

## Using DNA Testing to Aid the Transgender Community

The increasing societal commitment to the well being of those wishing to express different gender identity and gender expression together with the legal recognition of same, is important for the protection of individuals, their dignity and their health. Recent instances however, concern the ability of transgender people to amend the birth certificate of a child to reflect their own changed gender, which in one 2015 case was rejected by the Registrar and also by the High Court<sup>1</sup>. This has obvious implications for DNA testing in terms of checking for Parental Responsibility and in carrying out the work, whereby intimate details may be revealed.

There are two cases (one ongoing) which highlight the need for fresh consideration of how we might integrate transgender rights into legal parlance and process.

In the aforementioned case (the first of its kind) a person male at birth who was undergoing transition to female requested that the Registrar of Births amend her child's birth certificate to reflect her new name. This was refused and resulted in proceedings under Article 8 (respect for private life) and Article 14 (discrimination on the basis of transgender identity<sup>2</sup>) of the European Convention of Human Rights (ECHR). This was rejected on the basis that the interference with the Article 8 right was justified but not material, since it would only be under rare situations (we expect paternity testing to be one of them) that the transgender female would be required to produce the child's full birth certificate. A changed certificate might record the sensitive information or require disclosure, but of course, it would only need to be revealed to those with an obligation of confidentiality,

despite the fact that in this case she had identified herself as transgender on social media.

Furthermore, a birth certificate can only be altered to correct minor errors or when parents marry or enter into a civil partnership following the birth<sup>3</sup>. The Registrar of Births does not have discretion concerning the categories that are recorded on the birth certificate, which are "child", "father", "mother" and "informant". Indeed, the Registrar successfully argued that point in terms of the legitimate aims of the Births and Deaths Registration Act 1953. There was justified interference with the claimants rights under the ECHR because there was a need for; a) an administratively coherent system for the registration of births and b) a need to respect the rights of others such as those of the partner and child of the transgender person and, of particular relevance, the fundamental right of a child to know the identity of his or her biological father.

In a subsequent case<sup>4</sup>, a person female at birth and living as a male (TT) had a child (YY), biologically theirs, by artificial insemination. At the point at which the child was born, a valid Gender Recognition Certificate was in place, so the biological mother was male. The Registrar has decided that the birth mother must be registered as "mother" on the birth certificate. This is against the wishes of TT who asserts that as a matter of domestic law, he should be regarded as the father or secondarily, in a gender-neutral manner as "parent". Failing that and assuming he has to register the birth as "mother", then he considered that this would be a contravention of Article 8 of the ECHR. If upheld on the other hand, YY will be

the first person born in the UK without a mother on their birth certificate, since other transgender males have accepted the “mother” annotation. Those acting for YY have issued an application for TT to be declared YY’s father under the Family Law Act 1986, s55A.

We await the final judgement on this case, but in any event the outcome will have profound implications. Society is in the process of normalising its institutions to accept the status of transgender persons but of course in this case must also take into account the separate needs of the child; their Article 8 rights should not be compromised by the decisions of a parent. If the status quo is not upheld, then as a DNA testing company we will inevitably at some point detect a biological female registered as the father, maybe with another registered father or father unknown or a biological male registered as the mother. The biological facts of course, cannot be denied<sup>5</sup>.

In 1953 social motherhood and fatherhood were presumed to reflect biological motherhood and biological fatherhood. The increasing complexity of social relationships since that time have been recognised by the law and provide interesting points regarding the registration of the birth of a child in situations of surrogacy, adoption and assisted reproduction, which may provide precedent and guidance as to how the parentage may be best recorded when one of the parents is transgender. In any event, in all three cases, once the child has attained the age of 18, the respective legislation allows for the child to obtain information on their biological parentage. We will discuss these points in the next article and by then, we will hopefully have the judgement on TT vs YY.

About the author: Neil Sullivan, BSc, MBA (DIC), LL.M, PhD is General Manager, of Complement Genomics Ltd (trading as dadcheck<sup>®</sup>gold).

The latter is a company accredited by the Ministry of Justice as a body that may carry out parentage tests directed by the civil courts in England and Wales under section 20 of the Family Law Reform Act 1969".

---

<sup>1</sup> JK, R (on the application of) v The Secretary of State for the Home Department & Anor [2015] EWHC 990 (Admin) (20 April 2015)

<sup>2</sup> Goodwin v United Kingdom (2002) 35 EHRR 18 and PV v Spain (11 April 2011) (Application No 2 35159/09)

<sup>3</sup> Births and Deaths Registration Act 1953, sections 29,14 and 14A 4 Administrative Court and Family Division in the Matter of TT and YY [2019] EWHC 1823 (Fam)

<sup>4</sup> Administrative Court and Family Division in the Matter of TT and YY [2019] EWHC 1823 (Fam)

<sup>5</sup> As Lord Simon noted in the Amptill Peerage Case [1977] AC 547, page 577: "Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition".

---

## Sex and Gender – Definitions

There has been a neo-logic expansion of terminology concerning sex and gender...here are explanations for a few of them!

### **The difference between Sex and Gender**

“Sex” relates purely to biology and refers to the genetic make up, which is either male (an X and a Y chromosome), female (two X chromosomes) or intersex. Gender on the other hand, is largely a social construct relating to behavioural, social and psychological characteristics; it may take many forms<sup>6</sup>. Sex and gender may overlap, but should never be confused. Biologically, humans are most often classified as binary, i.e. either male or female.

### **Transgender<sup>7</sup>**

Transgender (often applied to non-binary gender identities) is an umbrella term that describes a diverse group of people whose internal sense of gender is different than that which they were assigned at birth. It refers to a gender identity which does not align with the gender assigned at birth. Gender dysphoria applies when the individual has a sense of dissatisfaction with their gender. To attain transgender status in the law, an individual must be diagnosed with gender dysphoria by a professional and then apply for a gender recognition certificate under the Gender Recognition Act, 2004. Whilst this piece of legislation allows transgender persons to obtain a new birth certificate for themselves, it expressly precludes the fact of gender reassignment as a means to alter the status of the transgender person as the mother or father of the child and thus ensures the continuity of parental rights and responsibilities<sup>9</sup>.

## **Intersex**

It has long been recognised (since ancient times) and in different cultures that some people are neither male nor female (in whole or in part) or, are a combination of male and female. This is driven by genetic, hormonal or physical features, that is, by their intrinsic biology. For example, some intersex people may have XXY as their chromosome set. Presently in the UK, intersex people may not change their sex classification unless they declare that they are transgender - then they would have to seek a professional diagnosis of gender dysphoria. Equating intersex with transgender is not appropriate.

---

<sup>6</sup><https://genderfluidsupport.tumblr.com/gender>

<sup>7</sup>Trans – exploring gender identity and gender dysphoria – by Dr Az Hakeem, 2018, Trigger Press ISBN 978-1-011246-49-7

<sup>8</sup><https://www.gov.uk/apply-gender-recognition-certificate>

<sup>9</sup><https://www.legislation.gov.uk/ukpga/2004/7/notes/division/4/12>

---