

Next, the panel turned its attention to whether changing the terminology would help. LG thought it would, saying that it is really confusing at the moment. However, LB suggested the issue is more about being user-friendly in explaining the processes.

We then moved to an exchange about whether there should be advice for family law practitioners to support through therapeutic intervention and whether this would be helpful.

LB confirmed it would be helpful and should be strongly encouraged because it is necessary for our wellbeing and we take a lot of it on board ourselves.

Meanwhile, DB acknowledged that, when he needs a break it is because of day-to-day issues. As a barrister, he doesn't get all the emails and calls that solicitors get but can see that it is exhausting and emotionally tiring. The Bar has woken up to wellbeing. You can't perform at your best if you are not emotionally at your best. Reflective groups have been established and running in the Cambridge area for about two years.

The discussion concluded with the panellists agreeing that the best television programme to explain separation and divorce would be *EastEnders* and *Coronation Street*.

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When fathers are mothers



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Re TT and the absurdity of modern family law which does not include trans parents



The recent ruling of the President of the Family Division in *Re TT* [2019] EWHC 2384 is a significant one for transgender and non-binary parents who conceive children after transitioning, but it also raises important questions about whether UK law on parenthood is fit for 21st century modern families.

The facts of the case

Fred McConnell is a transgender man, assigned female at birth but identifying as male. Deciding that he wanted to start a family, Mr McConnell suspended his cross-sex hormone treatment in 2016 under medical guidance to pursue having a family. He was issued with a gender recognition certificate confirming his gender as male (and correcting his birth certificate) on 11 April 2017, and just ten days later conceived a child through fertility treatment using his own eggs and donor sperm. He became pregnant and gave birth to a son in January 2018.

In law, he is a man, and fundamentally the issue in this case was whether that meant he was his son's mother or father. There is no doubt that he was a father psychologically, emotionally and in a practical sense as a caregiver. On registering his son's birth, he therefore asked to be registered as his child's father (or parent) rather than

mother. The registrar refused, saying that he must be registered as the mother.

Mr McConnell challenged that decision, applying for judicial review of the registrar's decision or, if the court was not willing to overturn it, a declaration of incompatibility under the Human Rights Act 1998 ruling that the law was incompatible with his and his son's Convention rights.

Unusually for a children case, his identity has been disclosed, following his involvement in a documentary (*Seahorse*) about his journey – well worth a watch if you are interested in the case and the story.

The decision on parenthood

One thing which is very clear from the whopping 61-page judgment is that this scenario – the conception and birth of a child to a man – is not catered for explicitly in any existing UK legislation. On the question of whether Mr McConnell was a mother, father or parent, the court therefore had to explore where the law on parenthood came from. The President of the Family Division set out that:

- At common law, a person whose egg is inseminated in their womb and who then becomes pregnant ➤

and gives birth is the “mother” of that child. Unless legislation provides otherwise, the status of motherhood comes from the biological process of conception, pregnancy and birth.

- The Gender Recognition Act 2004 was the obvious place to look to see if legislation altered that common law principle for transgender parents. However, the court ruled that it did not. Although s9(1) GRA 2004 changes a person’s gender “for all purposes”, s12 GRA 2004 says that a gender change “does not affect the status of the person as the father or mother of a child”. The court rejected arguments from Mr McConnell that s12 was only retrospective (with the purpose of protecting parental status in respect of existing children) and ruled that it also preserved the common law position in respect of children who were conceived after a legal gender change.
- The Human Fertilisation and Embryology Act 2008 was the other possible source of legislation which might alter the common law position. The HFEA 2008 deals with parenthood in relation to children who are conceived through assisted reproduction. After the court took a meander through consideration of whether Mr McConnell’s fertility treatment had even properly fallen within the Act (since HFEA licences are given “for the purpose of assisting women”), the court ruled that this legislation also did not alter the common law position. The HFEA 2008 allowed people to be nominated as a “father” or “parent” in certain circumstances (including women who could be nominated as second female “parents”) but the rules were narrow and restricted to specific conception circumstances which did not apply in Mr McConnell’s case. The parenthood provisions in ss33 to 47 HFEA 2008 therefore did not provide a statutory answer.

The court therefore ruled that the common law position on motherhood applied in the absence of any statutory provision to the contrary, and that the effect of s12 GRA 2004 was to separate the issues of gender and parental status. The President ruled that the term “mother” was not a gendered term but one which referred to the gestational and biological process of pregnancy and birth. The court could therefore find both that Mr McConnell was male and that he was a mother.

The Human Rights dimension

Mr McConnell’s second line of argument was that, if the law forced him to be registered as a mother, that would be a breach of rights under the European Convention on Rights, and the court should therefore exercise its duties under the Human Rights Act 1998 to either “read down” the legislation to make it compatible or, if this was not possible, to make a declaration of incompatibility to prompt Parliament to consider amending the law.

The key Convention rights concerned were Article 8 – right to respect for private and family life – and Article 14 – the

prohibition of discrimination. The President accepted that the requirement to register as a mother would impact on Mr McConnell’s “human dignity and human freedom”. The need to produce his son’s birth certificate revealing he was a mother (when to the world he would be his son’s father) could cause distress and confusion and represent an interference in the family’s privacy. However, the court was concerned that it could be equally detrimental to a child to have a birth certificate recording no mother, and that the child’s right to an identity needed to be considered too. The President held that “a balance must be struck between the parent’s individual right to privacy and the child’s right to know about their biological identity”. There was, he said, a public policy argument that a clear and coherent registration process should require the person who gives birth to be recorded on every birth certificate clearly, and that the impact on Mr McConnell was outweighed by the wider public interest. Therefore, although it was accepted that there was an interference of Mr McConnell’s, and his son’s, Article 8 rights, the court held that the interference was justified and there was therefore no breach of their Convention rights.

Where do we go from here?

The judgment, despite being thorough and carefully considered, was deeply disappointing. From a moral and child-centred perspective, the right outcome was clear: a parent who identifies as a father, and is legally male, is not a mother. Forcing a transgender man to be recorded as a mother is a breach of his privacy and against the child’s best interests, given that the birth certificate will be at odds with how this child’s father is known to them and to the wider world throughout their life. It also undermines the force of UK gender recognition laws, which were designed to recognise the validity and authenticity of transgender people’s identities.

The court also seems to have given disproportionate weight to the need for children’s birth origins to be recorded on their birth certificates. Why should a child have a right to have the person who gave birth to them on their birth certificate, when there are myriad other circumstances in which non-biological/social parents can be recorded as legal parents? The UK’s parenthood rules accommodate birth certificates recording non-biological fathers through sperm donation, second female parents in same-sex relationships and parents through surrogacy. It is simply wrong to say that birth certificates are an accurate record of a child’s origins.

It is also important to consider another significant recent human rights case involving single fathers: *Re Z (No.2)* [2016] EWHC 1191 (Fam). This case involved a cisgender single father who had conceived a child through surrogacy in the USA and who challenged the law which, at the time, only allowed couples to apply for parental orders to confirm their parentage. The former President of the Family Division made a declaration of incompatibility under the Human Rights Act (on the basis that the law discriminated against single parents and their children) and this resulted in the enactment of s54A HFEA 2008, which allowed single parents to apply for parental orders. The single father in *Re*

Z was therefore enabled to obtain a birth certificate for his child which recorded him as the sole male parent – with no mother. When you take these two cases together, the net effect of the current law seems to be that a cisgender man with a child born through surrogacy has a human right to be recorded on his child's birth certificate as a sole parent, but a transgender man who gives birth does not.

An appeal is likely, so the judicial journey of *Re TT* may not yet be over. However, whatever happens in the court process, the underlying truth here is that the UK's laws around parenthood never envisaged the possibility of transgender parents conceiving children. Since such scenarios are now a modern reality, the law needs to catch up. A legislative solution (whether driven by a declaration of incompatibility or otherwise) is likely to be the answer. The government has been considering reform of the Gender Recognition Act 2004 (which for various other reasons is to be welcomed) and that may afford an opportunity. Alternatively, the Law Commission is currently consulting on surrogacy law reform, and it might be possible to incorporate some wider changes for transgender parents into any legislation which results.

However, perhaps the real answer here is not a patching up of the existing legislation but a braver wider review of

UK law on parenthood. The existing law could be replaced with a simple legislative rule that, where a child is conceived through assisted reproduction, the legal parents are the people who intend to be the parents when the child is conceived, and that parental titles on birth certificates are either gender-neutral or can be chosen by the parent. Over the past 15 years we have seen a plethora of judicial decisions and legislative changes designed to bring modern families within the scope of law which was only ever designed to protect different-sex couples conceiving through IVF, egg and sperm donation. We have ended up with complex rules under which legal parenthood depends on the place and method of conception, who gives birth, and their relationship status and gender identity. Working out whether you are a legal parent – and which parental title applies – takes navigation of an increasingly complex flowchart. If we accept that modern families are becoming ever more diverse, perhaps we should go back to the drawing board and design a broader system of law which includes everyone. That would benefit a broad range of modern families, but it would also ensure that transgender fathers who are – in all real senses – fathers are not recorded as mothers.

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