

Case Comment

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In early November, a mother applied for an injunction against her transgender 17-year-old's double mastectomy. The British Columbia Supreme Court [granted the injunction](#) for approximately three weeks. This case raises a central legal issue: when disputing gender-affirming procedures, how does self-identification of transgender youth affect the "best interests of the child" analysis? Two common factors emerge from the patchwork of Canadian jurisprudence: the irreversibility of the procedure, and the age of the child.

In such cases, determining a child's best interests evaluates the desires of gender-creative children against the desires of disagreeing parents. Jurisprudence suggests that transgender children's views towards their gender identities may hold special weight. But that weight is not absolute.

Irreversibility of the Procedure

The above BCSC case, which is under a publication ban, suggests that irreversibility of the procedure is a factor. In another recent B.C. case, [AB v CD, 2019 BCCA 297](#), the B.C. Court of Appeal found that a 14-year-old could give valid consent to hormone treatment. While hormone treatments have lasting effects, treatments are more reversible than surgery.

The BCSC case also suggests that even when a child nears the age of majority, irreversibility still permits a parent's objections to stay a gender-affirming procedure. Indeed, the mother questioned her 17-year-old child's "mental and emotional fitness" and "maturity" to understand the irreversible nature of the surgery, even though the mother's objections will be vitiated when the child reaches the age of majority in 2 years.

Age of the Child

Apart from hormone treatments and surgeries, Canadian courts generally allow transgender children to express as they choose. The Ontario Court of Justice ruled in [Halton Children's Aid Society v GK, 2015 ONCJ 307](#) that a four-year-old should discover their own gender identity and that the parents should not impose their preferences. The BCCA in [AB v CD](#) confirmed that a 14-year old has the maturity to affirm their gender identity and choose hormone therapy. And in 2016, the BCSC affirmed that an 11-year-old had the maturity to instruct a litigation guardian through a dispute over hormone therapy ([NK v AH, 2016 BCSC 744](#)).

Courts generally consider the wishes of the child to determine best interests, especially in issues such as custody and parenting. Alberta's *Family Law Act* enshrines "the child's views and preferences, to the extent that it is appropriate to ascertain them" in the best-interests test (s.18(1)(iv)). Courts across many jurisdictions give considerable weight to a child's interests by the early teen years, and the above cases suggest that a child's voice be given even more weight with respect to gender identity.

Conclusion

Nonetheless, the patchwork of jurisprudence and [SOGIE](#) laws do not present a settled framework for transgender youth. The ONCJ ruled in *Holton Children's Aid Society* that parents imposing gender expectations would be emotionally harmful, while the BCCA ruled in *AB v CD* that misgendering did not constitute family violence. And while irreversibility of procedure and age of the child are nascent factors in assessing a transgender youth's voice through the "best interest" analysis, Canadian courts have not elucidated a bright-line test.