

Gender identity and UK family law: Reform is needed

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Over the last 50 years we have witnessed the dynamic response of the law in England and Wales to developments for modern families such as adoption, IVF, surrogacy, civil partnerships and same sex marriage. However, many will see the refusal of the Court of Appeal to allow Mr McConnell, a trans-man who gave birth to his son in 2018 to be registered as the father on his child's birth certificate, as a step in the wrong direction.

Background

Mr McConnell is a transgender man and has lived as a male since his early twenties. He was granted a Gender Recognition Certificate in April 2017, which has the legal effect that his gender 'becomes for all purposes the acquired gender'. Examples of the formal documents that record his acquired gender include his passport and his NHS records.

Mr McConnell suspended hormone treatment and became pregnant, giving birth in January 2018. At the registration of his son's birth, he was informed that he would have to be registered as his child's mother, although registration could be in his current (male) name.

Mr McConnell decided to challenge the Registrar's position and brought an application for judicial review, together with an application for a declaration that our domestic law was incompatible with his human rights. The child, represented by a Guardian joined the proceedings to bring an application for a declaration that Mr McConnell is his 'father' under s.55A of the Family Law Act and to grant him parental responsibility.

The case was heard at first instance by the President of the Family Division, Sir Andrew McFarlane, who said that a person's gender can be different to their status as parent. The status of mother refers to the person who has been pregnant and given birth. Tellingly, in making this determination, the President 'looked back at earlier times' to draw upon the common law definition of mother 'prior to mid-20th century, when conception and pregnancy other than through sexual intercourse was unknown' and when 'motherhood was established by the act of giving birth'.

Decision of Court of Appeal

Mr McConnell's appeal against this judgment was rejected by the Court of Appeal last week. Although the potential infringement to Mr McConnell's human rights were acknowledged, the balancing exercise undertaken by the Court concluded that the rights of children to know the biological reality of their birth outweighed the parent's right to be recognised on the birth certificate in their legal gender. The underlying legislation contained in the Gender Recognition Act was considered and the specific exclusion contained in paragraph 12 that 'a person's gender has become the acquired gender under this Act does not affect the status of the person as father or mother of the child' was found to be retrospective as well as prospective in effect.

Having determined that parliament intended this exception, the Court of Appeal have concluded that there is currently no legitimate justification for interfering with the underlying laws. The Judgement accepts that 'in time' it may be possible to persuade Parliament to take a different view but for now, Mr McConnell will be registered as his child's mother on the birth certificate.

Mr McConnell has made it clear he intends to appeal to the Supreme Court, hoping to emulate the success of Rebecca Steinfeld and Charles Keidan who took a similar course through the courts to achieve legislative changes. In their case they obtained a judgment from the Supreme Court that the Civil Partnership Act 2004 was incompatible with the ECHR. This then led to the government introducing legislative changes to open up the civil unions register to mixed sex couples, with the first becoming civil partners on 31 December 2019.

Many disagree with the Court of Appeal and see the current legislation contained in the Gender Recognition Act as incompatible with the ECHR, as well as being out of step with modern society. If Mr McConnell's case proceeds to the Supreme Court, it will be fascinating to watch another area of our law develop and respond to modern families. Of course a totally separate question about the UK's relationship with ECHR after brexit also looms on the horizon...

FOOTNOTES

The Government Equalities Office 'tentatively estimates' that there are between 200,000 – 500,000 transgender people living in the UK.

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