

CANADA / JUDGMENT

## G.M.S. v. Dr. Z

2021 BCSC 1915

### COURT

Supreme Court of British Columbia

### DECIDED

1 October 2021

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2021 BCSC 1915 G.M.S. v. Dr. Z

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.M.S. v. Dr. Z,

2021 BCSC 1915

Date: 20211001

Docket: E212267

Registry: Vancouver

Between:

G.M.S.

Petitioner

And

Dr. Z, R.A.S.J. and C.M.J.

Respondents

Restriction on publication: Order sealing court records 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 referred to in these proceedings as G.M.S., Dr. Z, R.A.S.J. and C.M.J. This publication ban applies indefinitely unless otherwise ordered

Corrected Judgment: The text of the judgment was corrected on the cover page and at paragraphs 10 and 12 on October 6, 2021

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

September 2, 2021

Place and Date of Ruling given to Parties with Reasons to follow:

Vancouver, BC

September 2, 2021

Place and Date of Judgment:

Vancouver, B.C.

**October 1, 2021**

- [1] G.M.S. seeks an injunction restraining Dr. Z from performing a double mastectomy or any surgery on her child, R.A.S.J., pending a determination of many issues by this Court. The surgery is scheduled for the morning following the hearing of this application. I refused to grant the injunction with reasons to follow. These are those reasons.
- [2] G.M.S. argues that the respondents have not satisfied the requirements of s. 17 of Infants Act, R.S.B.C. 1996 c. 223, that R.A.S.J. has not given informed consent for treatment. She says that parents should make important decisions affecting their children and that s. 7 of the Charter constitutionalizes the liberty and security interests of parents in their children, including a right to make decisions for them in fundamental matters such as medical care. She argues that parents determine the child's best interests. She says that she satisfies the test for a pretrial injunction.

- [3] G.M.S. argues that s. 17 of the Infants Act cannot be interpreted in a way which unjustifiably infringes the s. 7 rights of the parent under the Charter. The question of whether R.A.S.J. has the capacity to give informed consent to the treatment; whether s. 17 of the Infants Act permits the administration of the treatment without the consent of the petitioner, and; whether the implementation of the treatment unjustifiably infringes the s. 7 rights of the petitioner and R.A.S.J. are all serious issues to be tried. She argues that commencing the treatment will have serious, permanent, life altering effects that may not be in R.A.S.J.'s best interests. She argues that there is no demonstrated need to rush into the treatment. She says that the results of the surgery are irreversible and the harm occasioned by the unjustified infringement of her constitutional rights will be irreparable and irremediable. She refers me to *A.B. v. C.D.*, 2020 BCCA 11.

## Background Facts

- [4] R.A.S.J. is now 18 years old, his birthday was June 4, 2003. He is diagnosed as gender dysphoric. He indicates that by the age of seven, he asked his mother if he could change his body into a boy's body. He has been receiving testosterone for a number of years. He has the support of a medical team who have concluded that

R.A.S.J. understands the nature and consequences and the reasonably foreseeable benefits and risks of surgery a gender affirming mastectomy surgery is in the best interest of R.A.S.J.

- [5] As I have indicated, the surgery is scheduled for the morning following the hearing of this application.

## Discussion

- [6] On the application before me the applicant/petitioner says that she meets the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 that is:
1. Whether there is a serious issue to be tried;
  2. Whether irreparable harm would result to the applicant if the injunction is not granted; and
  3. Whether the balance of convenience between the parties favours granting the injunction to the applicants.
- [7] The respondents argue that because an injunction prohibiting surgery on the day following the hearing would effectively provide all of the relief sought in the petition, this amounts to a final order. The applicant/petitioner must therefore satisfy the more stringent test that in order to obtain final injunctive relief, a party is required to establish its legal rights and the court must then determine whether an injunction is an appropriate remedy. (*Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396)

## Serious Question to be tried

- [8] In my view, whether the test at stage one of the injunction is that of a 'serious question to be tried' or the higher threshold of 'establishing current legal rights', the applicant fails. The legal question to be determined in this case is whether the requirements of s. 17 of the Infants Act have been met:

### Consent of infant to medical treatment

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.

- [9] The evidence of Dr. Z and the other health care providers in R.A.S.J.'s care (M.R., Dr. C, N.P.M) all agree that R.A.S.J. is sufficiently mature to consent to the medical treatment and that the medical treatment is in his best interests. In the AB case the Court of Appeal said:

- [133] The larger question, however, is whether a consent given under s. 17 of the Infants Act, and in particular whether s. 17(3) has been complied with, is open to review by a court. In our view, the answer must be "yes". The issues encompassed by s. 17 must be justiciable, but the jurisdiction is limited.

- [134] One way in which the issue may come before the courts is in an application to determine the extent of parental responsibilities under s. 41(f) of the FLA. Under s. 41(f), parental responsibility for "giving, refusing or withdrawing consent to medical, dental and other health related treatments for the child" is subject to s. 17 of the Infants Act. Consistent with this, the Family Agreement acknowledges that CD's responsibilities to participate in health care decisions affecting AB are subject to s. 17. This reflects a carefully legislated balance between parental responsibilities, medical expertise, the protection of young people, and

the right of a capable individual to medical self-determination.

- [135] Clearly "subject to s. 17" means subject to a lawful exercise of the rights accorded to mature minors under s. 17. The lawful exercise of those rights requires a health care provider to assess whether the "infant" understands the nature, consequences, benefits, and risks of the proposed treatment, and whether the treatment is in that individual's best interests.
- [136] The court's approach to that review must be deferential given the legislative intent behind s. 17 to recognize the autonomy of mature minors and the expertise and good faith of the health care providers.
- [137] As referenced above, the relief sought in CD's petition is vastly beyond the scope of permissible review of a s. 17 determination. The Infants Act has made it clear that health care professions, not judges, are best placed to conduct inquiries into the state of medical science and the capacity of their patients when it comes to questions of minors' medical decision-making. The statutory deference accorded to health care providers appropriately protects minors' medical autonomy by providing a limited scope of review. In this case, Bowden J.'s ultimate finding on this issue was made in accordance with this principle and within his limited jurisdiction.
- [138] To summarize our disposition of the issues discussed here, it is our view that:
- (a) there is no jurisdiction under ss. 37 and 38 of the FLA to make bald declarations as to the best interests of the child or family violence in the absence of specific orders "respecting guardianship, parenting arrangements or contact with a child" under Part 4 of the FLA; and
  - (b) in the context of a guardian's responsibilities under the FLA, a consent given under s. 17 of the Infants Act is reviewable by the court having regard to whether the infant has legal capacity to consent, and specifically:
    - (i) whether the health care provider "has explained to the infant and has been satisfied that the infant understands the nature and consequences and reasonably foreseeable benefits and risks of the health care"; and
    - (ii) whether the health care provider has made reasonable efforts to determine, and has concluded, that the health care is in the infant's best interests.
- [141] Respecting the best interests consideration in this case, it must be recognized that s. 17 of the Infants Act has entrusted health care providers with the responsibility of assessing AB's understanding and capacity, and satisfying themselves that his treatment decisions were in his best interests. The court should not presume to declare a treatment in a minor's best interests in light of its limited authority, which is confined to reviewing compliance with s. 17.
- [10] There is no evidence from the applicant/petitioner that raises a question with respect to compliance with s. 17. She speculates that Dr. Z. may not have all of the medical background relating to R.A.S.J. She says that she does not believe that R.A.S.J. understands the

consequences of the surgery. She appends to her affidavit a psychoeducational assessment that was prepared for R.A.S.J. This was of course produced for a different reason but the report does not raise any issue with respect to the medical team's assessment and compliance with s. 17 of the Infants Act. To the extent that that report is pertinent to this application it suggests that R.A.S.J. has learning difficulties in specific areas. It does not suggest that he is not able to understand the nature and consequences and the reasonably foreseeable benefits and risks of health care or to determine whether that healthcare is in his best interests. In fact, the report suggests otherwise. With respect to cognitive testing the report provides:

Some results were thought to be a possible underestimate of R.A.S.J.'s true ability/performance levels due to attention fatigue and lack of self-confidence and/or persistence. R.A.S.J.'s performance in the area of verbal comprehension is in the average range and suggests that his verbal reasoning, general information and ability to access vocabulary is age-appropriate. Of particular strength, both within his own profile and in comparison to his age peers, is his social skills and judgment. Overall, results indicate that R.A.S.J. is in the average range in many areas of executive function.

- [11] The concerns expressed by the petitioner/applicant with respect to R.A.S.J.'s medical condition and the psychoeducational assessment do not satisfy me that there is a reasonable issue to be tried with respect to compliance with s. 17 of the Infants Act.
- [12] Moreover, I have comprehensive affidavit evidence from members of the medical team involved in R.A.S.J.'s care that R.A.S.J. is mature enough to make his own medical decisions regarding gender affirming medical procedures. These include the opinions of a registered clinical counsellor, a psychiatrist and the surgeon as well as R.A.S.J.'s father.

### **Irreparable Harm to the Applicant**

- [13] The respondents argue that absolutely nothing will happen to the applicant if this surgery proceeds. Assuming that irreparable harm to the applicant is broad enough to include her role as a parent/guardian, the Court of Appeal has described that role at para. 215 of A.B. There the court said:
- [215] As acknowledged by this court in *Van Mol v. Ashmore*, 1999 BCCA 6, a child's capacity to consent does not remove all parental involvement from their medical decisions:
- [89] The position of the parents at common law is straightforward. If the child does not have sufficient intelligence and understanding to have the capacity to consent, then only the parents can consent and their consent will be sufficient. But once the child has sufficient intelligence and understanding to have the capacity to consent, then only the consent of the child will do. The capacity of the parents to consent on behalf of the child does not coexist with the child's own capacity to consent or to refuse consent. It could not be otherwise. But that is not to say that the parents need not be involved in the process of explanation, instruction and advice leading to the obtaining of the informed consent of the child. They

should be involved as part of that process wherever possible.

[Emphasis in original.]

- [14] The applicant has been involved in the decision-making as contemplated by A.B. The registered clinical counsellor deposes that she saw R.A.S.J. over 10 sessions from January 11, 2019 to November 22, 2019. Both R.A.S.J.'s mother and father attended at the office with R.A.S.J. The applicant/petitioner was involved in the decision to commence testosterone therapy. She agreed to testosterone therapy on November 22, 2019. The psychiatrist indicates that he saw R.A.S.J. by telehealth. At that time R.A.S.J. was 16.5 years old. R.A.S.J.'s mother took part in some of the call and assured the psychiatrist that she would convey information about the diagnosis of gender dysphoria to R.A.S.J.'s father.
- [15] The surgeon deposes that R.A.S.J. attended the consultation with respect to the surgery on August 17, 2021 with his father. They discussed all of the details regarding gender affirming surgery including risks, benefits and options. They discussed what to expect after the surgery. He answered R.A.S.J.'s questions as well as his father's questions. His father indicated that he was supportive of R.A.S.J. obtaining the surgery. The surgeon understood from the father and from R.A.S.J. that the mother was aware and generally supportive of R.A.S.J.'s transition and had taken R.A.S.J. to previous readiness assessments and mental health visits for care relating to gender dysphoria.
- [16] R.A.S.J. deposes that he was approved for gender affirming surgery and waited approximately a year before an opening was available. He says that his mother knew about the surgical consultation with Dr. Z because he told her about it. His father had suggested that he tell his mother before the consultation. She knew about it for at least a month beforehand.
- [17] As such, even if the concept of "irreparable harm" is sufficiently broad to include the applicant's role as guardian with respect to advising and explaining the particular medical procedure contemplated, the evidence before me indicates that the applicant has been involved in these decisions and has known of the particular surgery contemplated for at least a month. As such, she had the opportunity to advise and explain and would not to be irreparably harmed were the surgery to proceed.

### **Balance of convenience between the parties**

- [18] I have found that the first two branches of the RJR-McDonald test have not been met. It follows that the balance of convenience favours the respondents. However, I will make the following comment: I do not accept that delay has no implication or impact on R.A.S.J. The materials before me indicate that R.A.S.J. has been suffering from gender dysphoria for many years. As he deposes, the current conditions with respect to his chest makes his dysphoria worse. It makes him "so unhappy that it is sometimes difficult to live." Even the terms make him uncomfortable. He prefers to use the term "top surgery". His father deposes that:

The timing of R.A.S.J.'s operation in my view is critical. he wants to have this part of transition which he believes will free him once again from some of the issues which hold him back The operation is timed so that he can fully dedicate the rest of the year to getting into a good school/ university "

I am worried about his mental health if his long-awaited operation is delayed. He has been suicidal in the past and I would like him to not have to feel that again.

- [19] It is not simply a question of having the surgery when it is convenient so it does not interrupt with the school year. As is apparent from the affidavits of R.A.S.J. and of C.M.J., foregoing surgery will have a significant impact on R.A.S.J. As such, the balance of convenience favours the respondents and favours proceeding with the surgery.
- [20] Accordingly, the application for an injunction has been dismissed.
- [21] The respondents are entitled to their costs of this application from the applicant/petitioner. The respondents have been successful.

The application of Dr. Z.

- [22] In addition to hearing the application for an injunction, I also heard the application of Dr. Z for an order that he be identified by the pseudonym Dr. Z in these proceedings; that the style of cause be modified to identify him as Dr. Z; that the documents currently filed be sealed and that the parties re-file documents in accordance with the anonymization order and a publication ban on the use of the surgeon's name in connection with these proceedings.
- [23] I granted those orders. They were not opposed by any party. However, the court must be satisfied that such an order is appropriate.
- [24] The Supreme Court of Canada has indicated that the court does have an inherent jurisdiction under the common law to order a publication ban of confidential information where necessary and when the salutary effects of the publication ban outweigh its deleterious effects to the free expression of those affected by the ban (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Sherman Estate v. Donovan*, 2021 SCC 25)
- [25] The *Dagenais* framework sets out the following criteria: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.
- [26] Here, I am satisfied that court openness poses a serious risk to an important public interest: preventing serious physical and professional harm to the surgeon. The surgeon has set out in his deposition the basis for his concerns with respect to his physical and professional safety. I am satisfied that these concerns are serious. A refusal to grant this order would not only affect Dr. Z's personal safety, it would likely impact his ability to provide care to other patients without safety concerns or negative intrusions of privacy into the physician-patient

relationship. Patients such as R.A.S.J. are at a particularly sensitive stage in their lives and public scrutiny would have a negative effect on them. There are also legitimate concerns about the negative effects on the physician's relationship with other patients. Because the affidavits were filed on such short notice and include highly sensitive information, it is appropriate that the file be sealed and the parties file appropriately anonymized materials so that these may be available to the public. The public's interest will be addressed by anonymous materials.

### **R.A.S.J.'s Application to Seal Medical Records**

[27] There is no public interest in access to these medical records. Rather, the public interest will be served by anonymized materials being filed. Accordingly, I have granted the order sought by R.A.S.J.

[28] As I have indicated, the last two applications were not opposed. The court would have to decide these matters in any event. Therefore, I ordered that each of the parties will bear their own costs with respect to these two applications.

"B.J. Brown J."

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