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Bridging the Gap: Providing Children With Limited Standing in Family Law Proceedings

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The recent decision of the British Columbia Court of Appeal in *A.B. v C.D. v E.F.* offers a couple of troubling conclusions with respect to the rights of children and whether determining the presence of family violence requires proof of intent not prescribed by statute. I'll leave it to others, and hopefully the outcome of a successful leave application, to address the family violence issue; this note concerns a gap in the province's Family Law Act, revealed by the decision, that leaves mature minors without the ability to apply to court for a declaration as to what is or is not in their best interests.

The claimant, A.B., is the 15-year-old child of the respondents, C.D. and E.F. Under the terms of a separation agreement, C.D. and E.F. share decision-making responsibility for A.B. A.B. suffers from gender dysmorphia, has identified as male since the age of 11 and sought hormone therapy to "align his body more closely with how he perceives his gender," as the court put it. In 2018, however, his father, C.D., obtained an ex parte provincial court order restraining A.B. from pursuing treatment for his dysmorphia.

A.B. commenced a superior court family law proceeding in 2019, seeking, among other things, declarations under sections 37 and 38 of the Family Law Act that the proposed hormone therapy is in his best interests, and a declaration under section 17 of the British Columbia Infants Act that he is capable of making his own decisions about his medical care.

(In brief, section 17(2) of the Infants Act provides that "an infant may consent to health care … 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." Section 37 of the Family Law Act provides that when making an agreement or order affecting children, parties and the court must consider only the best interests of the child, and sets out a lengthy but non-exhaustive list of criteria to consider in assessing the course of action which is in the child's best interests. Section 38 provides additional best-interests criteria where family violence is a factor.)

A.B.'s claim resulted in findings that A.B. is competent to consent to hormone therapy and that it is A.B.'s best interests that he have the therapy, that he be referred to using male personal pronouns and that he be called by the name he chose for himself, all of which C.D. appealed. As you might expect – especially when noting the number of organizations and individuals who sought intervenor status on the appeal, never mind the length of the judgment – there is a great deal more to the case than this simple summary suggests; I encourage you to read the decision.

The Court of Appeal held that the trial court correctly determined that A.B. had the capacity to consent to hormone therapy under the Infants Act, but also found that "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 the portions of the Family Law Act dealing with parenting after separation.

In my view the court is quite correct that sections 37 and 38 of the Family Law Act do not provide jurisdiction to make declarations with respect to the best interests of the child, they provide guidance only on the making of decisions on children's parenting arrangements rather than statutory authority for specific relief. Such declarations are normally made in the context of applications for parenting orders de novo under section 45 of the act, variation applications under section 47 or applications under section 49, the latter of which provides that:

> A child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate.

Given that C.D. and E.F. had previously agreed to share decision-making responsibility, an application for directions under section 49 would normally be the proper recourse. However, standing under section 49, just like standing under section 45, is restricted to guardians, and this is the lacuna the decision illuminates.

I have previously written about how children are largely invisible in family law disputes. The only actors in a family law claim are parents, guardians and spouses, for whom a child's best interests typically serve as a stalking horse for their preferred outcomes. It is a child's guardians – normally the child's parents – who have the exclusive right to make applications to the court about parenting time and decision-making, and the portion of the Family Law Act which addresses parenting after separation is drafted to that end. Under the British Columbia Family Law Act, children have neither standing nor effective voice; *there is no means by which a mature minor may apply to the court for declaratory relief on their own behalf*.

Now, I do understand why the Family Law Act, and the Divorce Act for that matter, are framed as directing the resolution of disputes between parents, guardians and spouses. They are the parties with legal capacity to sue and be sued and, under the antique approach to domestic relations that viewed children as animate chattel, it is they whose rights are at stake, not those of their children. It is worth noting, however, that the trend in contemporary family law legislation clearly leans toward child-centred rules which focus on the rights and interests of children rather than the entitlements of their parents; the Family Law Acts of Alberta and British Columbia are good examples of this approach, as are the amendments to the Divorce Act which take effect this summer.

If we are sincere in adopting a child-centred view of family justice, it is time, I suggest, to take a broader approach to standing in family law disputes. The UN Convention on the Rights of the Child, to which both Canada and British Columbia are signatories, provides that children have the same fundamental human rights as adults. The Convention on the Rights of the Child, at article 12, also gives children the right to be heard in matters affecting their interests:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

and, at article 14, a number of the fundamental freedoms guaranteed by section 2 of the Charter of Rights and Freedoms:

> States Parties shall respect the right of the child to freedom of thought, conscience and religion.

I am not suggesting that children be given the same statutory rights as parents, guardians and spouses; parental authority deserves a certain amount of respect and I wouldn't want to see children inserting

themselves into their parents' litigation by applying for orders about which guardian should have which decision-making responsibility for which aspects of their lives. (Nor would I want to see children applying to court for directions about the new PlayStation, a more liberal curfew or freedom from the tyranny of brussels sprouts.)

What I am suggesting, however, is that the Family Law Act be amended to give mature minors the right to apply for declarations about their best interests, and it seems to me that such amendments are supported by the Charter and our provincial and federal obligations under the Convention on the Rights of the Child. We already recognize that mature minors have the autonomy to make a certain class of decisions – medical and therapeutic decisions – without the consent of their parents under the Infants Act. Why shouldn't this autonomy extend to other classes of decision which bear the same degree of personal significance?

The circumstances of A.B. are the perfect set of facts supporting the discretion provided by the Infants Act: a mature minor with a diagnosed history of gender dysphoria, who identifies as a gender other than his physiological gender at birth, contrary to the wishes of a parent, who wishes to pursue a treatment essential to the support of that identity, contrary to the wishes of a parent, and who will suffer harm if the treatment is withheld. Other supporting fact patterns might include a mature minor who seeks life-saving blood transfusions contrary to the dictates of their parents' religion, or a minor who prefers to undergo treatments prescribed by empirical science rather than by homeopathy's wishful heterodoxy.

Moving away from health care and toward the Family Law Act, what of a mature minor who wishes to attend public education rather than be homeschooled? What of a minor who would rather be placed in a religious school rather than a secular institution, practice a religion other than that of their parents, or associate with individuals other than those approved by their parents? Or, as in the case of *A.B. v C.D. v E.F.*, a mature minor who wishes to be referred to by one set of personal pronouns rather than another and who wishes to adopt a name better reflective of his gender identity than the name given to him at birth?

Section 17 of the Infants Act provides mature minors with an important degree of discretion. I cannot fathom how the restriction of children's autonomy to matters of health care can be justified, especially if children are in fact endowed with the full breadth of human rights guaranteed by the Charter and the Convention on the Rights of the Child. Given the fulsome description of children's best interests provided at sections 37 and 38 of the Family Law Act, and the act's historic and present focus on domestic relations, the easiest remedy seems to me to be a simple three-word amendment to section 49:

> A child or a child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate.

Such an amendment would:

> 1. give children the ability to apply for a declaration as to their best interests without yielding standing under any other part of the act;
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> 2. provide an essential safety valve where the fervent wishes of a parent collide with the convictions of a mature minor; and,
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> 3. avoid relying on the *parens patriae* jurisdiction of the superior courts, thus allowing children to seek relief in provincial court.

Perhaps more importantly, it would go a long way toward satisfying our obligation to respect children's limited right to self-determination under the Charter and the Convention on the Rights of the Child.

Children have the right to a voice in critical matters of personal significance. An amendment of this restricted and narrow nature would bridge the gap in British Columbia's legislation on domestic relations and give it to them.