano J. terminated the appointment of the respondent as a co-committee; directed the continuation of the petitioner as committee of the person and estate of Martin; and limited the respondent's access to a maximum of six visits per month with a maximum of two visits in any single week. Quijano J. further limited individual access visits to a maximum of three hours apiece. Other conditions also applied to access including a requirement for supervised access. With the exception of the requirement for supervision, the other conditions relating to access still apply today.
- [4] By notice of motion signed in January 2008, the respondent applies to vary and increase his time with Martin. This application is the most recent of a series of applications relating to Martin, some of which predated the order of Quijano J. in 2002 and others since that order.
- [5] On one of those occasions, April 24, 2003, Quijano J. modified her earlier order. Of significance here, she set a schedule for reducing and ultimately removing the requirement for supervised access. She also added a condition prohibiting any attempt by the respondent to communicate with Martin using the medium of facilitated communication while operating a motor vehicle. The respondent's wish to generally increase the use of facilitated communication lies at the heart of this application for increased access.
- [6] The petitioner opposes any use of facilitated communication with Martin. She seeks, in part, an order prohibiting the respondent from attempting to communicate with Martin using the medium of facilitated communication. She also seeks an order pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, prohibiting the respondent commencing any proceeding respecting Martin without first obtaining leave of the court. Section 18 permits

me, if satisfied that the respondent "has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings" in this court against the petitioner respecting the issues raised by the respondent, to require him to seek leave before commencing any future legal proceeding.

- [7] The petitioner relies on the history of applications by the respondent over the intervening years since Quijano J. made her first order in 2002. To provide full context, it is also necessary to consider the course of applications predating the 2002 order. I will set out the history of the proceedings and applications briefly, including the role that the question of facilitated communications played in that history.
- [8] After my review of the history, I will turn to the evidence that the respondent relies on for his present application and address whether he has demonstrated the necessary material change in circumstances to justify any change to the existing access order. Lastly, I will address the petitioner's two applications.
- [9] In 1998, the parties were appointed as co-committees of Martin's person and estate at the request of the petitioner. In September 2001, the court granted two interim restraining orders on application by the petitioner. The first order was made without notice and restrained any person from removing Martin from his group home without the prior written consent of the manager. The second order was made on notice to the respondent and limited his access to no more than two hours per week to be supervised by an independent access supervisor.
- [10] The next order is the first by Quijano J., in July 2002, again on application by the petitioner. I have earlier described the salient features of the order and need not repeat them. In her reasons, Quijano J. accepted evidence that the frequency and duration of the respondent's visits with Martin were increasing Martin's level of anxiety and stress. Over time, this manifested in increased behavioural problems, including self-abuse, harm, anger and anxiety. It is apparent that the question of the respondent's use of facilitated communication was in evidence.
- [11] Quijano J. said this, commencing at para. [11] of her reasons:
- [11] In the late fall of 2000, the respondent received some limited training in a communication technique known as facilitated communication, which some persons believe can be used to assist with communicating with autistic persons, and I am sure it is used for other purposes as well. By December of 2000, the respondent was using this facilitated communication technique with Martin and the respondent believes that he has enjoyed some considerable success in communicating with Martin, to Martin's benefit, through the use of this technique.
- [12] However, from the material before me, by the summer of 2001, Martin's behavioural problems had worsened to such an extent that, in September of 2001, the petitioner set down this application.

After making these observations, Quijano J. made no specific finding respecting any connection between facilitated communication and the behavioural problems.

[12] Quijano J. described the respondent's general position respecting access in terms very similar to how I would describe his position today. At para. 17, she stated:

The respondent does not want to be removed as co-committee, nor does he want any restrictions on his ability to visit with Martin. He believes that his involvement with Martin is important to Martin's development and he appears to believe that the more contact he has with Martin, the more he can contribute to that development.

[13] In April 2003, the respondent applied before Quijano J. to vary her order. As set out earlier, she agreed to vary the requirement for supervision but also imposed a condition prohibiting the use of facilitated communication while in a vehicle. The parties consented to the latter so there was no need for Quijano J. to address the basis in her reasons. She dismissed the respondent's application to be re-appointed committee. For the purpose of the s. 18 analysis, I observe that this was the first application by the respondent relating to access.

[14] In May 2004, the respondent applied to vary the access order. The court was not satisfied that the respondent demonstrated any change in circumstances and dismissed his application. In June 2006, the respondent applied for an independent examination and assessment of Martin in relation to his access. The respondent proposed that Dr. Burima, whom I will refer to later, assess the respondent's interaction with Martin. The court expressed concern about Martin's lack of tolerance for change and dismissed the application.

[15] In April 2008, the court dismissed an application by the respondent to set the proceeding for trial but ordered that the matter be converted to a family law proceeding and that a date be set for a judicial case conference. The combined effect of these orders for the respondent is that the 2002 order respecting access is a final order but subject to application to vary in the event of a material change in circumstances. This remedied some of the procedural issues associated with the access issue arising within the context of a petition seeking orders relating to the appointment of committees. The respondent did not appeal either order.

[16] A judicial case conference took place on April 24, 2008. The court can only make orders by consent at such a conference. The parties consented to an order that Dr. Burnside assess Martin in the presence of the respondent to address the following questions:

1. What are Martin's functional levels for adaptive behaviour and cognitive ability?
2. What forms of communication are likely to be most beneficial for Martin?
3. What are the implications of facilitated communications with Martin?

The court also ordered an assessment of Martin's use of facilitated communication "to be conducted by an expert agreeable to both parties utilizing a double-blind test methodology" to be devised by the expert with input from both parties.

- [17] Dr. Burnside is a psychologist with expertise in assessing autistic individuals like Martin. She assessed Martin's communications styles but was not able to administer standard cognitive and language measure tests due to Martin's limitations. Instead, she relied mainly on observing Martin perform sub-test tasks and on interviews of support personnel and his parents.
- [18] For the most part, Martin communicates non-verbally along with some limited signing. He often repeats echolaic, or repetitive, phrases which are rarely relevant to the situation but are expressive of his current emotional state. He also indicates mood state by physical expression. For example, Martin may make "happy fists" held close to his cheeks, look down and grin to show that he is happy.
- [19] I accept Dr. Burnside's opinion that Martin generally functions cognitively at about the level of a two year old. This has implications for his ability to communicate. For example, Dr. Burnside observed that Martin's pointing, as a form of expressive communication, is unpredictable. Further, Martin makes no use of written language in either his day program or home setting and shows no interest in writing or being read to.
- [20] Dr. Burnside observed the respondent and Martin attempting facilitated communication but was not persuaded that Martin was communicating verbally. In Dr. Burnside's view, Martin does not have the cognitive ability to develop the written language skills necessary for facilitated communication. Further, her detailed observations cast considerable doubt on the respondent's subjective assertion that Martin is meaningfully communicating. Finally, there is no evidence that Martin chooses the medium of facilitated communication in his interactions with any other caregiver.
- [21] Dr. Burnside opined that there are significant risks associated with facilitated communication in general and identified the following:

First, there is an enormous potential for the technique of facilitated communication to be abused. If only one person can facilitate, or if a level of sophistication is only obtained by one facilitator, the content of the communication is suspect. In those circumstances it is impossible to distinguish between the utterances of the facilitator and the speaker. The speaker's communication could be distorted or completely fabricated by the facilitator.

Second, for any client with impaired communication, it is important to make communication easier in all settings. Cultivating a form of communication only possible with one other person is not in the client's best interest.

Third, it is conceivable that a person would learn not to resist facilitated communication, or to learn that positive rewards such as food or cuddles would come after surrendering the hand to the board. If this were so, it would also corrupt another potential form of communication for the client -- that of simply pointing to a choice. Pointing would become meaningless.

Dr. Burnside recommended, in part, that any means of communication with Martin be as consistent as possible across all settings and used by all his caregivers. She observed all Martin's caregivers use sign, speech and gesture with Martin.

- [22] Dr. Burnside also recommended that sign, speech and gesture be used to give Martin as many clues as possible to help him move through his day with a minimum of distress. In her opinion, the risks of facilitated communication far outweigh the benefits for Martin and she strongly recommended discontinuing its use altogether.
- [23] Only the respondent uses facilitated communication with Martin. The respondent persuaded himself long ago that the medium benefits Martin and that Martin communicates in a fairly sophisticated way well beyond the level that one would expect given his cognitive limitations. This has been the respondent's belief throughout the chain of applications described earlier.
- [24] According to the respondent, he cares more for his son than anyone else in the world and has the greatest skill to care for him. He deposed that he uses facilitated communication with Martin with ease. He denies that the process places Martin at risk or overwhelms him.
- [25] I permitted limited oral evidence at the hearing and also viewed a video showing the respondent and Martin in the respondent's home on three occasions. According to the respondent, the video demonstrates the successful use of facilitated communication. I observed apparent positive emotional support and attachment between the respondent and Martin, including during the course of facilitated communication, but am unable to conclude as a result of my own observations whether Martin was directing communication during the process as the respondent claims.
- [26] Dr. Burima is also a psychologist. She too is experienced with autistic individuals. I permitted the respondent to call her to testify. Dr. Burima observed Martin on one occasion in 2006 and four times in 2007. She never assessed his cognitive functioning. The doctor confirmed that Martin's level of awareness and verbal ability is variable. In her view, he is not amenable to cognitive testing.
- [27] The underlying theory of facilitated communication is that the non-verbal speaker, in this case, Martin, will direct the hand of another person, in this case, the respondent, to letters and short words such as yes and no on a board. According to the respondent, although not properly in evidence, he resists the pressure of Martin's hand to ensure that the movements are deliberate. The respondent then repeats verbally his understanding of what Martin has directed him to.

- [28] Dr. Burima described her observations of Martin using facilitated communication. She opined that Martin might only be willing to use the board with the respondent because of their close emotional connection and nurturing relationship. Martin apparently became very attached to the respondent in his early years. Dr. Burima accepts that the use of the board is an aspect of the father-son relationship but unfortunately her evidence is not an answer to the question of whether Martin is verbally communicating when using the board.
- [29] Dr. Burima testified that Martin appears to understand some concepts and that he sometimes speaks in complete sentences. She also commented on Martin's use of echolaic words or phrases.
- [30] Again with leave, the respondent called two other witnesses. Mr. Van Brunt is an access supervisor. Mr. Van Brunt swore an affidavit in support of the respondent's application and also testified. He is a social worker rather than a trained psychologist. Mr. Van Brunt observed the respondent and Martin use the facilitated communication board, most recently in July 2007. The witness criticized Dr. Burnside's report and suggested that Martin is able to use the board to communicate so long as his medications are stabilized and he has not been suffering from the aftermath of the seizures to which he is prone.
- [31] According to Mr. Van Brunt's affidavit, he observed Martin using the board to spell out short words. He also deposed that Martin never appeared in distress when using the board and that its use seemed to contribute to a positive interaction and rapport between the respondent and Martin. He also heard Martin say short words from time to time.
- [32] It is apparent that Mr. Van Brunt is not an expert in the field of facilitated communication. Nor did he have any direct knowledge of Martin's medication regime and its effects. He simply relied on his subjective observations considered against the backdrop of possible explanations for Martin's variation in apparent performance from time to time.
- [33] I conclude that Mr. Van Brunt is not qualified to assess whether Martin communicates successfully and meaningfully using the board in any consistent way. I accept his observation that the respondent and Martin seem to share an emotional attachment associated with the process. My own observation of the video led me to a similar conclusion.
- [34] Susan Batstone is a speech pathologist. She was retained to attempt the double-blind assessment directed by the consent order in April 2008. Ms. Batstone provided a report and also testified.
- [35] Ms. Batstone described the facilitated communications board in detail in her report. It is set up like a computer keyboard with letters and the numbers 1 to 10 along the top. Short words such as yes, no and more are on the board. Ms. Batstone reviewed the video and observed the respondent and Martin interact using the board. After three sessions of getting to know Martin, Ms. Batstone attempted unsuccessfully to have Martin communicate with her using the board.

- [36] With the collaboration of the respondent, Ms. Batstone also attempted to develop a double-blind study at the respondent's home. Martin refused to cooperate. She questioned in her report whether Martin would ever be comfortable enough to participate. She observed Martin appearing agitated when she directly observed him using the board with the respondent.
- [37] Ms. Batstone was not able to accurately discern the numbers, letters or words that the respondent attributed to Martin on the video. Neither could I watching it.
- [38] Of significance, Ms. Batstone commented in her report that the respondent's interpretation of Martin's communications may not be valid. She opined that it is impossible to say that Martin intentionally spelled words that the respondent attributed to him or that the words were meaningful to him.
- [39] During her testimony, Ms. Batstone was equivocal when the respondent asked if Martin needed a strong relationship in order to be assessed. She was unable to say if Martin had such a need only that he did not cooperate with her. When the respondent pressed Ms. Batstone whether she would commit to a longer period in which Martin might develop trust in her, she responded that Martin did not appear interested in such communication and given his history of becoming very anxious, she would not carry on.
- [40] In response to counsel for the petitioner, Ms. Batstone agreed that it is best to encourage a person with very limited communication abilities to use as broad based a method as possible but, unlike Dr. Burnside, did not suggest that the facilitated communication limited to the respondent be discontinued. In re-examination by the respondent, Ms. Batstone confirmed the last point.
- [41] On the whole of the evidence, I am not able to accept the respondent's contention that Martin communicates in any meaningful verbal way using the medium of facilitated communication. At most, he is able sometimes to duplicate the simplified communication techniques otherwise available to him through signing or the use of short words or phrases.
- [42] Keith Pennock is a community living consultant who has extensive experience with augmented communications generally and including facilitated communication. Mr. Pennock's comments, albeit not based on actual observation, seem consistent with common sense. He points out the obvious difficulty in determining what capacity Martin has for internalizing complex information and his ability to respond independently of his father's influence associated with hand contact during the use of the board. He also points out that any apparent demonstration of communication capability as reported by the respondent from time to time is at odds with Martin's lack of adaptive functioning skills and experience. I agree with those comments.
- [43] On a more positive note, I am satisfied, in spite of Dr. Burnside's recommendation that the use of facilitated communication be discontinued entirely, that there is some emotional attachment associated with the current interactions between the respondent and Martin

including the use of the board. I am not persuaded that it is necessary to prohibit its use during the visits as currently scheduled. There is some evidence that Martin is often agitated after returning from visits with the respondent but there might be many different reasons for that.

- [44] The respondent also went to some lengths to demonstrate that the group home is not a good safe environment for Martin. I do not propose to set that evidence out in any detail. It will suffice to say that I considered it and reject the respondent's contention in such regard.
- [45] I am not persuaded that the respondent has demonstrated any material change of circumstances to justify re-visiting and altering the existing access order. In particular, I am not satisfied that Martin has the abilities or the inclination to communicate verbally using the facilitated communication board. Any further attempts to assess the use of the board are unnecessary and potentially harmful to Martin. The respondent's application for increased access is denied.
- [46] Similarly, I am not persuaded to prohibit the respondent's use of the communication board within the existing access regime. I accept that the board's use with the respondent is a potential cause of anxiety but the evidence is insufficient to satisfy me on the point. I am satisfied that it is not in Martin's best interests for anyone else to attempt facilitated communication with him. I dismiss the petitioner's application for a prohibition order.
- [47] Section 18 orders are unusual in nature. The Court of Appeal has interpreted the section as sufficiently broad to apply to repetitive, vexatious or frivolous applications within a proceeding: see *S. v. S.*, [1998] B.C.J. No. 2912 (C.A.), at para. 13. I also have an inherent jurisdiction to control vexatious or frivolous applications within a matrimonial proceeding as they are an abuse of the court's process. It is not open to the respondent to keep litigating the same issue over and over again. I am satisfied that I should make an order under s. 18 prohibiting further applications by the respondent unless he first obtains leave of the court.
- [48] Any application to vary a final order must be based on a material change of circumstances. Before bringing any future application to vary, the respondent must first obtain leave, by demonstrating to a judge of the court that there is a *prima facie*, or arguable, case that there has been a material change in circumstances. In the result, the respondent must obtain leave before delivering to the petitioner any notice of an application to vary the access provisions set out in the July 2002 order of Quijano J., as amended by her in 2003.
- [49] The parties may speak to the matter of costs at a date to be arranged through the trial coordinator.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/09/03/2009BCSC0327.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bell-v-hagger-2009>

Prepared on 29 October 2026 · Esheria