

Gender identity — how the courts approach children's right to choose

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Re J is a very difficult case concerning a 7 year old boy ('J'). His parents had separated acrimoniously and his mother was refusing to allow J to spend time with his father. This was largely because (she said) the father was uncomfortable with the fact that J identified more strongly with being a girl than a boy.

Temporary transfer of residence

The issue came before a judge in February of this year after three years of litigation. The case is a sad reminder of how long it can take to resolve matters where parents are not engaging with the court process, and where the professionals involved are unthinkingly going through the motions.

The judge's conclusions make for disturbing reading. He found that the local authority and other professionals had failed J, and had been too quick to accept the mother's understanding of J's identity. They had failed to conduct an independent and thorough investigation of the situation, and had failed to adequately consider concerns raised by schools, health professionals, the police, anonymous referrers and, of course, the father that the mother's beliefs may be distorted and exaggerated. The judge found that the mother had become determined, when J was only 5 years of age, that he should live entirely as a girl and that J was not being offered a choice or even the opportunity to express any ambivalence or confusion about this.

J was removed from his mother's care to live with his father on a temporary basis. Whilst with his father, J developed more typically male interests (such as Power Rangers and football) and began to clearly identify as a boy. At one point, he was mistaken for a girl at school by a visiting teacher and asserted in front of everyone: 'no, I am a boy'.

Final hearing

The matter came before the same judge for a final hearing in July, and the judgment from this hearing has recently been published.

The content of the judgment is important for what it says about children's right to be heard, even at a young age, whilst not boxing them into a corner. The judge said that his objective was: 'to place J back at the center of the litigation and not permit him to be marginalized as had happened'. He said: the mother 'has caused significant emotional harm to J in her active determination that he should be a girl...She has overborne his will and deprived him of his fundamental right to exercise his autonomy in its most basic way'. He found that the father, meanwhile, had not pushed J to develop male interests. By contrast, the father had always been happy for J to be whatever he wanted to be and he had, in a quiet and self-effacing manner, stood by his son through extremely trying circumstances. These included a long period during which he had been excised from J's life. The judge decided that J should remain living with his father and should have monthly supervised contact with his mother.

Do not 'tiptoe' around gender identity issues

There are unfortunately many lessons to be learned from this case. The obvious one is the damage that protracted disputes over children can cause to everyone involved. But the case is also an important indication of how the courts will deal with gender identity questions in relation to children. The judge noted that: 'Some children, as young as 4, 5, 6 years of age may identify strongly with their opposite gender...It is important that such children are listened to and their views afforded respect but, to my mind, they are ill-served by premature labeling. What they require...is the opportunity to develop their identity in whichever way it evolves'. In an era that quite rightly defines 'gender reassignment' as a protected characteristic under equality legislation, nervousness around the issue should not prevent professionals from doing their job of focusing first and foremost on the child's well being, especially in relation to children of a young and impressionable age.

Part two of this blog will deal with how the judge balanced the family's privacy with the public interest in deciding to publish the judgment.

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