

# Boldt v. Boldt

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**Boldt v. Boldt**, framed as a child-custody case originating in the state of Oregon, actually concerns the proposed non-therapeutic circumcision of a boy, intended to indulge his father's religious urges.

On Sunday, May 30, 2004, the mother, Russian-born Mrs. Lia Nikolaevna Boldt, learned from her son, nine-year-old Mikhail James Boldt, known as Misha/Jimmy, that the custodial father, James Harlan Boldt, was planning on having him circumcised as part of the father's plan to convert the child from the Russian Orthodox faith to the Jewish faith.<sup>[1]</sup>

## Contents

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**Legal proceedings**

**Commentary on Boldt v. Boldt**

**Sequelae**

**See also**

**External links**

**References**

## Legal proceedings

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The case started in 2004 when James Boldt, a divorced father, who had custody of his nine-year-old son, decided to convert from Russian Orthodox to Judaism and wanted to have his son circumcised in accordance with the Abrahamic covenant. The son, however, had not converted and did not want to be circumcised. He was supported by his mother in his desire for genital integrity.<sup>[2]</sup>

His mother, Mrs. Lia Boldt, represented by Clayton C. Patrick, filed suit in the Jackson County Circuit Court (<https://www.courts.oregon.gov/courts/jackson/Pages/default.aspx>) for an injunction to prohibit the circumcision and for change of custody, which was denied. (No. 98-2318-D(3)) The court said:

I am still of the opinion that the decision of whether or not a child has elective surgery, which this appears to be, is a call that should be made and is reserved to the custodial parent... I don't believe that there is any reason to have a hearing at this point on a motion for change of custody until and if – and I'm certainly not even saying it would be appropriate later. I don't see that this is grounds for an emergency change of custody. And as I said, I firmly believe that this is one of the very types of issues, because of the controversy surrounding it, the potential for disagreement, that are given to the custodial parent.

The court did not think that the father's desire to cut off part of his son's penis was grounds for a change of custody, however the court granted the injunction against the proposed circumcision. Lia Boldt then filed an appeal of the circuit court's decision with the Oregon Court of Appeals (<https://www.courts.oregon.gov/courts/appellate/coa/Pages/default.aspx>) (OCA).<sup>[2]</sup> The OCA rejected Lia Boldt's appeal.

She then appealed to the Oregon Supreme Court (<https://www.courts.oregon.gov/courts/appellate/supreme/Pages/de>

[fault.aspx](#)) (OSC) in 2007. It was at this point that Doctors Opposing Circumcision (D.O.C.) entered the case. Doctors Opposing Circumcision (D.O.C.) realized that the OSC needed information about circumcision and about the child's rights under Constitutional and international human rights law, so it filed an *amicus curiae* brief to help the Court understand why it should accept the case. The brief stated in part:

Mikhail (Misha/Jimmy) James Boldt, (hereinafter 'Misha/Jimmy') is a minor who is legally incompetent. Nevertheless, Misha/Jimmy is a person with rights of his own. As a minor he deserves special protection under Oregon, and international law. Misha/Jimmy has an unalienable right to protection and security of his person, and the Courts of the State of Oregon have a corresponding obligation to protect his rights independent from and even despite the wishes of a parent who might endanger the child unnecessarily.<sup>[3]</sup>

After the OSC granted review, DOC submitted a second *amicus curiae* brief to address the merits of the case. That second brief, in summation, stated:

There is no basis on which the father can hope to prevail in the face of overwhelming protections offered to Misha/Jimmy by the Washington, Oregon, and U.S. Constitutions, and moreover, in face of the protections offered by international treaties, in particular, the ICCPR. The Supreme Court has stated that "a child, merely on account of his minority, is not beyond the protection of the Constitution." There are no material facts at dispute that require further hearings on the child's fundamental rights.<sup>[4]</sup>

When the OSC eventually ruled in an unanimous decision in January 2008, it reversed the decision of the trial court, reversed the decision of the OCA, and remanded the case to the Jackson County Circuit Court with instructions to determine the boy's wishes regarding circumcision. The opinion stated:

However, in this case, mother has averred in her affidavit that M objects to the circumcision. In our view, at age 12, M's attitude regarding circumcision, though not conclusive of the custody issue presented here, is a fact necessary to the determination of whether mother has asserted a colorable claim of a change of circumstances sufficient to warrant a hearing concerning whether to change custody. That is so because forcing M at age 12 to undergo the circumcision against his will could seriously affect the relationship between M and father, and could have a pronounced effect on father's capability to properly care for M. ... Thus, if mother's assertions are verified the trial court would be entitled to reconsider custody. As to that inquiry, however, we think that no decision should be made without some assessment of M's true state of mind. That conclusion dictates the outcome here.

We remand the case to the trial court with instructions to resolve the factual issue whether M agrees or objects to the circumcision. In order to resolve that question, the trial court may choose to determine M's state of mind utilizing means available to it under the relevant provisions of ORS 107.425. If the trial court finds that M agrees to be circumcised, the court shall enter an order denying mother's motions. If, however, the trial court finds that M opposes the circumcision, it must then determine whether M's opposition to the circumcision will affect father's ability to properly care for M. And, if necessary, the trial court then can determine whether it is in M's best interests to retain the existing custody arrangement, whether other conditions should be imposed on father's continued custody of M, or change custody from father to mother.<sup>[5]</sup>

The father, James Boldt, then appealed the decision of the OSC to the United States Supreme Court (<https://www.supremecourt.gov/>), however a writ of certiorari was denied.<sup>[6]</sup>

The case on remand was now in the Jackson County Circuit Court again. Judge Lisa Greif held a hearing on 22 April 2009. Misha/Jimmy testified in chambers "that he did NOT want to be circumcised, he did NOT want to convert to

Judaism, was afraid of his father and wanted to live with his mother."<sup>[2]</sup> <sup>[7]</sup>

John Geisheker commented:

"Misha went home with his father the day of the final appearance before Judge Greif on April 22. No one knows what transpired later between the father and the son who had bravely defied him -at age 14- in the Judge's chambers, and before the many attendees at the hearing."

The Court then issued a verbal order from the bench that the boy was not to be circumcised. The court then followed that with a written order on 2 June 2009, in which the court found that a substantial change of circumstances had occurred and ordered an investigation by an independent child custody evaluator for a future evidentiary hearing.<sup>[7]</sup>

In September 2009, facing a custody hearing he was likely to lose, the father voluntarily agreed to give up physical custody of Misha (now 14-years-old) to his mother with court approval. The stipulated custody order provides:

1. Mother and Father shall have joint legal custody of the minor child.
2. The minor child shall have his primary residence with Mother according to the joint parenting plan attached herein as Exhibit 1.<sup>[8]</sup>

The child's proposed circumcision, at one point only hours away, remains judicially prohibited so the proposed circumcision was never carried out.<sup>[9]</sup>

Thus ended in victory a five-year legal battle to save a boy's foreskin. The boy's legal, constitutional, and human rights prevailed over the father's claimed religious right to excise a functional body part from his son's body. The father's supporters, the American Jewish Congress, the American Jewish Committee, the Anti-Defamation League, and the Union of Orthodox Jewish Congregations of America were also on the losing side.

Doctors Opposing Circumcision (D.O.C.) filed two *amicus curiae* briefs in this case and was successful in protecting the boy's foreskin from circumcision.<sup>[3][4]</sup>

The case also set a legal precedent regarding the rights of the male child to judicial protection of his person.

## **Commentary on Boldt v. Boldt**

There has been a fair amount of commentary on this case.

Sherry F. Colb (2007) wrote:

Though it is, in some respects, very unusual, this case nonetheless highlights a somewhat hidden and more widespread assumption embedded in our laws - that if a couple's mainstream religion requires them to inflict harm upon their child, then the law will not interfere with that prerogative. ... In the *Boldt* case, the boy at issue is not a newborn but an adolescent, a 12-year-old, who not only has the self-evident capacity to feel pain but who could also offer his own opinion on the question of whether he should have his foreskin amputated. So far, we do not know from press accounts what the boy thinks about his father's plans, although his mother claims that he is opposed yet reluctant to say so. Even assuming, however, that the 12-year-old is neutral on the question, the notion of subjecting a child his age to such a surgery would likely seem barbaric to many people. There is, after all, no medical need to circumcise the boy. His foreskin is, so far as we know, not plagued with any disease or other malignancy. No doctor has offered the medical opinion that the family really ought to circumcise the boy. The only reason to do it is that his father has found religion and wishes to bring his son into the faith. ... It is

when parents disagree with each other and ask the courts to step in that we are uniquely able to consider some of the harm to which people expose their offspring. The *Boldt* case thus may, in this way, help us focus on what is otherwise "routine" in parenting and perhaps become more sensitive to the sorts of harm that we might otherwise continue to take for granted.<sup>[10]</sup>

The 2009 NOCIRC Annual Newsletter commented:

The US Supreme Court in October turned down a father's petition in *Boldt v Boldt*. The boy's father, who converted to Judaism and wants his son circumcised, was unhappy with the decision of the Oregon Supreme Court to determine the wishes of the child, and appealed to the US Supreme Court, alleging the child's wishes are irrelevant. Fortunately, the right of the boy was paramount in the court's decision.<sup>[11]</sup>

Douglas Diekema (2009), a pediatric medical ethicist, commented:

The fact that Jimmy's father had sole custody does not eliminate the mother's ethical right and obligation to look after the welfare of her son. While the mother may not have legal decision-making authority, that legal determination does not appear to be related either to a lack of interest in her son's welfare or an inability to carry out that role. Jimmy is her son, and she has an interest in seeing his welfare protected. Whether or not she has legal rights, I would be very reluctant to perform an elective procedure for cultural or religious reasons without the permission of both parents and the unambiguous assent of Jimmy himself. Neither appears to be present in the case as it presented to the courts.<sup>[12]</sup>

John Geisheker (2010) observed:

The child's testimony showed courage and took a risk that he would be ignored, as children too often are. Because it would have been far easier for Misha to accede to his custodial father's wishes than to defy him in public, perhaps it can be assumed his testimony was truthful. Indeed, the child returned home with his father that day.

None of the amicus groups that supported the father's legal position all the way to the U.S. Supreme Court — and back to Oregon — appeared at the hearing on 22 April 2009 to hear the child's actual "voice" (nor did they express any written sympathy for the plight of the child throughout the proceedings.

...

In closing: children who are welcomed, gently, into their birth communities have been given the gift of Joel Feinberg's "open future." They may embrace their community or they may eventually drift away; there is no way to tell, in advance, what they will choose. But, importantly, their options are left open, and none of their body parts will have been surgically modified or removed — without their consent — prior to the moment when we will be able to hear the voices of the adults they will become.<sup>[9]</sup>

J. Steven Svoboda (2010) commented:

Geisheker notes that the Court mentioned only the child's right to be heard, but did not recognize its paramount duty to protect him. Misha's case is a sad commentary upon American life and constitutional principles. *Boldt v. Boldt* eloquently demonstrates that in the US, at least, the law to date has not been able to effectively grapple with such a heavily contextual and cultural practice as male circumcision.


To date, with one known exception, all awards and settlements have occurred in cases involving either a "botched" procedure or a lack of informed consent. At least three times, courts have avoided squarely addressing

the legality of male circumcision by diverting the discussion into such peripheral, procedural issues as standing. Judicial views of standing are politically and culturally shaped in response to social mandates. Although MGC is currently illegal under existing laws and human rights treaties, if properly and objectively interpreted free of cultural bias, American cultural blindness has prevented recognition of this. Elsewhere in the world, Tasmania's Law Review Commission recently released a lengthy issues paper questioning the legality of male circumcision. Sweden has regulated circumcision and the practice was recently made illegal in South Africa, with religious and medical exceptions included that threaten to swallow the rule. While the practice is not otherwise explicitly prohibited anywhere in the world, it is of course illegal worldwide under a broad range of prohibitions imposed by statute, common or civil law, human rights treaties, and customary law.<sup>[2]</sup>

British law professors Marie Fox and Michael Thompson examine *Boldt v. Boldt* in comparison with British legal decisions:

On two occasions the Court of Appeal in England has addressed the legality of non-therapeutic circumcision performed on a minor unable to provide consent. Both cases involved disputes in post-separation families where one parent sought a male child's circumcision against the wishes of the other parent. In January 2008, the Supreme Court of Oregon was faced with a similar factual situation in the case of *Boldt v Boldt*. However, the boy at the center of the dispute in *Boldt* was significantly older than in the English cases. The Supreme Court therefore concluded that the testimony of the boy himself, who is now 13, was required and remanded the case for a re-hearing in order that the trial court could specifically address his wishes with regard to circumcision. In this paper, we offer a critique of the Oregon Court's somewhat elliptical reasoning in the *Boldt* case. We argue that cases involving male circumcision of older children raise important ethico-legal issues, which the *Boldt* judgments gloss over, and which English courts have yet to confront in the context of circumcision. Consequently, our aim in this paper is to use *Boldt* as a lens through which to explore and inform UK practice. We argue that this case fits into a characteristic pattern according to which judges, law makers, and professional bodies shy away from confronting key ethico-legal questions raised by the tolerance in Anglo-American society of non-therapeutic genital cutting of male infants. In raising explicitly for the first time the position of older minors, the factual situation in *Boldt* affords us an opportunity to begin to address the limits of parents' rights to determine the future religious identity of their children. In seeking to analyze how *Boldt* and the questions to which it gives rise might inform UK law we focus on three issues. The first is the right of the boy at the center of the dispute to determine which medical treatments or interventions to his body are permissible. The father's subsequent petitions for reconsideration and for certiorari mean that, when the boy's testimony is finally heard by a court, it is likely that he will be 14 or 15 years of age. We aim to assess how a UK court might respond if faced with the task of determining whether a minor could choose circumcision for himself in such a scenario. A subsidiary question here is the extent to which circumcision procedures are appropriately categorized as "medical treatment." Finally, we offer some more tentative thoughts on what limits may legitimately be placed on parental rights to make choices for their children when their choices are motivated by religious belief.<sup>[13]</sup>

## Sequelae

-  (2010) *Genital Autonomy — Protecting Personal Choice* (<https://epdf.pub/genital-autonomy-protecting-personal-choice.html>). George C. Denniston, Frederick M. Hodges, Marilyn Fayre Milos (eds.). Springer. ISBN 978-90-481-9446-9. Retrieved 26 April 2020.
- The Twelfth International Symposium on Law, Genital Autonomy, and Human Rights, meeting at Helsinki, adopted the Declaration of Helsinki (2012), which calls for everyone to have a *right of genital autonomy*.

- The Parliamentary Assembly of the Council of Europe, under the leadership of [Marlene Rupprecht](#), adopted Resolution 1952 (<http://www.circumstitions.com/Rights.html#coe>) (2013) which calls for all member-states to protect children from violation of their physical integrity by [circumcision](#).





## See also

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- [Schmidt vs. Niznik](#)
- [Human rights](#)
- [Cologne circumcision court judgment](#) (7 May 2012)












## External links




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4.  [Geisheker, John](#): BRIEF ON THE MERITS OF AMICUS CURIAE, DOCTORS OPPOSING CIRCUMCISION ([https://pool.intactiwiki.org/images/2007-07-31\\_BoldtAmicusBriefMerits.pdf](https://pool.intactiwiki.org/images/2007-07-31_BoldtAmicusBriefMerits.pdf)) , *Doctors Opposing Circumcision (D.O.C.)*. (July 2007). Retrieved 23 April 2020.
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