WHEN GIRLS PLAY WITH G.I. JOES AND BOYS PLAY WITH BARBIES: THE PATH TO GENDER REASSIGNMENT IN MINORS

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Abstract

Currently, the process of gender reassignment in minors requires parental consent and the approval of a mental-health counselor. The actual treatment can begin with puberty blockers—which stall the beginnings of puberty—followed by hormone injections to transform the minor into the requested gender. The hormone injections are thought to have irreversible features, but the effects of these injections are largely untested. The final step, surgical reassignment, is seemingly limited to those over the age of eighteen. The process of reassignment in minors has seen a substantial increase nationwide over the past decade, although the exact number of those seeking reassignment is hard to define. There are a number of concerns regarding gender reassignment in minors, concerns which come from both sides of the political aisle. This Note will review some of these concerns, namely: the lack of research on the effects of reassignment, the conflicting results of treatment, the possible influence of authority figures, and the proven mental instability and gender fluidity of minors.

In response to the increase of gender reassignment in minors and the many concerns associated with reassignment, this Note proposes legislation that would give courts greater oversight in the reassignment approval process. This legislation requires a minor seeking reassignment to petition the court, who would subsequently serve notice and summons to an appointed agency of the governing state. This agency would presumptively oppose the petition in efforts to create an adversarial landscape. The court would ultimately have authority to approve or deny the requested reassignment, with the aid of a Guardian ad Litem appointed to represent the best interests of the child. There may be constitutional roadblocks to the enforcement of such a statute, however, this Note acknowledges those roadblocks and recognizes the ways in which this legislation could overcome them.

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INTRODUCTION

Gender reassignment within the transgender community has, of late, become a widespread topic of discussion. This conversation has found its way from Hollywood to Afghanistan,[1] starting a widening trend in one startling group. Doctors have reported seeing a substantial increase in the

1. *See, e.g.*, Tom Vanden Brook, *Military Approves Hormone Therapy for Chelsea Manning*, USA TODAY (Feb. 13, 2015, 5:18 AM), http://www.usatoday.com/story/news/nation/2015/02/12/chelsea-manning-hormone-therapy/23311813/ (discussing the gender reassignment of convicted national-security secrets leaker Chelsea (Bradley) Manning); Maria Puente, *Caitlyn Jenner's Speaking Tour Will Focus on Transgender Acceptance*, USA TODAY (Oct. 21, 2015, 6:01 PM), http://www.usatoday.com/story/life/people/2015/10/21/caitlyn-jenners-speaking-tour-focus-transgender-acceptance/74326622/ (discussing Californian Caitlyn Jenner's speaking tour as the face of the transgender community).

number of minors seeking gender reassignment and suffering from conditions related to transgenderism—also known as gender dysphoria or gender-identity disorder.[2] The current steps to obtaining approval for reassignment merely consist of the counseling and recommendation of a mental-health professional.[3] After approval, treatments used may include: puberty blockers,[4] hormone injections,[5] and surgery.[6] This Note seeks to address the issues that surround this new area of treatment, recognizing the negatives and positives of reassignment. Further, this Note will introduce a piece of legislation necessary to protect the rights and best interests of minors.

Part I will discuss the background of transsexuality and gender reassignment. It will discuss the growing trend of minors seeking reassignment and the current path minors take to executing the process. Part II will focus on the concerns surrounding the allowance of gender reassignment in minors. These concerns find their base in the fields of health,[7] law,[8] and public interest.[9] This Part will also counter those concerns with arguments from proponents of reassignment. These arguments suggest that disallowance would be more harmful to minors than the alternative.[10] Finally, Part III will propose state legislation that focuses almost solely on protecting the best interests of minors. This legislation will be Florida-specific and parallel other areas of the law in

2. Colleen O'Connor, *Pediatricians See Growing Number of Cross-Gender Kids Like Coy Mathis*, DENVER POST (Mar. 2, 2013, 12:57 PM), http://www.denverpost.com/2013/03/02/pediatricians-see-growing-number-of-cross-gender-kids-like-coy-mathis/.

3. Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3132, 3132 (2009).

4. Priyanka Boghani, *When Transgender Kids Transition, Medical Risks Are Both Known and Unknown*, FRONTLINE (June 30, 2015), http://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/.

5. *See id.*

6. Lenny Bernstein, *Here's How Sex Reassignment Surgery Works*, WASH. POST (Feb. 9, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/02/09/heres-how-sex-reassignment-surgery-works/.

7. *See* Paul McHugh, *Transgender Surgery Isn't the Solution*, WALL ST. J. (June 12, 2014, 7:19 PM), http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.

8. *See* Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277, 280 (2003).

9. *See* Anermona Hartocollis, *How Young Is Too Young to Seek Gender Reassignment?*, HERALD-TRIB. (July 7, 2015), http://health.heraldtribune.com/2015/07/07/how-young-is-too-young-to-seek-gender-reassignment/.

10. Norman Spack, *Transgenderism*, LAHEY CLINIC MED. ETHICS, Fall 2005, at 1, 2.

which the best interests of the minor are a question for and duty of the court.[11]

I. THE ARRIVAL AND IMPLEMENTATION OF GENDER REASSIGNMENT

For the past sixty years, two terms have been a topic of discussion in social circles, health fields, and courtrooms[12]: *transsexual*[13] and *sex reassignment*.[14] Widespread recognition of figures like Caitlyn Jenner,[15] Jazz Jennings,[16] and Chelsea Manning[17] has only bolstered the conversation. The concept of changing one's gender has found widespread support from the progressive left, with political figures and health professionals citing the need for improved mental health as support for their position.[18] However, other political figures and health professionals instead see reassignment as merely a band-aid for a deeper mental issue.[19] While medical science has been unable to find the exact cause of transsexuality, it is believed to be a combination of neuro-biological, genetic, and neonatal environmental factors.[20]

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11. *See, e.g.*, FLA. STAT. § 743.08 (2016) (proscribing rules for approving contracts where one party is a minor); *see also* Stephen M. Carlisle & Richard C. Wolfe, *Florida's New Child Performer and Athlete Protection Act*, FLA. B.J., Nov. 1995, at 93, 93–94 (1995) (recognizing a statutory change as one which sought to protect minors from entering into a contract against his or her best interest).

12. Megan Townsend, *Timeline: A Look Back at the History of Transgender Visibility*, GLAAD (Nov. 12, 2012), http://www.glaad.org/blog/timeline-look-back-history-transgender-visibility (displaying an infographic entitled "Transgender Visibility Timeline").

13. "A person who was born with the physical characteristics of one sex but who has undergone, or is preparing to undergo, sex-change surgery." *Transsexual*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. "Medical treatment intended to effect a sex change; surgery and hormonal treatments designed to alter a person's gender." *Sex Reassignment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

15. *See* Puente, *supra* note 1.

16. *See* Steve Rothaus, *Growing up Transgender: Jazz Jennings*, MIAMI HERALD (June 25, 2015, 4:07 PM), http://www.miamiherald.com/news/local/community/gay-south-florida/palette-magazine/article25505500.html.

17. *See* Brook, *supra* note 1.

18. *See, e.g.*, Spack, *supra* note 10, at 2; Josh Lederman, *Joe Biden Backs Transgender Military Service as U.S. Weighs Policy*, ASSOCIATED PRESS: THE BIG STORY (Oct. 4, 2015, 9:08 AM), http://bigstory.ap.org/article/a2ff9e2564f84317b642cd31fc601751/biden-backs-transgender-military-service-us-weighs-policy; Jesse McKinley, *Cuomo Planning Discrimination Protections for Transgender New Yorkers*, N.Y. TIMES (Oct. 22, 2015), http://www.nytimes.com/2015/10/23/nyregion/governor-andrew-cuomo-new-york-transgender-rights.html?_r=0.

19. *See, e.g.*, Den Trumbull et al., *Puberty Is Not a Disorder*, PEDIATRICS (May 2015), http://pediatrics.aappublications.org/content/135/5/e1366.1.full; McHugh, *supra* note 7.

20. Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745, 754 (2000); *see also* Hembree et al., *supra* note 3, at 3135.

The increase of those identifying as transgender—and subsequently seeking reassignment—has sparked a fresh debate. The debate surrounding these two terms centers on civil rights,[21] ethics,[22] and religion.[23] A third term has now entered this marketplace of ideas, a term at the base of what will surely be the beginning of many legal battles and much social discussion in the days ahead: *minors*.[24]

A. *Background*

The first use of the word "transsexual" did not appear until 1949, followed by the use of "transgender" in 1971.[25] Of course, the first appearance of this phenomenon has been recognized as arriving much earlier than the 1900s.[26] Dr. Felix Abraham performed the first sex-change operations at the Berlin Institute for Sexual Research, which was founded by German sexologist Magnus Hirschfield.[27] Dr. Abraham performed a mastectomy in 1926, a penectomy in 1930, and a vaginoplasty in 1931.[28] In the 1950s, after Christine Jorgenson became America's sweetheart,[29] the number of people seeking gender reassignment began to rise.[30]

Dr. Harry Benjamin, an endocrinologist who was trained at Hirschfield's clinic, set up his own clinical practices in New York and San Francisco, training health professionals in the field of transsexuality.[31] In 1966, Dr. Benjamin published the first major textbook on the subject, *The Transsexual Phenomenon*.[32] In 2011, a detailed report

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21. Lederman, *supra* note 18.

22. Maggi Colene Hume, *Sex, Lies, and Surgery: The Ethics of Gender Reassignment Surgery*, 2 RES COGITANS 37, 38–40 (2011).

23. Emma Green, *The Real Christian Debate on Transgender Identity*, ATLANTIC (June 4, 2015), http://www.theatlantic.com/politics/archive/2015/06/the-christian-debate-on-transgender-identity/394796/.

24. "Someone who has not reached full legal age; a child or juvenile." *Minor*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* FLA. STAT. § 1.01(13) (2016) (defining "minor" as "any person who has not attained the age of [eighteen] years").

25. Stephen Whittle, *A Brief History of Transgender Issues*, GUARDIAN (June 2, 2010, 6:49 AM), http://www.theguardian.com/lifeandstyle/2010/jun/02/brief-history-transgender-issues.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Chloe Hadjimatheou, *Christine Jorgenson: 60 Years of Sex Change Ops*, BBC MAG. (Nov. 30, 2012), http://www.bbc.com/news/magazine-20544095 (detailing the story of a former GI who made U.S. headlines after undergoing a sex-change treatment in Denmark).

30. Whittle, *supra* note 25.

31. *Id.*

32. *Id.*; HARRY BENJAMIN, THE TRANSSEXUAL PHENOMENON 4 (1996) ("There is a challenge as well as a handicap in writing a book on a subject that is not yet covered in the medical literature. Transsexualism is such a subject.").

from the Williams Institute of the UCLA School of Law revealed that roughly 700,000 individuals identified as transgender in the United States.[33] This number is thought to be higher, but the exact number of those who identify as transgender has been hard to define.[34] Researchers believe a lack of government data and the reluctance of individuals to identify as members of the transgender community lead to this disparity.[35] The recent exposure of pop-culture figures in the transgender community,[36] however, has led to an increased awareness of transgender issues across the United States.

B. *Growth of Transsexuality in Minors*

The number of minors who identify as transsexual and subsequently seek gender reassignment has also seen a substantial increase.[37] Dr. Daniel Reirden, a physician at the Children's Hospital in Colorado, has said his referrals have increased "200-fold" since speaking at a conference on the topic of children and gender reassignment.[38] Dr. Norman Spack, director of the Children's Hospital in Boston, reports seeing a fourfold increase in patients, treating nineteen patients per year since opening his Gender Management Service clinic in 2007.[39] Dr. Spack receives calls on a daily basis from health professionals across the country specifically asking about reassignment.[40] He estimates that 1 in 10,000 children suffer from gender-identity issues.[41] While the exact number of children with gender-identity issues cannot be identified, the number of children seeking reassignment has clearly increased.[42]

Responding to this increase, in 2009, the Endocrine Society released evidence-based medical guidelines for treating transgender people, including children.[43] The Endocrine Society recommends that the

33. GARY J. GATES, THE WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1, 6 (2011).

34. Claire Cain Miller, *The Search for the Best Estimate of the Transgender Population*, N.Y. TIMES (June 8, 2015), http://www.nytimes.com/2015/06/09/upshot/the-search-for-the-best-estimate-of-the-transgender-population.html.

35. *Id.*

36. *See supra* notes 15–17 and accompanying text.

37. O'Connor, *supra* note 2.

38. *Id.*

39. Associated Press, *Sex-Change Treatment for Kids on the Rise*, CBS NEWS (Feb. 20, 2012, 8:12 AM), http://www.cbsnews.com/news/sex-change-treatment-for-kids-on-the-rise/.

40. Petula Dvorak, *Drug Treatments for Transgender Kids Pose Difficult Choices for Parents, Doctors*, WASH. POST (May 19, 2012), http://www.washingtonpost.com/drug-treatments-for-transgender-kids-pose-difficult-choices-for-parents-doctors/2012/05/19/gIQAxgakbU_story.html.

41. Associated Press, *supra* note 39.

42. Dvorak, *supra* note 40.

43. Hembree et al., *supra* note 3.

diagnosis of gender-identity disorder be made by a mental-health professional, who—for minors—also has training in child and adolescent developmental psychopathy.[44] The Society advises that physicians ensure all applicants understand the reversible and irreversible effects of hormone suppression and hormone treatment and that all applicants be informed and counseled regarding options for fertility.[45] Further, the Society suggests that a child who fulfills the eligibility and readiness criteria for gender reassignment initially undergo treatment to suppress puberty.[46] Acknowledging the high rate of remission after the onset of puberty, however, the Society recommends waiting to start puberty suppressions until physical signs of puberty are exhibited.[47] Finally, the Society proposes beginning hormonal development of the desired sex at the age of sixteen, recommending surgery only when: 1) there is a satisfactory social role change, 2) the individual is satisfied with the hormonal effects, and 3) the individual desires definitive surgical changes.[48] The Society does suggest that the surgery itself be deferred until the age of eighteen,[49] the age of consent in the majority of states.[50]

In 2010, following the lead of the Endocrine Society, the World Professional Association for Transgender Health released its Standards of Care that—for the first time—included standards for the treatment of children.[51] These standards outline the competence that mental-health professionals working with gender dysphoric children should have and the roles these professionals should play.[52] The Association listed the minimum credentials for competence: following the requirements for working with adults,[53] being trained in childhood and adolescent developmental psychopathology, and maintaining competence in diagnosing and treating the ordinary problems of children and adolescents.[54] The outlined roles are more extensive, primarily focusing

44. *Id.* at 3136.
45. *Id.* at 3139.
46. *Id.* at 3140.
47. *Id.*
48. *Id.* at 3142–43.
49. *Id.* at 3143.
50. *See* GLOB. JUSTICE INITIATIVE, LEGAL AGE OF CONSENT FOR MARRIAGE AND SEX FOR THE 50 UNITED STATES (2011), https://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf. *But see* Dan Springer, *Oregon Allowing 15-Year-Olds to Get State-Subsidized Sex-Change Operations*, FOX NEWS (July 9, 2015), http://www.foxnews.com/politics/2015/07/09/oregon-allowing-15-year-olds-to-get-state-subsidized-sex-change-operations/.
51. *See* Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, 13 INT'L J. TRANSGENDERISM 165, 172 (2011).
52. *Id.* at 173–74.
53. For a review of these requirements, see *id.* at 179.
54. *Id.* at 173.

on the areas of assessment and support.[55] Regarding assessment, the mental-health professional should directly assess gender dysphoria in the child, assess and treat any existing mental-health concerns, and document the assessment of dysphoria for subsequent referral to begin physical interventions.[56] The mental-health professional should support the child by: 1) providing family counseling and supportive psychotherapy, 2) educating and advocating on behalf of the gender dysphoric child and his or her family, and 3) providing the child and his or her family with information and a referral for peer support.[57] The Association also lists the guidelines that mental-health professionals should follow when identifying and assessing the extent of gender dysphoria in minors.[58]

C. *Current Approval for Treatment*

Currently, a child seeking reassignment must see a mental-health professional to be approved and referred for treatment.[59] This approval begins with an evaluation of the child by the mental-health professional to assess the extent of gender dysphoria.[60] The mental-health professional is instructed not to "dismiss or express negative attitudes towards non-conforming gender identities or indications of gender dysphoria."[61] They should, however, "acknowledge the presenting concerns" of the child and his or her family, "offer a thorough assessment for gender dysphoria and any coexisting mental health concerns," and educate the child and his or her family about "therapeutic options."[62] The actual assessment will look at the "nature and characteristics" of the child's gender identity.[63] The assessment should cover the areas of "emotional functioning, peer and other social relationships, and intellectual functioning/school achievement."[64] Further, the assessment should evaluate "the strengths and weaknesses of family functioning."[65]

The American Psychiatric Association identified the criteria used for diagnosing children with gender dysphoria in its DSM-5 fact sheet.[66] These criteria include a "marked difference between the individual's

55. *Id.* at 174.
56. *Id.*
57. *Id.*
58. *Id.* at 174–75.
59. Hembree et al., *supra* note 3, at 3132.
60. *Id.*
61. Coleman et al., *supra* note 51, at 174.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA FACT SHEET, DSM-5, at 1 (2013), https://psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf.

expressed/experienced gender and the gender others would assign him or her, [continuing] for at least six months" and a "[present and verbalized] desire to be of the other gender."[67] The guidelines from the World Professional Association for Transgender Health also encourage the mental-health professional to inform the child and his or her family about the possibilities and limitations of different treatments to meet the standard of informed consent.[68]

Further, before physical intervention, the mental-health professional should review any psychological, family, and social issues.[69] The duration and scope of this review will depend on the "complexity of the situation."[70] In addition, there are listed criteria that must be met before beginning stages of intervention.[71] The child should present a "long-lasting and intense pattern of gender non-conformity" which has "emerged or worsened" after the beginnings of puberty.[72] Any psychological, medical, or social problems that may interfere with treatment should be addressed to ensure that the child is stable enough to start treatment.[73] Finally, the child—or parents/guardians if the child is not at the age of medical consent—must give informed consent.[74] On the recommendation and approval of the mental-health professional,[75] as well as with the consent of the parent, the child can begin the steps of treatment.[76]

D. *Steps of Treatment for Minors*

Puberty blockers are the first step of treatment for minors requesting reassignment.[77] In females, these blockers pause the formation of breast tissue and facial changes.[78] In males, these blockers pause vocal chord changes and other biological changes.[79] These blockers work by

67. *Id.*

68. Coleman et al., *supra* note 51, at 166, 175 (recognizing that this information may change the child's desire for "certain treatment" if the desire is based on "unrealistic expectations").

69. *Id.* at 176.

70. *Id.*

71. *Id.* at 177.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 181. Approval for treatment is given in the form of a referral letter that should include: the child's identifying characteristics, results of the assessment and diagnosis, duration of the referring professional's relationship with the child, a finding that the criteria for physical intervention have been met, a statement that informed consent has been met, and a statement that the referring professional is available for "coordination of care." *Id.* at 181–82.

76. Hembree et al., *supra* note 3, at 3138–40.

77. *Id.* at 3139–40.

78. Boghani, *supra* note 4.

79. *Id.*

suppressing the release of LH and FSH from the pituitary gland.[80] They are typically administered in two ways, either by injectable medication or implant.[81] The effects from these blockers can be reversed if the treatment is halted.[82]

Once the minor has passed puberty, generally at the age of sixteen, a regimen of hormone injections are recommended.[83] For treatment of female to male (FTM), these injections include differing forms of testosterone.[84] For treatment of male to female (MTF), these injections include differing forms of estrogen.[85] These injections render the child sterile and present changes in the child that are thought to be irreversible.[86] Risks for FTM patients include impaired liver function, polycystic ovaries, and ovarian cancer.[87] For MTF patients, risks include impaired liver function and thromboembolism.[88] The final measure of reassignment is the surgical alteration of gender-specific organs. However, this measure is almost completely limited to those over the age of eighteen.[89]

The life-altering treatment of gender reassignment presents a potential hazard to the well-being and mental health of minors. The irreversible effects of hormone treatment raise serious questions as to whether there are enough protections in place to ensure that the minor is capable of making the life-altering decision of reassignment. Thus, an essential part of the discussion regarding reassignment in minors must address the apprehension that surrounds the treatment, as well as the effect treatment—or lack thereof—may have on minors who seek reassignment.

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80. Karin Selva, *Puberty Blockers and Puberty Inhibitors*, TRANSACTIVE GENDER CTR., https://www.transactiveonline.org/resources/youth/puberty-blockers.php (last visited Aug. 27, 2016).

81. *Id.* (listing Leuprolide or Depot Lupron as choices for injectable medications and Suprellin or Histrelin as implants).

82. Dvorak, *supra* note 40.

83. Hembree et al., *supra* note 3, at 3142.

84. Ananya Mandal, *Treatment for Gender Dysphoria*, NEWS MED., http://www.news-medical.net/health/Treatment-for-Gender-Dysphoria.aspx (last updated June 25, 2012).

85. *Id.*

86. Dvorak, *supra* note 40.

87. Steven Strickland, Law Reform Committee, Family Court of Australia, *To Treat or Not to Treat: Legal Responses to Transgender Young People* (2014) 4–5 (Austl.).

88. *Id.*

89. Hartocollis, *supra* note 9 (explaining that while no state or federal law bars the surgery, most insurance providers do not provide for reassignment surgery until the age of consent).

II. CONCERNS SURROUNDING GENDER REASSIGNMENT IN MINORS

There are many concerns surrounding the current availability and use of gender reassignment in minors. Results of the reassignment process[90] and a lack of long-term research[91] are two such concerns. A number of studies have followed the mental health and progression of those individuals who have completed gender reassignment.[92] The results from these studies have raised the question of whether reassignment is truly the answer for individuals identifying as transgender.[93] Further, as this is still a relatively new and unexplored area of healthcare, there is an overwhelming lack of research on the long-term effects of gender reassignment.[94]

Some health professionals have also expressed the worry that the interests of the child are being overcome by the interests of authority figures.[95] Whether parental figures or mental-health authorities, these figures can easily influence the mind of the minor, resulting in a permanent but perhaps unnecessary change. Finally, the established mental instability and gender fluidity of minors raises concerns as to whether they have the capacity to understand and make such a lasting decision.[96]

A. *Concerns Surrounding Inadequate Results*

Johns Hopkins University was one of the first medical centers to attempt gender reassignment surgery in the United States.[97] In the 1970s, following its foray into the surgeries, the University implemented a study to track the post-surgical, mental-health outcomes of its patients.[98] This study compared the mental health of those identifying as transgender who did have the surgery with those who did not.[99] While most patients were

90. *See* McHugh, *supra* note 7.

91. *See* Boghani, *supra* note 4 (discussing the need for specific studies of neurocognitive effects of puberty blockers).

92. *See* Cecilia Dhejne et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE, Feb. 2011, at 1, 7; McHugh, *supra* note 7.

93. *See* McHugh, *supra* note 7 (discussing the results of long-term studies, which included increased mental difficulties, suicide mortality, and other fundamental problems); *see also* Dhejne et al., *supra* note 92, at 7 (finding higher rates of overall mortality, cardiovascular disease, and psychiatric hospitalizations, among other substantial adverse effects).

94. Boghani, *supra* note 4.

95. Associated Press, *supra* note 39 (explaining circumstances in which a parent may be more comfortable with a sex change than having a homosexual child).

96. *See* McHugh, *supra* note 7.

97. *Id.*

98. *Id.*

99. *Id.*

"satisfied" with the results, their "subsequent psycho-social adjustments were no better than those who didn't have the surgery."[100] Johns Hopkins discontinued gender reassignment surgeries, reasoning that "a 'satisfied' but still troubled patient seemed an inadequate reason for surgically amputating normal organs."[101]

In 2011, a study released from the Karolinksa Institutet in Sweden also produced concerning findings.[102] The study tracked 324 people over a thirty-year period who had gender reassignment surgery.[103] The alarming results revealed that those undergoing sex reassignment had an increased rate of mortality, an increased risk of suicide, and an increased rate of "psychiatric hospitalisations."[104] In concluding, the study found that although sex reassignment may answer the issue of gender dysphoria, the surgery alone may not suffice as treatment for transsexualism.[105]

However, recent research has shown that hormone treatments for minors are not always negative, and in some cases can lead to a positive outcome.[106] At the Endocrine Society's 95th annual meeting in San Francisco, results were presented that showed hormone treatments in minors do not cause lasting harm to their bones.[107] The study's lead author stated that hormonal interventions were "effective and sufficiently safe to alleviate the stress of gender dysphoria."[108] Dr. Spack and other health professionals in the reassignment field share this view.[109] They have concluded that withholding treatment can cause more aggressive health issues and more expensive treatment in the future.[110] Children who suffer from gender-identity disorder often engage in self-mutilation and have an increased risk of suicide and depression, results which produce damaging statistics that proponents of reassignment are seeking to limit.[111]

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100. *Id.*

101. *Id.*

102. Dhejne et al., *supra* note 92.

103. *Id.* at 3.

104. *Id.* at 7.

105. *Id.*

106. *See* Press Release, Endocrine Soc'y, Medical Intervention in Transgender Adolescents Appears to Be Safe and Effective (2013), http://www.endocrine.org/news-room/press-release-archives/2013/medical-intervention-in-transgender-adolescents-appears-to-be-safe-and-effective.

107. *Id.*

108. *Id.*

109. *See* Spack, *supra* note 10, at 2 (contending that earlier interventions prevent depression and avoid the physical and psychological show of reversing pubescent manifestations).

110. Simona Giordana, *Lives in a Chiaroscuro: Should We Suspend the Puberty of Children with Gender Identity Disorder?*, 34 J. MED. ETHICS 580, 581, 583 (2008).

111. Associated Press, *supra* note 39.

Then there are children like Coy Mathis, who was born a male but transitioned to a female at an early age.[112] Coy expressed gender-identity issues as early as eighteen months, refusing to leave home dressed as a boy by the age of two.[113] Coy was diagnosed with gender-identity disorder in kindergarten and began making the social transition to female shortly after.[114] Coy's mother reports that since being able to live as a female, Coy has "blossomed."[115] Proponents of reassignment cite to Coy and other real-life examples as proof that reassignment is a necessity.[116]

B. *Concerns Surrounding Lack of Research*

There is also a vast lack of research regarding gender reassignment, and much of the available research is conflicting.[117] Although gender reassignment has been performed since the early 1900s, the research covering such reassignment is underwhelming.[118] This may be due, in part, to the inability to identify the number of transgender individuals, stemming from privacy concerns of those individuals and a lack of national or government-motivated surveys.[119] Few studies have been successfully commissioned and executed, which has led to conflicting feedback. Further, not only is there a lack of research on gender reassignment as a whole, but research on the lasting effects of treatment for minors is almost non-existent.[120]

The use of puberty blockers, as treatment for gender dysphoria, has not been approved by the Federal Food and Drug Administration.[121] Doctors have expressed concern over the length of time that minors are taking the medication, as there is not enough research regarding the effects of "stalling puberty at the age when children normally go through it."[122] Dr. Courtney Finlayson, a pediatric endocrinologist at Lurie

112. O'Connor, *supra* note 2.

113. *Id.*

114. *Id.*

115. *Id.*

116. *See, e.g.*, Kate Snow, *Jacob's Journey: Life as a Transgender 5-Year-Old*, NBC NEWS (Apr. 23, 2015, 1:39 PM), http://www.nbcnews.com/storyline/transgender-kids/jacobs-journey-life-transgender-5-year-old-n345131 (following a family with a young girl who consistently expressed the belief "she" was really a "he"; the parents allowed reassignment at the age of four).

117. Boghani, *supra* note 4; *see also* Coleman et al., *supra* note 51, at 172 (asserting that formal epidemiologic studies in children, adolescents, and adults are lacking).

118. Boghani, *supra* note 4.

119. Mona Chalabi, *Why We Don't Know the Size of the Transgender Population*, FIVETHIRTYEIGHT (July 29, 2014, 4:31 PM), http://fivethirtyeight.com/features/why-we-dont-know-the-size-of-the-transgender-population/.

120. Boghani, *supra* note 4.

121. *Id.*

122. *Id.*

Children's Hospital, has concerns about whether minors on puberty blockers can ever regain all their bone strength and whether they will be at a higher risk for osteoporosis in the future.[123] As estrogen and testosterone, the hormones blocked during this treatment, play a role in children's neurological development and bone growth, doctors are concerned over the proven decrease in bone density during puberty suppression treatment.[124]

Dr. Lisa Simons, a pediatrician at Lurie Children's, points to a lack of research concerning brain development.[125] She asserts that the "bottom line" is a lack of "specific studies that look at the neurocognitive effects of puberty blockers."[126] The second step of treatment, hormone injections, presents other unknown concerns. Taking these cross-sex hormones can reduce fertility, and at this point there is not enough research to test reversibility.[127] A personal and ethical concern is whether viable eggs or sperm will be available after beginning these steps.[128] Dr. Finlayson does point out that this treatment would not be administered if doctors believed it was unsafe, but states that these concerns are a part of the conversation that should be had before treatment.[129]

While some studies have shown a continuing decline of mental health and an increased risk of suicide and mortality rates,[130] other studies—and real life examples—have shown the benefits and need for reassignment.[131] However, there has been no real weighing of this information, such as which information is held in higher esteem or which information has a stronger research skill set. Thus, the battle between proponents and detractors rages on.

C. *Concerns Surrounding Struggle of Interests, Gender Fluidity, and Mental Instability of Minors*

There are also issues regarding the minor's age and the potential influence of authority figures. Jack Drescher, a New York psychiatrist, references the legal issue of adolescent consent.[132] Because children seeking reassignment are not of the age of consent, they rely on their parents or caregivers to make the treatment decisions that will affect their

123. *Id.*
124. *Id. But see supra* notes 105–07 and accompanying text.
125. Boghani, *supra* note 4.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *See, e.g.*, Dhejne et al., *supra* note 92, at 7.
131. *See, e.g.*, O'Connor, *supra* note 2; Snow, *supra* note 116.
132. Dvorak, *supra* note 40.

lives.[133] This raises the question: Whose interests are being best served, parent or child?[134] And that, Dr. Margaret Moon, a member of the American Academy of Pediatrics' Bioethics Committee, points out, is exactly the problem.[135] Dr. Moon believes some of the children may instead be gay, coerced by their parents into undergoing the extreme treatment of gender reassignment rather than addressing the subject of homosexuality.[136]

Dr. Moon's belief is not far off from issues facing homosexuals around the world today.[137] In Iran, for instance, homosexuals are pressured into sex-change operations at an alarming rate, as homosexuality is not accepted by its culture.[138] However, gender reassignment has now been accepted, after Ayatollah Khomeini issued a fatwa allowing such a change.[139] The almost-forced surgery has had profound effects, with some individuals that have gone through with the change feeling "physically damaged."[140]

This concern could also sway in the opposite direction. While there are parents who may coerce their child to engage in reassignment, there are also parents who would never permit their child to engage in reassignment, even when that child may see improvement in his or her mental health and quality of life.[141] Christine Kitzler faced this opposition throughout her life until a judge found her competent to undergo surgical reassignment.[142] Her parents opposed the reassignment and sought an injunction based on incompetency.[143] Christine alleged that her depression and years of drug abuse were tied directly to her need for reassignment, a need that began as a child and has continued, even in the

133. *Id.*

134. *See id.*; *see also* Ann Bittinger, *Legal Hurdles to Leap to Get Medical Treatment for Children*, FLA. B.J., Jan. 2006, at 24, 31–32.

135. Associated Press, *supra* note 39.

136. *Id.*; *see also* Coleman et al., *supra* note 51, at 172 (recognizing that pre-pubertal children who exhibit signs of gender dysphoria are more likely to identify as gay in adulthood than transgender).

137. *See* Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC NEWS (Nov. 5, 2014), http://www.bbc.com/news/magazine-29832690.

138. *Id.*

139. *Id.*

140. *Id.* (describing a woman who had the operation after her doctor told her she was ninety-eight percent female).

141. *See* Michael R. Sisak, *Judge OKs Gender Surgery Opposed by 48-Year-Old's Parents*, ASSOCIATED PRESS: THE BIG STORY (Sept. 3, 2015, 12:42 AM), http://bigstory.ap.org/article/ecbfa49358664333af28407c2069317e/parents-seek-halt-48-year-olds-gender-reassignment.

142. *Id.*

143. *Id.*

face of her parents' opposition.[144] Children may also shift towards gender *conformity* in efforts to please unsupportive parents, but this shift may not reflect "a permanent change in gender dysphoria."[145] Thus, the concern of influence from authority figures lends itself to both sides of the reassignment debate.

Further, research suggests that children suffering from gender dysphoria—"a persistent discomfort with one's gender"—eventually outgrow it.[146] In studies at Vanderbilt University and London's Portman Clinic, children with transgender feelings—but without surgical or medical treatment—were tracked.[147] The studies found that seventy to eighty percent of those children reported losing those feelings, with approximately twenty-five percent having continuing feelings.[148] Young children are found to be very gender-fluid, so that feelings of gender dysphoria disappear in most children before puberty.[149] The Endocrine Society recognized this concern in their guidelines, noting that a high rate of children suffering from gender-identity disorders regress from these feelings after the beginnings of puberty.[150] The World Professional Association for Transgender Health warned about this fluidity as well, noting that changing back to an original gender role can be "highly distressing and even result in postponement of th[e] second social transition on the child's part."[151]

Gender fluidity is not the only issue: the mental instability of minors should not be discounted. The Florida legislature has already addressed this concern by putting laws in place that restrict minors from making life-altering decisions before exhibiting the awareness and knowledge required to do so. Driving motor vehicles,[152] smoking cigarettes,[153] drinking alcohol,[154] getting tattoos,[155] and consenting to medical

144. *Id.* (In the words of Christine, "I can't maintain being a sober man, being happy, because it hasn't happened. It can't happen. I don't have a choice.").

145. Coleman et al., *supra* note 51, at 176.

146. Dvorak, *supra* note 40; *see also* Coleman et al., *supra* note 51, at 172 (finding that "[g]ender dysphoria during childhood does not inevitably continue into adulthood").

147. McHugh, *supra* note 7.

148. *Id.*; *see also* Coleman et al., *supra* note 51, at 172 (detailing results from studies that found feelings of gender dysphoria persisted through childhood for only six to twenty-seven percent of children who exhibited gender issues pre-puberty).

149. O'Connor, *supra* note 2.

150. Hembree et al., *supra* note 3, at 3138.

151. Coleman et al., *supra* note 51, at 176.

152. FLA. STAT. § 322.05 (2016).

153. *Id.* § 877.112.

154. *Id.* § 562.111.

155. *Id.* § 381.00787.

procedures[156]—all of these activities are age-restricted due to the lack of mental capacity necessary to make certain judgment calls. It is a long-accepted belief that minors lack the mental capacity to make the decisions that adults of reasonable judgment often make.[157]

These concerns are just the tip of the gender reassignment iceberg. Due to the lack of long-term research and the conflict in available data, there may be concerns as to the effects of reassignment that have yet to be discovered. Further, the influence of authority figures on those suffering from gender dysphoria is an intangible concept and impossible to calculate. Thus, the question of how many individuals have been influenced for or against reassignment remains unanswered. Finally, the mental instability and gender-fluid nature of minors continue as issues of concern in the realm of gender reassignment and beyond. The implications of a minor making the wrong decision as to his or her gender—emotional damage, mental damage, and reproductive damage—cannot be dismissed as "minor." Because these concerns remain, steps to protect the interests of minors seeking reassignment must be implemented.

III. PROPOSED FLORIDA LEGISLATION

With little research giving no definitive answer as to the cause of gender identity disorder and providing no predictable mental-health outcomes of reassignment, there is a need to ensure that children seeking reassignment are well-protected. There are significant legal, mental, and physical risks associated with reassigning one's gender. Due to these risks, the influence of authority figures, and the gender-fluid state of the child, this Note proposes legislation aimed solely at protecting the best interests of minors. This Note proposes legislation with three features: 1) requiring the minor to submit a petition for reassignment, 2) requiring

156. Bittinger, *supra* note 134, at 24 (discussing how a physician merely touching a child without consent from the parents or legal representative can be considered battery under common law).

157. *See, e.g.*, Simmons v. State, 944 So. 2d 317, 323 (Fla. 2006) (holding that the state has a compelling interest, albeit a tailored one, to shield minors from the influence of constitutionally protected indecent material); State v. J.P., 907 So. 2d 1101, 1111–12 (Fla. 2004) (holding that the rights of minors are treated differently from the rights of adults, based on "the particular vulnerability of children; their inability to make critical decisions in an informed mature manner; and the importance of the parental role in child rearing" (quoting Bellotti v. Baird, 443 U.S. 622, 634 (1979))); Kingsley v. Kingsley, 623 So. 2d 780, 783–84 (Fla. 5th DCA 1993) (holding the necessity of the appointment of a Guardian ad Litem (or alter ego of a Guardian ad Litem) to represent a minor in court). *But see In re* Doe, 113 So. 3d 882, 886–89 (Fla. Dist. Ct. App. 2012) (finding the trial court abused its discretion in holding that a minor lacked maturity to waive parental notification in the context of abortion when the minor was seventeen and her school grades, career plans, overall intelligence, and substantial responsibilities at home led to a determination of greater maturity).

court approval of the requested treatment, and 3) requiring the appointment of a Guardian ad Litem to represent the best interests of the minor.

A. *Proposed Legislation: Petition and Notice*

To give "teeth" to any legislation on this topic, an adversarial landscape should be established on the presumption that gender reassignment is contrary to the minor's best interest. Requiring the minor to file a petition to overcome this presumption, while requiring the appointed government agency to dispute the allegations of that petition, establishes such a landscape. Thus, the first feature of the proposed legislation is a requirement that the minor file a petition seeking reassignment, which would be served upon the appointed agency of the governing state. In Florida, the appropriate state agency is the Florida Department of Children and Families (DCF). DCF is generally the appropriate agency when the underlying issue involves the welfare and rights of children.[158] In cases where a court order results in a commitment to DCF, Florida courts have held that notice must be given in such a way that DCF is allowed to "participate in a meaningful manner."[159] Because the mere act of reassignment could be argued to create a tenable nexus to the safety of the child,[160] DCF would have an interest in participating in the process of litigation and should be served with any such petition in the manner provided by law.

Under this legislation, the minor—through his or her designated legal agent—would thus submit the petition for reassignment to the court. This petition would allege facts showing that gender reassignment is in his or her best interest. The law, however, presumes that reassignment is contrary to the minor's best interest. Thus, when the petition is filed, the clerk would issue a summons to DCF through the accepted process of service. DCF, in upholding the presumption against the petition, would then answer denying the allegations of the petition. The parties would proceed, under the Florida Rules of Civil Procedure and the Florida Rules of Evidence, to trial and judgment by the court. To overcome the presumption of opposition, the minor would then bring forth evidence to support his or her petition. This evidence may include witness statements from friends, family, treating physicians, school officials, health care

158. This agency provides services relating to minors, including: child care, child welfare, and children's legal services. *See Services & Programs*, FLA. DEP'T CHILD. & FAMILIES, http://www.myflfamilies.com/service-programs (last visited Sept. 30, 2016).

159. Dep't of Children & Families v. W.J.R., 915 So. 2d 245, 246 (Fla. Dist. Ct. App. 2005).

160. W.N. v. Dep't of Children & Family Servs., 919 So. 2d 589, 591 (Fla. Dist. Ct. App. 2006) (establishing that a nexus between harmful conduct and the safety of a child is necessary to terminate parental rights).

professionals, and the child;[161] any evidence showing the applicability of treatment to the mental health of the minor; evidence showing that the minor has been fully informed of the risks and outcomes of the treatment; and evidence supporting the contention that the minor understands and accepts those risks.

B. *Proposed Legislation: Court Approval*

The second feature of the proposed legislation would closely follow the first: a requirement of court approval. There are many areas that require court approval, nationwide, when considering acts by or for minors. Florida requires court approval when minors enter contracts,[162] settle claims,[163] or go through the process of adoption.[164] In *Meyers v. United States*,[165] the parents and natural guardians of a minor petitioned the court for approval of a settlement.[166] The court recited Florida's statutory requirement that "settlement of a claim on a minor's behalf becomes effective only when certain procedures are followed."[167] The court went on to identify one of those procedures as the requirement of court approval for any settlement made on behalf of a minor.[168]

A number of other states have this requirement for settlement approval.[169] California requires approval when a minor settles a claim[170] or enters into a contract for attorney's fees or litigation support.[171] Like Florida, Texas requires court approval when minors enter certain contracts.[172] The purpose of these statutes have one striking similarity: protection of the child's interests.[173] These statutes operate under the

161. *See* Hazel Beh & Milton Diamond, *Ethical Concerns Related to Treating Gender Nonconformity in Childhood & Adolescence: Lessons from the Family Court of Australia*, 15 HEALTH MATRIX 239, 240 (2005) (describing the process of Australian courts in evaluating a minor's petition for gender reassignment).

162. FLA. STAT. § 743.08 (2016).

163. *Id.* §§ 744.387, 768.25.

164. *Id.* § 63.052.

165. No. 6:13-cv-1555-Orl-41TBS, 2014 WL 5038585 (M.D. Fla. Sept. 29, 2014).

166. *Id.* at *1.

167. *Id.* at *2.

168. *Id.*; *see also* J.S.J. v. Pena, 109 So. 3d 1281, 1284 (Fla. Dist. Ct. App. 2013) (requiring court approval of a guardian's decision impacting a minor's estate); Herig v. Akerman, Senterfitt & Edison, P.A., 741 So. 2d 591, 594 (Fla. Dist. Ct. App. 1999) (holding that a minor's earnings are included in his or her property if the court approves the employment contract under the Child Performer and Athlete Protection Act); Nixon v. Bryson, 488 So. 2d 607, 608–09 (Fla. Dist. Ct. App. 1986) (enforcing the authority and requirement of the trial judge to protect a minor's interest in a death settlement).

169. *See, e.g.*, PA. R. CIV. P. 2039; DEL. R. CIV. P. 133; S.C. CODE ANN. § 62-5-433 (2016).

170. CAL. PROB. CODE § 2504 (West 2016).

171. CAL. FAM. CODE § 6602 (West 2016).

172. TEX. EST. CODE ANN. § 1356.051 (West 2015).

173. *See* FLA. STAT. § 744.387(1) (2016); Espericueta v. Shewry, 164 Cal. App. 4th 615,

theory that minors lack the mental capacity to enter into contracts or make long-lasting legal decisions.[174]

Some nations have already implemented the requirement of court approval regarding gender reassignment in minors.[175] In Australia, a minor must secure court approval before proceeding with the second step of gender reassignment—hormone injections.[176] The court considers the testimony of the child, interested relatives, experts, treating physicians, school officials, the caseworker, and the guardian.[177] In *In re Alex*,[178] the family court of Australia reviewed the case of a thirteen-year-old anatomical female diagnosed with gender-identity disorder.[179] The child had undergone psychological support and counseling, and the treating physicians recommended the administration of hormones as treatment.[180] The court found that all interested parties agreed that the treatment should proceed, due to the emotional discomfort and social adjustment problems the child was encountering, and approved treatment.[181] Since 2004, when the court saw its first gender reassignment application, the court has handled twenty-five other cases.[182] The majority of those cases had minors ages fifteen to seventeen, but the court has approved applications by minors as young as thirteen.[183]

The Australian court's jurisdiction in this matter came from the enactment of the Family Law Act 1975.[184] Section 67ZC provides the court with jurisdiction "to make orders relating to the welfare of children."[185] This order must "regard the best interests of the child as the paramount consideration."[186] To satisfy the duty of the court in protecting the best interests of the child—following current Florida statutes and mirroring the approval process used in Australia—the Florida legislature should implement the requirement of court approval before treatment for reassignment in minors.

625–27 (2008); Byrd v. Woodruff, 891 S.W.2d 689, 705 (Tex. App. 1994).

174. *See* Jessica Krieg, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LABOR & EMP. L. 429, 430–31 (2004).

175. Beh & Diamond, *supra* note 161, at 245.

176. *Id.* at 245–46.

177. *Id.* at 246–47.

178. *Re Alex* [2004] 180 Fam LR 89 (Austl.).

179. Beh & Diamond, *supra* note 161, at 239.

180. *Id.* at 239–40.

181. *Id.*

182. Shannon Deery, *More Teenagers Having Irreversible Sex Change Surgery with Help of Courts*, HERALD SUN (July 2, 2015, 9:33 AM), http://www.heraldsun.com.au/news/victoria/more-teenagers-having-irreversible-sex-change-surgery-with-help-of-courts/story-fni0fit3-1227426081721.

183. *Id.*

184. *Family Law Act 1975* (Cth) (Austl.); Strickland, *supra* note 87, at 4.

185. *Family Law Act 1975* (Cth) s 67ZC(1) (Austl.).

186. *Id.* s 67ZC(2).

C. *Proposed Legislation: Guardian ad Litem*

The proposed adversarial process requires the appointment of a non-interested third party. This third party should have no bias for or against the treatment, instead focusing solely on the best interests of the minor. A Guardian ad Litem is an appropriate third party who fits this necessity and has continuously been used by states in furthering the protection of minors. A Guardian ad Litem in Florida is vested with the authority needed to protect the best interests of the child.[187] These powers include, but are not limited to, investigating the allegations of pleadings affecting the child, petitioning the court for an order to inspect and copy documents from medical professionals, requesting the court to order expert examinations, making recommendations to the court, and filing pleadings and motions on behalf of the child.[188] Accordingly, the universally recognized function of a Guardian is to protect the interests of the child.[189] The appointment of a Guardian has been met with approval from legal authorities in cases regarding visitation rights,[190] settlements,[191] and other areas of law concerning protection of the child.[192]

Here, the Guardian, who would serve as a liaison for the minor within court proceedings, should be appointed after the minor has petitioned the court for approval of reassignment. The Guardian should review the minor's request and make evidentiary findings to file with the court. These findings should reflect some of the same evidence that will be presented before the court, with an objective, unbiased reflection in efforts to protect the interests of the child.

These three listed features of the proposed legislation are key to ensuring that the best interests of the minor are well-protected. While broadly discussed here, it will be up to the Florida legislature to narrowly tailor these parts into a cohesive piece of workable legislation. While the Author does not purport to be an expert on statutory construction, this Note discusses the scale and scope of enactment and contains a draft sample provision of the intended legislation.

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187. FLA. STAT. § 61.403 (2016).

188. *Id.*

189. Perez v. Perez, 769 So. 2d 389, 393 (Fla. Dist. Ct. App. 1999).

190. *See* Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 FLA. L. REV. 321, 334 (2001) (outlining guidelines from the ABA, which included recommendations that Guardian ad Litems be appointed to represent children in visitation disputes).

191. *See* FLA. STAT. § 744.3025.

192. *See* Tallahassee Mem'l Reg'l Med. Ctr., Inc. v. Petersen, 920 So. 2d 75, 77–79 (Fla. Dist. Ct. App. 2006) (recognizing a number of areas where Guardian ad Litems are appointed to represent best interests of a minor).

D. *Scale and Scope of Enactment*

The proposed legislation should be narrow in scope, limited to a determination of whether gender reassignment is in the best interest of the minor.[193] Claims regarding the welfare of children generally fall into the sector of family law—consistently viewed as a states' rights issue[194]—and, as such, this legislation should be limited to the state. While other nations have enacted broad legislation,[195] the federal government would have to find Constitutional authority to step on the states' toes.[196] The vested authority for review should be granted to the circuit courts of the state, and the court should be restricted from standing as the Guardian representative.[197] Accordingly, the selection and appointment of the Guardian ad Litem should follow measures traditionally accepted by Florida courts. An attempt at the construction of this legislation—elementary as it may be—is thus:

APPROVAL FOR THE SEXUAL REASSIGNMENT OF MINORS

(1) Sexual reassignment of a minor, or other treatment which is designed to alter sexual development, is presumed to be contrary to the best interests of the affected minor and creates a tenable nexus between the act and the safety of the minor ("Presumption"). The reassignment or alteration shall only be permitted by Court Order entered in the adversary proceedings described in this statute.

(2) Under this section, "minor" is defined as any unmarried person under the age of sixteen years who has not been emancipated by order of the court.

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193. Compare this narrow limitation with the broad authority of the Australian court, which allows the court to enter into any area that concerns the welfare of a minor. *See Family Law Act 1975* (Cth) s 41 (Austl.).

194. *See* Lynn D. Wardle, *State Marriage Amendments: Developments, Precedents, and Significance*, 7 FLA. COASTAL L. REV. 403, 431–33 (2005); *see also* Sarah Rebecca Sullivan & Amy L. Cosentino, *Immigration, Domestic Violence, and What the Family Practitioner Should Know*, FLA. B.J., Jan. 2007, at 47, 49 ("There is no federal body of family law.").

195. Beh & Diamond, *supra* note 161, at 245 (recognizing that Australia enacts family law legislation at a federal level).

196. Federal intrusion into state authority is generally found by the ever-broadening Commerce Clause. *See* Robert J. Pushaw, Jr., *The Paradox of the Obamacare Decision: How Can the Federal Government Have Limited Unlimited Power?*, 65 FLA. L. REV. 1993, 2000–05 (2013). A review of this possibility is outside the scope of this Note.

197. *See* Deborah M. Oborny, *The Conundrum of Impartiality: Why a Judge Cannot Ethically Fulfill the Duties of Guardian Ad Litem*, 19 GEO. J. LEGAL ETHICS 883, 883–84 (2006).

(3) Proceedings seeking court approval of the sexual reassignment or alteration of the sexual development of a minor shall be governed by the following requirements:
   a. Jurisdiction of such proceeding is vested in the Circuit Court of the county in which such minor resides and shall be assigned to the Family, Juvenile, or other equivalent division of such court;
   b. The petition shall be filed in any pending guardianship proceeding relating to the minor. The petitioner shall be the guardian of the minor, a parent, as natural guardian of the minor, or next friend of the minor;
   c. The petition shall allege facts, which, if proven by a preponderance of the evidence, will overcome the Presumption and establish that granting the petition is in the best interest of the minor;
   d. The Florida Department of Children and Families ("Agency") shall be served with the petition and summons in the manner prescribed by law for service upon the Agency. The Agency shall be the Respondent and shall deny the material, debatable allegations of the petition and shall vigorously and diligently defend the Presumption;
   e. If the minor has no court-appointed guardian, the Court shall appoint a qualified Guardian ad Litem who shall protect the interests of the minor. The Guardian shall conduct investigations, including discovery under any applicable rules, as is necessary to satisfy himself or herself whether or not the granting of the petition is in the best interests of the minor. The Agency shall provide resources and assistance as the Guardian requests, so long as such request is reasonable and permissible under ethical rules. The Guardian shall provide any of his or her reports, findings, and recommendations which the court may request in the course of the proceedings;
   f. The proceedings shall be conducted as an adversary proceeding under Florida Rules of Civil Procedure. On disputed issues, only evidence that is admissible under applicable rules of evidence shall be admitted;
   g. No sexual reassignment or alteration permitted by the Order of the Court shall be commenced until the Order is final; and
   h. In any such proceeding, the Court, whether or not the petition is granted, may reserve jurisdiction to

monitor any treatment permitted or to review the status of the minor until he or she reaches the legal age of adulthood.

(4) A minor or child seeking sexual reassignment or alteration due to the medical condition of intersex is exempt from the requirements of this statute.

IV. ROADBLOCKS TO ENFORCEMENT

As with all legislation, there are a number of potential roadblocks to enforcing this statute.[198] One main concern would center on the intrusion of the Act upon the privacy rights of the individual. Courts review constitutional challenges using a scale of standards, assigned based on the fundamental nature of the right. A challenge to the proposed legislation requires a different level of analysis depending on the level of review. Whether the issue at hand is viewed narrowly or broadly is thus essential. However, this proposed legislation will be a part of the law that affects the interests of minors, an area that courts have entered many times before to uphold what the court sees as a duty to protect.[199]

A. *Rational Basis*

The first question regarding any new legislation is whether the state has authority to make the law. The Tenth Amendment to the U.S. Constitution states that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states . . . or to the people."[200] Courts have routinely upheld the notion that issues within the realm of family law are reserved to the laws of the state.[201] Thus, states have authority to make legislation regarding court approval of gender reassignment.

However, groups like the ACLU and Southern Poverty Law Center often bring suits seeking to overturn state statutes that are seen as violating certain Constitutional rights.[202] Regarding this legislation, a claim would likely center on a violation of the individual's privacy rights. The standard for court review of this legislation would depend on whether

198. This Note will only address the roadblocks regarding the constitutionality of such legislation, viewed both narrowly and broadly.

199. *See, e.g.*, *In re* Adoption of: H.Y.T., 458 So. 2d 1127, 1128 (Fla. 1984) (acknowledging that in adoption proceedings, the primary duty of the court is to protect the interests of the child).

200. U.S. CONST. amend. X.

201. *See supra* note 194 and accompanying text.

202. *See, e.g.*, ACLU v. City of Las Vegas, 466 F.3d 784, 786–87 (9th Cir. 2006) (arguing that a city ordinance banning solicitation and tabling violated the First and Fourteenth Amendment); ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996) (arguing that provisions within the Communications Decency Act violated the First Amendment).

the right is narrowly interpreted as the right to reassign one's gender or broadly interpreted as an individual right to privacy. If viewed narrowly, to date, no fundamental right of reassignment has been recognized by the courts, and thus the court would likely evaluate the constitutionality of the law using the rational basis test.[203] The rational basis test has a low threshold which requires the state to have a legitimate interest with means that are rationally related to that interest.[204] The burden is on the challenger to prove the legislation fails to meet this standard.[205]

The legitimate interest for the proposed legislation is simple: to protect the best interests of the child. In *Lofton v. Secretary of the Department of Children and Family Services*,[206] the court upheld this interest as legitimate when a Florida statute barring homosexual couples from adoption was challenged as unconstitutional.[207] While the claim was brought on equal protection grounds, the court first suggested that adoption was "not a right" but instead a "statutory privilege."[208] Further, the court stated that the class of people—homosexuals—was not a suspect class and thus was only subject to rational basis review.[209] The court found a clear, legitimate interest in "encouraging a stable and nurturing environment for the education and socialization of its adopted children."[210] The court then agreed that the measures used were rationally related to that interest.[211] Rational relation is found when there is a reasonable relationship between an act and the furtherance of a legitimate government interest.[212] Here, requiring court approval and the appointment of a Guardian ad Litem clearly bears a rational relation to the state interest of protecting minors. Therefore, under the rational basis standard, this legislation would seemingly pass the test of constitutionality.

B. *Compelling Interest*

However, it is more likely that the courts will view this broadly as an individual right to privacy. Courts have found an individual right to

203. *See* State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985) (expressing that in the absence of a constitutional right, the appropriate standard of review is whether there is a reasonable relation to a legitimate state interest).

204. *Id.*

205. *Id.*

206. 358 F.3d 804 (11th Cir. 2004).

207. *Id.* at 806.

208. *Id.* at 809.

209. *Id.* at 818.

210. *Id.* at 819; *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (agreeing that the state "has a duty of the highest order to protect the interests of minor children").

211. *Lofton*, 358 F.3d at 820.

212. Haire v. Fla. Dep't of Agric. & Consumer Servs., 870 So. 2d 774, 782 (Fla. 2004).

privacy as a fundamental right, and thus the court would evaluate this legislation under the compelling interest standard.[213] Under this standard, the legislation is presumptively unconstitutional, and the burden is on the state to prove otherwise.[214] While state legislation requiring court approval before reassignment would easily pass under the rational basis test, such a law would face an uphill battle under this higher standard of scrutiny. This standard requires the state to prove validity by putting forth a compelling state interest, implemented using the least intrusive means necessary.[215] In 1985, the Florida Supreme Court found the compelling interest standard appropriate for analyzing the expectation of privacy in financial institution records,[216] later extending this standard of review to other areas of privacy.[217]

In 1999, the Florida Legislature enacted the Parental Notice of Abortion Act,[218] which required minors seeking an abortion without parental consent to obtain a waiver from the court before the procedure.[219] Pro-choice activists quickly brought suit, seeking to enjoin enforcement of the act and claiming that the law was a violation of an individual's privacy.[220] The requested injunction was granted by the circuit court, reversed by the district court, and went to the Florida Supreme Court for review.[221] On review, the Florida Supreme Court found that the legislation was in fact an unconstitutional intrusion on the individual's right to privacy.[222] The court began its review of the claim by reciting the state-supported right to privacy, which was amended by voters in 1980 to include an express, freestanding Right of Privacy Clause.[223] This clause provides the individual with the "right to be let alone and free from governmental intrusion into [his] private life" and created a broader, more

213. *See* Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation, 477 So. 2d 544, 547 (Fla. 1985) (expressing the right to privacy as a fundamental right and applying a higher standard of scrutiny).

214. Harris v. McRae, 448 U.S. 297, 312 (1980); *see also Winfield*, 477 So. 2d at 547.

215. *See Winfield*, 477 So. 2d at 547.

216. *See id.* at 547–48.

217. *See* N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 615–16 (Fla. 2003); *In re* T.W., 551 So. 2d 1186, 1192–93 (Fla. 1989) (extending this broad right to privacy and imposing a higher standard of scrutiny for minors).

218. FLA. STAT. § 390.01115 (1999) (repealed 2005).

219. Diane Lourdes Dick, Case Comment, *Constitutional Law: Reaffirming Every Floridian's Entitlement to a Broad and Fundamental Right to Privacy*, 56 FLA. L. REV. 447, 447 (2004).

220. *See N. Fla. Women's Health*, 866 So. 2d at 615.

221. *Id.* at 616.

222. *Id.* at 615.

223. FLA. CONST. art. I, § 23.

protective right than had previously existed.[224] The Court then expressed the standard of review regarding privacy-related challenges as one of a compelling state interest, "presumptively unconstitutional unless proved valid by the State."[225] Citing the seminal case on the subject, *In re T.W.*,[226] the Court concluded that the state's interests were not compelling enough to justify the infringement.[227]

In the interim between *T.W.* and *North Florida*, this broad right to privacy was limited by *Jones v. State*.[228] In *Jones*, men convicted of sexual battery against female minors fought the criminal state statute[229] as an unconstitutional invasion of the minors' privacy rights.[230] The petitioners cited the Court's decision in *T.W.* as a full extension of privacy to minors, thus alleging that the decision of minors to engage in intercourse was constitutionally protected.[231] The Court refused to extend this rationale, instead holding that the extension of adulthood in *T.W.* did not extend to all private activities of minors.[232] Affirming the conviction, the Court found the state had a compelling interest in protecting minors from "sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them."[233] This ruling seemingly limited the extension of privacy rights of minors to abortion and other medical procedures, but the subsequent ruling in *North Florida* re-iterated the Court's belief in the broadest application of the privacy policy possible.[234]

Although the test for constitutional validity regarding fundamental rights includes a "least restrictive means" analysis, the precise meaning of the term has not been judicially established.[235] Clearly, if there is an alternative that accomplishes the objective but infringes less on the fundamental right, the challenged legislation is not the least restrictive. While the majority in *North Florida* stated the notification statute was not

224. *N. Fla. Women's Health*, 866 So. 2d at 658 (Quince, J., concurring) (quoting FLA. CONST. art. I, § 23).

225. *Id.* at 626 (majority opinion).

226. 551 So. 2d 1186, 1188 (Fla. 1989) (holding unconstitutional a statute that appointed a Guardian ad Litem and allowed parental consent to be bypassed with court approval for a minor seeking an abortion).

227. *N. Fla. Women's Health*, 866 So. 2d at 656–57.

228. 640 So. 2d 1084 (Fla. 1994); Dick, *supra* note 219, at 451.

229. FLA. STAT. § 800.04 (1991) (statutory rape).

230. *Jones*, 640 So. 2d at 1086–87.

231. *Id.*

232. *Id.* at 1087.

233. *Id.* (quoting Jones v. State, 619 So. 2d 418, 424 (Fla. Dist. Ct. App. 1993) (Sharp, J., concurring)); *see also* A.H. v. State, 949 So. 2d 234, 236 (Fla. Dist. Ct. App. 2007) (recognizing that protecting children from sexual exploitation is a compelling state interest).

234. Dick, *supra* note 219, at 452.

235. Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003).

the least restrictive means,[236] the concurring opinion instead found that the outlined procedure was probably the least restrictive when no other "valid, less intrusive method" could be identified.[237]

While it appears that, under this higher standard of scrutiny, legislation intruding on minors' right to privacy may not stand, courts have been careful to leave the door open for continuing debate. For instance, the Court in *T.W.* also cited an earlier case, *Bellotti v. Baird*, which set forth reasons justifying why the state can impose greater restrictions on minors.[238] These reasons included the vulnerability of children, their inability to make critical decisions, and the importance of parents in childrearing.[239] The Court in *Bellotti* also suggested that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[240] Further, *Jones* showed that legislation may be upheld when the state can demonstrate its interests are compelling through "objective, empirical evidence that documents a need for government intervention."[241]

C. *Overcoming Constitutional Roadblocks*

The proposed legislation can be distinguished in a number of ways from the seminal cases of *North Florida* and *T.W.* First, gender reassignment has a greater risk to the well-being and interests of the child than abortion. This treatment is much more akin to the types of facts found in *Jones*, which involved sexual activity and the sexual exploitation of minors and found only a limited privacy right. The interest of the state is also far more compelling when focusing on gender reassignment. While abortion affects the life of a fetus, it only results in immediate and temporary health effects to the minor. Gender reassignment, on the other hand, has far-reaching and permanent effects, both known and unknown, as to the health of the child. Likewise, the legal concerns surrounding reassignment extend further than the legal concerns surrounding abortion. Finally, narrowly limiting the scope of the law should overcome any inconsistency with prior case law on the minors' right to individual privacy.

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236. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 655 (Fla. 2003).

237. *Id.* at 667 (Lewis, J., concurring).

238. *In re* T.W., 551 So. 2d 1186, 1194 (Fla. 1989) (citing *Bellotti v. Baird*, 443 U.S. 622, 634 (1979)).

239. *Bellotti*, 443 U.S. at 634.

240. *Id.* at 635.

241. Dick, *supra* note 219, at 457.

Courts have upheld interests of the state as compelling in a number of cases where the rights of the minor were infringed upon. For instance, the Florida Supreme Court determined that a statute prohibiting the transmission of obscene literature to minors did not violate the First Amendment.[242] The Court declared that the state has a compelling interest in protecting the physical and psychological well-being of minors.[243] The Court continued to uphold this interest in later cases, finding that child-protection censorship serves a compelling interest and can survive strict scrutiny, even when the censorship invades the minor's constitutional rights.[244] Finally, the Court has upheld intrusion into a minor's privacy rights when the interest protects the minor from harmful sexual exploitation.[245]

The compelling interest here mirrors these cases, focusing on the mental and physical well-being of minors, in the vein of sexual exploitation. This interest is compelling because of the vulnerability of the minor and the extreme nature of sexual reassignment. The vulnerability of children and their lack of capacity for making critical decisions in an "informed, mature manner" requires that the state protect them against exploitation.[246] The nature of reassignment—as an invasive, partially irreversible treatment—presents a significant risk of making the wrong decision, the consequences of which are particularly grave. The nature of this treatment, combined with the mental instability of minors, lends itself to a finding that the state's interest in this protection is compelling.

Additionally, while there is a substantial lack of research on the effects of gender reassignment,[247] there is extensive knowledge about the effects and risks of abortion. The trial court in *North Florida* made findings of fact based on that knowledge, alleging that abortion is one of the safer procedures and the risk of mortality or complications are low.[248] Further, the legal consequences of abortion are nil; once the minor successfully completes the abortion, the only legal issues that may arise center on informed consent and any potential medical malpractice claims. Legal issues surrounding reassignment, however, may include:

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242. Simmons v. State, 944 So. 2d 317, 321–22 (Fla. 2006).

243. *Id.* at 323.

244. Alan E. Garfield, *Protecting Children from Speech*, 57 FLA. L. REV. 565, 582–83 (2005).

245. *See, e.g.*, J.A.S. v. State, 705 So. 2d 1381, 1382 (Fla. 1998); Jones v. State, 640 So. 2d 1084, 1085 (Fla. 1994).

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

247. *See supra* notes 117–31 and accompanying text.

248. N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 617 (Fla. 2003).

> (1) the ability to marry in a particular gender role; (2) the sex designation on official documents; (3) the ability to state a cause of action for violation of employment discrimination laws; (4) the ability to state a cause of action for a constitutional equal protection violation; (5) the ability to participate in [gender-specific] athletic competitions . . . ; (6) pension and insurance payments; (7) liability for sex-based crimes; and (8) the right to be housed with male or female prisoners.[249]

As the least amount of intrusion is a necessary component of the compelling interest test, narrow tailoring of the legislation seems to fall hand-in-hand. The seminal Florida cases on a minor's individual right to privacy, *North Florida* and *T.W.*, expressed a very broad right that can only be overcome by a compelling state interest. Here, the interest in protecting the personal well-being of the minor, both physically and psychologically, is compelling enough on its own. However, to avoid inconsistency with the precedent cases, it may be prudent to narrowly tailor the legislation to children of a lesser age within the category of minors. Establishing, for lack of a better term, a "quasi-adulthood" exemption for minors age sixteen to the age of majority is consistent with prior court rulings on privacy.[250] Both of the above cases addressed privacy in the context of abortion rights. The court in *North Florida* pointed specifically to the ages of the minors seeking abortion—minors who were near the age of majority.[251] According to the CDC, in 2012, minors under the age of fifteen who were seeking abortions accounted for only a small portion of total abortions—around 0.4 percent—while minors between fifteen and nineteen accounted for 12.2 percent.[252] Thus, while the right to privacy was extended to all minors, there is an argument to be made based off the *North Florida* court's dicta that this expansive privacy right extends only to those in the age of "quasi-adulthood." Limiting the proposed legislation to minors under the age of sixteen is thus consistent with the holdings in *North Florida* and *T.W.* and should meet the least restrictive means standard. Narrowly tailoring the

249. Greenberg, *supra* note 8.

250. *See* FLA. STAT. § 794.05 (2016) (allowing people age eighteen to twenty-three to have consensual sex with minors ages sixteen or seventeen); *In re* Doe, 113 So. 3d 882, 886, 889 (Fla. Dist. Ct. App. 2012).

251. 866 So. 2d at 654.

252. *See* KAREN PAZOL ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, ABORTION SURVEILLANCE, MORBIDITY AND MORTALITY WEEKLY REPORT 1 (2015), http://www.cdc.gov/mmwr/pdf/ss/ss6410.pdf.

legislation based on age is also consistent with many of Florida's current statutes concerning minors.[253]

Further, limiting this legislation to minors under the age of sixteen will also ease certain concerns surrounding gender reassignment in minors. As discussed above, the remission rate and mental fluidity of minors are continuing concerns for the health field. By requiring the younger subset of minors to request court approval, there is a lessened chance that minors who identify as transgender pre-puberty will unnecessarily go through gender reassignment and run the risk of later reversion. Minors in the "quasi-adulthood" range may also have less risk of suffering from the influence of authority figures in a way that opposes their best interests. Finally, quasi-adults are better able to establish their own wishes and needs and are more capable of meeting the standards of informed consent.

CONCLUSION

This Note's proposed legislation would serve to protect the rights of minors, while upholding policy goals and defeating constitutional challenges. The adversarial nature of the petitioning process would give full and fair debate to the requested act, where concerns brought forth will be addressed from all sides: those in support, those against, and those neutral. As gender reassignment in minors is on the rise, the time is ripe for the implementation of legislation to protect the best interests of those minors. Parents who find their children playing with the toys of the opposite gender should not feel they are without a forum to help identify the best options for the needs of their child. And children who suffer from gender-identity issues that do not persist should not feel coerced into making a decision with uncertain, lifelong effects. But children who truly find themselves on the wrong side of the gender divide should have options to better their mental, physical, and emotional health.

253. *See supra* notes 152–57 and accompanying text.