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Trans man continues his fight to be registered as 'father' or 'parent'

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A transgender man who gave birth has been unsuccessful in his latest legal bid to be named as “father” or the gender-neutral term “parent” on his child’s birth certificate rather than “mother”, as required by the registrar.

The decision upholds that of the President of the Family Division, The Right Honourable Sir MacFarlane, who in the case of *R (on the application of TT) v The Registrar General for England and Wales [2019] EWHC 2384 (Fam)* in September 2019 held that a person who carries and gives birth to a baby is legally that child’s mother, regardless of whether that person is recognised in law as being male or female.

Freddy McConnell is a freelance journalist and single parent in his mid 30s. He experienced gender dysphoria in childhood and, at the age of 22, realised that he was trans. He then lived as a man for a number of years, before beginning his medical transition with testosterone treatment in 2013 and undergoing a double mastectomy in 2014. His passport and NHS records were amended to show his gender as male. He received a Gender Recognition Certificate under the Gender Recognition Act 2004 recognising him as male in 2017. He

retained his female reproductive system due to a potential interest in having children and, having suspended his hormone treatment to allow his reproductive system to function, conceived using donor sperm in 2017 and after legally becoming a man. He gave birth to a son in early 2018 and his journey through IVF, pregnancy and birth as a trans man was documented in the 2019 documentary, Seahorse (a reference to the fish known to have male pregnancies). When he went to register the birth, the registrar refused to register him as the boy's father, though he could be registered as "mother" in his current (male) name.

Mr McConnell applied for a judicial review of the decision.His primary claim was for a declaration that as a matter of domestic law he was to be regarded, and hence entitled to be registered, as YY's "father", or otherwise "parent" or "gestational parent". In the alternative, he applied for a declaration of incompatibility under section 4 of the Human Rights Act 1998 on the ground that the domestic regime (requiring him to be registered as "mother") was incompatible with his and his toddler son's rights under Articles 8 and 14 of the European Convention on Human Rights. His son (granted anonymity and known for these proceedings as "YY") applied through his litigation friend for a declaration that Mr McConnell was his "father" under section 55A of the Family Law Act 1986.

The case was heard in Summer 2019. When giving Judgment and deciding that Mr McConnell could not be registered as the "father" of YY, Sir Andrew McFarlane held that the term "mother" related purely to reproductive experience, noting that it was:-

"*the status afforded to a person who undergoes the physical and biological process of carrying a pregnancy and giving birth."*

In his Judgment, the President recognised that:-

"*It is now medically and legally possible for an individual, whose gender is recognised in law as male, to become pregnant and give birth to their child. Whilst that person's gender is 'male', their parental status, which derives from their biological role in giving birth, is that of 'mother'."*

Accordingly, the application for judicial review was dismissed.

Mr McConnell appealed to the Court of Appeal and the case was heard in March 2020.

In giving Judgment on Wednesday, a Court of Appeal bench made up of Lord Chief Justice Lord Burnett, Lady Justice King and Lord Justice Singh dismissed the appeal, finding in favour of the right of a child to know the biological reality of its birth, rather than the parent's right to be recognised on the birth certificate in their legal gender.

In their Judgment, they held that:-

1. An infringement of Mr McConnell and his son's rights to family life under the Human Rights Act (as a result of the incompatibility between the birth certificate recording

2. Mr McConnell as "mother" whereas in a social context he was recognised as YY's "father") was justified by the need to maintain a "*clear and coherent scheme of registration of births*".

3. Section 12 of the Gender Recognition Act *("The 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."*) had already expressly provided for the situation they were being asked to determine, that the section applied retrospectively as well as prospectively and that the correct literal interpretation of the section was to register Mr McConnell as the child's mother.

4. The legislative scheme of the Gender Recognition Act required Mr McConnell to be registered as the mother of YY, rather than the father, parent or gestational parent.

In considering the appeal, the panel noted that the case was one in which difficult and sensitive social, ethical and political questions arose. They also recognised that there were many, inter-linked pieces of legislation which may be affected if the word "mother" was no longer to be used to describe the person who gives birth to a child (by way of example, as noted in the Judgment, the word "mother" is used 45 times in the Children Act 1989 alone). They also highlighted that there was no European consensus on the ground which arose under the appeal and that, whilst some jurisdictions (such as Sweden) had reformed the law to reflect what Mr McConnell wanted to achieve, in the majority the person who gave birth to a child would be recognised as their "mother", regardless of legal gender.

The appeal judges concluded by recognising that the Courtoperates on the basis of relatively limited and narrow evidence, adduced by the polarised parties in the context of litigation. In contrast, they reflected that Parliament has the means and opportunities to obtain far more diverse information and evidence, from much wider sources. It has access to expert bodies, which can advise it on reform of the law and can carry out public consultation exercises. In conclusion, they recognised whilst the case raised complicated and inter-linked legal issues, any review and amendment of the law must be for Parliament and not for the Court.

This case again highlights the pressing need for a review of not only the Gender Recognition Act 2004, but also other associated legislation in the family law sphere which, as demonstrated in this case, is often seen as struggling to keep pace with the rapidly developing scientific, societal and social change in this country. It is imperative that the law is consistently and regularly developed and modified to keep up with the evolution of the modern family structure.

Mr McConnell has indicated that he intends to appeal to the Supreme Court.

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