The Male "Mother" at English Law

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A core principle of England's birth registration scheme is that the status of "mother" on a birth certificate is always attributed to the person who gave birth. In consequence of the Gender Recognition Act 2004 (UK) facilitating legal gender change, it is now possible for someone to be of the male gender and a "mother". The President of the High Court's Family Division recently held that the interference with the privacy and identity rights of a trans-man and his child, resulting from the man's registration as "mother", was justified by the Government's aim for an administratively coherent and certain birth registration scheme. While it is regrettable that the President declined to make a declaration of incompatibility under the Human Rights Act, his extensive analysis of the current legal framework serves to illuminate the shortfalls in the outdated scheme and the pressing need for parliamentary attention. This article proposes that expanding the parental information collected upon a child's birth, and replacing the terms "mother" and "father" with "parent" on birth certificates, will equip the scheme to reflect all manner of families while also increasing the accuracy of its records.

I INTRODUCTION

On 25 September 2019, the Family Division of the High Court of England and Wales delivered judgment on a seemingly elementary question: what is the definition of "mother"? This question had in fact never been posed at English common law.[1] *R (TT) v Registrar General for England and Wales (AIRE Centre intervening)* tasked the Court with determining the parental status of a transgender man in relation to a child whom he had conceived, carried and birthed — a scenario for which legislation has not expressly

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1 *R (TT) v Registrar General for England and Wales (AIRE Centre intervening)* [2019] EWHC 2384 (Fam), [2020] Fam 45 at [1].

provided.[2] Sir Andrew McFarlane P held that a person who gives birth to a child must be registered on the birth certificate as its "mother", thereby creating a disjoint between the legal and everyday realities of the claimant's parenthood.[3]

This article will survey the legislative context, the parties' submissions and the President of the Family Division's analysis of the claimant's legal position. It will also address the resulting human rights implications. It will be argued that despite holding correctly on the law, the President erred in concluding that the interference with the rights of the claimant and his child was justified. Finally, this article will consider reforms to the birth registration system in England and Wales. These reform proposals aim to capture the gamut of family formation methods that exist today.

II THE FACTS

The claimant in *R (TT)*, Freddy McConnell, transitioned at age 22 to living as a male, having been registered as female at birth and later diagnosed with gender dysphoria.[4] He began testosterone therapy in 2013, followed by a double mastectomy operation in 2014.[5] His passport and health records were amended, and in 2017 he obtained a Gender Recognition Certificate (GR Certificate) under the Gender Recognition Act 2004 (UK) (GRA) confirming the change of his legal gender to male.[6] Despite this, McConnell temporarily suspended testosterone therapy in September 2016, intending to fall pregnant.[7] After undergoing an intrauterine insemination (IUI) procedure in April 2017, McConnell successfully conceived and ultimately gave birth to a son ("YY" in the judgment) in January 2018.[8] McConnell intended to raise YY as a single parent.[9]

McConnell claimed at the High Court for judicial review of a determination of the Registrar General that required McConnell to be registered as YY's "mother" (as opposed to "father" or "parent").[10] McConnell's alternative contention was that the determination, if implemented, would breach both his and YY's rights under the European

2 At [3], [7] and [124]. "Transgender" (or "trans") is used in this article to describe a person whose gender identity differs from their assigned sex at birth; accordingly, a transgender man is someone who was born female but identifies as male.
3 At [279]–[280].
4 At [4], [6] and [51].
5 At [4].
6 At [4] and [6].
7 At [5].
8 At [7].
9 At [59].
10 At [8].

Convention on Human Rights (ECHR).[11] This, he argued, would warrant the Court issuing a declaration of incompatibility under s 4 of the Human Rights Act 1998 (UK) (HRA).[12] Simultaneously, a declaration of parentage application was made on YY's behalf by his litigation friend, in the interests of YY having legal clarity over his parent's status.[13]

III THE JUDICIAL REVIEW CLAIM

Statutory Context

1 Birth Registration and Parental Responsibility

The legislative starting point of this case is the Births and Deaths Registration Act 1953 (UK) (BDRA), which requires the registration of every child born in England and Wales.[14] Registration is a duty primarily incumbent upon a child's "natural mother" and "natural father".[15] It results in an entry for the child on the register of births and a corresponding birth certificate, detailing various particulars.[16] For present purposes, the relevant particulars are those describing the "mother" and "father/parent".[17] While English law entitles a person to obtain a "short" birth certificate excluding parentage details, its functionality is limited. A full birth certificate must still be submitted for many official purposes, such as applying for a passport.[18]

Parental responsibility vests under the Children Act 1989. For the most part, the Act employs the undefined terms of "mother" and "father".[19] Presumably, these terms contemplate the biological link to a child and thereby mean "natural mother" and "natural father", as in the BDRA. The event of birth automatically attributes responsibility to a child's mother. The same applies to a child's father when married to the mother.[20] A father can otherwise acquire responsibility by being registered as "father" on the birth

11 See Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), arts 8 and 14.
12 *R (TT)*, above n 1, at [8].
13 At [55], [57] and [79].
14 Births and Deaths Registration Act 1953 (UK) 1 & 2 Eliz II c 20 [BDRA], s 1(1).
15 Sections 1(2) and 41(1).
16 Registration of Births and Deaths Regulations 1987 (UK), reg 7(1).
17 Registration of Births and Deaths (Amendment) (England and Wales) Regulations 2009, sch 1.
18 Births and Deaths Registration Act [BDRA], s 33; and GOV.UK "Birth certificates and the full birth certificate policy" (30 October 2019) <www.gov.uk>.
19 Children Act 1989 (UK), s 105.
20 Sections 2(1)–2(2A).

certificate,[21] making a "parental responsibility agreement" with the mother[22] or applying for a court order.[23]

2 Gender Recognition

The GRA facilitates the legal recognition of a transgender person's gender identity. The instrument for achieving this is a GR Certificate. Anyone over the age of 18 living in the "other gender" to that assigned at their birth may apply for a certificate.[24] Applications are determined by a "Gender Recognition Panel", appointed by the Lord Chancellor and comprised of barristers/solicitors and registered medical practitioners/psychologists.[25] The Panel must issue a Certificate when provided with satisfactory medical evidence of the applicant's gender dysphoria, and a statutory declaration that the applicant has lived in their acquired gender for two years prior to their application and intends to continue doing so until death.[26] Medical modification of an applicant's sexual characteristics is not required.[27]

The general effect of a GR Certificate is that the person to whom it is issued becomes their acquired gender "for all purposes".[28] This effect is purely prospective.[29] However, recognition of this is limited.[30] For instance, s 16 highlights that the descent of peerages is unaffected, while s 19 allows regulatory bodies to prohibit or restrict a transgender person's participation in gender-affected sports. Section 12 pertains to parentage:

> 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.

Upon receipt of a person's GR Certificate, the Registrar General records an entry for that person on the "Gender Recognition Register". This entry is then used to produce a new birth certificate corresponding with the person's updated name (where applicable) and sex.[31]

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21 Section 4(1)(a).
22 Section 4(1)(b).
23 Section 4(1)(c).
24 Gender Recognition Act 2004 (UK) [GRA], s 1(1)(a). The GRA treats gender as a binary concept. Accordingly, a GR Certificate can only recognise a person as "male" or "female".
25 Schedule 1 cls 1 and 4.
26 Sections 2(1), 3(1)–(4) and 4(1).
27 Section 2(1).
28 Section 9(1).
29 Section 9(2).
30 Section 9(3).
31 HM Courts & Tribunals Service *The General Guide for all Users: Gender Recognition Act 2004* (GOV.UK, T455, July 2019) at 6 and 17.

3 Assisted Reproduction

The Human Fertilisation and Embryology Acts of 1990 (HFEA 1990) and 2008 (HFEA 2008) make provision for artificial conception "treatment services" and their legal implications. These Acts also govern the Human Fertilisation and Embryology Authority (HFEA) which regulates such services. "Treatment services" are defined as "medical, surgical or obstetric services provided to the public … for the purpose of assisting women to carry children".[32] One of the HFEA's functions is to license clinics to provide these services.[33] While it appears that assisting trans-men to carry children falls outside the scope of these clinics' licences, McConnell's experience shows that this practice occurs regardless.[34]

The HFEA 2008 defines the terms "mother" and "father" in relation to assisted reproduction. Section 33(1) treats "[t]he woman who … has carried a child as a result of the placing in her of an embryo or of sperm and eggs" in law as the child's mother for all purposes.[35] The only exception is where adoption occurs following birth.[36] Several provisions define the situations in which a man will be treated in law as a child's father for all purposes. However, these provisions are all based on a man's relationship with a woman who has conceived.[37]

Submissions

1 The Claimant

The issue at the heart of this claim was the interpretation of ss 9 and 12 of the GRA. McConnell submitted that under s 9, he was considered male "for all purposes" from the issuance of his GR Certificate on 11 April 2017 onward. As such, he argued he was male for the purpose of parental categorisation, and therefore must be registered by the Registrar General as YY's "father".[38] It was submitted that s 12 merely reiterates s 9(2)'s prospective focus, given the importance of legal certainty for an affected child's familial relationships.[39] The key assumption underpinning McConnell's case was that gender is the sole determinant of whether a parent is a "mother" or "father". Therefore, registering McConnell as YY's "mother" would be synonymous with "female parent". This categorisation

32 Human Fertilisation and Embryology Act 1990 (UK) [HFEA 1990], s 2.
33 Section 11.
34 *R (TT)*, above n 1, at [22].
35 Section 48(1).
36 Section 33(2).
37 *R (TT)*, above n 1, at [24].
38 At [63]–[64].
39 At [85] and [97].

would place McConnell in limbo between two genders, as his GR Certificate provided that he was otherwise male.[40]

In the alternative, counsel submitted that the Registrar General has discretion under the BDRA to amend the standard birth registration form's particulars and accommodate McConnell's circumstances.[41] Section 39 states that the Registrar General, on the approval of the relevant Minister, can make regulations to prescribe anything to be a particular on the form. Accordingly, a category such as "gestational parent" or simply "parent" could be added.[42] YY's counsel supported and adopted these submissions.[43]

2 The Government

By contrast, the Government submitted that s 12 of the GRA applies even if the child in question is born after the issuing of a GR Certificate to its parent. In turn, the Registrar General had a duty to record McConnell as YY's "mother".[44] It was argued that Parliament would have expressly confined s 12 to children born before a GR Certificate if this had been its intention, as it had done so in respect of welfare benefits elsewhere in the GRA.[45] The Government submitted that it is a person's physiological role in the conception, pregnancy and birth of a child (rather than a person's gender) that confers the status of "mother".[46] Counsel argued that this was the common law's view, as well as a core principle of legislation like the HFEA Acts, ensuring that every child has a legal "mother" at birth.[47]

The Judgment

The significance of the case was not lost on Sir Andrew McFarlane P of the Family Division.[48] The Court took time for consideration, and the ensuing judgment is some 60 pages in length. It is apparent throughout that the President sympathised with persons affected by transgender issues.

The President considered his decision from two angles: first, in light of the common law and the GRA, and secondly, with the HFEA 2008 as an added factor.[49] The President did so because of the uncertainty around whether McConnell's reproductive treatment was lawful under the wording of the HFEA legislation.[50] The President also isolated the HFEA 2008 so

40 At [65] and [87].
41 At [114].
42 At [114] and [115].
43 At [70].
44 At [78].
45 At [99].
46 At [98].
47 At [106] and [110].
48 At [3].
49 At [126] and [130].
50 At [127].

that his reasoning would address cases where that legislation is irrelevant, like for dealing with a transgender man conceiving via ordinary sexual intercourse.[51]

Acknowledging the lack of an applicable statutory definition of "mother", the President adopted the common law as the baseline of his analysis. With the caveat that the common law position "reflect[ed] common sense, common experience and the basic facts of life" of an era when gender, conception and pregnancy were fixed concepts, the President held that whoever carries and births a child is that child's "mother".[52] In other words, the status of "mother" results from a person's role in the biological process.[53]

In contemplating whether ss 9 and 12 of the GRA could dislodge this position, the President turned first to the claimant's "lynchpin" assumption that the term "mother" is specific to the female gender.[54] The President held that the essence of a mother is "conception, pregnancy and birth" and that being female is not the determining characteristic of motherhood.[55] The President thought it significant that when enacting the HFEA 2008, Parliament did not provide for the attribution of parental category on the basis of gender, despite the GRA's existence.[56] The President then considered the construction of ss 9 and 12. Viewing s 12 as a qualifier to the "general" provision of s 9, the President held that s 12 would be redundant if read only retrospectively (s 9(2) already dictated that a GR Certificate was not retrospective for any purpose).[57]

Additionally, the President emphasised that the wording of s 12 was open and nothing precluded it from being both retrospective and prospective in effect.[58] Returning to the claimant's assumption, the President noted that even a purely retrospective reading of s 12 would result in male "mothers" and female "fathers" under the law where a transgender person becomes a parent before obtaining a GR Certificate.[59] Accordingly, the President's preliminary conclusion was that the status of "mother" results from a person giving birth, not their gender. This status is not altered by a GR Certificate, as s 12 is both retrospective and prospective.[60]

Proceeding on the premise that McConnell's treatment was lawfully within the HFEA scheme,[61] the President determined that nothing in the HFEA legislation displaced his preliminary conclusions.[62]

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51 At [129].
52 At [133].
53 At [135].
54 At [136] and [137].
55 At [139].
56 At [138].
57 At [144].
58 At [143].
59 At [140]–[142].
60 At [149].
61 This premise was questioned in obiter.
62 At [160] and [168].

IV THE DECLARATION OF INCOMPATIBILITY APPLICATION

Statutory Context

McConnell and YY's "right to respect for private and family life" in art 8 of the ECHR was of clear relevance in this case.[63] So, too, was art 14, which states that enjoyment of ECHR rights "shall be secured without discrimination on any ground" (including sex and birth).[64] The HRA stipulates that United Kingdom legislation must be interpreted in a manner compatible with ECHR rights, so far as possible.[65] That being so, the first task for the Court was to determine whether the domestic law regarding McConnell's parentage of YY should be interpreted differently in view of the ECHR.[66]

Where satisfied that a legislative provision is incompatible with an ECHR right, the court may make a declaration of incompatibility under the HRA.[67] However, such a declaration does not bind the parties or nullify the provision.[68] As the Government accepted that requiring McConnell to be registered as YY's "mother" would interfere with his art 8 rights, the Court had to weigh "whether that interference is in accordance with the law, pursues a legitimate aim and is proportionate or otherwise strikes a fair balance".[69]

Case Law

Besides *R (TT)*, only one other English decision has addressed how gender change may affect parenthood.[70] *R (on the application of JK) v Registrar General for England and Wales* involved a transgender woman who had two biological and naturally conceived children with her wife prior to obtaining a GR Certificate.[71] Accordingly, the GRA was extraneous.[72] The claimant argued on judicial review that the Registrar General had a discretion to record her as "parent" under the "father/parent" field on her children's birth certificates. Alternatively, she argued that the deletion of "parent" breached her and her children's rights under arts 8 and 14 of the ECHR and warranted

63 At [186].
64 At [186].
65 Section 3(1).
66 *R (TT)*, above n 1, at [169] and [171].
67 Section 4(2).
68 Section 4(6).
69 *R (TT)*, above n 1, at [191].
70 *R (on the application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin), [2016] 1 All ER 354.
71 At [4]–[19].
72 *R (TT)*, above n 1, at [41].

justification.[73] The art 8 rights of the claimant's wife also required consideration.[74]

The Judge held that the Registrar General did not have a discretion to select either "father" or "parent", as the terms are mutually exclusive; "parent" is confined to second female parents, where a child's "mother" is in a same-sex relationship and the pregnancy occurred while the HFEA Acts were in force.[75] On the one hand, the Judge accepted that JK continuing to be recorded as "father" on the birth certificates was a material interference with her and her family's right under art 8 to keep her transgender status private.[76] However, the Judge concluded that this interference was outweighed by the public interest in a coherent scheme of birth registration and the right of children to know the identity of their biological father.[77] Therefore, the Judge did not grant a declaration of incompatibility.

Submissions

1 The AIRE Centre

In addition to the parties, a legal charity that advances understanding of European rights applied to intervene by submissions.[78] The Advice on Individual Rights in Europe (AIRE) Centre analysed the applicable international and European standards and jurisprudence, without affinity to either party's case.[79] It first addressed the United Nations Convention on the Rights of the Child (UNCRC), which the United Kingdom Supreme Court has previously imported into the interpretation of art 8 rights as regards children.[80] The Centre asserted that the UNCRC required the Court to treat YY's best interests as a primary consideration.[81] Moving to the ECHR, the Centre noted that:[82]

> … the [European Court of Human Rights ("ECtHR")] has not yet been required to rule upon … whether article 8 on its own and/or taken with article 14 is infringed where a legally recognised trans-man is required to be entered as 'mother' on his child's birth certificate.

Despite the absence of direct precedent, the Centre's central submission was that the Government's stance did not place enough importance on the rights

73 At [38].
74 At [41].
75 *R (on the application of JK)*, above n 70, at [93].
76 *R (TT)*, above n 1, at [39].
77 At [40].
78 At [56].
79 At [76].
80 At [175]–[177]; and United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).
81 At [182].
82 At [187].

of the children of a transgender parent, given the potential harm caused to them by a system incongruent with their familial reality.[83] Accepting that the interference was in pursuit of a legitimate aim, the Centre focused on proportionality and fair balance.[84]

On the one hand, the submissions placed weight on children knowing their full history (both for identity and medical purposes) and, specifically, who their biological mother and father are.[85] The Centre emphasised a line of jurisprudence from the ECtHR supporting this, in the context of birth mothers wishing to conceal their identities from children given up for adoption.[86] On the other hand, it was submitted that a child having their family's identity correctly encapsulated in official documentation is also important. This importance is both symbolic and practical.[87] The submissions gave the example of overseas travel, where a transgender parent cannot prove the parentage of their child due to conflict between the gender on the parent's passport and the parent's status on the child's birth certificate.[88] As a final point, the Centre noted that the practices of adoption, surrogacy and gamete donation already generate a divergence between biological origin and legally recognised parentage. The law has been drafted in a way that achieves this. Accordingly, a compelling justification would be necessary if the same accommodation was not to be provided to a male parent who gave birth.[89]

2 The Claimant

McConnell submitted that an interpretation of English law resulting in his registration as YY's "mother" limited his rights under art 8 in a way that was not justified, necessary or proportionate — and therefore presented a breach of his rights.[90] The ensuing situation was an "impossible dilemma", whereby a transgender man must be willing to compromise the full legal recognition of his gender in order to conceive and give birth.[91] The potential disclosure of transgender status that could ensue was not a trifling interference — it posed a strong deterrent to transgender men pursuing pregnancy and was a source of anxiety.[92] The submissions referenced the ECtHR's view of England's pre-GRA position, namely that it breached art 8 by producing "the unsatisfactory situation in which post-operative transsexuals live in an

83 At [77] and [174].
84 At [191].
85 At [193].
86 At [195]–[200].
87 At [205].
88 At [205].
89 At [206].
90 At [66] and [67].
91 At [66].
92 At [211] and [212].

intermediate zone as not quite one gender or the other".[93] McConnell argued that the Government's position on YY's registration placed McConnell in a comparable intermediate zone and called into question the value of a GR Certificate.[94]

3 The Child

The submissions on behalf of YY largely echoed those of the AIRE Centre, and emphasised that the best interests of the child were a primary consideration.[95] Counsel implored the Court to make an evidence-based assessment when determining what the child's best interests would entail.[96] They highlighted that there was no evidence that recording McConnell as YY's "father" would not be in YY's best interests.[97] Equally, the opinion of YY's litigation friend was that registering McConnell as YY's "father" or "parent" would overwhelmingly be in YY's best interests. It would prevent YY from feeling there was something secretive or shameful about his birth certificate (and existence).[98] Counsel also pointed to sociological evidence on the deep psychological distress and insecurity caused to a parent when they are accorded a parental marker inconsistent with their gender, and how this indirectly impacts their child.[99] Counsel emphasised that the case was not confined to YY, but represented the best interests of all children in such a situation.[100]

4 The Government

While the Government accepted that a strict application of the BDRA and GRA interfered with McConnell and YY's art 8 rights, it asserted that this interference was justified in two respects: first, by the societal aim of having an "administratively coherent and certain" birth registration scheme,[101] and secondly, by the right of a child to know and "have properly recognised" the identity of their birth parent.[102] The Government argued that Parliament, in pursuit of the first aim, had decided always to record the person who gives birth as "mother" (including a transgender man).[103] This practice was mirrored by nearly all members of the Council of Europe.[104] On the second

93 At [208] citing *Goodwin v United Kingdom* (2002) 35 EHRR 447 (Grand Chamber, ECHR) at [H18].
94 At [209] and [213].
95 At [214].
96 At [216].
97 At [215].
98 At [59]–[60].
99 At [62] and [219].
100 At [221].
101 At [78] and [253].
102 At [78], [227], [233] and [244].
103 At [232] and [234].
104 At [229].

justification, counsel noted the Judge's observation in *R (JK)* that parentage is just as integral an identity factor as "[s]exual identity and the choice of gender".[105] Accordingly, there needed to be a balance between respecting these identity factors for a child and a trans-parent, respectively.[106] Counsel also remarked that the rights of another parent might be disturbed by recognition of a trans-parent in their acquired gender.[107] It was submitted that the level of interference was proportionate, as very few occasions invited the inspection of a full birth certificate and the scheme otherwise maintained the confidentiality of a trans-parent's status. The absence of a workable alternative also supported this submission.[108]

The Judgment

The President examined whether the interference with McConnell and YY's art 8 rights was proportionate and fairly balanced against the rights of others and the needs of society.[109] In measuring proportionality, the President began by highlighting that McConnell's right to gender identity must attract "a weight of a high order"; clear and substantial grounds were thus needed to justify the interference.[110] Although McConnell had widely publicised his transgender status in the media, the President said that this was only marginally relevant as the analysis would be high-level and would have general validity.[111] The President noted that YY's art 8 rights raised complications, as the factors against McConnell's registration as YY's "mother" were equalised by others that appeared to justify that outcome.[112] Additionally, the President perceived that if McConnell were registered as other than "mother", this would be contrary to YY's best interests as he would be marked out from every other child before the law.[113] Considering the best interests of all children at the level of principle, the President held that Parliament had made a "social and political judgment" between competing interests. The Government's justification for recording people who give birth as "mother" — the need for an administratively coherent and certain birth registration scheme — was highly important from a policy perspective.[114]

In light of this analysis, the President decided the ECHR claim hinged on the same point as the judicial review claim: whether "mother" is,

105 At [239] citing *R (JK)*, above n 70, at [109].
106 At [239].
107 At [238].
108 At [228], [236] and [238].
109 At [254].
110 At [255].
111 At [249].
112 At [256] and [259].
113 At [258].
114 At [261]–[266].

at law, a term associated with the female gender or the role of giving birth.[115] The President's view was that the proportionality analysis did not warrant deviating from his interpretation that "mother" is a genderless term.[116] Accordingly, requiring every person who gives birth to be registered as "mother" was justified.[117] The President accepted both McConnell's perspective that the interference with his art 8 rights was significant and the Government's case that the opportunities for disclosure of his status as YY's "mother" were small.[118] The potential individual impact of such disclosure was "very substantially outweighed" by society's interest in a coherent birth registration scheme.[119] Therefore, the President held that the interference with McConnell and YY's art 8 rights was lawful, served a legitimate purpose, and was necessary, proportionate and fair.[120] There had been no breach.[121]

The President dealt with art 14 summarily, holding there was no breach because the scheme required every person who gives birth to be recorded as "mother". The scheme did not discriminate against or between any group in imposing this requirement. Nonetheless, the President held that any such difference in treatment would have been justified on the same grounds as art 8.[122] Therefore, the declaration of incompatibility application failed. In turn, a declaration of parentage was granted, confirming McConnell as YY's "mother".[123]

V ANALYSIS

"Mother" and Gender

The finding that the legal status of "mother" is freestanding of legal gender was key in the President's dismissal of McConnell's claims.[124] Accordingly, a proper review of the judgment must examine the soundness of this interpretation. There are several signs in the law of "mother" being gender-specific. First, on a birth certificate, the respective sexes of the "mother" and "father" are not required particulars, indicating that they are inherent. By contrast, the child's sex must be specified. Secondly, the HFEA legislation

115 At [269].
116 At [270].
117 At [271].
118 At [272].
119 At [272].
120 At [273].
121 At [281].
122 At [274]–[277].
123 At [278] and [284].
124 At [251].

only permits clinics to assist "women" to carry children.[125] This framing appears to preclude a man giving birth and therefore becoming a "mother" at law. Finally, the replacement of the "father" heading on the birth registration form with "father/parent" (to accommodate same-sex female couples following the HFEA 2008) implies that "father" is a gender-specific term and requires a neutral alternative.[126] It would be artificial not to extend this implication to "mother".

Nonetheless, the President's finding that there were already male "mothers" and female "fathers" in English law confirms that any other interpretation of "mother" would not have been tenable.[127] Because the GRA enabled people to change their gender but did not introduce a corresponding mechanism for change of parental title, the gender exclusivity of "mother" and "father", in the legal usage of those terms, was broken. The GRA is thus somewhat paradoxical. Its very existence — to provide for transgender recognition — is the reason why "mother", on a strict legal interpretation, does not conflict with being a male for all purposes. This position leaves a transgender man like McConnell with no prospect of success in judicial review.

Despite being correct in law, interpreting "mother" as genderless is otherwise strained. The Oxford English Dictionary defines "mother" as:[128]

> The female parent of a human being;
>
> a woman in relation to a child or children to whom she has given birth;
>
> (also, in extended use) a woman who undertakes the responsibilities of a parent towards a child, especially a stepmother.

The commonality between the three sub-definitions is gender, namely being a female. The fact that there is more than one sub-definition highlights that the concept of a mother is less rigid than it once was. It is increasingly common to see adopted mothers, stepmothers and other relatives fulfilling a female parent role without stigma, despite not having given birth to the child she is parenting. Additionally, the responsibilities of childcare and income-earning are no longer mutually exclusive or gender-specific. Nevertheless, in line with ordinary usage, virtually everyone would envisage a female when describing a mother. Accordingly, being labelled as "mother" on a birth certificate both perpetuates a transgender man's own gender dysphoria and creates a separate dysphoria for their child in relation to their family unit. This weakens the recognition afforded by the GRA.

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125 HFEA 1990, s 2.
126 See Registration of Births and Deaths (Amendment) (England and Wales) Regulations, sch 1.
127 *R (TT)*, above n 1, at [140]–[142].
128 *Oxford English Dictionary* (2020, online ed) at [mother, *n*].

The President had no choice on the law but to dismiss McConnell's judicial review claim. However, it is curious that the contrived meaning "mother" now possesses did not weigh more heavily towards making a declaration of incompatibility. The law has overwhelming symbolic significance. For example, a panel study investigating the impact of the legalisation of same-sex marriage in Iowa showed that it had a "positive signalling effect" and increased public support for the policy.[129] Conversely, requiring a transgender man to be his child's "mother" at law does little to engender public understanding of trans-parents and how their gender identity can be reconciled with their parenthood. A declaration of incompatibility would have been a potent gesture of awareness from the Court on transgender parenthood. Instead, s 12 of the GRA and s 2 of the HFEA 1990, along with the Government's case, send the message that motherhood is something too sacred to be modified by transgender interests.

Section 12 of the GRA

In light of the terms "mother" and "father" being genderless at law, a person's status as either will not be affected by the change of gender through a GR Certificate. That being so, the debate over whether s 12 of the GRA is prospective was effectively moot. Nevertheless, the parties' differing arguments and what those arguments revealed about the scheme remain worthy of attention. One point of contention between the parties was the following paragraph from the GRA's explanatory note, regarding s 12:[130]

> [T]hough a person is regarded as being of the acquired gender, the person will retain their original status as either father or mother of a child. The continuity of parental rights and responsibilities is thus ensured.

McConnell submitted that the words "original status" denoted a purely retrospective effect, whereas the Government took these words to mean "parental status conferred by a person's birth gender".[131] The Government's view here contradicted its central submission that parental categorisation is based on biological role rather than gender. It is also convoluted to say that a person has a parental status prior to ever having a child. Additionally, the reference to "continuity of parental rights and responsibilities" as the desired goal of s 12 indicates a retrospective effect. A person cannot have parental rights and responsibilities without first having a child.

While s 12 may exist to demonstrate that the terms "mother" and "father" are unaffected because they transcend gender — in line with the

129 Rebecca J Kreitzer, Allison J Hamilton and Caroline J Tolbert "Does Policy Adoption Change Opinions on Minority Rights? The Effects of Legalizing Same-Sex Marriage" (2014) 67 Pol Res Q 795 at 805–806.

130 *R (TT)*, above n 1, at [84].

131 At [84] and [100].

President's interpretation — there are grounds to believe this was not its original scope. No specific reference to a prospective effect exists in the Working Group report preceding the Gender Recognition Bill or in the relevant Hansard.[132] Furthermore, evidence from the Registrar General's Joint Head of Civil Registration Policy showed that until 2016, the Registrar General's position was that s 12 only pertained to children born prior to the issue of a GR Certificate. Unfortunately, the Joint Head did not divulge what prompted this change in construction.[133] It is tempting to speculate whether the prompt was the Government's realisation that the legalisation of gender change had inadvertently removed the gender connotations of "mother" and "father" at law. If that were indeed the situation, it would be disappointing that, upon this realisation, the Registrar General entrenched its position on how transgender men who give birth are registered, rather than directly confronting the dilemma.

The Government also drew attention to the "surprising proposition" that if McConnell's interpretation of s 12 was adopted, a person could be the "mother" of a child born before the issue of a GR Certificate and "father" of a child born afterwards.[134] Although consistency between children in the same family is a valid objective, achieving this at the expense of consistency with reality should not be taken lightly. Instead of interpreting s 12 to have prospective effect, the "surprising proposition" could also be avoided by allowing existing children's birth certificates to be updated to reflect their transgender parent's new status. This possibility is not far-fetched, considering that an adopted child's birth certificate is reissued after their legal parents change.[135] While there are difficulties in ensuring that the status of a second parent on the birth certificate is unaffected, the congruence it would achieve merits consideration.

Even so, the Government's prioritisation of consistency within families in its interpretation of s 12 is undermined by a hypothetical outcome under the current law. The AIRE Centre drew attention to this outcome.[136] At present, McConnell is the "mother" of YY. However, if he were ever to marry a cisgender woman, and that woman gave birth to a child, McConnell would be presumed as the "father" of that child on account of his legal male gender and relationship with the "mother". This paradox is just one of the discrepancies resulting from the failure to fundamentally reform birth registration to accompany other interrelated shifts in the law.

132 *R (TT)*, above n 1, at [90].
133 At [58] and [61].
134 At [101].
135 GOV.UK "Child adoption: Applying for an adoption court order" <www.gov.uk>.
136 At [202] and [203].

Individual Interference or Coherent Scheme

In declining to make a declaration of incompatibility, the President favoured the Government's argument that the individual interference with McConnell and YY's art 8 rights was justified by the public interest in an administratively coherent and certain birth registration scheme. Irrespective of whether the interests should have been balanced in that way, the notion that the scheme is coherent and certain is a fallacy. While "mother" will always be the person who gave birth, the term "father/parent" does not have a consistent meaning. For instance, the "father/parent" could be the spouse of the "mother" or the biological father of the child.[137] Moreover, there is no longer any certainty about what the gender of a "mother" will be.

Additionally, not every child has a "father/parent" recorded on their birth certificate. Though the arrangement of the scheme respects the importance of knowing maternal origin to a child's identity, it does not place the same priority on paternal origin. Even the recognition of different categories of transgender people is incoherent. A post-GR Certificate transgender woman can be recorded on the birth certificate of a child she fathered as "parent", thus avoiding the misgendering McConnell has experienced. The President held that the single practice of registering whoever gives birth as "mother" was at the core of a coherent and certain scheme.[138] However, this element alone surely cannot be a panacea.

Nevertheless, the pursuit of a coherent scheme was considered a legitimate purpose and it was open to the President to hold that the interference with McConnell and YY's rights was justified on that basis. In saying that, the President's balancing exercise perhaps failed to accord due weight to the psychological and practical implications that will be felt by the claimant, McConnell and YY, and others in their situation. The President acknowledged that an occasion whereby McConnell's transgender status is disclosed through YY's birth certificate would cause "exquisite embarrassment and confusion" for them both.[139] However, in concluding that the degree of interference was outweighed by society's interest in a coherent scheme, he favoured the Government's submission that few such occasions would arise.[140] This finding was something of a non sequitur, given the President's earlier acknowledgement. This focus on disclosure also glaringly overlooked the mental harm that registration as "mother" may cause McConnell and YY, even if disclosure never occurs. There was a curious lack of reference to the dangers faced by transgender individuals and their loved ones. Home Office data shows a threefold increase in reported hate crimes towards transgender people in England and Wales between 2013

137 BDRA, ss 10–10A; and Children Act, ss 2 and 4–4A.
138 *R (TT)*, above n 1, at [265].
139 At [252].
140 At [272].

and 2018.[141] Being transgender is a clear risk to one's safety and not having complete ability to keep that status private only exacerbates that risk.

There is also scope to disagree with the President's approach to the different facets of art 8 as applied to YY's circumstances. Undoubtedly, a child's right to know their birth story is integral. Any arrangement concealing the truth would likely cause more harm in the long term, as demonstrated by research into delayed disclosure of adoption.[142] However, such information is best broached sensitively and privately by a child's parent(s), as opposed to being exposed by an official record in a situation that could evoke distress and shame. While recording a child's trans-male parent as "mother" offers a definite mechanism for finding out who gave birth to them, it is somewhat counterintuitive that this mechanism simultaneously produces an incongruity in their identity. The President agreed with Hickinbottom J's stance in *R (JK)* that "[a] scheme that may assist the interests of some children, may be substantially damaging or harmful to the interests of others" without necessarily being unlawful.[143] With respect, a great deal of caution should accompany such a utilitarian approach to the best interests of children. The prospect of interference with even one child's ECHR rights should weigh strongly towards making a declaration of incompatibility.

ECHR Rights

The President's conclusion that the interference with McConnell and YY's art 8 rights was justified raises questions about the efficacy of the HRA in protecting ECHR rights. After the ECHR came into full effect in 1953, the only way a British citizen could bring a legal claim on those rights was by filing at the ECtHR in Strasbourg, France.[144] The HRA was introduced to enable enforcement in domestic courts, thereby avoiding the cost and delay of going to Strasbourg. It was hoped this would ultimately enhance human rights awareness in the United Kingdom.[145] Between October 2000 and July 2019, the English courts made 42 declarations of incompatibility under s 4 of the HRA. Of the 31 that were not overturned on appeal, all were — or are soon to be — addressed by the Government, either through legislation or remedial order.[146] These figures demonstrate that declarations are an

141 Sarah Marsh, Aamna Mohdin and Niamh McIntyre "Homophobic and transphobic hate crimes surge in England and Wales" *The Guardian* (online ed, United Kingdom, 14 June 2019).

142 Amanda L Baden and others "Delaying Adoption Disclosure: A Survey of Late Discovery Adoptees" (2019) 40 J Fam Issues 1154.

143 *R (TT)*, above n 1, at [262].

144 Amnesty International UK "What is the European Convention on Human Rights?" (21 August 2018) <www.amnesty.org.uk>.

145 Secretary of State for the Home Department *Rights Brought Home: The Human Rights Bill* (Cm 3782, October 1997).

146 See Ministry of Justice *Responding to human rights judgments: Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2018–2019* (CP 182,

effective impetus for reform, despite being non-binding. However, of the 42 declarations, only one involved a transgender issue.

The House of Lords' declaration of incompatibility in *Bellinger v Bellinger*, a 2003 case on whether a person could change their birth sex — and subsequently marry someone of their birth sex — was in part the catalyst for the GRA's enactment.[147] The presiding Lords acknowledged that they were compelled to declare by the ECtHR's 2002 judgment in *Goodwin v United Kingdom*, which held that refusing to legally recognise gender change was no longer within the United Kingdom's "margin of appreciation".[148] This holding creates doubt over how willing the domestic courts really are to make an independent declaration on a socially contentious issue. The Government's arguments in *Goodwin* merit attention, particularly in how they compare to the Government's submissions in *R (TT)*.[149] The Government argued that its stance towards the applicant did not breach art 8, given the ECtHR's margin of appreciation and the lack of consensus by the Contracting States on legal recognition of transgender identity.[150] The Government made a similar argument concerning the impact of gender change on parenthood.[151] The overriding submission in both cases was that the relevant laws had fashioned a fair balance between the general interests of society and the rights of the individual, with the former ultimately being prioritised.[152] The parallels between the two sets of arguments are striking and show that the Government's default approach towards issues of this nature is rather unreceptive.

The HRA's implementation of the ECHR is politically controversial in England, particularly regarding its perceived elevation of the courts' powers at the expense of domestic parliamentary sovereignty.[153] It is surprising, then, that the United Kingdom will remain a party to the ECHR following its departure from the European Union.[154] Even so, there are indications that the political climate has perhaps chilled the English courts' approach to the HRA. In *R (TT)*, the Government referenced House of Lords authority stating that the HRA only demands the "national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less". The Government, therefore, submitted that the non-

October 2019) at 37–67 stating that of the 42 declarations of incompatibility, 10 were overturned on appeal and two remained subject to appeal as at July 2019. The two declarations said to be subject to appeal have since been resolved, with one appeal being withdrawn and the other being allowed: *Regina (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542.

147 *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127 at [20].

148 *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at [21], [55], [69] and [78]–[79].

149 *Goodwin*, above n 93, at [H18].

150 *R (TT)*, above n 1, at [64].

151 At [226] and [229].

152 *Goodwin*, above n 93, at [70]; and *R (TT)*, above n 1, at [233]–[238].

153 Elin Weston "The Human Rights Act 1998 and the Effectiveness of Parliamentary Scrutiny" (2015) 12 KLJ 266 at 266.

154 Ministry of Justice, above n 146, at 5.

existence of ECtHR cases requiring a transgender man's registration as "father" entitled it to be cautious and rendered its interference with art 8 proportionate.[155] The President's conclusion that there was no breach of McConnell and YY's rights was consistent with this approach. This outcome suggests that domestic courts are reluctant to declare domestic legislation in breach of an ECHR right until their hands are absolutely tied by Strasbourg jurisprudence, enabling them to deflect offshore any ensuing wrath of public opinion. On another note, the President's judgment in *R (TT)* exhibited unwarranted faith that Parliament, in enacting s 12 of the GRA, had made an active judgment that the competing interests would be best accommodated by providing that GR Certificates do not affect parental status.[156] The idea that considerable deference should be shown to the legislature in this sphere is problematic. The full practical implications of the GRA are still emerging, and the courts can act more dynamically in addressing issues that evaded Parliament's attention during drafting. The reality is that this is a politically sensitive and contentious issue, and is unlikely to be subject to reform unless there is pressure from some direction.

Essentialism

Closer inspection of *R (TT)* suggests that essentialism may have been a major obstacle to a more progressive ruling. It can be easily forgotten that certain facts which society once deemed essential have now been turned on their heads. For instance, prior to the passage of the GRA, sex could not be changed on a birth certificate and transgender people had no means of legal recognition.[157] *Corbett v Corbett*, decided only 50 years ago, firmly entrenched that position.[158] Two essentialist threads run through the President's judgment and the Government's submissions in *R (TT)*: first, that whoever gives birth to a child must be its "mother" at law, and secondly, that every child must have a "mother" at law.

The Government's evidence demonstrated the first thread. A 1977 House of Lords judgment was the sole authority cited in support of the argument that the common law always considers a child's "mother" to be the person who gave birth to that child. That judgment stated that "[m]otherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition".[159] Counsel on behalf of YY quite prudently minimised this statement's weight, arguing it was an obiter comment made in the context of fatherhood, and from an era when the

155 *R (TT)*, above n 1, at [231].
156 At [263].
157 Sally Hines *Gender Diversity, Recognition and Citizenship: Towards a Politics of Difference* (Palgrave Macmillan, Basingstoke, 2013) at 45.
158 *Corbett v Corbett (otherwise Ashley)* [1971] P 83 (PDA).
159 *R (TT)*, above n 1, at [106] citing *The Ampthill Peerage* [1977] AC 547 (HL) at 577.

possibility of a legal male giving birth was beyond comprehension.[160] Apart from that, the tenor of the Government's submissions was that it was just an immutable fact that giving birth conferred legal motherhood.

Similarly, the President surmised that conceiving, carrying and giving birth to a child is "surely at the essence" of what a "mother" is, without elaborating on why that was the case.[161] This conclusion, however, overlooks that the law does provide for a person who gives birth to lose the status of "mother". Parliament has recognised in other contexts the importance of a child's birth certificate reflecting the reality of their family, rather than their situation at birth. A notable example of this recognition is the ability of adoptive parents to obtain an "adoption certificate" that replaces their child's original birth certificate.[162] It should not have been any more objectionable that McConnell wanted his son's birth certificate to reflect the reality of their parent-child relationship.

The President declared that "the outcome sought by [McConnell] means that YY will not have, and will never have had, a 'mother' as a matter of law, he will only have a father".[163] Other than the valid concern that this would differentiate YY from other English children, it is hard to see why this outcome would be so objectionable. The President's comment presupposes that it is more critical for a child to have a mother than a father and that there is a material difference between their respective roles following birth. The notion that a child must have a mother is out of step with the many family units today that lack a female parent. A number of these family units possess this characteristic at the child's birth, for instance where a single male or same-sex male couple become parents via surrogacy or adoption. This raises the question: why is it so fundamental that every child has a registered "mother" at law? While registration can reveal one half of the child's biological origins, this is no longer guaranteed due to gestational surrogacy and ova donation. Regardless, the law fully facilitates a child being registered without a "father/parent", despite the lack of visibility this accords a child over their paternal biological line. Instead, the apparent rationale for every person who gives birth being recorded as "mother" is guardianship. Guardianship ensures with absolute certainty that no child is left parentless at law. However, there is no intrinsic reason why this burden should fall to a "mother", so long as at least one person has parental responsibility for a child.

The Government also submitted that, as another consequence of McConnell's desired outcome, people like YY would have no statutory means of discovering who gave birth to them. This discrepancy would be

160 At [107].
161 At [139].
162 GOV.UK "Child adoption: Applying for an adoption court order" <www.gov.uk>.
163 *R (TT)*, above n 1, at [258].

due to the "mother" field being blank.[164] However, it is questionable how critical it is for someone to know who gave birth to them. As gestational surrogates do not have a genetic link to a child they have carried, there are no medical grounds for their genetic information being provided to the child. So long as a child has visibility over their genetic origins and a parent responsible for their care, there is no universal reason why that child must know the identity of a person whose only role was to gestate and give birth to them.

The essentialism evident throughout *R (TT)* is symptomatic of a broader hesitance to proactively address contentious social issues like transgender parenthood. The President stated that the dilemma raised by McConnell was "at its core, a matter of public policy rather than law".[165] Despite that observation, he declined to make a declaration of incompatibility. Such a declaration would have placed the onus to confront this dilemma firmly on policymakers. The Government's submissions and the Registrar General's approach to McConnell's circumstances suggest that authorities are not open to exploring a redesign of the birth registration scheme of their own volition. Standing by the status quo avoids controversy, but can further repress minority and emerging interests.

VI NEW ZEALAND

It is interesting to hypothesise how the courts in another jurisdiction might approach McConnell's case. New Zealand's judiciary has not yet had an opportunity to consider how gender change impacts parenthood, nor has Parliament pre-emptively addressed the issue. New Zealand lacks an equivalent to the GRA, with its legal recognition of transgender people being more ad hoc. A person may apply to the Family Court for a declaration that their birth certificate be issued to show their nominated sex.[166] The Court shall grant the declaration if satisfied that the applicant has assumed and intends to maintain the gender identity of the nominated sex, and has undergone medical treatment to attain physical conformity with that identity.[167] There is some ambiguity as to the effect of a declaration. While the relevant Act and its explanatory material provide that the general law of New Zealand will continue to determine a person's sex (indicating something less extensive than s 9(1) of the GRA), another provision states that the information on a birth certificate is prima facie accurate.[168]

164 At [122].
165 At [125].
166 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 28(1).
167 Section 28(3).
168 Annabel Markham "Transgender ideology and the law" [2019] NZLJ 14 at 15.

Regardless, it is unlikely that this piecemeal legislation regarding gender change would answer the question of transgender parents determinatively.

The more pertinent inquiries are who can be recorded as "mother" and "father" on a birth certificate in New Zealand and whether the courts would view "mother" as a gendered term. There have been few judicial determinations throughout the Western world on the definition of "mother".[169] New Zealand is no exception. The only occasion the term has been considered was in 1973, relating to its specific usage in the Domestic Proceedings Act 1968.[170] Nevertheless, the "Notification of Birth for Registration" standard form offers some hints.[171] At first glance, gender appears to be implicit in the headings "mother" and "father", as their respective sexes are not requested. However, under the "father" heading, there is an explanatory note which applies when the child is born via an assisted reproductive procedure. This note states that if the (birth) "mother" is married or in a civil union or de facto relationship with a woman who consented to the procedure, that woman's details should be entered under that heading. In this situation, the woman is asked to select a title preference of "mother" or "parent". Significantly, this arrangement would preclude the English High Court's interpretation that "mother" is a genderless term and is exclusive to the person who gave birth. Despite this, the parallel absence of an explanatory note for the "mother" heading indicates that there is no doubt as to who is registered under it: the person who gave birth.

This hypothesis about the "mother" heading is corroborated by how the law has been arranged around assisted human reproduction (AHR) procedures. Upon the passing of the Human Assisted Reproductive Technology Act 2004, s 17 was inserted into the Status of Children Act 1969. This section confirms that a woman who becomes pregnant from an AHR procedure using an ovum or embryo derived from another woman will be the "mother" of the resulting child for all purposes. Notably, there is no provision clarifying legal maternity where a person becomes pregnant from an AHR procedure using their own ovum, probably because there would be no doubt. It would be interesting to learn whether the New Zealand Government would entertain withholding legal maternity from a transgender man who gives birth, or if it also regards registering whoever gives birth under "mother" to be a cornerstone of its scheme.

The likelihood of a person having a "male" birth certificate and giving birth is perhaps smaller in New Zealand than in England, as that person would have undergone "some degree of permanent physical change" (which may have removed their ability to conceive and carry children) in

169 *R (TT)*, above n 1, at [1].
170 *W v Y* [1973] 2 NZLR 175 (SC).
171 New Zealand Government "Registering a new baby and getting a birth certificate" (27 April 2017) <www.govt.nz>.

order to attain that birth certificate.[172] When that day eventually comes, it is plausible that the Registrar-General will accommodate that person under the "mother" heading, as they have done for "second female parents" under the "father" heading. However, Department of Internal Affairs guidance reiterates that being male on a birth certificate may not be enough to meet the standard for determining gender elsewhere in the law.[173] If the Registrar-General does insist on attaching the title of "mother" to a male who gives birth, that person will have recourse under s 15A of the Births, Deaths, Marriages, and Relationships Registration Act 1995. This Act allows a parent to appeal a decision of the Registrar-General to (or to not) register information about their identity on their child's birth certificate. As a result, the Court may direct the Registrar-General to delete (or include) such information.[174] It is difficult to gauge what approach the Court would take, as there have been no reported cases pursuant to s 15A.[175] Alternatively, a person like McConnell could claim that their right to freedom from discrimination on the basis of sex under s 19(1) of the New Zealand Bill of Rights Act 1990 has been breached. As with the HRA in England, though, that right may be subject to a justified limitation.[176]

VII REFORMING BIRTH REGISTRATION IN ENGLAND AND WALES

Background

In his judgment, the President signalled "a pressing need for Government and Parliament to address square-on the question of the status of a trans-male who has become pregnant and given birth to a child".[177] As McConnell has stated he intends to appeal, the courts may not have had their final word.[178] Nevertheless, it is worth exploring how reform to the birth registration system could better accommodate parents like McConnell, as well as others whose situations do not fit the traditional family unit.

In December 2019, a transgender couple in Illinois discovered that the state's birth registration system would automatically misgender them on their daughter's birth certificate. The male parent, having given birth, would be recorded as "mother/co-parent", while the female parent would be

172 *Michael v Registrar-General of Births, Deaths and Marriages* (2008) 27 FRNZ 58 (FC) at [50].
173 Department of Internal Affairs "General information regarding Declarations of Family Court as to sex to be shown on birth certificates" <www.dia.govt.nz>.
174 Section 15A(4).
175 Births, Deaths, Marriages, and Relationships Registration Amendment Act 2008, s 11.
176 New Zealand Bill of Rights Act 1990, s 5.
177 *R (TT)*, above n 1, at [125].
178 Aimee Lewis "Transgender man who gave birth loses court battle to be registered as father" (25 September 2019) CNN <http://edition.cnn.com>.

recorded as "father/co-parent".[179] Alert to the safety implications of a birth certificate incongruous with appearances, the Illinois Department of Public Health (IDPH) agreed to categorise the couple according to their respective gender identities. They also began the process of making this a "permanent option easily available to all transgender parents".[180] The IDPH's response — which prioritised the individuals affected rather than the coherence of the system — is in marked contrast to the English Registrar General's treatment of McConnell. Admittedly, Illinois — unlike the BDRA and subsequent regulations — gives the IDPH some discretion over the category of parental status to ascribe to an individual.[181] Equally, the couple's position is perhaps less affronting in that their daughter will still have a "mother" on her birth certificate, and thus not be differentiated from every other child in Illinois. Nonetheless, this example shows that a birth certificate that accurately represents parents' gender identities is a workable possibility.

In the vein of Illinois's anticipated reforms, the Registrar General could heed one of McConnell's submissions and change the Registration of Births and Deaths Regulations to feature a "gestational parent" field on the birth registration form.[182] As the President rightfully identified in his judgment, to record a male on a birth certificate under "gestational parent" would by implication out them as transgender.[183] Nevertheless, that result would arguably be better than imposing a gendered term that is clearly inconsistent with that person's identity. A more prudent change would be to replace "mother" and "father/parent" with two "parent" fields, so that a parent's gender cannot be gathered from a birth certificate. However, without more fundamental reform, this move would merely plaster over the cracks of a system unfit for purpose in the 21st century.

Exploring potential reforms necessitates reviewing the purpose served by a birth registration system and birth certificates. The practice of birth registration in England originates from a 1538 injunction issued by Henry VIII that required parishes to record baptisms, burials and weddings.[184] While this ecclesiastical method of registration was pre-eminent over the following three centuries, its entries were prone to inaccuracy and failed to capture births occurring outside the Church.[185] In light of these shortcomings, a secular system of registration was introduced in 1837 with the establishment of the General Register Office.[186] The

179 Lambda Legal "Illinois Must Issue an Accurate Birth Certificate to Child of Trans Parents" (17 December 2019) <www.lambdalegal.org>.

180 Jake Wittich "Transgender parents welcome baby girl, prompting update to state's birth certificate system" *Chicago Sun-Times* (online ed, Chicago, 6 January 2020).

181 *R (TT)*, above n 1, at [119].

182 At [32] and [115].

183 At [264].

184 (28 March 1833) 16 GBPD HC 1210.

185 Henry St James Stephen *Mr Serjeant Stephen's New Commentaries on the Laws of England (Partly Founded on Blackstone)* (9th ed, Butterworths, London, 1883) vol 3 at 235–236.

186 Births and Deaths Registration Act 1836 (UK) 6 & 7 Will IV c 86, ss 2 and 18.

notification of a child's birth by its parents was ultimately made compulsory in 1874.[187] At that time, birth registration had especial economic importance. The register's accurate recording of genetic lines provided for succession and the inheritance of property rights, while also offering proof of age amidst growing regulation of child labour.[188]

There is a key statistical benefit to birth registration. Registration ensures the state has visibility over all individuals and a full picture to inform high-level decisions, such as allocation of public spending.[189] A birth certificate is the genesis of a person's legal existence, securing basic rights and entitlements and acting as a form of identity. Equally, birth certificates are the basis of parental responsibility and the rights that certain others have in relation to a child. Birth certificates have arguably grown to serve a key symbolic purpose, being in most instances the first representation of a child's family unit.[190]

Cases like McConnell's have recently illuminated the tension between the GRA and England's birth registration scheme. However, such schemes have long failed to reflect the complete tapestry of a child's background. There is no longer necessarily a concurrence between biological mother, gestational carrier and intending female parent, or between biological father and intending male parent. These potential incongruities are due to technological advances making surrogacy and gamete donation viable. If one looks further back, adoption has long left fissures between affected children's biological and intending parents. It is well documented that the law has only nominally tolerated and accommodated this "fragmentation" of parenthood.[191] Anywhere between two and five different individuals could be directly responsible for a child's birth. These individuals fall into the categories of intending parent, biological parent and gestational parent. While reproductive biology dictates that there must be two biological parents and one gestational parent, there may be either one or two intending parents. Accordingly, the birth registration system should facilitate the identities of up to five individuals being the subject of a centralised record that correctly reflects their respective roles.

All information that could pertain to an individual child's genealogy, birth and guardianship is currently dispersed across different official records. As established, the child's birth certificate will always reveal who gave birth to them and who has default parental responsibility. If birth resulted from treatment services using donated gametes, these services will be logged on a

187 Births and Deaths Registration Act 1874 (UK) 37 & 38 Vict c 88, s 1.

188 Ruth Elizabeth Grace Ballantyne "Legal Parentage 'By Design': Reimagining Birth Certificates in Aotearoa New Zealand" (LLM Thesis, Victoria University of Wellington, 2019) at 24–25.

189 Leah Selim "What is birth registration and why does it matter?" (10 December 2019) UNICEF <www.unicef.org>.

190 Law Commission *New Issues in Legal Parenthood* (Report 88, April 2005) at 116.

191 Alison Diduck and Felicity Kaganas *Family Law, Gender and the State* (3rd ed, Hart Publishing, Oxford, 2012) at 124.

register of information, which the child can access once they are 16 years old.[192] If the child is carried by a surrogate, this fact will only be implicit in the granting of a parental order to their intending parent(s).[193] If the child is adopted, this fact is recorded on the "Adopted Children Register", but the child cannot query this until they turn 18.[194] A person's art 8 rights include being able "to establish the substance of his or her identity".[195] This right cannot presently be achieved without navigating several obstacles.

A New Back-End System

An effective reform to achieve definitive, accurate records of every child's birth and background would be to expand the particulars required upon registration. This expansion would involve amending the "particulars of live-birth" form.[196] All the current particulars would remain, but the two parent categories of "mother" and "father/parent" would be replaced with five new fields. The first field on the new form would be "gestational parent", to record whoever gave birth to the child (the same function presently served by "mother"). The second and third fields, titled "male biological parent" and "female biological parent" respectively, would reflect lineage. It is necessary to specify sex in the titles, considering the differing functions of sperm and ova in the reproductive process. The fourth and fifth fields would both be titled "intending parent". Males and females could be logged in either. In the vast majority of scenarios, a particular woman would be listed three times and a particular man twice. This approach ensures the state has a complete picture of a child's parental background. A final addition to the form will be a "tick-box" field, applicable only to registrations where the entries differ between the various parent fields. This will ask what the reason for the difference is, and include the non-exclusive options of "surrogacy", "sperm donation", "ova donation" and "adoption".

The output of the registration would resemble the current full birth certificate, with the only difference being that the "mother" and "father" titles are both replaced with "parent". The parent(s) listed would correspond to the "intending parents" on the form, ensuring the certificate is consistent with the outward appearance and lived experience of a child's life. Accordingly, the meaning of "parent" throughout English law and the associated rights and responsibilities will continue to align with "parent(s)" on the birth certificate. As the birth certificate will not show all the information provided on the registration form, it is similar to an iceberg. The

192 HFEA 1990, ss 31 and 31ZA.
193 HFEA 2008, ss 54 and 54A.
194 Adoption and Children Act 2002 (UK), ss 77–79.
195 *R (TT)*, above n 1, at [256].
196 Registration of Births and Deaths (Amendment) (England and Wales) Regulations, sch 1.

full record would only be accessible to certain government bodies for limited purposes, and (significantly) to the child at any point in their life.

In order to execute this reform, an amendment to the BDRA would be necessary. The amendment would place the duty to register the birth on the "gestational parent", instead of the "natural mother" and "natural father".[197] This approach would continue the safeguard currently offered by the automatic conferral of parental responsibility on a child's "mother". This safeguard is important in situations involving a gestational surrogate.[198] Additionally, several amendments would need to be made to the Children Act 1989 in relation to parental responsibility. These amendments would facilitate conferral of parental responsibility on the "intending parent(s)". The definition of "mother" in the HFEA 1990 would remain, but the title would be changed to "gestational parent" and this framing would be substituted throughout the legislation wherever "mother" is presently employed.[199]

This reform would enable YY to query the register of births and ascertain that McConnell gave birth to him, and is his biological female parent and intending parent. Equally, the register would show his biological male parent's particulars. YY's resulting birth certificate would record McConnell as his (only) "parent", in line with the one "intending parent" on the register.

Reality Testing

Despite the desirable outcomes that the above reforms would secure, there are likely to be hurdles. It is doubtful that lawmakers would be receptive to having genderless "parent" fields on birth certificates. For instance, the Government has no plans to create a gender-neutral title option for peers and members of the House of Lords, which would avoid the implications of "Lord" and "Baroness".[200] The Home Office has a similar stance towards gender on passports, in not allowing a person to be identified by the "X" marker. The Court of Appeal upheld this determination in March 2020.[201]

Notwithstanding the apparent lack of urgency or regard by the Government, there are signs that pressure may come to bear sooner rather than later. In *R (TT)*, the AIRE Centre highlighted a 2018 resolution of the Parliamentary Assembly of the Council of Europe. The resolution, among other aims, implored its member States to "provide for transgender parents' gender identity to be correctly recorded on their children's birth

197 Section 2(1)(a).
198 Children Act, s 2.
199 Section 27.
200 BBC "Gender neutral titles for Lords ruled out" (12 July 2018) <www.bbc.com>.
201 Owen Bowcott "Lack of gender-neutral passports is lawful for now, says appeal court" *The Guardian* (online ed, United Kingdom, 10 March 2020).

certificates".[202] This extract shows the beginnings of recognition that the interplay between gender change and parenthood is an important policy area that is not being satisfactorily served at present. As an increasing number of trans-men give birth in European states, it is foreseeable that one of them will make a successful challenge in domestic courts or before the ECtHR. Alternatively, other states may proactively tackle the situation with legislative reform. Either way, once the tide begins to shift, the balancing approach exhibited by the President in *R (TT)* will become more tenuous.

There is something to be said for the ease of use and simplicity of the current registration form. Nonetheless, the reality of conception and birth is no longer so simple. A brief explanatory note accompanying the new form should clarify how a gestational parent is to complete it, depending on the situation. It is worth noting, too, that it is not uncommon for a birth registration form to collect more information than will ultimately be displayed on a birth certificate. For instance, New Zealand's form asks for parents' occupations, ethnic groups and addresses, among other particulars that are not carried over to the birth certificate.[203]

At the very least, if the Government is to maintain the current archaic and overly simplistic registration scheme, it could facilitate the issuing of parental orders to parents like McConnell. These parental orders would categorise parents correctly and could be used in place of their child's original birth certificate. This initiative could be achieved by establishing an equivalent to the Adopted Children Register or Gender Recognition Register. While it would inevitably entail additional work for the General Register Office, it would also have an immeasurably positive impact on the lives of transgender parents with outdated parental markers and their children.

Although the reform suggested above would drastically modernise the birth registration system, it is unlikely to be completely future-proof. One possibility that may arise is a child being conceived from the DNA of two women. Early research has indicated the potential to emulate the male body's process of creating sperm from stem cells, using female stem cells.[204] It is also conceivable that future births may not require a human gestational carrier, in light of the success scientists at the Children's Hospital of Philadelphia have had in gestating lamb fetuses in an "artificial womb".[205] These possibilities would evidently pose major complications, not only for birth registration but for other aspects of the law. Nonetheless, families and children are at the core of any society, so it is critical that the law keeps in

202 *R (TT)*, above n 1, at [183] and [184].

203 Births, Deaths, Marriages, and Relationships Registration (Prescribed Information) Regulations 1995, s 3A(c).

204 Julie Compton "Could same-sex couples soon conceive a child with both their DNA?" (13 January 2018) NBC News <www.nbcnews.com>.

205 Rob Stein "Scientists Create Artificial Womb That Could Help Prematurely Born Babies" (25 April 2017) NPR <www.npr.org>.

step with further developments so that affected individuals can be accurately and comprehensively registered.

VIII CONCLUSION

While the President's dismissal of McConnell's judicial review claim was the only tenable outcome on the legal framework, the refusal to make a declaration of incompatibility was a missed opportunity. Such a declaration would generate official urgency for reform. Though the interference with McConnell and YY's rights to private and family life under art 8 of the ECHR was justifiable, it was an interference nonetheless. It is foreseeable that there will come a time when the English courts no longer support such interference. Reforming the birth registration scheme by retiring the terms "mother" and "father" — or expanding the required particulars to capture all potential categories of parent — will resolve this interference. These options would also enhance the breadth and certainty of the scheme's information.