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Children Self-Advocating in Legal Proceedings: How Children Can Advance their Interests and Rights in Divorce and Gender Transition

Reflection Essay

This semester, I had the privilege of writing a term paper as part of the To Look and To Play Project run by Professor Van Praagh and Professor Ménard. My paper is entitled “Children Self-Advocating in Legal Proceedings: How Children Can Advance their Interests and Rights in Divorce and Gender Transition,” supervised by Professor Beaudry at the McGill University Faculty of Law. This paper constituted the last credits of my BCL/JD degree at McGill and ending my time at McGill in this way was a delightful experience.

My paper explored how and when children can self-advocate in pursuit of their rights and interests in legal proceedings. To answer this question, I surveyed key tensions between children and the law and found there were a few reoccurring themes: issues of balancing autonomy with protection of children and the guiding principle of the best interests of the child. I explored my main question in two comparable but different legal contexts: children self-advocating for their needs and preferences when their parents are divorcing and trans children self-advocating for the recognition and respect of their gender identity. I looked at these legal contexts under the lenses of autonomy, protection, and best interests of the child.

In both contexts, I found that the literature suggests that children benefit the most from guiding their self-advocacy efforts on their own, including being able to actively participate in legal proceedings which implicate them if they choose so while also being able to choose to not participate, if they prefer. For divorce, children typically want to be included in custody decisions in ways where they feel their voices are heard and considered. For trans children, much of the self-advocacy revolves around disagreements in whether the child should be permitted to transition at all. These disagreements can do real harm to children given that we know that the most important factor in a trans child’s wellbeing is family support. Nevertheless, I saw that the trends for trans children self-advocating are changing. Where case law from earlier in the 2000s saw judges altering custody agreements to place trans children in the custody of a parent who did not approve of their child’s transition – to ‘protect’ the child from the harm of transitioning – a recent case in British Columbia saw a child successfully petition the court for his father to recognize his gender identity, to allow him to continue hormone replacement therapy, and to continue his social and medical transitions.

I was interested in the topic of children self-advocating in legal spaces for three main reasons. First, I wrote a paper in disability law last year on the subject of parents of trans youth and youth with disabilities advocating for their children in schools. In writing that paper, I questioned whether parents should be the legal and social advocates for their children. In particular, I wondered what tensions might arise when a parent does not recognize their child’s gender identity or disagrees with their transition plan and goals. From there, I began to wonder about how children

would interact with the law and in what ways they would be able to self-advocate. Could children receive dedicated legal counsel in civil proceedings? How can children fight for their rights when they, by virtue of their age, have different legal status from adults? While researching for this paper, I appreciated seeing the different ways children have been able to have their voices heard during legal proceedings in different contexts.

Second, I was interested in this topic because of my desire to work in family law in my future career. While I have worked in family law in a few capacities, I often wonder about the children implicated by the decisions being made. In practice in family law we rarely interact directly with children, but that does not negate the importance that family court decisions have on them. I think that learning about the kinds of barriers children face in having their voices and interests fully heard will support my long-term career plans, helping me become a more sensitive lawyer in my future work with children and families.

Finally, I was interested in this topic because I have, during my time at McGill, developed a real interest in the wellbeing of trans youth and families. Along with the research I completed in 3L for my disability law paper, I worked as a Research Assistant for a professor in the Centre for Research on Children and Families within the McGill School of Social Work. Together, we explored access needs for parents of trans youth and how the relationships between parents and their trans children impact family wellbeing. I also co-organized a therapy group for parents of trans youth and helped run the McGill Trans Youth and Family Journal Watch. Writing my term paper, thus, helped deepen my knowledge of trans youth and families, allowing me to compliment my more social work-oriented knowledge with a view into specific legal issues and recent case law.

Overall, I enjoyed the process of researching for and writing my term paper. I will take away from this experience a deeper understanding of tensions in the area of children's legal rights and how children themselves have been able to self-advocate in a variety of situations. I also feel both frustrated and hopeful for how trans children in particular have and continue to self-advocate both within legal regimes and extralegally. I hope that the knowledge I have gained from this experience will be something I can take with me in my practice to help me become a better, more sensitive family lawyer.

Annotated Bibliography

Jurisprudence

AB v CD and EF, 2019 BCSC 254

AB v CD, 2020 BCCA 11

- These two cases follow a series of legal actions between a trans child and his father. The cases are important because they are the first judgments where a court ordered the child's father to use the child's name and pronouns that align with his gender identity. The court also found that the child continuing HRT was in his best interests.

B (SG) v L (SJ), 2010 ONCA 578

- This case is the only example to date where a child obtained leave to intervene on a custody and access appeal brought by his parent.

Juliana et al v United States of America et al, 2020 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 64.

- This case is an American example where the plaintiffs were a group of 21 children. While their remedies sought were ultimately not granted, the children were successful in having standing as plaintiffs despite their minor ages.

Smith v Smith, 2007 No 01-DR-86

Williams v Frymire, 2012 377 SW 3d 579

- These cases are examples of custody disputes where, following a child coming out as trans, the non-custodial parent petitioned court to obtain custody so as to bar the child from transitioning. In both cases the court agreed with the father who petitioned the court and transferred custody.

Legislation

Alberta Rules of Court, Alta Reg 124/2012, Rule 2.11.

Ontario's Rules of Civil Procedure, RRO 1990, Reg 194, Rule 7.01(1)

- These rules are examples where a child must act through a litigation guardian in a legal proceeding in Canada.

Arts 33 and 34 CCQ

Children's Law Reform Act, RSO 1990, c. C. 12

- Examples where the “best interests of the child” principle is enshrined in legislation.

Convention on the Rights of the Child, 20 November 1989, UNTS 1577 (entered into force 12 December 1991) at art 1 [CRC].

UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para 1), 29 May 2013, CRC /C/GC/14

- The CRC provided the basis for many arguments around children’s “right to be heard.”

Secondary Sources

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4. On trans children self-advocating

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