

Lunchtime Seminar :
**The Court's Approach to Transgender
Issues in Care Proceedings**

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Barristers at 18 St John Street Chambers

Defining Gender

- **Differentiating the concepts of sex, gender and sexuality.**
- Sex is defined at birth in the majority of children and is determined by their genitalia.
- Sex does **not** define gender.
- Gender refers to the **socially constructed characteristics of women and men, such as norms, roles and relationships between groups of women and men. It varies from society to society and can be changed.** – World Health Organization.
- Gender identity is therefore an individual's fundamental sense of their own gender.
- *TT v YY* [2019] EWHC 2384 (Fam) – Birth Certificates

Relevant Legislation

- **The Equality Act 2010**
- The Equality Act (“EqA”) 2010 gave trans people explicit protection against discrimination in their own right.
- This protection is achieved by Section 7 of the EqA 2010 which recognises the protected characteristic of “gender reassignment”.
- A person has this characteristic if he or she *“is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person’s sex by changing physiological or other attributes of sex”*.
- Any person meeting this description is referred to in the EqA 2010 as a “transsexual person”.
- The Act provides protection to these individuals from both indirect and direct discrimination, victimisation and harassment.

Gender Recognition Act 2004

- Two key judgments precipitated the passing of the Gender Recognition Act (“GRA”) 2004. The first of these was handed down by the European Court of Human Rights on 11 July 2002 in *Goodwin v The United Kingdom and I v The United Kingdom (2002) 35 EHRR 18*. The Court found that the UK had breached the Convention rights of two transsexual people, under Articles 8 and 12.
- The second judgment was given by the House of Lords on 10 April 2003 in *Bellinger v Bellinger [2003] 2 All ER 593*. Mrs. Bellinger, a male-to-female transsexual person, was seeking legal recognition of her 1981 marriage to a man. Their Lordships were sympathetic to Mrs Bellinger’s plight but ruled that the marriage was void. They declared that section 11I of the Matrimonial Causes Act 1973 was incompatible with the Human Rights Act 1998.

Gender Recognition Certificates

- The GRA 2004 sets out the process by which trans people can acquire legal recognition of their acquired gender, involving an application to the Gender Recognition Panel.
- If successful, an applicant will be issued with a Gender Recognition Certificate (“GRC”), permitting the holder to be recognised for all legal purposes (including marriage) as belonging to their acquired gender.
- Applicants for a GRC are required to prove that they:
 - are aged over 18;
 - have, or have had, a documented mental-health diagnosis of gender dysphoria;
 - are not married (unless their spouse has given consent to changing the marriage from different-sex to same-sex or vice versa, as appropriate);
 - are not in a civil partnership;
 - have lived fully for the last two years in their acquired gender (by producing a selection of items of documentary evidence showing change of name and gender, such as a passport, rent book, wages slip or benefits documentation); and
 - intend to live permanently in their acquired gender.

Scope for Reform

- Note that the 2016 Women and Equalities Select Committee heard evidence from many people that the GRA has many shortcomings. It is considered to be narrowly defined in binary terms, excluding non-binary, non-gender and intersex people.
- In many countries, gender recognition and legal recognition on a birth certificate can be done by self-determination, without a “diagnosis” of gender dysphoria. The model of self-declaration is considered gold standard.
- One of the recommendations of the Transgender Equality Committee is for the GRA to be updated.
- **The committee also recommended that provision should be made for 16 and 17-year-olds, with appropriate support, to apply for gender recognition, on the basis of self-declaration.**

Re M
(Children)
2017 EWCA Civ
2164

- Court of Appeal overturned the decision on the basis that:-
 - Religious views (sometimes discriminatory) should not override the Judge's role as the "judicial reasonable parent" applying the standards of reasonable men and women today.
 - The human rights of the father and discrimination against him was not fully considered.
 - The "community's objection to direct contact compared to indirect contact was not sufficiently analysed".
 - The Judge "gave up too easily" in its attempt to make direct contact work.
- Much discussion of the Equality Act 2010 and the HRA (Articles 6, 8, 9 and 14).
- Importance of paramountcy principle :
- "*§47 – the fact is, as the daily business of the Family Division so vividly demonstrates, that we live today in a world where the family takes many forms and where surrogacy, IVF, same sex relationships, same sex marriages and transgenderism, for example, are no longer treated as they were in even the quite recent past*"

Re J
(a Minor)
[2016] EWHC
2430

- Section 37 concluded no immediate risk of harm; M's approach to gender identity supportive and not harmful.
- Hayden J described the section 37 as "irrational and unsustainable" and "I am afraid to say that I can only describe the conclusion of the section 37 report as entirely lacking in any logical, coherent analysis" (§21).
- Raft of directions for further gender assessment including Tavistock etc.
- NB at para 43 – Hayden J articulated his view of M's assessment of the gender dysmorphia of J. At the end of the hearing he ordered J be transferred to the care of his father where he assumed the identity of a boy and refused the child to be referred to by their pronoun of choice.
- Expert – Dr Hellin, consultant clinical psychologist:
 - *M has caused significant emotional harm to J and in her active determination that he should be a girl, I find that she has overborne his will and deprived him of his fundamental right to exercise his autonomy in the most basic way.*
- Decided correctly but attracted adverse media reports – interpreted by special interest groups as a message to parents of transgender children that they should fear their child being taken away from them.
- Case correctly decided – point was his mother was so overbearing that the establishment of *any* identity which was at odds with M's own values and belief was not possible (§58)

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[2019] EWFC 30

- Mr Justice Williams
- 3 biological children and FC and SG
- N - natural child (male) transitioned to female and became known as R. Parents changed name by deed poll. Referred to Tavistock.
- H (biologically male) foster child - primary school worried because being sent to school in girls clothing after school had asked child be sent in boys clothing.
- Anonymous referral - “preoccupation with and encouragement of gender dysphoria in 3 children.
- Experts
 - Dr Hellin
 - Dr Ward (FII)
 - Dr Pasterski - consultant psychologist specialising in gender identity

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TP
[2019] EWFC 30

- “current guidance suggests that supporting a child who clearly and consistently states that they wish to be the other gender, in their preferred gender role is associated with improved mental health and well-being” (§58).
- Enabled the J to conclude :

§81 “...I observed during the course of the hearing that the issues relating to gender identity and the medical understanding of such issues is complex and developing and that inevitably here is some lag between those professionals at the cutting edge such as Dr Pasterski and others (in which I include myself) which might have played some role in how these proceedings came about”

Glossary / Terminology

- **Transgender**
Transgender refers to the individuals who have a binary identity (male or female) and for whom this identity is not aligned with their sex at birth (natal sex). For children, cross-gender behaviours may start between the ages of 2 and 4, the same age at which most typically developing children begin showing gendered behaviours and interests.
- **Gender Identity**
Gender identity is an individual's fundamental sense of their own gender. In most children this aligns with their natal sex. In transgender children, it does not.
- **Gender dysphoria**
This refers to the condition in which an individual wishes to be accepted as a member of the sex/gender other than that which was assigned at birth. This is usually accompanied by a sense of discomfort or inappropriateness of one's anatomical sex.
- Until 2014 "Gender Identity Disorder" was the official diagnosis given to children who had behavioural preferences and identities. The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders changed the terminology. The diagnostic category was renamed gender dysphoria and is stricter.

Glossary / Terminology

- The presentation of gender dysphoria differs between children, adolescents and adults.
 - In children, a diagnosis involves at least 6 of the following criteria and an associated significant distress (pre-transition) or impairment in function, lasting at least 6 months:
 - A strong desire to be of the other gender or an insistence that one is the other gender.
 - A strong preference for wearing clothes typical of the opposite gender.
 - A strong preference for cross-gender roles in make-believe play or fantasy play.
 - A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender.
 - A strong preference for playmates of the other gender.
 - A strong rejection of toys, games and activities typical of one's assigned gender.
 - A strong dislike of one's sexual anatomy.
 - A strong desire for the physical sex characteristics that match one's experienced gender.

Glossary / Terminology

- For adolescents and adults- there is a difference in one's experienced/expressed gender and assigned gender and significant distress or problems in everyday functioning. Diagnosis can be made when at least 2 features have been present for 6 months or more;
 - A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics.
 - A strong desire to be rid of one's primary and/or secondary sex characteristics.
 - A strong desire for the primary and/or secondary sex characteristics of the other gender.
 - A strong desire to be of the other gender.
 - A strong desire to be treated as the other gender.
 - A strong conviction that one has the typical feelings and reactions of the other gender

Glossary / Terminology

- **Gender variance and gender diversity**

Gender variance and gender diversity are umbrella terms used to describe the wide range of gender identifications outside of conventional gender categories.

- **Non-binary**

Non-binary is a lack of identification with conventional maleness or femaleness. Non-binary people may express features of both genders or neither.

- **Trans people**

People who have a gender identity which differs from that of their (assigned) birth sex.

- **Transman/transboy**

A person born phenotypically female (natal female), registered (assigned) female at birth, who identifies as male. Also known as female to male.

- **Transwoman/transgirl**

A person born phenotypically male (natal male), registered (assigned) male at birth, who identifies as female. Also known as male to female.

Glossary / Terminology

- **Cisgender**
Used in trans community to refer to people who are not transgender
- **Intersex**
Intersex people are born with ambiguous primary physical sexual characteristics.
- **Transition**
The process of a person changing their gender presentation to bring it into alignment with their gender identity. A trans person's gender after transitioning is known as their "affirmed "gender"
- **Hormone-blocking medication**
This medication is available from the onset of puberty (regardless of chronological age) and involves pressing the "pause button" on the process of puberty, allowing the young person to address their gender identity issues without the distress that puberty can cause.

Glossary / Terminology

- **GnRH analogue**

GnRH analogue is known colloquially as 'the blocker'. It is a longer acting version of the naturally occurring gonadotropin-releasing hormones (GnRH) such as triptorelin (Gonapeptyl Depot or Decapeptyl SR) used to prevent pituitary gonadotropin (follicle stimulating hormone FSH and luteinising hormone LH) secretion by competitive inhibition of the GnRH receptor.

- **Pubertal-postponement treatment**

These treatments, by preventing the development of secondary sexual characteristics, obviate the need for some surgery and other treatment if the patient later undergoes gender reassignment/confirmation surgery.

Glossary / Terminology

- **Cross-sex hormones**

Cross-sex hormones (also known as gender-affirming hormones) are physiological doses of testosterone in transboys and oestradiol in transgirls used to induce secondary sex changes associated with the gender of identification.

- **Desistance**

Where children who have presented with gender dysphoria have not persisted with their cross-gender identification as they have got older. Note that past research studies that show that up to 80% of children desist or realign their gender identity were based on studies with a high number of non-dysphoric children. This was because the diagnostic criteria was different before 2014. Before 2014, children might present with gender variance but did not always state that they wanted to be the other gender.

Research and Guidance

- **Assessment and Support of Children and Adolescents with Gender Dysphoria**

(Gary Butler, Nastasja De Graaf, Bernadette Wren, Polly Carmichael)

<https://adc.bmj.com/content/103/7/631.full>

<https://adc.bmj.com/content/archdischild/103/7/631.full.pdf>

This is a practice review dated July 2018 provides an overview of gender diversity and the management and care of children and adolescents.

Research and Guidance

- **Mental Health of Transgender Children Who Are Supported in Their Identities.**

*US Research paper by Olson, Durwood, De Meules and McLaughlin .
Pediatrics 2016.*

- **House of Commons – Women and Equalities Committee:
Transgender Equality [First Report of Session 2015 – 2016]**

<https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>

The report identified that high levels of transphobia are experienced by individuals on a daily basis. About half of young trans people and a third of trans adults attempt suicide. Whilst the GRA 2004 was once pioneering, it is now outdated. It places too great an emphasis on a medicalised approach which pathologises trans identities and runs contrary to the dignity and personal autonomy of applicants. In the same vein, whilst the EqA 2010 was a huge step forward in providing protection for trans people, the terms “gender reassignment” and “transsexual” are outdated and misleading and may not cover wider members of the trans community. It is important to recognise that trans identities take a wide variety of forms.

Research and Guidance

- **Department for Education: Transgender awareness in child and family social work education [May 2018]**

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706344/Transgender_awareness_in_child_and_family_social_work_education.pdf

Include – stuff on “De- transition advocacy network” – BBC news feature October 2019 – children who have transitioned and want to transition back again.

Summary; there is a significant lack of transgender specific social work research. There is variable training of social workers with regard to transgender issues and it is largely deficient. Very few social workers have specific education or training in this subject. Transgender awareness is an area “in need of development “ across the profession