

2013 ONCJ 684
Ontario Court of Justice

B. (K.A.) v. Ontario (Registrar General)

2013 CarswellOnt 17175, 2013 ONCJ 684, [2014] W.D.F.L. 187, 235 A.C.W.S. (3d) 317

K. A. B., Applicant and Registrar General, Respondent

Marion L. Cohen J.

Heard: May 8, 2013
Judgment: November 26, 2013
Docket: DFO-12-10959-00-A1

Counsel: Ms Mary Birdsell, for Applicant
Mr. James Stebbing, for Respondent

Subject: Public; Family

Marion L. Cohen J.:

- 1 In the matter of an Application Under the *Change of Name Act*, R.S.O. 1990, C. c.7.
- 2 On May 8, 2011, for reasons delivered orally, and with written reasons to follow, I found that no person has lawful custody of K.A.B., born June 14, 1996, for purposes of the *Change of Name Act*, and that no consent is required for purposes of an application under section 4 of the *Change of Name Act*. The following are my written reasons:
- 3 K.A.B. is a seventeen-year-old transgendered youth who was born a boy. K.A.B. presents as female, and identifies using female pronouns. In this ruling K.A.B. will be referred to as "she". K.A.B. states that for as long as she can remember, she has known that her true identity is female. She is currently undergoing hormone therapy, and anticipates she will undergo sex reassignment surgery in "a few years". K.A.B. wishes to use the name A.R.B., which is a female name. She wishes to change her name legally, both to use A.R.B. as her preferred name, and also because she wishes the name on her legal documents, including her school registration, to be consistent with her female identity and appearance.
- 4 On February 13, 2013, K.A.B. applied to the Registrar General pursuant to the *Change of Name Act* for a change of name. At the time of the application she was over the age of

sixteen. Section 4 of the *Act* governs the application for a change of name by a person who is over sixteen years of age. Section 4 provides as follows:

Change of Name of Person over Sixteen

Application for change of name

4. (1) A person at least sixteen years of age who has been ordinarily resident in Ontario for at least one year immediately before making the application may apply to the Registrar General in accordance with section 6 to change his or her forename or surname or both. R.S.O. 1990, c. C.7, s. 4 (1).

...

Consent required where applicant under 18

(3) An application by a child requires the written consent of every person who has lawful custody of the child. R.S.O. 1990, c. C.7, s. 4 (3).

Application to dispense with consent

(4) If the required consent cannot be obtained or is refused, the child may apply to the court for an order dispensing with the consent. R.S.O. 1990, c. C.7, s. 4 (4).

How application determined

(5) The court shall determine an application under subsection (4) in accordance with the best interests of the child. R.S.O. 1990, c. C.7, s. 4 (5).

5 Because K.A.B.'s application was not accompanied by a written parental consent, her application was denied. Section 4(4) of the *Act* provides that if the required consent cannot be obtained or is refused, the child may apply to the court for an order dispensing with the consent. By an amended application dated April 3, 2013, K.A.B. applied for an Order dispensing with parental consent to her application. She submits that that her mother's consent is not required since she is not in the lawful custody of her mother.

6 The only parent K.A.B. has known is her mother. K.A.B. deposes that her mother has been aware for many years that she does not identify with her biological gender. She states that her mother refuses to accept that her birth gender "is not who I truly am." K.A.B. states that she has been unable to speak to her mother in any way about her gender identity. She deposes that her life with her mother was neither safe nor healthy. She states that the Children's Aid Society was involved with the family for several years.

7 Commencing in June 2012, K.A.B. began to attend at the Griffin Centre for counseling. The Griffin Centre is a non-profit mental health agency in Toronto, which provides a variety of services to transgendered youth. In August, K.A.B. moved out of her mother's house. She now resides in co-op housing run by Youthlink, another local agency which provides services to young people.

8 K.A.B. has acted in a careful, thoughtful and responsible manner, despite the absence of financial or emotional support from her mother. She is attending school, has arranged for her own health care, and is connected to supportive services. Despite her mother's refusal to accept her female identity, K.A.B. endeavours to remain in regular contact with her mother. To avoid an inevitable angry response from her mother, she does not talk to her about her transitioning.

9 A counselor from the Griffin Centre has written a letter to the court supporting K.A.B.'s application. The counselor states that K.A.B.'s home was "was quite abusive and was negatively impacting her well-being mental health." She described the family as "quite transphobic." She states:

Due to cultural differences, value differences and ignorance, they are not co-operative in supporting my client in any endeavours that will further her identity as a female rather than identifying with her biological gender. Therefore, making contact with her family is not feasible at this time.

10 Section 4(3) of the *Act* provides that an application by a child for a change of name requires the written consent of every person who has lawful custody of the child. What is "lawful custody"? In the case of *Chou v. Chou*, [2005] O.J. No. 1374 (Ont. S.C.J.), Perkins, J. considered the meaning of this phrase in a case where parties unrelated to a child sought a custody order or guardianship to avoid paying school fees otherwise applicable to non-residents. Justice Perkins noted that

21 "Custody" is not defined in Ontario legislation, though its meaning in family law is generally understood. It consists of a bundle of rights and obligations, called "incidents" in sections 20 and 21 of the Children's Law Reform Act, R.S.O. 1990, c. C-12, as amended. Family law cases often deal with the allocation of rights of custody. Those rights include the right to physical care and control of the child, to control the child's place of residence, to discipline the child, to make decisions about the child's education, to raise the child in a particular religion or no religion, to make decisions about medical care and treatment...

11 Later in the judgment he states that

I have performed a search of Ontario legislation on the e-Laws database and found that the word "custody" occurs 1343 times in 231 statutes and regulations. Sometimes it means merely physical care or control of a person or possession of a thing and sometimes it connotes care or control under some lawful authority. Often it is used in the criminal law sense of imprisonment. In family law statutes and regulations and many other instances, it is used in the family law sense of some or all of the bundle of rights and obligations mentioned in paragraph [21] above, but sometimes in those provisions it appears in the phrase "lawful custody"...

12 By this definition, it is clear that K.A.B.'s mother does not have lawful custody. The mother does not have physical care or control of K.A.B., nor does she make decisions about K.A.B.'s residence, her education or her medical care. K.A.B. makes all those decisions for herself.

13 K.A.B. is entitled to withdraw from parental control notwithstanding that she is under the age of majority: *Children's Law Reform Act*, section 65.

14 I find that for purposes of the *Change of Name Act*, neither K.A.B.'s mother, nor any other person, has lawful custody of her. Accordingly no consent is required under section 4(3) of the *Change of Name Act*.