Comment, Home is a Body Where You Get to be You: The Intersection of Minor Guardianship and Transgender Youth

I. Introduction

One of the most difficult situations a child can face is being taken from their parents' home and being placed with another caregiver. This is particularly true if the circumstances surrounding that removal have to do with neglect, trauma, or abuse. Imagine, then, the added stress of being a child that identifies as transgender, whose parents do not agree with their gender identity.

Compared with cisgender children, transgender and gender non-conforming youth are at a higher risk of suffering psychological, physical, and sexual abuse at the hands of their primary caregivers. One national study found that transgender youth were 84% more likely to report emotional abuse by a parent or other adult in their household than their cisgender counterparts. Transgender youth were also 61% more likely to report physical abuse in the home, and 104% more likely to report sexual abuse.[1] Another study found that transgender and gender-non-conforming youth routinely reported high levels of childhood trauma, with the mean score on the Adverse Childhood Events (ACE) scale being 3.83 for transgender minors and 3.69 for gender non-conforming minors.[2] By comparison, studies have reported a mean score of 1.46 for cisgender males and 1.68 for cisgender females.[3] These high rates of adverse childhood events

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[1] Brian C. Thoma et al., *Disparities in Childhood Abuse Between Transgender and Cisgender Adolescents*, 148 (2) PEDIATRICS e2020016907 (2021).

[2] S. L. Craig et al., *Frequencies and Patterns of Adverse Childhood Events in LGBTQ+ Youth*, 107 CHILD ABUSE & NEGLECT 1, 2 (2020).

[3] Zachary Giano et al., *The Frequencies and Disparities of Adverse Childhood Experiences in the U.S.*, 20 BMC PUBLIC HEALTH 1327 (2020); *see also* Melissa T. Merrick, M.T. et al. *Prevalence of Adverse Childhood Experiences from the 2011-2014 Behavioral Risk Factor Surveillance System in 23 States*, 172(11) JAMA PEDIATRICS 1038 (2018).

also correlate with the prevalence of suicide attempts in transgender youth; one study found that transgender youth who experienced emotional abuse in the home were 2.5 times more likely to attempt suicide than those who did not.[4] Because of these high rates of abuse and neglect, the intersection of gender-affirming care for minors and permanency placement can present a difficult situation for the law and the parties involved.

This Comment looks at one such challenging situation. Minor guardianship is a reliable placement option, but the nature of guardianship creates a uniquely troublesome situation for transgender youth. Guardianship creates a gap between the rights and obligations conferred upon the guardian and the rights and obligations retained by the natural parents. This gap poses a danger to transgender minors in that it presents a stumbling block to obtaining gender-affirming care and achieving expression of their gender identity.

This Comment is divided into four sections, each addressing different aspects of the intersection of minor guardianship and gender-affirming care for transgender minors. Section II explains some of the common terminology that is used when discussing transgender individuals and the process of transitioning.

Section III gives a brief discussion of the laws applicable to transgender minors. In particular, Section III discusses the challenges facing transgender minors in trying to express their gender identity, the largest of which are the legal incompetency of minors and the strength of the fundamental right of parents to the care, custody, and control of their children.

Section IV looks at minor guardianships in general, and specifically at the nature of the rights retained by the natural parents. When a child is placed under guardianship, their guardian is conferred a large portion of the rights that a parent would have. However, because guardianship does not terminate the natural parents' rights, there are some residual rights that are retained by the minor's parents.

Finally, Section V illustrates the problem that is created by the intersection of guardianship, residual parental rights, and transgender minors' wishes. Because there is uncertainty as to

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[4] A. Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 (5-6) J. Interpersonal Violence NP2696 (2022).

which rights, exactly, are retained by the natural parents when a guardianship is imposed, there is a real risk that the natural parents may be able to object to their child's guardian obtaining gender-affirming care for the minor.

II. Terminology of Transition

Because the legal field surrounding transgender individuals, the transitioning process, and transgender minors is rapidly changing, it is necessary to provide clarification on the terminology of transition. There are many variations in the terminology that is used to describe transgender individuals and the process of transitioning in general. This Comment endeavors to use the most common terms in use at this time, as recommended by the Gay and Lesbian Alliance Against Defamation (GLAAD), the National Center for Transgender Equality, and Planned Parenthood.

The term "transgender" covers a range of individuals whose gender identity does not conform to the sex that they were assigned at birth.[5] Sex assigned at birth is sometimes referred to as "biological sex," and is the sex that was assigned to an individual at birth based on their external anatomy.[6] An individual born with male external genitalia is typically assigned as male, and an individual born with female external genitalia is typically assigned as female. Gender identity, as opposed to sex assigned at birth, is an individual's personal, internal conception of their gender, regardless of their external anatomy.[7] When an individual's sex assigned at birth and gender identity match – that is, the individual was assigned female and identifies as female, for example – the term often used is "cisgender."[8]

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5 Linell Smith, *Glossary of Transgender Terms*, JOHNS HOPKINS MEDICINE (Nov. 20, 2018), http://www.hopkinsmedicine.org/news/articles/glossary-of-terms-1.

6 *Id.*

7 *Transgender FAQ*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION (GLAAD), https://www.glaad.org/transgender/transfaq (last visited Oct. 15, 2022).

8 *Transgender Identity Terms and Labels*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/gender-identity/transgender/transgender-identity-terms-and-labels (last visited Oct. 15, 2022).

Individuals who identify as transgender are often diagnosed with gender dysphoria, a medical diagnosis that encompasses the anxiety, distress, and other mental and physical symptoms that arise because of the disconnect between the individual's external anatomy and their gender identity.[9] The term "transition" or "transitioning" describes the process by which a transgender individual begins living and presenting in accord with their gender identity.[10] It is important to note that transitioning does not necessarily involve medical or surgical procedures; a transgender individual may have bottom surgery,[11] top surgery,[12] both, or neither during the course of their transition.

The umbrella term "gender-affirming care" is used to cover a variety of procedures, behaviors, or interventions that help align a transgender individual's presentation with their gender identity.[13] Gender-affirming care encompasses everything from using the correct pronouns and chosen name of a transgender individual to hormone therapy to full surgical procedures.[14]

Two important distinctions must be made when defining terms used to describe transgender individuals generally and gender identity specifically. First, gender identity and sexual orientation are *not* equivalent to one another. Sexual orientation describes the gender to which an individual is romantically or sexually attracted,[15] and has no impact on how a person perceives their gender. A male-to-female transgender individual who is attracted to females would be considered a lesbian. A female-to-male transgender individual who is attracted to females would be considered straight. Being transgender does not imply

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9 *Id.*

10 Smith, *supra* note 5.

11 Bottom surgery refers to a surgical procedure to change the external genitalia to conform to one's gender identity; for male-to-female transgender individuals, this may take the form of a vaginoplasty, while for female-to-male transgender individuals this may involve phalloplasty or metoidioplasty.

12 Top surgery refers to a surgical procedure to change the chest to conform to one's gender identity; for male-to-female transgender individuals, this would be a breast augmentation, while for female-to-male transgender individuals this would be a bilateral mastectomy.

13 Smith, *supra* note 5.

14 *Id.*

15 *Transgender FAQ*, *supra* note 7.

any particular sexual orientation, any more than being cisgender implies a particular sexual orientation.

Second, there is a difference between identifying as transgender, identifying as gender non-conforming, and identifying as gender non-binary. Gender non-conformity is used to describe individuals who do not identify as belonging to typical gender stereotypes of masculinity or femininity.[16] An individual who is gender non-conforming is not necessarily transgender. For example, someone who was assigned female at birth and is cisgender may present as more typically masculine in hairstyle, mannerisms, or clothing while still identifying as female. A gender non-binary individual is someone who does not identify as either male or female in their gender identity.[17] A non-binary person feels that they do not fit neatly into the prescribed gender categories of male and female. As with gender non-conformity, being non-binary does not imply that an individual is transgender.

Although this is not an exhaustive list of the terminology used to describe transgender individuals and the process of transitioning, it covers the terms this Comment uses throughout.

III. Barriers to Transgender Minors Accessing Gender-affirming Care

It is beyond the scope of this Comment to examine the full state of the law regarding transgender individuals in the United States and the full gamut of difficulties that transgender individuals face on a regular basis. However, there are several key differences between the transitioning process for adults and the transitioning process for minors. The largest obstacles to transgender minors receiving gender-affirming care are their status as legally incompetent in most situations owing to their youth, the strength of parental rights in the law, and the laws of their particular state of residence regarding gender-affirming care for minors.

Minors are often at the mercy of their parents' beliefs and decisions regarding their gender presentation and gender-af-

16 *Frequently Asked Questions About Transgender People*, NATIONAL CENTER FOR TRANSGENDER EQUALITY (July 9, 2016), https://transequality.org/issues/resources/understanding-transgender-people-faq.

17 *Id.*

firming care because they are not considered legally competent to make impactful decisions for their own care, custody, and control.[18] Although minors do have some constitutional rights, those rights are not co-extensive with the constitutional rights of adults.[19] Children's rights are limited because of their lack of maturity; minors are more vulnerable than adults and they do not have the same critical thinking and critical decision-making skills as adults.[20] This immaturity is reflected in the law by the limitations that nearly every state places on minors regarding voting, serving as jurors, and marrying without parental consent.[21]

One notable exception to the legal incompetence of those under age eighteen is the mature minor doctrine. The exact implementation of the mature minor doctrine varies from state to state, but generally it encompasses a common law notion that a minor over a particular age threshold can demonstrate sufficient maturity and understanding of a procedure that parental consent is not necessary. In medical contexts, a mature minor is a minor who is capable of understanding the nature of the procedure to be performed, can weigh the benefits and risks of the procedure, and understands the implications of that procedure.[22] Failing an assessment by a medical provider that the minor is mature enough to make their own decision regarding medical treatment, the Supreme Court has held that a minor is entitled to a proceeding in which they can show that they are sufficiently mature and informed to make that decision.[23]

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18 *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the parents of Amish minors aged 14-15 had the sole discretion to hold the minors out of school, with no need to take the minors' opinions into account).

19 Bellotti v. Baird, 443 U.S. 622, 634 (1979).

20 *Id.*

21 Roper v. Simmons, 543 U.S. 551, 569 (2005).

22 *Bellotti*, 443 U.S. at 643. *Bellotti* discusses the ability of a mature minor to make her own decision to obtain an abortion without parental consent. The concept has been applied to other medical treatments. *See generally* Cardwell v. Bechtol, 724 S.W.2d 739 (Tenn. 1987)(minor's capacity to consent to osteopathic treatment); Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827 (W. Va. 1992)(minor's capacity to consent to a do not resuscitate order); *In re* Cassandra C., 112 A.3d 158 (Conn. 2015) (minor's capacity to refuse chemotherapy).

23 *Bellotti*, 443 U.S. at 643.

The lack of legal competence results in a lack of ability for minors to make their own medical decisions, barring the application of the mature minor doctrine. This affects transgender minors no less than their cisgender peers; a transgender minor seeking gender-affirming medical treatment needs the consent of their parent or guardian unless they have been adjudged to be a mature minor.

Generally, medical professionals are required to get informed consent from their patients before they start treatment, at the risk of malpractice or negligence claims if they fail to do so.[24] A minor is not capable of giving informed consent, meaning that their parent or guardian must give consent on their behalf.[25] For transgender minors, this constitutes a significant hurdle. In situations where the minor's parents do not agree with their gender identity, a transgender minor has little recourse for obtaining gender-affirming care. Unfortunately, this is a common struggle for transgender youth. The 2015 U.S. Transgender Survey found that among individuals who came out as transgender under the age of 18, 56% reported some form of rejection by an immediate family member.[26] In addition, 14% reported having been sent to some form of counseling or therapy to stop them from being transgender after coming out, 27% reported not being allowed to wear clothing that corresponded to their gender identity, 10% reported that they experienced violence at the hands of an immediate family member when they came out, and 8% reported being kicked out of their home when they came out.[27]

The hurdle of legal incompetency is worsened by the strength of parental rights in the law. Parents have a right to make decisions about the care, custody, and control of their children. This fundamental right of parents to raise their children free from undue government interference has long been recognized in the United States.[28] More to the point of this Comment,

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24 *The Doctrine of Informed Consent*, 4A AMERICAN LAW OF TORTS § 15:71.

25 RESTATEMENT (SECOND) OF TORTS § 892A (1979).

26 SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 75 (2016).

27 *Id.* at 71-73.

28 *See inter alia* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of the Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972).

parents have broad authority over decisions regarding their child's medical care.[29]

The right of a parent to the custody and control of their children is balanced by the state's interest in the well-being of children. The state has an inherent interest in all minors, including transgender minors, because of its *parens patriae* obligation to protect children.[30] Where a transgender child's parents refuse to obtain gender-affirming care, it is possible that *parens patriae* may lead to state involvement. However, the strength of parental rights in the United States makes it difficult for the state to become involved in getting gender-affirming care for a minor whose parents object to their gender identity.

Of course, parental rights to the control of their child's medical care also entail a responsibility to obtain that care. The law has recognized that a parent has a duty to provide their child with necessary medical care.[31] If a parent fails to provide necessary medical care, they can face accusations of medical neglect.[32] For transgender minors, the word "necessary" is the stumbling block in obtaining gender-affirming care. Often, "necessary" medical care is defined as the minimum care necessary to protect a minor's physical or mental health from serious harm, or from a substantial risk of serious harm.[33]

For transgender youth, the law has not come to a consensus that gender-affirming care is medically necessary care. The World Professional Association for Transgender Health (WPATH), a group for medical professionals involved in transgender healthcare, has stated in its Standards of Care that gender-affirming care is medically necessary for individuals whose gender

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29 Restatement of Children and the Law § 2.60 (Am. L. Inst., Tentative Draft No. 1, 2018).

30 The doctrine of *parens patriae* has had a long history in family law and the discussion of children's rights. It is often stated as being in tension with a parent's fundamental right to the care, custody, and control of their children free from state interference. *See Prince*, 321 U.S. 158 (holding that the state may limit the rights of parenthood via parens patriae in order to protect a child's general well being).

31 *Id.*

32 *Id.*

33 Restatement of Children and the Law § 3.26 (Am. L. Inst., Tentative Draft No. 1, 2018).

dysphoria causes clinically significant distress and anxiety.[34] For a minor, medical interventions constituting gender-affirming care encompass the use of puberty blocking hormones at the onset of puberty, cross-sex hormones administered later in adolescence, and counseling or psychiatric treatment.[35] However, courts and legislatures do not always agree that gender-affirming care is necessary for minors. Recently, three states have enacted legislation banning gender-affirming care for minors, and two more have made public policy statements banning such care.[36]

As a result of this lack of clarity, even if the state does get involved in the custody and care of a transgender minor, the minor is largely at the mercy of the individual judge's beliefs about transgender status and gender-affirming care for minors. The court, when it engages in a best interests of the child analysis, has a fair amount of judicial discretion. The outcome for transgender minors is therefore dependent on the court's ability to understand transgender issues and on the court's tendency to agree or disagree with gender-affirming care in situations where custodi-

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34 E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23:sup 1 INT'L J. TRANSGENDER HEALTH S1, S17 (2022).

35 *Id.* at S65.

36 The following states have enacted laws regarding gender-affirming care for minors: Arizona (SB 1138, enacted Mar. 2022); Alabama (SB 184, enacted Apr. 2022); Arkansas (ARK. REV. STAT. § 20-9-1502, enacted in 2021). Texas does not have legislation that has been enacted, but the Governor issued a directive on Feb. 22, 2022 that parents whose children are undergoing gender transitioning should be investigated for child abuse. Letter from Governor Greg Abbott to the Honorable Jaime Masters, Commissioner, Texas Department of Family and Protective Services, Feb. 22, 2022. Florida does not have an active ban, but its Department of Health has advised against gender-affirming care for minors. Florida Dept. of Health, *Treatment of Gender Dysphoria for Children and Adolescents*, Apr. 20, 2022. Florida's Board of Medicine has also voted to begin drafting a rule against gender-affirming care. Fla. Bds. Med. and Osteopathic Med., Proposed Rule 64B8-9.019 & 64B15-14.014, F.A.C. – Practice Standards for the Treatment of Gender Dysphoria, Nov. 4, 2022. As well, the following states have introduced legislation intended to ban gender-affirming care for minors, which was either defeated or is languishing in committee: Idaho, Utah, Kansas, Missouri, Iowa, Wisconsin, Louisiana, Mississippi, Indiana, Ohio, Kentucky, Tennessee, Georgia, Florida, South Carolina, North Carolina, and New Hampshire. *See* Legislative Tracker: Youth Healthcare Bans, *Freedom for All Americans,* https://freedomforallamericans.org/legislative-tracker/medical-care-bans (last visited Dec. 28, 2022).

ans are in conflict about how best to approach a minor's gender identity conflict.

A good example of how badly this judicial discretion can go for a transgender minor is *Smith v. Smith*, an unpublished case that originated in Ohio in 2007.[37] In that case, there was a dispute between parents over the custody of their two children. In the initial separation agreement, the mother retained primary custody of both children, and the father was granted visitation.[38] The older child was assigned male at birth, but identified as female; the mother was supportive of her gender identity, took her to a transgender support group, and enrolled her in school as a female.[39] The father, upon learning that the mother was supportive of the older child's gender identity, filed to obtain sole custody of both children.[40]

Despite expert testimony that confirmed that the older child was diagnosed with gender identity disorder,[41] the trial court ordered that she was not to be allowed to wear female clothing, that she could not be referred to by female pronouns or a female name, and that she could not continue going to the transgender support group.[42] On appeal, the Ohio Court of Appeals affirmed the trial court, partially basing its decision on the fact that the law allowed the mother to petition for a modification of custody if the circumstances changed.[43]

The challenges faced by transgender youth are compounded by the uncertain approach taken by courts to the interactions between parental rights, minors' rights, and the state's interest in

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37 Smith v. Smith, No. 05 JE 42, 2007 WL 901599 (Ohio Ct. App. Mar. 23, 2007).

38 *Id.* at 1.

39 *Id.*

40 *Id.*

41 Gender Identity Disorder was the diagnosis provided by the Diagnostic and Statistical Manual of Mental Disorders-IV (DSM-IV) for the cluster of symptoms associated with gender identity conflicts. In the *Diagnostic and Statistical Manual of Mental Disorders-V* (DSM-V), gender identity disorder was officially replaced with gender dysphoria. *See* Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451-53 (5th ed. 2013).

42 *Smith*, 2007 WL 901599, at 5.

43 *Id.* at 12.

protecting children. At this point, the legal landscape of gender identity is a minefield for transgender minors.

IV. Minor Guardianship

To understand the gap that occurs at the intersection of transgender minors and minor guardianship, it is necessary to explain minor guardianships generally, and differentiate guardianship from other forms of child custody. As opposed to custody arrangements such as foster care and adoption, which are generally governed by family or juvenile courts that apply the best interests of the child standard, guardianship is based on a standard of fitness of the parents primarily, and best interests of the child secondarily. Guardianship also does not rely on an underlying termination of parental rights; parents whose children are under guardianship still retain some rights over their children.

Generally, the standard used to impose a minor guardianship is whether the child's parents are unfit, unwilling, or unable to exercise their parental rights over their child.[44] In the majority of states, this is a clear and convincing evidence standard, requiring that the individual petitioning for guardianship prove by clear and convincing evidence that the minor's parents are unfit, unwilling, or unable to act as a parent.[45] By contrast, the best interests of the child analysis is typically determined by the preponderance of the evidence.[46] That is not to say that the best interests of the child is not considered in minor guardianships; however, a best interests analysis is only engaged in once the court has determined that the parents of the child are unfit, unwilling, or unable to act in a parental capacity.[47]

The nature of guardianship implies that it is possible to find a minor's parents to be fit, willing, and able to resume their parental rights and obligations. Indeed, minor guardianship is not necessarily intended to be a permanent placement option, although such guardianships often continue until the child reaches the age of majority. Instead, a minor guardianship is intended to

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44 Children and the Law: Rights and Obligations § 7:17 (2022).

45 *Id.* at § 7:19.

46 Handling Child Custody, Abuse, and Adoption Cases § 10:5 (Dec. 2022).

47 Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act § 201 (Unif. L. Comm'n 2017).

act as a stopgap to insure a child's safety until their parents are once again able to exercise parental rights.[48]

As a consequence of this stopgap nature, a judgment that a parent is unfit, unwilling, or unable to exercise their parental rights is fundamentally different from a termination of parental rights. A termination of parental rights permanently severs the legal relationship between the child and their natural parents.[49] A minor guardianship, on the other hand, places a parent's rights on hold until they are able to resume their duties and obligations. If child custody and placement is viewed as a spectrum marking the degree to which parental rights have been abrogated, with full cessation of parental rights at one end and full exercise of parental rights at the other, minor guardianship occupies a space in the middle. A termination of parental rights, leading to adoption, is at the cessation extreme, because it fully severs the legal relationship between the child and their parents. Legal custodianship is closer to the full exercise of parental rights, because it takes the right to physical custody of a child away from the parents, and legal custody to various extents. Minor guardianship takes physical custody away from the parents, and gives the guardian nearly the full extent of rights and obligations that the natural parents have.

Crucially, however, guardianship does not confer *all* of the same rights that a parent would have. Some jurisdictions have discussed this in the context of "residual parental rights." The exact nature of what parental rights are residual – which rights the parents retain and which rights are ceded to the appointed guardian – is not always clear cut. Residual parental rights can be, unhelpfully, defined as the rights a parent retains after a custody adjudication.[50] Several states have statutory definitions that enumerate exactly which rights are retained by a parent after legal custody has been transferred either to a state agency or a guardian[51]; some of the most commonly enumerated rights in-

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48 *In re* E.R.V.A., 637 S.W.3d 100, 108 (Mo. Ct. App. 2021).

49 *Id.*

50 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES, *supra* note 46, at § 12:37.

51 Alabama (ALA. CODE § 12-15-102 (2019)); Alaska (ALASKA STAT. ANN. § 47.10.084 (West 2018)); Colorado (COLO. REV. STAT. ANN. § 19-1-103 (West 2022)); the District of Columbia (D.C. CODE ANN. § 16-2301 (West

clude the right to visitation, the right to consent to adoption, and the right to determine religious affiliation.[52] A few states enumerate other specific rights as well.[53] All of these statutory schemes provide that the list of enumerated rights is not exclusive, however, meaning that additional rights may be found to remain with the parents. The remaining states are either silent on the subject of residual parental rights, or define what rights accompany legal custody such that any right not conferred along with legal custody could be assumed to remain with the natural parents.[54]

These residual parental rights constitute an important check on the authority of a guardian of a minor. While a guardian is in place, some of the guardian's rights to the minor are superior to the rights of the natural parents, but the natural parents' residual rights are not and cannot be destroyed by the guardianship.[55] That would require a separate proceeding to terminate parental

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2021)); Hawai'i (HAW. REV. STAT. ANN. § 571-2 (West 2022)); Idaho (IDAHO CODE ANN. § 16-1602 (West 2022)); Illinois (705 ILL. COMP. STAT. ANN. § 405/1-3 (2021)); Louisiana (LA. CHILD. CODE ANN. art 116 (2018)); New Hampshire (N.H. REV. STAT. ANN. § 169-C:3 (2022)); Ohio (OHIO REV. CODE ANN. § 2151.011 (West 2021)); Utah (UTAH CODE ANN. § 80-1-102 (West 2022)); Vermont (VT. STAT. ANN. tit. 33, § 5102 (West 2020)); Virginia (VA. CODE ANN. § 16.1-228 (West 2022)); Wyoming (WYO. STAT. ANN. § 14-3-402 (West 2020)).

52 The states mentioned in note 51 *supra*, Alabama, Alaska, Colorado, D.C., Idaho, Illinois, Louisiana, New Hampshire, Ohio, Utah, Virginia, Wyoming, provide for all of these rights,

53 Wyoming – the right to petition on the minor's behalf (WYO. STAT. ANN. § 14-3-402(xvi)(E) (West 2020)); Louisiana – the right to inheritance from the minor (LA. CHILD. CODE ANN. art 116(24) (2018)); Idaho – the right to attend family counseling with the minor (IDAHO CODE ANN. § 16-1602(41) (West 2022)); Alaska – the right to consent to marriage, military enlistment, and major medical treatment (ALASKA STAT. ANN. § 47.10.084(c) (West 2018)); Utah – the right to consent to marriage, military enlistment, and medical, surgical, or psychiatric treatment *if* no guardian has been appointed (UTAH CODE ANN. § 80-1-102(70)(b) (West 2022)).

54 Georgia, for example, specifies that legal custody confers on the custodian the rights to physical custody, to protect, train, and discipline the child, to determine where and with whom the child lives, and to provide the child with food, clothing, shelter, education, and ordinary medical care. *See* GA. CODE ANN. § 49-5-3 (West 2022). Iowa follows this same pattern. *See* IOWA CODE ANN. § 600A.2A (West 2008)).

55 *In re* Guardianship of Doe, 339 P.3d 1154, 1160-1161 (Idaho 2014).

rights. A guardian's rights and obligations do not stand to the exclusion of the parents' natural rights and obligations.[56] For this reason, a guardian cannot simply make *any* decision on behalf of the minor; they are limited not only by the oversight of the court, but also by the residual rights of the minor's parents.

V. The Gap at the Intersection of Guardianship and Gender-Affirming Care

The nature of minor guardianship, with its mixture of parent-like authority and rights that compete with residual parental rights, creates a gap into which transgender minors may fall. If a transgender minor is under guardianship, their guardian may approve of gender-affirming care at the same time as their natural parents object to gender-affirming care. Research and litigation in this particular area is scarce, and although issues surrounding transgender youth are becoming more prominent, given the gender-affirming care bans that have been enacted recently in several states.[57] However, in a longitudinal study of primary caregivers of transgender youth, two children were documented who were being raised by their grandmothers.[58] Both grandmothers had obtained guardianship of their grandchildren; in both cases, the child had been removed from their parents' home for abuse and neglect, and in both cases the parents objected to the child's transgender identity.[59] When asked, both grandmothers noted that although guardianship had given them expanded decision-making power – such as controlling visitation with the natural parents and making decisions regarding the children's schooling – there were also limitations.[60] One grandmother specifically mentioned the lack of ability to change the minor's name, because despite the guardianship, the consent of both of the minor's parents were required by the court in order to effectuate a name change. She also discussed her concern with ob-

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56 *In re* Guardianship of J.J.H., 168 P.3d 243, 248 (Okla. Civ. App. 2007).

57 *See supra* note 36.

58 Katherine A. Kuvalanka et al., *Grandmothers Raising Their Transgender Grandchildren: An Exploratory Study*, 16(3) J. GLBT Family Studies 312 (2020).

59 *Id.* at 317.

60 *Id.* at 320.

taining puberty blockers for the minor in the future, because the natural mother objected to hormone therapy.[61]

Gender-affirming care constitutes a major decision in a minor's life, and for that reason, is vulnerable to courts determining that the natural parent retains the right to consent or object to that care. This means that even if a transgender minor is able to leave the care of an objecting parent, they still may not be able to receive gender-affirming care, or may only be able to obtain gender-affirming care after significant legal process. Such delays are a very real concern for transgender youth, who face the added time pressure of the onset of puberty of the unwanted gender. Even if gender-affirming care is not seen as under the purview of residual parental rights, the natural parents may still have the ability to prevent or stall care by petitioning the court.

A. *Consent to Gender-affirming Care as a Residual Parental Right*

Gender-affirming care, as was discussed in Section 1, can take many forms. Simplistically, it can be divided into social efforts and medical efforts, and a guardian may wish to engage in both of these. Social aspects of gender-affirming care might include letting a child choose what type of clothing they wear and what name they want to go by, letting them choose their own pronouns, and letting the child present congruently with their gender identity. For example, a guardian who wants to enroll a minor assigned male at birth in school as a female, wants to change her name to a more feminine name, or wants to allow her to dress as a female is engaging in social gender-affirming care.

Social transitioning may be easier for a guardian to obtain for a minor, because it arguably involves a lesser level of decision-making. Something that all of the statutes governing residual parental rights appear to agree on is that *major* decisions should rightly remain with the natural parents. The ability to consent to the child being adopted is a major concession of a parent's rights and a serious invasion of a family's integrity. The freedom of religion is a fundamental right in the United States, and core to the concept of how many families perceive them-

61 *Id.*

selves, such that retaining the ability to choose the child's religion is of very high importance.

By contrast, fully reversible actions such as what clothing a child wears do not stand out as being at the same level as adoption or religion. The problem is not that simple, however. Other aspects of social transitioning – such as letting the child present in accord with their gender identity or enrolling them in school in accord with their gender identity – are more likely to be viewed as major decisions in the minor's life. Even though these social measures are also reversible, it is easy to see how a parent would (likely successfully) argue that their son being presented to the world as their daughter is a decision over which they should retain control.

The trial court in *Smith* certainly viewed social transition as being significant enough to warrant a disruption of a child custody arrangement between natural parents, both of whom still retained the full spectrum of parental rights.[62] Where the dispute is between a minor's parent and their guardian, who does *not* have the full bundle of parental rights, a court would undoubtedly consider very seriously whether the guardian has sufficient authority to make those decisions.

This was the argument put forward by the natural mother in *In re K.L.*, a case in which a transgender minor was placed into state custody because of parental neglect.[63] Although K.L. was in state custody, the natural mother's rights had not been terminated, such that residual parental rights remained, as in a guardianship. For example, when K.L. wished to begin hormone therapy, the consent of her natural mother was still required. When her mother refused to allow the treatment, the state had to petition the court to authorize hormone therapy without the mother's consent.[64] When K.L. later wished to change her name to accord with her gender identity, and to legally change her gender marker to "female", the state similarly had to contend with the natural mother's parental rights to give or withhold consent.[65] The court ultimately authorized the name and gender change, finding the natural mother's continual refusal to consent

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62 *See Smith*, 2007 WL 901599.

63 *In re* K.L., 258 A.3d 932 (Md. Ct. Spec. App. 2021).

64 *Id.* at 939.

65 *Id.* at 940.

to gender-affirming actions to be contrary to the best interests of the child.[66]

Medical aspects of gender-affirming care are complicated, because medical interventions are much more likely to be considered extraordinary medical care, such that the natural parents would likely retain the ability to consent or object to such care. Medical interventions are more complicated as well because the interventions available to transgender minors differ according to their age. Realistically, the procedures that can be performed on minors in this context are relatively few, and are generally hormonally-based. The most common medical interventions available to transgender minors are puberty-blocking hormones and cross-sex hormone therapy.

Puberty-blockers perform exactly as one would expect; they delay the occurrence of puberty by suppressing the body's natural production of androgens at the outset of adolescence.[67] These medications can therefore prevent or minimize the appearance of secondary sex characteristics that develop during puberty, which can cause severe distress in transgender minors.[68] Cross-sex hormone therapy is the use of either testosterone[69] or estrogen,[70] among other potential hormone therapies, to trigger the development of secondary sex characteristics opposite to those of a minor's sex assigned at birth.

According to WPATH's Standards of Care, puberty-blockers should not be used in minors until they have reached Tanner Stage 2,[71] the stage of puberty which is determined by the onset of the physical changes associated with secondary sex character-

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66 *Id.* at 959-60.

67 *Pubertal Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075 (last visited Nov. 26, 2022).

68 *Id.*

69 *Masculinizing Hormone Therapy*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/masculinizing-hormone-therapy/about/pac-20385099 (last visited Nov. 26, 2022).

70 *Feminizing Hormone Therapy*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/feminizing-hormone-therapy/about/pac-20385096 (last visited Nov. 26, 2022).

71 Coleman et al., *supra* note 34, at S64.

istics.[72] For most children, this occurs around the age of 12.[73] Cross-sex hormone therapy is not recommended before age 16.[74] The recommended age for cross-sex hormone therapy is based not just on the stages of puberty, but also on the belief that 16 is the age around which an adolescent can give informed consent to the procedure.[75]

These hormonal interventions are the recommended course for transgender minors because they are either fully or mostly reversible. If a minor who is taking puberty-blockers stops taking the puberty-blocker, they will simply begin puberty. A minor who is undergoing cross-hormone therapy, upon stopping the therapy, will experience a decrease in the secondary sex characteristics of the opposite sex. Even so, the use of hormone therapies for transgender minors constitutes a major medical decision. In states like Georgia and Iowa, which enumerate the specific rights that are conferred with legal custody, guardians can only make ordinary medical decisions.[76] In states that do not specify whether a major medical care decision can be made by a guardian, the possibility is left open that the right to make such decisions is retained by the natural parents.

As was discussed above, *In re K.L.* required an order by the court to overcome the natural mother's refusal to consent to hormone therapy for K.L. In a similar case in California, *In re D.H.,* a 17-year-old transgender minor who was in state custody petitioned the court for authorization to obtain hormone therapy.[77] D.H.'s mother had refused to consent to hormone therapy and requested that the matter be set for trial. The trial court entered an order authorizing the hormone treatments, and was affirmed

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72 Specifically, in persons assigned female at birth, Tanner Stage 2 is marked by the appearance of breast-budding; in persons assigned male at birth, Tanner Stage 2 is marked by a testicular volume of greater than 4mL. Mickey Emmanuel & Brooke R. Bokor, *Tanner Stages*, NATIONAL LIBRARY OF MEDICINE, https://www.ncbi.nlm.nih.gov/books/NBK470280/ (Dec. 15, 2021).

73 *Id.*

74 Coleman et al., *supra* note 34, at S65.

75 Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/ Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102:11 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3880 (2017).

76 *See* GA. CODE ANN. § 49-5-3; IOWA CODE ANN. § 600A.2A.

77 *In re* D.H., No. D078915, 2021 WL 5230734 (Cal. Ct. App. Nov. 10, 2021).

on appeal.[78] Nonetheless, the natural mother's residual rights encompassed the ability to withhold consent to major medical treatment, including hormone therapy, despite no longer having custody of D.H.

Because in most situations a transgender minor is not old enough to make their own legally recognized decisions about their healthcare and societal presentation, including registering for school in accord with their gender identity, obtaining clothing that accords with their gender identity, changing their name, and obtaining gender-affirming medical interventions, a legally responsible adult must make those decisions. However, the gap created by residual parental rights raises the question of who exactly has the authority to make those decisions – the minor's guardian, or the minor's natural parents?

Different states take different approaches to how much authority a guardian has to make medical decisions for their ward, and whether a court order needs to be sought before the decision can be made. In Connecticut, for example, a guardian has authority equal to that of a natural parent in the realm of medical decisions; a guardian can make both ordinary and major medical decisions for their ward without consultation with the natural parents.[79] Other states, like the District of Columbia, make it clear that the parents retain the right to make major medical decisions, including inpatient psychiatric treatment and the administration of psychotropic medications, even if that right is not specifically enumerated by statute.[80]

Since there are no states that specifically enumerate the right to consent to gender-affirming care or gender transition as being retained by the natural parents, the decision may well come down to judicial discretion. There is a danger, therefore, that courts will find that the right to consent or object to gender-affirming care is a residual parental right, thus allowing natural parents to prevent their transgender child from accessing gender-affirming care even when under guardianship.

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78 *Id.*

79 *In re* Rehtaeh B., No. H12CP12014741A, 2015 WL2344695 (Conn. Super. Ct. Apr. 9, 2015).

80 *In re* G.K., 993 A.2d 558, 565 (D.C. 2010).

B. *Objecting to Gender-affirming Care via Pleadings*

Even if a court decides that residual parental rights do not include the right to consent or object to gender-affirming care, the nature of guardianship provides an avenue for parents to object through pleadings to a transgender minor's gender identity expression. The natural parents remain parties to a minor guardianship, even after adjudication, because their rights have not been terminated. They are still necessary parties, and they still have the ability to file pleadings with the court if they object to how the guardian is caring for the minor.

The most readily available legal method open to the natural parents, if they object to their child being given gender-affirming care, is to petition the court to terminate the guardianship. This option is always available to the natural parents; it is the means by which a parent can show that their circumstances have changed such that they are now fit, willing, and able to resume their parental responsibilities and obligations.[81] If the parents can indeed show that they now have capability to parent, the guardianship would be terminated.

Of course, the court does not have to grant a petition to terminate a minor guardianship, if the parents are unable to show that they have had a change in circumstances that would warrant it. However, the continued litigation itself can be a heavy financial burden on a guardian, and could be a traumatic experience for the minor.

It is also possible for a natural parent to file objections to any petition a guardian makes to request authority from the court to provide gender-affirming care. For example, if the guardian petitioned the court for authority to change the minor's name or their birth certificate, or any other action designed to affirm the minor's gender identity, the parents could object to that petition. In states that are contemplating, or have already passed, gender-affirming care bans for minors, the natural parents would have the option of pursuing legal action under those bans.[82]

The most obvious threat to a transgender minor under guardianship is that the right to consent or object to gender-af-

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81 *E.R.V.A.*, 637 S.W.3d 100.

82 *See supra* note 30.

firming treatment may be considered a residual parental right. However, even absent such a finding, the nature of minor guardianships allow for parents to potentially block their child's guardian from obtaining gender-affirming care, or at least make it very difficult to do so.

VI. Conclusion

Minor guardianship is an excellent way to ensure that a minor is in a safe and stable placement while their parents are unable to fulfill their parental obligations. At the same time, guardianship does not preclude the possibility of the parents reentering their child's life when they are fit, the way that a termination of parental rights does. However, the nature of minor guardianship – the "halfway" sort of relationship between the rights conferred on a guardian and the residual rights retained by the natural parents – means that there is a potentially dangerous gap into which transgender minors under guardianship may fall.

These minors are away from their parents, which may be very necessary depending on their parents' views on transitioning. Yet they are not away from their parents' ability to prevent gender-affirming care from being obtained. There is so much space in the legal landscape of residual parental rights that a court has wide discretion to determine that whether gender-affirming care is obtained should be left to the parents, not the guardian.

Because denying a transgender minor the ability to present as their gender identity, or rejecting them for their gender identity, is so dangerous, practitioners must be aware of this potential limitation in guardianships. If there is a situation where a transgender minor is placed away from their parents with a resource that is open to transition, practitioners should be aware that guardianship may not be the best option to pursue, because of the potential limitations on a guardian's ability to make major decisions for their ward.

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