Birth registration: ‘coherent and certain’ or ‘an occasion for exquisite embarrassment and confusion’?

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Birth registration: 'coherent and certain' or 'an occasion for exquisite embarrassment and confusion'?

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R (McConnell And YY) v Registrar General And Secretary Of State For Health And Social Care And Others [2020] EWCA Civ 559 revealed the different priorities of the Court of Appeal and the President of the Family Division when deciding this novel case concerning trans parenthood. While much of the discussion at first instance centred on the definition of mother, the case also engages fundamental questions about the birth registration system. The issue at stake was whether Freddy McConnell, a trans man with a gender recognition certificate who had subsequently given birth to a child (YY), must be registered as that child's mother rather than father or parent. McConnell had applied for judicial review to quash the decision of the registrar general to register him as the child's mother. If this was not successful, he sought a declaration of incompatibility under s 4 of the Human Rights Act 1998. An application was also made on behalf of YY for a declaration of parentage under s 55A of the Family Law Act 1986 that McConnell was YY's father.

At first instance the President of the Family Division, sitting in the Administrative Court, dismissed the application for judicial review and made a declaration of parentage confirming that McConnell was YY's mother. McFarlane P declined to make a declaration of incompatibility on the basis that although, as the Government conceded, there had been an interference with McConnell's and YY's rights to respect for private and family life under Art 8 ECHR, this had been justified. The Court of Appeal (Lord Burnett of Maldon CJ, King and Singh LJJ) dismissed the appeal against both orders. Given the importance of the issues raised, permission to appeal to the Supreme Court may well be sought and received.

Both courts adopted the view that a central issue in the case is whether s 12 of the Gender Recognition Act 2004 (GRA 2004), which states that '[t]he fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child', is both retrospective and prospective. The courts found that the ordinary meaning of the words in s 12 supported the view that it was both retrospective and

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prospective. As such, s 12 constitutes an exception to s 9 (1) which states that '[w]here a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender'.

Despite reaching substantially the same conclusion, the difference in the President's and the Court of Appeal's reasoning, while unsurprising, is noteworthy. The Court of Appeal's judgment is characterised by its clarity and analytical approach. While the President's judgment is certainly rigorous and well-reasoned, it also evinces a more sensitive, contextual approach to this highly personal area of law. As you might expect from an appellate court, the Court of Appeal adopted a fairly circumscribed and orthodox approach to statutory interpretation, to which it accorded central importance in the disposition of the case. Although McFarlane P extensively discussed statutory interpretation, the President also devoted considerable attention to the meaning of 'mother' which underpins the law on this area. This willingness to re-evaluate fundamental notions of family law is a welcome contrast to the more formal analysis undertaken by the Court of Appeal.

As regards the human rights dimension of the case, the Court of Appeal's finding at [55] that the current position 'represents a significant interference with a person's sense of their own identity, which is an integral aspect of the right to respect for private life' represents the position of both courts. However, the language that McFarlane P chose to describe this position conveys a greater sense of empathy. The President, for example, found at [251] that to require McConnell 'to be registered as "mother" is rightly seen by him as a frontal assault on the integrity of his acquired male gender'. The President also found that in situations 'where YY's full birth certificate must be produced, this is very likely to be an occasion of exquisite embarrassment and confusion for both parent and child'. The importance of this use of language lies in the suggestion that '[a]ny meaningful discussion of transgender parenthood requires proper engagement with the lived-realities of transgender lives' (Dunne 2015).

Despite recognising there was an interference with Art 8 rights, the President held at [271] that 'the requirement that the person who gives birth to a child is registered on the occasion of every birth is fully justified' on the basis of having a coherent and certain scheme of birth registration. In agreeing with this, the Court of Appeal further held at [81] that '[i]f there is to be reform of the complicated, interlinked legislation in this context, it must be for Parliament and not for this court', which McFarlane P had also found. The failure to make a declaration of incompatibility has been criticised as 'further entrench[ing] the traditional

assumptions underpinning English family law' and as failing to provide 'impetus needed for Parliament to re-evaluate our understanding of legal parenthood to better reflect the complexities of modern family forms' (Fenton-Glynn 2020).

At the heart of this case lie important questions about the birth registration system in England and Wales. As Julie McCandless (2017, p 54) argues 'effective legal reform [of the system of birth registration] must be underpinned by a principled consideration of its role and purpose in contemporary society, for only then can we determine and justify the parameters of the information that should be recorded'. McCandless further argues that 'a normative narrative of family and kinship relations has always underpinned the birth registration system, and shaped its meaning in society. The information recorded by the state – however partial and prescriptive – is informed by the normative politics of family life' (ibid, p 56). As Liam Davis (2019) notes, '[t]he law may be seen to privilege a certain portrayal of "family" life…[i.e.] a child can only have a mother and father (correctly identified) by being born to a cisgendered, heterosexual woman, and her male partner'. The President arguably engaged with this normative narrative to some extent by considering the meaning of mother. Unsurprisingly though for a High Court judge sitting in the Administrative Court, McFarlane P's consideration of these normative underpinnings was necessarily limited.

In his discussion of the meaning of mother, the President found at [280] that 'being a 'mother' or a 'father' with respect to the conception, pregnancy and birth of a child is not necessarily gender specific, although until recent decades it invariably was so'. Questioning whether being a mother or father need necessarily be considered as being gendered in the way McFarlane P did is of academic interest and merits further judicial exploration. However, as the President acknowledged at [251], 'this is not [McConnell]'s perspective and is unlikely to be the perspective of others who [are in a similar position]'. Although this does not necessitate the conclusion that all trans men must identify as fathers rather than mothers, however likely that may be, being registered as a mother was inconsistent with McConnell's own sense of his gender identity. The judicial assertion, therefore, that mother could be taken as a gender-neutral phrase is of little assistance given the common understanding of mother in society.

While there might be considerable value in questioning and challenging cultural and social understandings of the terms 'mother' and 'father', it is not necessary to resolve the issue from first principles for the purposes of this case. If the law is willing to recognise someone who is assigned female gender at birth as a man, there is no inherent bar to recognising someone

who has given birth as a ‘father’ or at least using the gender-neutral phrase ‘parent’. Perhaps the more fundamental objection would be the failure to indicate on the birth certificate which person had given birth to the child. Parliament should, therefore, consider the President’s obiter remarks on this at [268], that ‘[i]f the registration scheme were to record the identity of the person who carried and gave birth to a child as the ‘gestational parent’ or some similar gender-neutral phrase, then, as I understand TT’s and YY’s case, there would be no issue.’ While a declaration of incompatibility would have prompted a response from Parliament, it would have been a fairly drastic step to take. Birth registration did not quite make it into the Law Commission’s Thirteenth Programme of Law Reform. *McConnell* provides a compelling case for its inclusion in the Fourteenth Programme and demonstrates the need for a considered response from Parliament.

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