COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *A.B. v. C.D.*,
2020 BCCA 11

Date: 20200110

Dockets: CA45940; CA46229

Docket: CA45940

Between:

A.B.

Respondent

(Claimant)

And

C.D.

Appellant

(Respondent)

And

E.F.

Respondent

(Respondent)

And

Attorney General of British Columbia,
pursuant to s. 204 of the *Family Law Act*, S.B.C. 2011, c. 25

Respondent

Provincial Heath Services Authority (B.C. Children's Hospital),
Justice Centre for Constitutional Freedoms, Association for Reformed Political Action Canada, Canadian Professional Association for Transgender Health,
West Coast Leaf Association, and Egale Canada Human Rights Trust

Intervenors

- and -

Docket: CA46229

Between:

C.D.

Appellant

(Claimant)

And

Provincial Health Services Authority (B.C. Children's Hospital), E.F., G.H., I.J., British Columbia Ministry of Education, Delta School District, and A.B.

Respondents

(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 A.B., C.D., E.F., G.H., I.J., K.L., M.N., O.P., Q.R., S.T., U.V. and W.X. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated February 27, 2019 (*A.B. v. C.D. and E.F.*, 2019 BCSC 254, Vancouver Docket E190334);
an order of the Supreme Court of British Columbia dated April 15, 2019 (*A.B. v. C.D. and E.F.*, 2019 BCSC 604, Vancouver Docket E190334);
an order of the Supreme Court of British Columbia dated July 4, 2019 (*C.D. v. Provincial Health Services Authority (B.C. Children's Hospital)*, Vancouver Docket E191371).

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Place and Date of Hearing:	Vancouver, British Columbia September 3–5, 2019
Place and Date of Judgment:	Vancouver, British Columbia January 10, 2020

Written Reasons by:
The Honourable Chief Justice Bauman

The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Groberman

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Summary:

CD appeals three orders of the Supreme Court. The first found his child AB to have validly consented to medical treatment for gender dysphoria and made declarations respecting AB's best interests and family violence. The second was a protection order against CD, and the third dismissed a second proceeding commenced by CD. At issue is whether the orders were procedurally unfair, authorized by the legislative scheme, or violated CD's Charter rights. Held: Appeal allowed in part. The bald declarations under s. 37 of the Family Law Act pertaining to AB's best interests and family violence were not permitted by the statutory scheme, and the protection order was consequently without foundation. Substituted for some of these orders are a declaration that AB's consent to the medical treatment was validly made under s. 17 of the Infants Act and conduct orders under s. 227(c) of the Family Law Act.

Reasons for Judgment of the Honourable Chief Justice Bauman and the Honourable Madam Justice Fisher:

I. OVERVIEW

[1] AB is a transgender teenager: assigned female at birth, he feels and perceives himself to be male. While still a minor, he wished to pursue hormone therapy, a medical procedure that would align his body more closely with how he perceives his gender (the treatment).

[2] His father, CD, strongly opposed AB receiving this treatment, while his mother EF was supportive.

[3] A medical team assessed AB as sufficiently mature to make the treatment decision on his own, and CD pursued litigation. AB and CD both commenced proceedings in the Supreme Court of British Columbia in February 2019 concerning CD's efforts to prevent the treatment and AB's ability to consent on his own behalf. The three orders under appeal stem from this litigation.

[4] First, a February 2019 order declared AB validly able to consent to treatment, and that referring to AB as a girl or attempting to convince him to halt treatment would be considered family violence under the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*]. Second, an April 2019 protection order restricted CD's ability to speak with others, including media outlets and AB, about AB's decision to receive hormone therapy. Third, a July 2019 order dismissed the action initiated by CD as vexatious and an abuse of process.

[5] CD appeals all three orders. He argues that they violate his *Charter*-protected freedoms of belief and expression and what he terms "parental rights", were procedurally unfair, and do not reflect AB's best interests.

[6] AB maintains that these orders were fairly decided, are *Charter*-compliant, and reflect his best interests as well as the statutory right of mature minors to make their own medical decisions

under s. 17 of the *Infants Act*, R.S.B.C. 1996, c. 223. He is supported by EF and the other respondents.

[7] Following the hearing of this appeal, this court observed there was no reason to interfere with the finding that AB's consent was valid. The treatment, which AB began following the February order, was thus permitted to continue.

[8] In these reasons, we explain that decision. We further explain why, in our view, certain aspects of the first two orders were issued in a procedurally irregular fashion and cannot stand. We would allow the appeals of these orders in part and substitute procedurally appropriate orders. We would dismiss the appeal of the July order dismissing CD's action.

II. BACKGROUND

A. AB's medical assessment and treatment recommendation

[9] AB's parents, CD and EF, have been separated for several years. They share parenting time and responsibilities over AB under the terms of a separation agreement.

[10] At the time this appeal was heard, AB was nearing his 15th birthday.

[11] AB has identified as male since he was 11 years old. At 12, he began to socially transition, enrolling in school under a chosen male name and using male pronouns with his teachers and peers.

[12] Around 13 years of age, after two years of consistently identifying as male, AB's persistent discomfort with his body led him to want to take steps to appear more masculine. With the support of his mother, AB went to see a registered psychologist, Dr. IJ, for a number of sessions.

[13] Following these sessions, Dr. IJ finalized an assessment and treatment plan for AB. The plan concluded that AB met the diagnostic criteria for gender dysphoria. As described in the consent form signed by AB, gender dysphoria is a recognized medical condition where a person experiences significant distress because the gender identity they experience differs from their genetic or biological gender, and how others perceive them.

[14] Dr. IJ found that AB would be a good candidate for hormone treatment, and referred him to the BC Children's Hospital (BCCH) for further assessment.

[15] In August 2018, AB met with pediatric endocrinologist Dr. GH at the Gender Clinic at BCCH. Dr. GH conducted a further assessment of AB and again determined that masculinizing hormone treatment was both reasonable in the circumstances and in AB's best interests.

[16] He explained the nature, consequences, and foreseeable risks and benefits of the treatment to AB, presenting a detailed consent form that laid out these risks. AB decided to proceed with the treatment, and signed the form. AB's mother, who supported him throughout this process, also signed the form.

[17] Upon learning AB's father was not aware he was pursuing this treatment, Dr. GH postponed its start in order to present information to AB's father, CD.

[18] CD emailed the clinic a few days later expressing his opposition to the proposed treatment.

[19] From August to December 2018, a social worker at the clinic made "numerous attempts" to set up a meeting between Dr. GH and CD to discuss the proposed treatment. CD did not attend at the clinic and did not engage with the medical team.

[20] On 1 December 2018, Dr. GH and social worker UV sent a letter to CD. The letter addressed CD's disagreement with the treatment and explained that, under s. 17 of the *Infants Act*, minors are permitted to consent to their own medical treatment.

[21] The letter explained that the consent of a parent is not required to administer health care to a minor where the health care provider is satisfied the minor understands a treatment's nature and consequences, and has concluded the health care is in the minor's best interests. It informed CD that the BCCH medical team had assessed AB and found him capable, meaning CD's consent was not required for AB to proceed with treatment.

[22] After litigation commenced, Dr. GH took further steps to ensure his capacity assessment of AB was correct. He asked for an opinion from the Provincial Health Services Authority (PHSA) Ethics Service, which examined his finding of capacity and agreed that AB demonstrated capacity to understand the treatment.

[23] The ethics opinion suggested that, while not necessary, Dr. GH may wish to have an additional capacity assessment done by a provider outside the current care team in order to assuage CD's concerns and improve family dynamics.

[24] Dr. GH referred AB to Dr. MN, a psychiatrist at BCCH in the BC Mental Health Centre, who assessed AB and found that he demonstrated a detailed understanding of the risks and benefits of the treatment. Dr. MN further assessed AB's mental status, finding he displayed reasonable judgment and insight.

B. Procedural history

1. Provincial Court proceedings

[25] This matter first came before a court on 12 December 2018. CD filed an application in the Provincial Court of British Columbia asking that AB be prevented from seeking treatment for gender dysphoria without CD's consent.

[26] The hearing proceeded without notice to AB on 14 January 2019. The court ordered that AB be prevented from pursuing treatment until 28 January 2019.

[27] On 28 January 2019, the order was extended to prevent treatment from commencing until CD had filed proceedings in Supreme Court.

2. Supreme Court proceedings

[28] In early February 2019, both AB and CD initiated proceedings in Supreme Court.

[29] AB filed a notice of family claim on 7 February 2019, following CD's successful Provincial Court application to temporarily bar his treatment. It named CD and EF as respondents. The following day, 8 February 2019, AB filed a notice of application requesting declarations under the *FLA*, including that he was entitled to make his own medical decisions under s. 17 of the *Infants Act* and that treatment for gender dysphoria was in his best interests. AB also obtained an order that the application be heard on short notice and an order for a publication ban on the proceedings.

[30] On 13 February 2019, CD filed a response to AB's application, which opposed his requests and asked for an interlocutory injunction preventing AB from obtaining the treatment.

[31] The same day, CD filed a petition in Supreme Court seeking a similar injunction against AB and nine additional parties: PHSA, EF, Dr. GH, Dr. IJ, the Ministry of Education, the Delta School District, elementary and high school counselors and officials who had dealt with AB, and barbara findlay, Q.C., lawyer to AB.

[32] CD then brought an application that asked, among other things, that the named parties be restrained from providing any advice or counsel in relation to the treatment, that they pass on any information they have about AB to CD, and that an interlocutory injunction be granted barring treatment until extensive evidence was heard on the merits of the treatment recommended for AB.

[33] CD also applied for an order that his application be heard on short notice, together with AB's.

27 February 2019: AB's application granted, CD's application dismissed

[34] On 19 and 20 February 2019, Justice Bowden considered both applications in a summary trial, along with a third application by AB for a publication ban in the proceeding initiated by CD. While the proceedings initiated by AB were anonymized, those initiated by CD named the parties on the public record.

[35] While AB's application was not expressly made under Rule 11-3 of the *Supreme Court Family Rules*, B.C. Reg. 169/2009, Bowden J. determined that this is what was intended and proceeded with the matter as a summary trial (at para. 7). As he noted in his reasons, none of the ten counsel present at the hearing objected (at para. 9).

[36] On 27 February 2019, Bowden J. issued reasons for judgment. He concluded, *inter alia*, that AB's consent was valid under s. 17 of the *Infants Act* and that CD lacked the legal basis for an interlocutory injunction (at paras. 54–60).

[37] CD's application was dismissed. Bowden J. concluded that the law on a mature minor's right to consent to treatment was well-settled. He accepted the evidence of Dr. GH that delaying the treatment further was not a neutral option for AB, as he was experiencing "ongoing and unnecessary suffering" due to his dysphoria (at para. 60). He noted EF's concern that her child might attempt suicide again, having done so in the past, if this suffering were prolonged (at para. 53).

[38] Bowden J. issued the following orders (collectively, the Bowden Order):

1. It is declared under s. 37 of the *Family Law Act* that it is in the best interests of AB that:

    i. he receive the medical treatment for gender dysphoria recommended by the Gender Clinic at BCCH;

    ii. 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;

    iii. 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:

    i. AB is exclusively entitled to consent to medical treatment for gender dysphoria and to take any necessary legal proceedings in relation to such medical treatment;

    ii. Pursuant to para. 201(2)(b), AB 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;

    iii. 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 under s. 38 of the *Family Law Act*.

3. AB 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. AB 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 AB, his father shall be referred to as CD and his mother shall be referred to as EF.

6. The publication by any person of any information that may disclose the identities of AB, his father or his mother is prohibited.

7. The application by CD is dismissed.

[39] Bowden J. declined to issue a publication ban in relation to the medical professionals named in CD's petition. This aspect was reconsidered by Justice Marzari.

[40] In reasons issued 15 April 2019, indexed as 2019 BCSC 603, Marzari J. found that, in the time since Bowden J.'s decision, "substantial online commentary analogizing AB's medical treatment to child abuse, perversion and even pedophilia" had been published online (at para. 31). Further, the doctors treating AB had received threatening emails. These communications gave rise to "reasonable and significant apprehension of harm" for the medical professionals involved (at para. 47). Given the change in circumstances, Marzari J. issued a publication ban for the medical professionals.

[41] Marzari J. also addressed the deficiencies in CD's petition: first, that it should have properly been filed as a notice of family claim, given its main grounds of relief were under the *FLA*; and second, that it was "largely duplicative" of the response CD filed to AB's notice of family claim (at paras. 76–77).

[42] Consequently, she directed CD to bring his case into compliance with the *Supreme Court Family Rules* by attending at the registry and re-filing his petition as an action.

15 April 2019: Protection order issued

[43] On 8 April 2019, AB brought an application for a protection order under s. 183 of the *FLA*. In a second set of reasons released 15 April 2019, Marzari J. found that AB was an at-risk family member and issued the order.

[44] This application followed multiple alleged breaches of the publication ban on the proceedings. Two different organizations had, following the summary trial before Bowden J., published AB's identifying information. AB had sought and obtained court orders issued on 5 March and 28 March 2019 compelling these organizations to remove identifying information from their websites. Both breaches were apparently supported by CD, who had given interviews to both organizations.

[45] The first organization, Culture Guard, had published two interviews where both CD and his legal counsel referred to AB as a girl and used female pronouns for him in these interviews, in alleged violation of Bowden J.'s order. Marzari J. found that CD's comments expressed opposition to AB's chosen course of treatment and "discusse[d] in detail AB's medical history, and trivialize[d] AB's suicide attempt" (at para. 29).

[46] CD had further posted comments on Culture Guard's website under his own name and agreed to be a speaker at an event of theirs, although he later withdrew from speaking (at para. 31).

[47] The second organization, an online conservative newspaper called the Federalist, had also published two interviews with CD, one before and one after Bowden J.'s reasons were released.

[48] In these interviews, CD once again referred to AB as a girl and expressed his disapproval of AB's medical choices. Marzari J. noted that one article stated CD "understood that this statement might be construed as a violation of the court's interdict against 'referring to [AB] as a girl…to third parties'" (at para. 24).

[49] The Federalist articles further provided links to materials in the case, including a copy of a letter sent to CD by AB's doctor, unredacted for anonymity (at para. 25).

[50] In the application before Marzari J., AB asked that his father be ordered to stop giving interviews and sharing documents pertaining to his case, including his personal medical information, with media organizations. EF supported the application.

[51] CD argued that bringing public attention to AB's case was important to society and to his rights as a parent.

[52] Marzari J. granted a protection order. She noted that Bowden J. had already made an order declaring that referring to AB as a girl, whether directly or to third parties, was a form of family violence. She considered this order binding on her unless or until it was overturned on appeal (at para. 11). She further distinguished between CD's objective of using AB's case to bring publicity to his cause, and the *FLA* objective of protecting the child (at para. 57).

[53] Marzari J. made the following order (the Marzari Order):

1. CD shall be restrained from:

    i. attempting to persuade AB to abandon treatment for gender dysphoria;

    ii. addressing AB by his birth name; and

    iii. referring to AB as a girl or with female pronouns whether to AB directly or to third parties;

2. CD shall not directly, or indirectly through an agent or third party, publish or share information or documentation relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies, other than with the following:

    i. His legal counsel;

    ii. Legal counsel for AB, EF, and the named respondents in the Petition currently filed as Vancouver Registry S-191565;

    iii. The Court;

    iv. Medical professionals engaged in AB's care or CD's care;

    v. Any other person authorized through written consent of AB; and

    vi. Any other person authorized by order of this court;

3. CD shall not authorize anyone, other than his own retained counsel, to access or make copies of any of the files from the Registry in relation to this proceeding or any related proceeding, including CD's petition proceedings currently filed as S-191565; and

4. The term of the protection order shall be one year, subject to any extension issued by the court.

4 July 2019: CD's action dismissed

[54] In accordance with the direction of Marzari J., CD refiled his petition as a family law action on 23 May 2019, replicating the grounds of relief in his original petition. He then filed an application seeking production of "all medical, counselling or other health related files, records and documents regarding A.B.'s gender dysphoria".

[55] In response, AB, Dr. GH, PHSA, and Dr. IJ filed notices of motion to strike CD's claim. EF filed a notice of motion consenting to the relief sought in AB's notice. The respondents argued that, among other flaws, CD's application was abusing this second process to seek production of documents for use in his appeal.

[56] On 4 July 2019, Justice McEwan dismissed the re-filed action and CD's application along with it (the McEwan Order). He found that CD's action disclosed no substantive claim, as it again only asked for an injunction against AB pursuing treatment, and in that way duplicated the relief CD sought in response to the action initiated by AB. He found the claim vexatious and dismissed it as an abuse of process. He ordered special costs to AB.

[57] Beyond his in-court statements during argument, McEwan J. did not issue reasons for this decision.

3. On appeal

[58] CD appeals the Bowden Order, the Marzari Order and the McEwan Order.

Intervenors

[59] The Attorney General of British Columbia, seven organizations, and one individual applied to intervene in the appeal of the Bowden and Marzari Orders.

[60] The Attorney General was permitted to intervene pursuant to s. 204(1) of the *FLA* and became a party to the proceeding pursuant to s. 204(3). Six of the other applicants were granted leave, all on matters of a limited scope (2019 BCCA 297).

[61] Four parties intervene solely in relation to the *Charter* issues raised in this appeal: the Justice Centre for Constitutional Freedoms (JCCF), the Association for Reformed Political Action (ARPA), Egale Canada Human Rights Trust (Egale), and the West Coast Legal Education and Action Fund (West Coast LEAF).

[62] PHSA intervenes in respect of the capacity of minors to consent to treatment, and treatment assessments under the *Infants Act*.

[63] The Canadian Professional Association for Transgender Health (CPATH) intervenes on questions of informed consent in relation to transgender youth, as well as freedom of expression and the protection order.

[64] The Attorney General, as a party, made oral submissions. PHSA and ARPA were given leave to make limited oral submissions. The other intervenors were confined to written submissions only.

Preliminary objections on mootness, right of audience, and fresh evidence on appeal

[65] Two preliminary questions are before the court on the appeal of the Bowden and Marzari Orders.

[66] First, AB asks that the court decline to hear the appeal. He submits that CD's repeated breaches of court orders in this litigation, including continued references to AB as female in his factum before this court, should disentitle him to a right of audience. Further, he submits that the issue of commencing treatment is moot; since beginning hormone therapy in February 2019, he has gone through changes he says are irreversible. He states it would be harmful to halt the treatment at this point.

[67] In support of his application, AB seeks to adduce new evidence in the form of affidavits from Dr. GH and Dr. IJ.

[68] Second, CD seeks to adduce new and fresh evidence respecting the risks of the treatment. This evidence includes 13 affidavits, 11 from medical professionals speaking generally about

medical transitioning, one from an individual who has experienced transitioning, and one from CD himself.

[69] The court heard arguments on these preliminary matters on the first day of the hearing and reserved its decision to these reasons.

III. ISSUES

[70] The following preliminary issues are raised on appeal:

1. Should this court decline to consider this appeal on its merits because:
    i. CD has failed to comply with the orders of the courts below and should be denied a right of audience; or
    ii. it is rendered moot due to the progression of AB's transition;

    and is AB's new evidence admissible for the purposes of determining these questions?

2. Is CD's fresh and new evidence admissible?

[71] CD raises several grounds of appeal against the Bowden Order and the Marzari Order. We would set out the issues as follows:

1. Did Bowden J. act in a procedurally unfair manner in hearing the applications before him?
2. What authority did Bowden J. have to consider compliance with s. 17 of the *Infants Act*?
3. Did Bowden J. err in his declarations regarding AB's best interests under the *FLA*?
4. Did Marzari J. err in issuing a protection order on the basis of determinations previously made by Bowden J. as well as the evidence before her?
5. Did Bowden and/or Marzari JJ. fail to sufficiently consider *Charter* values in restricting CD's ability to speak about AB's gender and the medical treatment?

[72] CD's five identified issues on appealing the order of McEwan J. can be grouped into three categories:

1. Did McEwan J. err in dismissing CD's refiled action?
2. Did McEwan J. err in not providing reasons for judgment in striking CD's action?
3. Did McEwan J. err in awarding special costs to AB?

IV. ANALYSIS

A. Preliminary applications

1. AB: Mootness, right of audience, and fresh evidence

[73] AB identifies valid concerns with respect to CD's disregard for orders in the lower courts and the risks of halting his treatment. However, in our view, the court should nonetheless consider this appeal on its merits.

[74] As we have related, AB began gender transition treatment shortly after the Bowden Order of 27 February 2019. AB also completed his change of name application and his change of gender application under the *Vital Statistics Act*, R.S.B.C. 1996, c. 479.

[75] AB seeks to file further evidence on the appeal updating the court on the progress of his treatment and the health ramifications of discontinuing it at this time. The evidence also contains allegations concerning the conduct of CD (and others) since the proceedings before Bowden and Marzari JJ. in relation to the issues giving rise to Justice Marzari's protection order.

[76] This evidence is tendered in aid of AB's application (in which EF joins) to stay the appeal as moot or alternatively to deny audience to CD on the appeal because of his allegedly contumacious conduct in the face of the orders below. As this evidence is not tendered in respect of the appeal, it does not in our view fall within the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and is therefore admissible on the preliminary application without leave.

[77] Dealing with whether CD should be granted the right of audience, it is submitted that CD has on sundry occasions (including in his factum on appeal) failed to honour the court's direction that AB be acknowledged and referred to as male. Further, it is submitted that CD has breached the confidentiality orders of the court in respect of AB through contact and interviews with third parties who strongly oppose gender transition treatment for children and adolescents.

[78] This court may, in its discretion, refuse to allow a party who has disregarded court orders to pursue or participate in an appeal: *Larkin v. Glase*, 2009 BCCA 321 at para. 34; *K.P.B. v. A.S.R.*, 2016 BCCA 382 at para. 37. However, given the importance of the issues raised in this appeal and the fact that our focus at all times must rest on the best interests of AB, we would not decline to hear from CD on the appeal. We do so without in any way countenancing CD's alleged conduct in this litigation, or the further conduct alleged in the fresh evidence tendered by AB.

[79] Turning to the mootness issue, we acknowledge that the evidence indicates physical and mental health risks associated with a discontinuance of treatment by AB at this time. However, we would decline to make a determination as to whether this case is moot, given that we would regardless consider this an appropriate case to hear in an exercise of the court's residual discretion in the mootness analysis: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358–363; *R. v. Rajaratnam*, 2019 BCCA 209 at para. 117.

[80] In any event, the order impacting CD's interactions with AB and others touching the issue of AB's transition are not moot and the appeal in any event would proceed in respect of those matters.

2. CD: Fresh and new evidence

[81] For the reasons that follow, we would conclude 12 of the 13 affidavits CD has filed are irrelevant and could not reasonably affect the outcome of this appeal, and are thus inadmissible.

[82] The affidavit by CD pertaining to his relationship with AB since the orders under appeal were made is admissible as new evidence on the mootness application, although not on the appeal proper.

[83] CD seeks to admit 12 additional affidavits, including from 11 medical professionals who have not met or examined AB. The affidavits address general questions about the suitability of hormone therapy for adolescents.

[84] CD mischaracterizes these affidavits and many of their exhibits as new evidence, that is, relating to events that happened subsequent to the order(s) appealed from: *Jens v. Jens*, 2008 BCCA 392 at para. 29.

[85] All of these affidavits are based on information and experience that predate the February hearing of this matter. They are properly characterized as fresh evidence, and their admissibility is subject to the *Palmer* test: (1) they are generally inadmissible if they could have been adduced at the initial hearing by due diligence; (2) they must be relevant to a decisive issue; (3) they must be reasonably capable of belief; and (4) they could reasonably be expected to have affected the result of the initial hearing. In cases involving the assessment of the best interests of a child, courts are permitted to take an elastic approach to the admissibility of fresh evidence where special circumstances argue in favour of flexibility: *Santelli v. Trinetti*, 2019 BCCA 319 at para. 39; *Jiang v. Shi*, 2017 BCCA 232 at para. 11.

[86] As we discuss below, it is our view that a court's role in reviewing the capacity of minors to make their own medical decisions is limited. The *Infants Act* assigns the role of assessing capacity to the medical professionals who provide health care. A court can only consider the limited question of whether s. 17 of the *Infants Act* has been complied with.

[87] Consequently, we would conclude that CD's affidavits are inadmissible on the second and fourth *Palmer* criteria. Affidavits of medical professionals without specific knowledge of AB's contextual medical history, needs, and capacity are not relevant to the question before this court: whether the health care providers dealing with AB's specific history, needs, and capacity complied with the *Infants Act*.

[88] Further, such generic evidence is unlikely to have affected the result of the February hearing. In considering two similarly general affidavits provided by CD at the hearing, Bowden J. concluded "[t]heir views are of such a generic nature that they are of little use". He stated this in relation to assessing AB's best interests, but similar considerations arise in assessing whether

AB was sufficiently mature to consent to the treatment. Moreover, we note that many of the points the affiants emphasize as important to informed consent—such as assessing and treating any mental health conditions along with treating gender dysphoria, and providing parents with the opportunity to be involved—are consistent with the evidence in the record before us.

[89] Having found the fresh evidence inadmissible, we see no need to address the credibility or due diligence requirements of the *Palmer* test.

B. The Bowden Order (2019 BCSC 254)

[90] There are two threshold issues of jurisdiction in this proceeding: first, that raised by the procedural irregularities on how the matter came to be disposed of by Justice Bowden; and second, that concerning the propriety of the court making what we will term "bald declarations" as to the best interests of AB purportedly under ss. 37 and 38 of the *FLA*. Along with this latter question, we will consider the question of the judicial reviewability of decisions by AB and his healthcare providers under s. 17 of the *Infants Act*.

1. Procedural fairness

[91] We will deal first with the procedural irregularities in the hearing on the 19 and 20 of February. In doing so we note at the outset that Justice Bowden was faced with a very daunting task. He had multiple applications and many counsel before him. He laboured within a compressed timeframe on a matter of great personal significance to the parties involved. And the hearing progressed, as the transcript indicates, in a haphazard fashion without counsel for the principal parties sufficiently clarifying the precise issues before him.

[92] We begin by identifying what was before the judge by way of formal application.

[93] The first matter heard on 19 February was the application by CD brought in his petition proceeding. That proceeding followed on CD's Provincial Court applications which in turn resulted in orders of that court enjoining the commencement of AB's treatment pending CD's proceedings in Supreme Court. As we have related, CD began his Supreme Court petition proceeding on 13 February 2019. In that petition CD sought, amongst a number of other orders, an interlocutory injunction restraining the administration of testosterone injections and other treatments for AB "for up to 120 days, pending a determination by this Honourable Court of whether", in the words of the petition:

(a) the Treatment has been accurately demonstrated to be in A.B.'s best interests according to verified up-to-date medical and scientific evidence and based on a thorough evaluation of A.B.;

(b) section 17 of the *Infants Act* [RSBC 1996] c. 223 permits the administration of the Treatment without the consent of C.D. in the circumstances of this case where urgency is absent;

(c) the Court is satisfied in its objective opinion that the Respondents, BC Children's Hospital and Dr. G.H., have discharged their legal obligations:

(i) with respect to s. 17(3)(a) and (b) of the *Infants Act*;

(ii) making the required reasonable efforts to determine whether the Treatment is in A.B.'s best interests;

(iii) making fulsome and honest disclosure to A.B. in relation to the Treatment;

(iv) providing reasonable opportunities to A.B. to discuss the Treatment with them, and ask questions and receive answers; and

(v) in concluding (rightly or wrongly) that A.B. has granted informed consent to BC Children's Hospital and Dr. G.H. to perform the Treatment,

whether or not the conclusions drawn by BC Children's Hospital and Dr. G.H. with respect to the suitability of the Treatment for A.B., or [AB's] consent to it, or their discharge of their legal duties pursuant to s. 17(3)(a) and (b) of the *infants Act,* are reasonable and correct in the Court's objective opinion.

(d) A.B. understands the:

(i) nature of [AB's] diagnosed condition;

(ii) options and alternatives;

(iii) multiple steps involved in the Treatment;

(iv) details concerning the nature of the procedures and the drugs to be administered;

(v) partial irreversibility of the initiation of the Treatment by hormone blockers;

(vi) irreversible consequences of subsequent steps necessary to complete the process of "gender transition", including but not limited to further escalation of hormonal treatment, several surgeries, psychological and/or psychiatric care, and palliative care; and

(vii) presence or absence of medical evidence of the reasonably foreseeable benefits and risks of the Treatment;

(e) A.B. has the mental and emotional fitness and maturity to consent to the Treatment based on a thorough evaluation of A.B., and as determined in relation to the requirements of the Practice Standards and Professional Guidelines of the College of Physicians and Surgeons of British Columbia, and otherwise as pursuant to the requirements of the law;

(f) A.B. has actually given informed consent to the Treatment, as per the requirements of the Practice Standards and Professional Guidelines of the College of Physicians and Surgeons of British Columbia, and otherwise as pursuant to the requirements of the law;

(g) the implementation of the Treatment unjustifiably infringes the sections 2(a) and (b), and 7 *Charter* rights of C.D. and/or A.B.;

and pending a review by this Honourable Court of expert evidence provided by the parties from academic disciplines including but not limited to:

(a) law of informed consent;

(b) bio-medical ethics;

(c) pediatric endocrinology;

(d) pediatric neurology;

(e) child and adolescent psychiatry;

(f) child psychology;

(g) medical history;

(h) medical statistics; and

(i) the study of relevant diseases including breast, ovarian, uterine, cervical and other cancers, diabetes, osteoporosis, stroke, sexually transmitted infections, erythrocytosis (having a higher than normal number of red blood cells), severe liver dysfunction, coronary artery disease, cerebrovascular disease, and hypertension.

[94] The application in respect of the *Infants Act* issues raised in the relief sought in the petition arose in the context of a written agreement CD entered into with EF on 30 January 2015 (the Family Agreement). There the parties agreed (in part):

1. THAT CD and EF will each continue to exercise all parental responsibilities with respect to AB and

…

(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

…

(h) giving, refusing or withdrawing consent for the child, if consent is required;

[95] The language in the Family Agreement duplicates s. 41 of the *FLA*, which states that parental responsibilities with respect to a child include

(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

[96] In brief, in the Provincial Court proceedings and in the Supreme Court petition, CD was, in effect, endeavouring to determine the scope of his parental responsibility to play a role in consenting to AB's medical treatment. That responsibility is subject, by agreement and by law, to the provisions of s. 17 of the *Infants Act*. Hence, CD brought into question the efficacy of AB's purported consent to the treatment under that provision. We return to this question below.

[97] In the petition proceeding, CD sought an order extending the Provincial Court order restraining the treatment of AB for 45 days, until 5 April 2019. As the Provincial Court order expired on 19 February 2019, he brought his application returnable on that date. CD sought the extension to allow him time to serve documents in support of "a hearing of substance [*sic*] of the petition…"

[98] The second application before Justice Bowden was the application of AB brought in his family law action. The relief sought there must be set out in some detail.

[99] AB sought, amongst others, these orders:

1. An Order pursuant to paragraph 201(2)(b) of the *Family Law Act* that the Applicant is permitted to bring this action and to defend any further or future proceedings concerning his gender identity brought by any person;

…

4. A Declaration under section 37 of *Family Law Act*, that it is in the best interest of the Applicant that he obtains necessary medical treatment for gender dysphoria.

5. A Declaration under the *Family Law Act* that, regardless of who his guardian is or may be from time to time, the Applicant is exclusively entitled to consent to medical treatment for gender dysphoria and to take any necessary legal proceedings in relation to his medical treatment.

6. An Order declaring that it is in the best interests of the Applicant that:

> a. He be acknowledged and referred to as male, both generally and with respect to any matters arising in this proceeding, now or in the future; and that any references to him in this proceeding, now or in the future, employ only male pronouns;

b. That he be identified, both generally and in these proceedings, by the name A.B., notwithstanding that his birth certificate presently identifies him as A.B.

7. An Order declaring that

a. Attempting to persuade the Applicant to abandon treatment for gender dysphoria;

b. Addressing the Applicant by his birth name (also known as 'Dead Name')

c. Referring to the Applicant as a girl, or with female pronouns, whether to the Applicant directly, or to third parties;

d. Taking any legal proceeding to attempt to interfere with medical treatment of the Applicant

constitutes family violence pursuant to section 38 of the *Family Law Act*.

8. An Order under the *Family Law Act* that the Respondent C.D. not have contact or parenting time with the Applicant unless and until he agrees to respect the Applicant's gender identity and gender expression, supports treatment for the Applicant's gender dysphoria, and is taking no legal proceedings to interfere with medical treatment for the Applicant.

9. An Order that the Respondent not refer to the Applicant by any name other than A.B. to any third parties including schools and doctors; and that he use male pronouns when referring to the Applicant to any person.

(AB also sought the change of name and gender identification amendments we earlier described.)

[100] Because CD argues that he was treated in a procedurally unfair manner in the hearing before Justice Bowden, we will spend some time reviewing the relevant transcripts. In essence, CD's complaints are that he did not have notice that a summary trial would proceed on that day; that the evidence of AB's doctors was erroneously admitted; and that he did not have time to consider AB's evidence, which he received the morning of the summary trial.

[101] As for the last two complaints, we would dismiss them summarily. CD received the evidence tendered by AB on short notice because that was a term of the order made on CD's short leave application. CD has only himself to blame for the short time frame he faced. And the exercise of the judge's discretion to admit the affidavits absent strict compliance with the rules is not seriously questioned.

[102] On the first point, the hearing before Justice Bowden began with an application by PHSA, the doctors, and others for a publication ban protecting their identities. This occupied some time at the outset of the proceedings.

[103] Eventually Ms. findlay, Q.C., on behalf of AB, was in the course of her submissions on that issue and more generally. Shortly before the lunch recess on 19 February and likely prompted by the fact that matters were not progressing quickly against the backdrop of limited court time, she said this:

MS. FINDLAY: I should say that, in the Notice of Ap – the – in order to facilitate the granting of the central order requested, the applicant – the applicant in the family case is adjourning the request for cognate orders, all cognate orders except for the s. 201(2)(b) and the publication ban, but we have requested orders declaring dad's conduct to be family violence, restricting dad's contact and a number of other related orders which we are adjourning to another day to – to facilitate the resolution of the central issue in this case.

[Emphasis added.]

[104] In our view, the reference to the "central issue in this case" that AB wished to resolve in this hearing was the declaration as to AB's best interests as requested in paras. 4, 5, and 6 of his notice of application. We would paraphrase those issues as:

1) whether it was in AB's best interests to obtain the treatment;
2) whether AB was "exclusively entitled" to consent to the treatment; and
3) whether it was in AB's best interests to be acknowledged and referred to as male and be identified by the name [AB] rather than his birth name.

[105] That was made clear in an exchange between the judge and counsel for CD the next day at the start of the hearing:

THE COURT: Let me just say what I understood we proceeded with yesterday, that was the application by Ms. findlay's client, which is Court File 190334 – E190334, seeking certain orders under the family act – *Family Law Act*, and seeking a publication ban, that we haven't yet dealt with, and most importantly a declaration under the *Family Law Act*, s. 37, that it's in the best interests of the applicant that he obtains the necessary medical treatment for gender dysphoria.

From your standpoint I was dealing with the application filed February 14th, that's 191565.

MR. DUNTON: Yes.

THE COURT: Seeking essentially, I think importantly from your client's standpoint, an injunction that would restrain the continuing treatment.

MR. DUNTON: Yes, essentially.

THE COURT: So I'd like to get right to the substance of that, those are the two applications that I'm dealing with right now.

MR. DUNTON: Okay.

THE COURT: What's happened or what you've described doesn't really, in my view, impact on the substance that we have to deal with. We have – I have been told that there are issues affecting this young boy that need to be dealt with, that's what's important. Let's get on with that.

MR. DUNTON: Very well. And I understood from yesterday that I would be given some time to respond at the end.

THE COURT: That will depend on how this unfolds.

MR. DUNTON: Okay, thank you.

[Emphasis added.]

[106] So it rings hollow when CD suggests that he was not aware that the central issue in the proceedings was before the court on 19 and 20 February 2019.

[107] That said, the "central issue" did not include the orders sought in para. 7 of AB's notice of application declaring certain conduct to be "family violence" under s. 38 of the *FLA.* While "the impact of any family violence on the child's safety, security or well-being" is a factor that the court had to consider in assessing the best interests of the child under s. 37—the overarching issue addressed by the parties at the hearing—there was no basis for the court to grant the declarations sought in para. 7. It appears that these declarations, in para. 2(c) of the order, may have been included as an oversight, as the judge made no findings in relation to family violence and his reasons are silent on the issue. It also appears that CD did not raise this issue before Bowden J. prior to the order being entered. Given the confused nature of the proceedings, that is understandable, but unfortunate. Nonetheless, we accept CD's argument that this issue was not properly before Bowden J. and we would therefore set aside para. 2(c) of his order. We have more to say below about the jurisdiction to make this kind of declaratory order.

[108] As for the complaint that CD did not know that he faced a summary trial on the "best interests" issue on 19 and 20 February 2019, he knew that this was the central issue before the court and any decision on it was bound to have a final effect.

[109] In the end we note paras. 9 and 10 of Justice Bowden's reasons:

[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.

[110] With the exception of the orders sought in para. 7 of AB's notice of application, we would not give effect to CD's submissions based on procedural fairness.

2. Authority to consider compliance with s. 17 of the Infants Act

[111] We have described above the essential applications before Justice Bowden and now develop more fully the jurisdictional issues that present in this appeal.

[112] The most critical orders made by the judge are these declaratory 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;
>
> …
>
> (c) Attempting to persuade A.B. to abandon treatment for gender dysphoria, addressing him 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*.

[113] These are bald declarations purportedly made under ss. 37 and 38 of the *FLA*. One must question the authority to make such declarations under Part 4 of the *FLA*. We use the phrase "bald declarations" to indicate that they are declarations not otherwise coupled with a substantive order in relation to the care of AB. They are declarations *simpliciter*.

[114] The “best interests of the child” is undoubtedly the paramount consideration animating Part 4 of the *FLA*. But in considering the authority to make orders under Part 4, it is necessary to note the context in which “best interests” are to be considered within this part of the statutory scheme. That context is set out in s. 37(1):

In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

[Emphasis added.]

[115] Subsection 37(2) then sets out what must be considered in determining the best interests of the child.

[116] This includes family violence and its impact, which must be considered under ss. 37(2)(g) and (h). The criteria for assessing “family violence” are set out in s. 38. Neither section contemplates the making of a bald declaration of best interests or conduct amounting to “family violence”.

[117] These considerations are relevant in making an agreement or order under Part 4 respecting guardianship, parenting arrangements or contact with a child. This is important in the case before us because s. 17 of the *Infants Act* is in play. That section 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.

[118] Clearly the issue of an infant's best interests in matters of health care, by statute, is within the purview, at least initially, of the child's "health care provider" under s. 17 of the *Infants Act*. This is clear from a reading of s. 17 itself, and importantly, it is buttressed by the specific direction in para. 41(f) of the *FLA* that parental responsibilities are expressly subject to s. 17 of the *Infants Act*.

[119] If we view s. 37 of the *FLA* as countenancing the making of a bald "best interests" declaration in the matter of the provision of "health care services", we are risking the court's interference with the best interests determination, which is, by statute, entrusted to the child's "health care provider". In our view, s. 37 deals only with considerations to be taken into account in "the making of an agreement or order …respecting guardianship, parenting arrangements or contact with the child". The provision does not contemplate freestanding judicial declarations as to the "best interests of the child" that are unconnected with agreements or orders respecting guardianship, parenting arrangements, or contact. In particular, where a child has consented to health care in accordance with s. 17 of the *Infants Act*, s. 37 of the *FLA* does not furnish a court with authority to enter upon a *de novo* consideration of the child's best interests in respect of medical treatment.

[120] How does this analysis impact the case? Declaration 1(a) cannot stand, but the effective outcome—upholding AB's consent to gender transition treatment—can be sustained, as we discuss below.

3. The best interests declarations

[121] We return to the case on appeal. We have said that the "best interests" issue is engaged where an order is being made under Part 4 respecting guardianship, parenting arrangements or contact with the child, AB. However, this was not the case before Justice Bowden. As noted above, AB restricted his application to the central issue of whether it was in AB's best interests to receive the treatment for his gender dysphoria.

[122] We consider it noteworthy that the order sought in para. 8 of AB's application involved CD's contact with him:

> 8. An Order under the *Family Law Act* that the Respondent C.D. not have contact or parenting time with the Applicant unless and until he agrees to respect the Applicant's gender identity and gender expression, supports treatment for the Applicant's gender dysphoria, and is taking no legal proceedings to interfere with medical treatment for the Applicant.

[123] If the judge was indeed making such an order, the consideration of best interests would be within s. 37(1) of the *FLA*. But he was not, as that application was clearly adjourned by counsel in the exchange in court on 19 February 2019 reproduced above.

[124] We turn to CD's application. It was pursuant to the petition in action S-191565 and it sought an order temporarily restraining the gender transition treatment. It was brought in the context of CD seeking an injunction (at para. 2(b)):

…pending a review by this Honourable Court of expert evidence provided by the parties from academic disciplines including but not limited to:

(a) law of informed consent;

(b) bio-medical ethics;

(c) pediatric endocrinology;

(d) pediatric neurology;

(e) child and adolescent psychiatry;

(f) child psychology;

(g) medical history;

(h) medical statistics; and

(i) the study of relevant diseases including breast, ovarian, uterine, cervical and other cancers, diabetes, osteoporosis, stroke, sexually transmitted infections, erythrocytosis (having a higher than normal number of red blood cells), severe liver dysfunction, coronary artery disease, cerebrovascular disease, and hypertension.

[125] In our view, CD's petition was a misconceived proceeding. The only way in which CD had standing to seek any relief was in the context of his role as AB's guardian and parent with parenting responsibilities. CD's application ought to have sought an order "respecting guardianship" as contemplated by s. 37; alternatively, it ought to have requested directions under s. 49 of the *FLA*, which permits a child's guardian to apply to a court for directions "respecting an issue affecting the child".

[126] While acknowledging the evidence at the summary trial of disingenuity on CD's part (at para. 43), Bowden J. considered CD's application in the context of CD's shared responsibility under the Family Agreement regarding "consent to medical, dental and other health related treatments for the child", a responsibility acknowledged to be subject to s. 17 of the *Infants Act*. Given this, his order could not have addressed the issue of consent to medical treatment unless it was shown that valid consent to such treatment had not been given under s. 17 of the *Infants Act.*

[127] We turn to discuss how the judge approached this consideration.

[128] Bowden J. first gave little weight to the expert evidence tendered by CD tending to question the efficacy of the gender transition treatment proposed for AB (at para. 49). Generally,

he noted that neither expert had examined or interviewed AB and offered only "general opinions". He considered their views to be "of such a generic nature that they are of little use in evaluating the best interests of AB" (at para. 49). More specifically, the judge accepted the view that the treatment should not be further delayed in light of AB's risk of suicide (at paras. 50–53).

[129] Critically, in the context of s. 17 of the *Infants Act*, Bowden J. found that AB's consent was sufficient for the treatment to proceed (at para. 54). He then concluded (at para. 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.

[130] Essentially, and correctly in our view, Bowden J. approached the review of the s. 17 issue—whether AB had the capacity to consent under s. 17(2) of the *Infants Act*—with a deferential review of the actions and determinations of the health care providers in purported compliance with the prerequisites to a valid consent set by s. 17(3).

[131] On the record here we see no basis to suggest that the judge's conclusion in this regard was in error—as we indicated at the conclusion of argument.

[132] Moreover, we see no merit to CD's submission that the consent form signed by AB is flawed in numerous respects. We consider the form to be totally adequate to its purpose.

[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.

[139] The established jurisprudence will guide the reviewing court in scrutinizing the determination of capacity and informed consent: see e.g., *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, especially at para. 96; *Ney v. Canada (Attorney General)*, 102 D.L.R. (4th) 136 (B.C.S.C.); *Hopp v. Lepp*, [1980] 2 S.C.R. 192.

[140] Clearly, in the course of exercising the court's Part 4 *FLA* jurisdiction, the court may opine on what is in the child's "best interests" and may well make findings in that regard. In considering the possibility of family violence in assessing the "best interests", the court may identify past conduct amounting to that, but an appropriate order would not include a bald declaration that serves no useful purpose. We do not see authority to declare certain conduct as "deemed" to be family violence for either present or future applications. Where the concern about family violence warrants consideration of an order beyond those provided for in Part 4 of the *FLA*, the court must look to Part 9 and the factors to be considered in making protection orders (discussed below).

[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.

[142] Further, the court should not presume to make a general declaration as to a minor's capacity to consent to medical treatment, as it did in para. 2(a) of the Bowden Order. In declaring AB "exclusively entitled to consent to medical treatment for gender dysphoria", the judge again went beyond what was appropriate in the circumstances of this case. As long as AB is a minor, the *Infants Act* requires that the health care he seeks to receive, or that is recommended to him, be compliant with s. 17(3). At law, he is exclusively entitled to consent to a specific treatment for gender dysphoria only if that specific treatment is one he understands and that a health care provider has determined is in his best interests. If these requirements are not met, his consent to treatment remains the responsibility of those accorded that parenting responsibility on his behalf under the *FLA*.

[143] Accordingly, we would set aside the declarations in paras. 1(a) and 2(a) of the Bowden Order, and substitute them with a declaration that in respect of the gender transition treatment proposed for AB (and already begun), s. 17 of the *Infants Act* has been complied with, AB's consent to that treatment is valid, and no further consent from his parents, in particular CD, is required in that regard.

[144] We would also set aside the declarations in paras. 1(b) and (c) and para. 2(c) of the Bowden Order, as these broad declarations went beyond what was properly before the court. Below, we discuss other remedies to address the harm caused to AB by CD's refusal to acknowledge AB's chosen name and gender. We would leave para. 2(b) as is, with the declaratory language removed. Allowing a child to conduct a proceeding without a litigation guardian is a straightforward order of the court and requires no declaration.

C. The Marzari Order (2019 BCSC 604)

[145] Before Marzari J., AB sought a protection order under ss. 183(2) and 183(3)(a)(i) and (e) of the *FLA* to restrain CD from giving interviews and sharing documents pertaining to his case, including AB's personal medical information, with media organizations. CD opposed the application on the basis that bringing public attention to AB's case was important to society and to his rights as a parent.

[146] Marzari J. considered herself bound by Bowden J.'s declaration that family members addressing AB by his birth name, referring to him as a female or attempting to persuade him to abandon treatment was a form of family violence. The focus of her reasons, however, reflected the focus of AB's concerns regarding CD's willingness to provide interviews to the media and to social media outlets where he identified AB as female, used a female pseudonym, discussed AB's personal and medical information and expressed his opposition to the treatment.

[147] In considering whether to grant a protection order, Marzari J. recognized that the purpose of such an order "is to ensure that courts have the means of ensuring the safety of those who are at risk" and that "mere unpleasantness" must be distinguished from conduct that amounts to

family violence. She found that AB was "in a particularly vulnerable position given his age, his dependency on both his parents, his love for his father, his discomfort with his physical body, his risk of suicide, and his exposure to bullying and harassment". She noted that the definition of "family violence" in the *FLA* recognizes that the risk of harm extends beyond physical violence, encompassing "psychological abuse in the form of harassment or coercion, and unreasonable restrictions or preventions of a family member's autonomy" (at paras. 17, 19, and 20).

[148] With respect to family violence, Marzari J. rejected an assertion by CD that AB was not harmed by CD's publicly expressed concerns or comments about AB's chosen gender identity and medical treatment. She considered the risk to AB to be not simply a risk that AB could be identified through CD's public opposition to his position but also that publishing and sharing deeply private information was harmful to AB. The judge relied on the "determinations" made by Bowden J., considering that they were "not open to re-determination" (at para. 11), as well as the evidence before her of CD's conduct of publicly sharing AB's information:

[46] On all the evidence, I find that CD's conduct both before and after the determinations made by this Court indicate that he is likely to continue to engage in conduct that constitutes family violence against AB, including through conduct already determined to be family violence by this court, and the publication and sharing of deeply private information that is harmful to AB.

[149] Marzari J. also rejected CD's argument that his freedom of thought and speech as well as his rights as a parent would be compromised by a protection order:

[49] CD's rights as a parent are necessarily guided and constrained by the *FLA* and orders of this Court. His rights do not include harming his child.

[50] Neither is CD's freedom of belief engaged by the orders sought. There is no requirement that CD change his views about what is best for AB. It is only how he expresses those views privately to AB and publicly to third parties that is affected.

[150] She considered the necessity of a protection order "and the proportionality of the constraints it would impose on CD's freedom of expression". In doing so, she found that such an order was both necessary to restrain CD's public expression to protect AB from harm, and proportionate as between protecting AB from the harm "of a public denial of his gender identity by his father" and allowing CD "to speak publicly about his parental rights as they concern this deeply private aspect of AB's innermost thoughts and feelings" (at para. 64). She concluded that the balance strongly favoured the protection of AB.

[151] In granting the protection order, Marzari J. made these additional findings:

[68] I find that CD's sharing of AB's private information has exposed his child to degrading and violent public commentary. CD has nevertheless continued to support the media organizations posting this commentary with additional interviews, and has expressed a desire for further opportunities to do so.

[69] I find that CD is using AB to promote his own interests above those of his child, by making AB the unwilling poster child (albeit anonymously) of CD's cause.

[70] I find that this conduct puts AB at a high risk of public exposure and acts of emotional or physical violence, in the form of bullying, harassment, threats, and physical harm, including self-harm.

[71] I find that CD's attempts at anonymizing himself and AB do not immunize AB from the harms associated with this publicity or the commentary arising from it. AB knows that his father, the public commentators, and online posters are all talking about him.

[152] The judge accepted that CD did not agree with AB as to what was in his best interests but found that he had been "irresponsible in the manner of expressing his disagreement and the degree of publicity which he has fostered with respect to this disagreement with his child" (at para. 73).

[153] Paragraph 1 of the Marzari Order was based on Bowden J.'s declaration regarding family violence. It restrains CD from (a) attempting to persuade AB to abandon treatment for gender dysphoria, (b) addressing AB by his birth name, and (c) referring to AB as a girl or with female pronouns whether to AB directly or to third parties.

[154] Paragraphs 2 and 3 of the Order restrain CD from publishing or sharing information or documentation relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies, other than with his legal counsel and others involved in the petition proceeding, the court, medical professionals, and any other person authorized by AB in writing or by the court. These paragraphs also restrain CD from authorizing anyone, other than his own retained counsel, to access or make copies of any of the files from the court registry in relation to this or any related proceeding.

[155] The term of the protection order was set at one year, subject to any extension issued by the court.

1. Protection orders and family violence

[156] Protection orders, which fall under Part 9 of the *FLA* entitled "Protection from Family Violence", are powerful tools to address family violence.

[157] "Family violence" is defined in s. 1 of the *FLA* as:

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

> (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
>
> (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
>
> (iii) stalking or following of the family member, and
>
> (iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

[158] Under s. 183(1) of the *FLA*, a protection order may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative. An order need not be made in conjunction with any other proceeding or claim for relief under the *FLA*. An "at-risk family member" is defined in s. 182 as

… a person whose safety and security is or is likely at risk from family violence carried out by a family member;

[159] A court may grant a protection order under s. 183(2) if it determines that family violence is likely to occur against an at-risk family member. Under s. 183(3), an order may include one or more of the following:

(a) a provision restraining the family member from

> (i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,
>
> (ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,
>
> (iii) following the at-risk family member,
>
> (iv) possessing a weapon, a firearm or a specified object, or
>
> (v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;

(c) directions to a police officer to

> (i) remove the family member from the residence immediately or within a specified period of time,
>
> (ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or
>
> (iii) seize from the family member anything referred to in paragraph (a) (iv) or (v);

(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(e) any terms or conditions the court considers necessary to

> (i) protect the safety and security of the at-risk family member, or
>
> (ii) implement the order.

[160] Under s. 183(4), protection orders expire after one year unless the court otherwise orders.

[161] Sections 184 and 185 prescribe what must be considered in determining whether to make a protection order:

184(1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

> (a) any history of family violence by the family member against whom the order is to be made;
>
> (b) whether any family violence is repetitive or escalating;
>
> (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
>
> (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
>
> (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

(f) the at-risk family member's perception of risks to his or her own safety and security;

(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

(2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account

(a) the history of, and potential for, family violence,

(b) the extent of any injuries or harm suffered, and

(c) the respective vulnerability of the applicants.

…

185 If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

(a) whether the child may be exposed to family violence if an order under this Part is not made, and

(b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

[162] What is apparent from reading these provisions generally is that the protection order framework is predicated on a finding that conduct meets the definition of family violence in s. 1. Once this is determined, an assessment of factors that include a history of family violence and whether it is repetitive or escalating, can lead to an order restraining or limiting certain behaviour. The orders that may be made under s. 183(3) are clearly directed to protecting the safety and security of at-risk family members—frequently separating parties—from serious physical, sexual, or psychological abuse, and orders that restrain and limit communications form a part of that objective.

[163] There is no jurisprudence interpreting these provisions in a comparable context to the case before us. *Morgadinho v. Morgadinho*, 2014 BCSC 192 and *S.M. v. R.M.*, 2015 BCSC 1344, cases cited by Marzari J., address protection orders in the more usual context of family violence as between separating parties. That said, we would agree with Fitch J. (as he then was) in *S.M.* (at para. 25) that in considering whether a protection order is necessary, judges should take into account:

…a variety of factors that frame the risk analysis in determining whether family violence is likely to occur. The inquiry is future oriented, but it takes its shape from past conduct and present circumstances that inform the assessment of risk.

[Emphasis added.]

[164] The ultimate purpose of a protection order is to prevent future family violence, and the court must assess this risk taking into account the factors under s. 184. A history of family violence, while one factor, is in our view an important one, as a risk analysis will usually begin with past conduct.

2. Application to the Marzari Order

[165] Paragraph 1 of the Marzari Order restrains CD from

> i. attempting to persuade AB to abandon treatment for gender dysphoria;
>
> ii. addressing AB by his birth name; and
>
> iii. referring to AB as a girl or with female pronouns whether to AB directly or to third parties…

[166] Paragraph 2 restrains CD from, directly or indirectly through an agent or third party, publishing or sharing information or documentation

> 2. …relating to AB's sex, gender identity, sexual orientation, mental or physical health, medical status or therapies, other than with the following:
>
> i. his legal counsel;
>
> ii. legal counsel for AB, EF, and the named respondents in the Petition currently filed as Vancouver Registry S-191565;
>
> iii. the Court;
>
> iv. medical professionals engaged in AB's care or CD's care;
>
> v. any other person authorized through written consent of AB; and
>
> vi. any other person authorized by order of this court;

[167] In this case, Marzari J. assumed that the conduct identified in para. 2(c) of the Bowden Order—attempting to persuade AB to abandon the treatment, addressing him by his birth name and referring to him as a girl or with female pronouns—constituted family violence as defined in the *FLA*. She made additional findings that CD's conduct in speaking publicly about AB's personal issues was harmful to AB.

[168] While the judge did not explicitly conclude that this conduct constituted "family violence", her finding that it was harmful to AB appears to ground her conclusion that CD was

likely to continue to engage in "conduct that constitutes family violence against AB". We take this from para. 46 of her reasons, where she found that CD's conduct "both before and after the determinations made by this Court" indicated that he was likely to continue to engage in conduct that constitutes family violence against AB, "through conduct already determined to be family violence by this court, and the publication and sharing of deeply private information that is harmful to AB".

[169] The declaration in para. 2(c) of the Bowden Order may have formed the basis for AB's decision to take the matter further and seek a protection order. It did form the initial basis for Marzari J.'s consideration of "family violence". This is indeed unfortunate, as it is our view that raising the issue of family violence in the context of this case caused the parties to become increasingly polarized in their positions, thus exacerbating the conflict and raising the stakes in the litigation. We see none of this to be in AB's best interests.

[170] Moreover, given our opinion that para. 2(c) of the Bowden Order should be set aside, and perhaps more importantly the fact that Bowden J. made no findings on the issue of family violence in this context, para. 1 of the Marzari Order should also be set aside.

[171] There is evidence that CD's refusal to acknowledge AB's gender is clearly hurtful to AB, but there is insufficient evidence in the record before both Bowden J. and Marzari J. that CD's conduct was grounded by an intent to hurt AB or that his refusal to agree with AB's decision about the treatment was ultimately unresponsive to AB when AB wished to disengage.

[172] Without more, there was insufficient evidence in the unique circumstances here to ground a finding of family violence—that is, emotional or psychological abuse—as defined in the *FLA*. Significantly, neither judge conducted an analysis of whether CD's conduct in relation to the name and pronouns he used with AB, and his discussions of AB's treatment choices, were sufficiently intentional or unresponsive to AB's communications with him to ground a finding of family violence. Bowden J. simply made a declaration that this constituted family violence without analysis (perhaps inadvertently as discussed above), and Marzari J. based this part of the protection order on this declaration.

[173] It is not our intention to minimize in any way the pain that AB feels due to his father's refusal to accept his decision to identify as male and proceed with hormone treatment. It is also not our intention to condone CD's conduct in refusing to engage with the medical professionals responsible for AB's care and refusing to engage in a more constructive way to communicate his views to AB.

[174] However, CD is entitled to his views and he is entitled to communicate those views to AB. As difficult as this is, this difference of opinion alone cannot justify a finding of family violence. As set out above, the evidence shows that AB is a mature minor with the capacity to make his own decision about the medical treatment recommended at this stage, and such capacity includes the ability to listen to opposing views. It also includes the ability to disengage in conversations that he finds uncomfortable or offensive. In fact, the evidence available suggests that AB has done just that, and that CD has generally respected this decision to disengage.

[175] In circumstances that do not fit squarely within the more obvious parameters of the family violence provisions in the *FLA*, it is our view that some caution should be exercised in identifying "psychological or emotional abuse" as constituting "family violence". This is especially important in cases such as this, which involve a complex family relationship stemming from a profound disagreement about important issues of parental roles and medical treatment. Moreover, a finding of family violence in such circumstances is inconsistent with the continuation of CD's parenting responsibilities.

[176] That said, CD's refusal to accept AB's chosen gender and address him by the name he has chosen is disrespectful of AB's decisions and hurtful to him. As we discuss below, there are other ways to address such conduct in a family law case.

[177] Paragraph 2 of the Marzari Order was based on the judge's own finding on the record before her that CD's conduct in continuing to publish and share AB's deeply private information was harmful to AB. The record before her, which she reviewed in her reasons, supports this finding so far as it relates to publication. For example:

- In two articles published in the online newspaper, the Federalist, CD was quoted as referring to AB as a girl "because she is a girl. Her DNA will not change through all these experiments that they do". CD understood that this statement might be construed as a violation of the Bowden Order but felt that he could not honestly take any other stand.
- The Federalist articles referred to AB as [redacted] but originally identified him by his chosen name. They also contained links to materials in the family law case that included an unredacted copy of a letter sent to CD by AB's doctor regarding AB's decision to proceed with hormone therapy.
- Comments posted on the Federalist's website included personal, derogatory and harmful comments about AB.
- In interviews with an organization known as Culture Guard, CD again referred to AB as female and discussed his rejection of the permanence of AB's gender identity and his opposition to AB's chosen treatment. He discussed AB's medical history and trivialized AB's suicide attempt. He also expressed pleasure with the amount of attention being given to his story.
- CD posted comments on Facebook in his own name regarding AB's case.
- AB described his reaction to these posts as follows:

Those posts make me terrified that my father is going to go public in some way that will identify me and open me up to terrible bullying or violence. If he speaks in public "as my father" about me in my case, I will be "outed" and I can never go back in the closet.

My mom told me that there are also interviews with my father on the Culture Guard website but I cannot bear to watch them. It feels as if my dad is going behind my back and I feel really sad and disappointed that he is doing that. I am scared to watch the interviews.…

I believe that my father is associated with groups that hate trans people, including Culture Guard….

I love my father. I want to have his name as my middle name. When I was born, I was given the middle name "[REDACTED]" as the female version of my dad's name. But I cannot be around him unless he respects who I am and my gender identity. It messes with my head and I cannot stand his berating me all the time.

> I am concerned for my physical and emotional safety around my dad, and very worried what he will do.

[178] In bringing his concerns to public forums like the Federalist and Culture Guard, CD apparently took no account of the extent to which AB would be negatively affected. Not only did CD continue to disrespect AB's decisions, he also appeared to be oblivious to the effect of his conduct on AB as well as the very derogatory public comments related to AB posted on the Federalist website. Marzari J.'s finding that CD had made AB "an unwilling poster child (albeit anonymously)" was well founded (at para. 69).

[179] 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" under the *FLA*. As we have observed, the evidence does not suggest that CD deliberately intended to harm AB; rather the evidence suggests that CD cares deeply for AB but, as Marzari J. found, he has been irresponsible in the way in which he has dealt with his disagreement with AB about what is in AB's best interests. We agree that his conduct in this regard has been seriously misguided but in the unique circumstances of this case, we do not agree that it should be characterized as "family violence" justifying the issuance of a protection order.

[180] It is apparent to us that Marzari J. was heavily influenced in her approach to family violence by "conduct already determined to be family violence by this court" (at para. 46). In the absence of the declaration in the Bowden Order, it is questionable whether she would have proceeded further down that path, particularly in light of her acknowledgement that restraining CD from publishing and sharing information about the issues in this case would restrict his freedom of expression not only within his own family but more broadly (at para. 47). This is not to suggest that CD's right to expressive freedom precludes any restrictions, a subject which we discuss below in respect of *Charter* values.

[181] It is our view, therefore, that para. 2 of the Marzari Order should be set aside. As paras. 3, 4, and 5 were also made under s. 183, they should also be set aside.

3. Other remedies: Conduct orders

[182] In a family law case, there are other ways to address conduct that has been found to cause harm to another party. One way is by a conduct order under ss. 222 and 227(c), which fall under Part 10, Division 5 of the *FLA*. These provisions give the court broad powers to regulate the conduct of parties to a family law proceeding.

[183] Section 222 provides the purposes which should guide conduct orders:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

> (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
>
> (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
>
> (c) to prevent misuse of the court process;
>
> (d) to facilitate arrangements pending final determination of a family law dispute.

[184] Under s. 227(c), a court may make an order requiring a party to

(c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222.

[185] Finally, s. 225 gives specific authority to make orders restricting communication:

225 Unless it would be more appropriate to make an order under Part 9 *[Protection from Family Violence]*, a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

[186] Sections 222 and 227 do not limit the court's authority to the scope of current proceedings. Section 222(a) allows orders regarding "an issue <u>that may become</u> the subject of a family law dispute" (emphasis added). The power to "manage behaviours that might frustrate…resolution" or "facilitate arrangements" similarly suggest court power to reach into issues incidental to the litigation. The breadth of authority is underlined by s. 227(c), which permits the court to require a party to "do or not do anything" in relation to the purposes referred to in s. 222.

[187] The conduct order provisions, like all provisions in the *FLA*, are guided by the best interests of the child, including minimizing the impact of conflict on a child. This is explicit in s. 199:

199 (1) A court must ensure that a proceeding under this Act is conducted

> (a) with as little delay and formality as possible, and
>
> (b) in a manner that strives to

> (i) minimize conflict between, and if appropriate, promote cooperation by, the parties, and
>
> (ii) protect children and parties from family violence.

(2) If a child may be affected by a proceeding under this Act, a court must

> (a) consider the impact of the proceeding on the child, and
>
> (b) encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict between the parties.

[188] In our view, a conduct order, rather than a protection order with its serious implications, is a tool that allows the court to ensure that a proceeding such as this is conducted in a manner that strives to minimize the conflict between the parties.

[189] Sections 222 and 227 have been interpreted as giving the court "broad discretion to craft appropriate conduct orders": see *R.A. v. W.A.*, 2018 BCSC 1910 at para. 219. However, in crafting appropriate conduct orders, particularly orders that restrict a party's ability to communicate with others, courts should take into account a party's right to freedom of expression. In *Chellappa v. Kumar*, 2016 BCCA 2 [*Chellappa*], a conduct order was described as "a complete gag on either party discussing the case with anyone" (at para. 30). This court (in *obiter*) expressed considerable doubt as to whether a trial judge has jurisdiction to make a conduct order that so broadly restricts a party's freedom of expression, but if such jurisdiction does exist, "it should only be invoked in the clearest of cases on a full evidentiary record" (at para. 30).

[190] Notwithstanding these concerns, it is our view that CD's conduct would more appropriately have been addressed in the form of a conduct order under s. 227(c) of the *FLA*. Although the relief sought in the original application did not include conduct orders, and although such relief was not sought on appeal, we are of the view that it is proper to consider the granting of such orders. CD has been afforded a full opportunity to address the substance of an order that restricts his manner of communication and the conduct orders we are considering are less severe and the terms less restrictive than the protection orders granted below.

[191] The issues the protection order aimed to address are closely implicated in the ongoing litigation, not all of which were addressed in the applications before Bowden J., and those that were addressed were under appeal when the application was heard before Marzari J. A conduct order could have been issued to facilitate the resolution of the ongoing issue of CD's conduct in refusing to acknowledge AB's chosen name and gender and in publishing AB's private information.

[192] However, the breadth of the court's authority to make conduct orders raises the issue of balancing *Charter* values in the *FLA* context, which prioritizes the child's best interests (per

s. 199). Similar to *Chellappa*, this case involves orders that limit freedom of expression. It also involves orders that impinge on CD's parental role. It is the issue of *Charter* values to which we now turn.

D. Charter values

[193] CD challenges both the Bowden Order and the Marzari Order on the basis that they violate his rights under ss. 2(a) and (b) of 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. In light of our conclusion that the relevant parts of these orders should be set aside, it is not strictly necessary to address these arguments. However, in assessing whether those orders should be replaced with a conduct order, we will address CD's arguments, and some of those made by the Attorney General and the intervenors, so far as they may be applicable in that context.

1. Submissions

[194] CD submits that orders that require him to acknowledge AB as male violated his right to freedom of conscience and belief under s. 2(a) of the *Charter* because they require him to adopt views that are not his own. He also submits that both the Bowden and Marzari Orders infringe his s. 2(b) rights in three ways: (1) they censor him from using AB's proper name and female pronouns in speaking with AB or referring to AB as his daughter in communications with third parties; (2) they compel him to refer to AB as a boy, to use male pronouns and to use the male name AB has chosen when speaking to AB or when speaking about AB to third parties; and (3) they censor him from discussing the case with anybody except his lawyers, who are also censored from talking about the case. CD says that referring to AB as his "daughter" lies at the core of the purpose of s. 2(b)—protecting truth-seeking.

[195] CD further submits that the orders that restrain him from discussing the medical treatment with AB prevent him from playing an important parental role in discussing an important medical decision with AB, thus violating his liberty right under s. 7 of the *Charter* to make decisions for his child in fundamental matters such as medical care.

[196] CD's position is supported by ARPA and JCCF.

[197] ARPA submits that a parent's freedom to hold certain beliefs, which include beliefs about gender, is protected by s. 2(b). It says that parents also have the right and the duty to give guidance to their children in accordance with those beliefs, and the state cannot prohibit parents from sharing their beliefs and opinions with their children. While ARPA's submissions focus on the interpretation of s. 183 of the *FLA*, the essence of its position is that such provisions—which we assume would include provisions for orders under the *FLA* other than protection orders—should be interpreted in light of their text and their context within the *FLA* as a whole, as well as consistently with the *Charter*.

[198] JCCF supports CD's position that the kind of orders made here violate CD's rights under ss. 2(b) and 7 of the *Charter*.

[199] AB's position is that *Charter* values were appropriately considered by both chambers judges, and that both of the impugned orders minimally intrude on CD's freedom of speech while considering AB's right to be protected from harm. He submits that the appellant's arguments inappropriately focus on CD's *Charter* rights to the detriment of AB's rights.

[200] EF supports AB's position. She says that any discussion about *Charter* values must take place within the confines of the statutory scheme under the *FLA*, which is unchallenged. She submits that "the best interests of the child are not dictated by parental preferences" and that the courts below applied the *FLA* and the *Infants Act* in a manner that is consistent with a proper balancing of the constitutional interests engaged.

[201] The Attorney General submits that the *Charter* does not apply to judicial orders made in the context of a private dispute, but he acknowledges that there is some basis for considering whether such orders are consistent with *Charter* values. The Attorney General points out, however, that recent jurisprudence has cast doubt on the appropriateness of considering *Charter* values in an unstructured way. However, if *Charter* values are considered here, he submits that the appropriate balance of rights was struck, especially given AB's vulnerability to harm as a transgender youth.

[202] West Coast LEAF supports the position that the impugned orders are not subject to *Charter* review, and submits that parental responsibilities and preferences are subordinate to their children's rights at law. Egale's submissions focus on the lack of protection in s. 2(b) for violent or harmful speech.

2. Analysis

[203] The law is clear that the *Charter* does not apply to judicial orders made in private disputes: *RWDSU v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573. In *Young v. Young*, [1993] 4 S.C.R. 3 and *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141, L'Heureux-Dubé J. applied this principle to court orders made in private family law disputes, but held that underlying *Charter* values are not to be ignored by courts when making such decisions.

[204] The Attorney General points out recent judicial and academic commentary that has been critical of the consideration of *Charter* values in making decisions and interpreting legislation: see *Ojeikere v. Ojeikere*, 2018 ONCA 372, Miller J.A.; *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, Lauwers and Miller JJ.A. While each of these cases involve different circumstances, the primary concern expressed is that reasoning based on *Charter* values lacks the doctrinal rigour of a traditional *Charter* analysis, which must also consider the competing principles in s. 1. The Attorney General also points to *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, where the Court held that *Charter* values had no role to play in interpreting legislation in the absence of an ambiguity. This court applied the same principle in the family law context in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

[205] It is clear the *Charter* values have no role to play in interpreting legislation in the absence of an ambiguity. The reluctance to apply *Charter* values to statutory interpretation is based on the fact that the *Charter* applies directly to legislation and applying *Charter* values on top of that would distort the interpretation process: see *R. v. Rodgers,* 2006 SCC 15 at para. 19. Here, however, the issue does not involve interpreting legislation *per se*, but rather whether orders permissible under legislation should nonetheless be made in light of *Charter* values. We appreciate that there are limits on a consideration of *Charter* values in this context. Such considerations do not engage traditional *Charter* analysis but simply take into account important underlying values that are embodied in the *Charter* when orders are sought that may interfere with an individual's rights, such as freedom of expression. In taking these values into account, it is also important to recognize that no *Charter* rights are absolute, but are subject to the reasonable limits imposed by s. 1.

[206] As CD points out, the values underlying the right to freedom of expression include finding the truth through the open exchange of ideas, which extends to protecting minority beliefs that the majority regard as wrong or false: see e.g., *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*]; *R. v. Zundel*, [1992] 2 S.C.R. 731 at para. 22. However, because the right to freedom of expression is not absolute, limitations may be justified in light of competing rights, interests, and values: see e.g., *Irwin Toy*; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

[207] Competing rights, interests, and values, in the context of a private family law dispute, will of course include consideration of the best interests of the child. As McLachlin J. (as she then was) held in *Young*, the *Charter* guarantee of freedom of expression does not protect conduct that violates the best interests of the child test.

[208] Similarly, the right of parents to make decisions for their child in fundamental matters such as medical care, which is part of the liberty interest of parents protected under s. 7 of the *Charter*, is not unconstrained. That liberty interest is based on the common law's long-standing recognition that parents are in the best position to make all necessary decisions to ensure the well-being of their child. That recognition is based on the presumption that parents act in the best interests of their child. In circumstances where parents are not acting in the best interests of their child, that parental liberty interest may be infringed where it is necessary for the state to intervene to protect a child whose life and security are in jeopardy. This occurs in circumstances where the child is unable to assert his or her rights: see *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

[209] In the circumstances of this case, however, the child AB is able to assert his rights, and has done so in accordance with the law. In addition, the court below has made findings that CD's conduct has been contrary to AB's best interests. In this context, it is our view that CD's assertion that his parental rights under s. 7 of the *Charter* have been violated by the kind of orders made has no merit. The same can be said for CD's rights under s. 2(a).

[210] Bowden J. did not discuss *Charter* values but Marzari J. did to a limited extent. She did not consider that CD's freedom of belief was engaged, as he was only being restrained in how he was to express his views both privately to AB and publicly to third parties. She was aware that

restraining CD's ability to discuss this case would restrict his freedom of expression not only within his family but also more broadly (at para. 47). However, she considered that CD's rights as a parent were necessarily guided and constrained by the *FLA* and court orders, and did not include harming his child (at para. 49). In our view, these considerations—while in the context of considering a protection order—are consistent with the principles enunciated in *Young*.

[211] In general, caution should be exercised in limiting a parent's discretion, guided by their own opinion and belief, to parent as they see fit. However, as we have noted, this is a unique case that involves a father's disagreement about what is in his child's best interests in relation to the child's identity, gender, and medical treatment for which the child has validly consented.

[212] CD's refusal to respect AB's decisions regarding his gender identity is troublesome. The evidence shows that his rejection of AB's identity has caused AB significant pain and has resulted in a rupture of what both parties refer to as an otherwise loving parent-child relationship. This rupture is not in AB's best interests. He clearly wants and needs acceptance and support from his father.

[213] While of course CD is fully entitled to his opinions and beliefs, he cannot forget that AB, now a mature 15-year-old, with the support of his mother and his medical advisors, has chosen a course of action that includes not only hormone treatment, but a legal change of his name and gender identity.

[214] It is our view that in these circumstances, a limited conduct order, made with the objective of protecting the best interests of AB, is consistent with the *Charter* values underlying ss. 2(a), 2(b), and 7. CD has the right to his opinion and belief about AB's gender identity and choice of medical treatment. His right to hold a contrary opinion would not be unduly affronted by an order that CD respect AB's choices by acknowledging them in his communications with AB and publicly with third parties, both generally and in respect of these proceedings. His right to express his opinion publicly and to share AB's private information to third parties may properly be subject to constraints aimed at preventing harm to AB. However, we would not restrict CD's right to express his opinion in his private communications with family, close friends and close advisors, provided none of these individuals is part of or connected with the media or any public forum, and provided CD obtain assurances from those with whom he shares information or views that they will not share that information with others.

[215] We would also not prohibit CD from expressing his opinion to AB about AB's choice to continue with hormone treatment. We consider such a direction to interfere too closely in the role of a parent. 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. <u>But that is not to say that the</u>

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 added.]

[216] CD's attempts to be involved in the process leading to AB giving his consent to the hormone treatment have been fueled by positional stances without any direct involvement with AB's medical team. This is so despite the evidence of the team's efforts to bring him into the discussion. This is not the kind of parental involvement contemplated by the above passage. We therefore urge CD to do two things: first, engage with AB's medical team in an effort to consider other points of view and understand the basis for their recommendations; and second, exercise restraint in his approach with AB and make every effort to listen to AB's point of view. If he fails to do these two things, the rupture in his relationship with AB will likely not heal, which would not be in AB's best interests.

[217] Finally, we would restrict these conduct orders to the same one-year term as the previous protection order, subject to any extension on application to the Supreme Court.

E. Conclusion on the Bowden and Marzari Orders

[218] In the result, we would allow the appeal of the Bowden Order on the limited basis described above and set aside the declarations made in paras. 1(a)–(c) and 2(a) and (c) of that order.

[219] We would substitute therefore a declaration that in respect of the gender transition treatment proposed for AB (and already begun), s. 17 of the *Infants Act* has been complied with, AB's consent to that treatment is valid, and no further consent from his parents, in particular CD, is required in that regard. AB's consent to fresh treatment modalities is not before the court at this time, and would in any event require fresh consent.

[220] With respect to paras. 1(b) and (c) of the Bowden Order, we would substitute a conduct order under s. 227(c) of the *FLA* that CD:

i. acknowledge and refer to AB as male and employ male pronouns, both generally and with respect to any matters arising in these proceedings; and

ii. identify AB by the name he has chosen, both generally and with respect to matters arising in these proceedings.

[221] Paragraph 2(b) should remain as is, with the language respecting declarations removed. Allowing a child to conduct a proceeding without a litigation guardian is a straightforward order of the court and requires no declaration.

[222] We would also allow the appeal of the Marzari Order and set aside the protection orders made. We would substitute a conduct order under s. 227(c) of the *FLA* that CD shall not, directly

or indirectly through a third party, publish information or provide documentation relating to AB's gender identity, physical and mental health, medical status or treatments, other than with:

i. his retained legal counsel;

ii. retained legal counsel for AB or EF;

iii. medical professionals engaged in AB's care or CD's care;

iv. any other person authorized by AB's written consent; and

v. any other person authorized by court order.

[223] This order should not restrict CD's right to express his opinion in his private communications with family, close friends and close advisors, provided none of these individuals is part of or connected with the media or any public forum, and provided CD obtain assurances from those with whom he shares information or views that they will not share that information with others.

[224] The conduct orders should be effective for a one-year term commencing from 15 April 2019, subject to any extension on application to the Supreme Court.

F. The McEwan Order

[225] The thrust of CD's position in appealing the dismissal of his action is that, because Marzari J. directed that he refile his petition as an action, it "must be taken to be a compliant family action". Because of Marzari J.'s order, he submits the question of his action continuing is *res judicata*, applying to strike it was a collateral attack, and it was not vexatious or an abuse of process.

[226] With respect to his document production application, he states that he would have used the documents in the appeal against the Bowden and Marzari Orders. He asserts that special costs were unwarranted and that the lack of reasons prevents proper appellate review.

[227] In our view, CD's position is without merit. He filed a petition under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 seeking relief under the *FLA*. Marzari J.'s order that he refile it as a family law action simply recognized the procedural impropriety of this.

[228] Correcting a procedural defect in an action does not prevent it from being vexatious or an abuse of process. As McEwan J. correctly assessed, and identified over the course of the hearing, CD's action was both of those things.

[229] It is clearly both vexatious and an abuse of process to start a second proceeding for identical issues being litigated in an already-commenced proceeding.

[230] Further, in CD's own argument on appeal, he states that he sought to use the second proceeding to access documents for appeal of the first, which is also an obvious abuse of process

in its attempt to breach the implied undertaking rule: *Juman v. Doucette*, 2008 SCC 8 at paras. 25, 26, and 29. In CD's hearing before McEwan J., these straightforward principles were explained to him in a manner sufficient to demonstrate the appropriateness of striking the claim.

[231] Special costs awards, which are discretionary, are entitled to deference: *Krist v. British Columbia*, 2017 BCCA 78 at para. 58. The *Supreme Court Family Rules* specifically provide the discretion to award these costs where the pleading is struck as vexatious or an abuse or process: Rule 11-2(1). We would decline to interfere with the chambers judge's exercise of discretion in awarding these costs.

[232] We would therefore dismiss the appeal from the McEwan Order.

V. COSTS

[233] While we would allow the appeals of the Bowden and Marzari Orders to the extent indicated, we would replace the orders with the declaration and conduct orders set out above. Given this, it is our view AB has nevertheless been substantially successful in this litigation and we would grant him his costs of the appeals of all three orders.

"The Honourable Chief Justice Bauman"

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Groberman"