

Mothers and others: Transgender birth, birth registration and the rights of the child, with a focus on the United Kingdom and South Africa

International Journal of
Discrimination and the Law
2020, Vol. 20(4) 203–223
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DOI: 10.1177/1358229120970142
journals.sagepub.com/home/jdi



Julia SlothNielsen¹  and Rachel SlothNielsen²

Abstract

The review concerns the position of the identification as ‘mother’ or ‘father’ of trans persons who give birth. This matter has occupied courts in the United Kingdom, Germany, Brazil and Sweden recently, and could well arise in South Africa, our country of origin. The first part of the discussion relates to a claim of a trans man who gave birth to be registered as the father of the child. The legal situation in South Africa and the United Kingdom is compared, and particular focus is placed on the meaning of ‘mother’. A second issue for discussion relates to the right of the child born to a trans person to birth registration, notably, what the child’s interests are in relation to his or her parent’s identification details on his or her birth certificate. We conclude that the gender identity of the trans parent must be the primary factor determining his or her registration as a parent on the birth certificate, and that this solution also better serves the child’s best interests.

Keywords

Transgender, identity, birth registration, children’s rights, best interests

¹ Faculty of Law, University of the Western Cape, Bellville, South Africa

² Miller du Toit Cloete Inc., Cape Town, South Africa

Corresponding author:

Julia SlothNielsen, Faculty of Law, University of the Western Cape, Robert Sobukwe Avenue, Bellville 7535, South Africa.

Email: jsloth-nielsen@uwc.ac.za

Introduction

On 21 April 2017, a child known only as YY was conceived by means of intra-uterine insemination fertility treatment in the United Kingdom. This is not novel or particularly ground-breaking- children are conceived by means of fertility treatment increasingly often. However, in this case, just 10 days earlier, on 11 April 2017, a Gender Recognition Certificate had been issued to the person to whom YY would be born confirming that he was male.

Freddy McConnell (referred to throughout the judgement as TT by reason of an anonymity order),¹ a man in law for all intents and purposes, got pregnant, carried the pregnancy to full term; in January 2018 he gave birth to his son YY. However, upon registration of the birth, McConnell (or TT), who was not married nor in a relationship at the time of YY's birth, was informed that he had to be registered as the 'mother' on YY's birth certificate. This led to him bringing a claim for judicial review of the Registrar General's decision to register him as the 'mother' and not father, or alternatively to register him as the 'parent', of the child he had given birth to.

The question put to the High Court (Family Division) for determination was thus, as The Right Honourable Sir Andrew McFarlane so clearly put it: 'Is that man the "mother" or the "father" of his child?'²

Counsel for TT essentially argued his case based on the assumption that the terms 'mother' and 'father' are inherently gendered terms; or put in overly simple terms: mother = female and father = male. Thus, as TT was legally male at the time YY was born, he averred that he must be registered as YY's father. In contrast, counsel for the government asserted that 'mother' did not necessarily refer solely to the female gender (or father to the male gender) but rather, as a matter of UK domestic law, the term 'mother' means the person who gave birth to the child.³ 'On the government's case, the attribution of status is of mother determined by the person's biological role in the process of conception, pregnancy and birth; on TT and YY's case, the attribution of status is determined by reference to a person's gender at the time of the child's birth'.⁴

In order to properly understand the nuances of these two arguments, it is necessary to briefly explain the difference between sex and gender, bearing in mind that the definition of these terms is constantly evolving, and that there are differences of opinion among various groups of persons.⁵

In the last 45 years, 'gender' has been understood as different to 'sex' by reference to a difference between the body, biology and being male or female ('sex') and social and cultural roles inscribed on bodies; masculinity and femininity ('gender').⁶

Sex has been traditionally understood as the biological distinction between men and women.⁷ This biological distinction is made up of the presence or absence of certain organs, sex characteristics and hormones. Thus, which internal and external organs are present in a person, as well as certain hormonal factors, will determine whether one is classified as male or female.

On the other hand, gender is commonly regarded as referring to how society thinks men and women should act (as defined by their real or perceived biological differences)

or how they ought to behave so that their behaviour accords with their sex. According to the World Health Organization it is the ‘socially constructed characteristics of men and women – such a norms, roles, and relationships of and between men and women’.⁸ It is the ‘manner in which culture defines and constrains the differences between men and women’.⁹ In other words, ‘gender typically refers only to the behavioural, social and psychological characteristics of men and women’.¹⁰

To bring this back to TT’s case, it can be seen that his counsel argued that ‘mother’ is a gendered term, while counsel for the State submitted that ‘mother’ is linked to the definition of sex i.e. it is solely informed by the biological processes of carrying and subsequently giving birth to a child. What role the parent will play thereafter is irrelevant, in this line of thought.

For the sake of completing an explanation of terminology, it is prudent to grapple with the term ‘gender identity’. While ‘gender’ refers to socially constructed ideas about how men and women should behave, the activities they should perform, what they should like (e.g. the colour pink vs the colour blue) and their general disposition, gender identity is not per se a social construct, but rather how an individual perceives their own gender (as opposed to how society thinks they should act). It is commonly understood as the ‘sense of knowing to which sex one belongs, that is, the awareness that “I am a male” or “I am a female”’.¹¹ It is the ‘core sense of the self as male, female or somewhere on the spectrum outside the binary’.¹² Professor Stephen Whittle summarises the interaction between gender identity and gender as follows:

Gender identity is the total perception of an individual about his or her own gender. It includes a basic personal identity as a boy or girl, man or woman, as well as personal judgments about the individual’s level of conformity to the societal norms of masculinity and femininity. Gender as others perceive it is called gender role. The two concepts are tied together, since most people show their perceptions of themselves in their dress, manners and activities. Clothing is the major public signifier of gender that allows other people to immediately identify an individual’s gender role, but there are other signifiers as well, such as mannerisms or occupational choice. For most people, their gender identity, gender role and all the symbolic manifestations of gender will be congruent. But trans people do not necessarily feel that they fit neatly into either the male or female role as designated at birth or that their behaviour is not totally congruent with the rules and expectations of the society they live in for any of the two gender disembodied law: trans people’s legal (outer)space roles offered.¹³

In law, gender and sex feature extensively in international treaties and in domestic law globally as prohibited grounds for discrimination, violence and persecution (generally by means of equality laws seeking to ensure that inequality between males and females is eradicated). However, gender identity is somewhat new in the legal terrain. It is often grouped with gender or sex in order to bring it into the realm of the law, thus making it capable of protection. Often gender identity is found in international resolutions and commitments that are not binding, for instance in the *Yogyakarta Principles* and the *YP+10*.¹⁴ Thus while TT and his counsel couch their argument in terms of ‘gender’, it could be argued that Freddy is actually fighting for recognition of his male ‘gender

identity’; fighting to be recognised as YY’s father – the role he identifies with and wants the world at large to acknowledge him as.

Legislation relating to gender transition in the United Kingdom and South Africa

Both the United Kingdom (‘UK’) and South Africa (‘SA’) have enacted legislation allowing trans persons to change their legal gender from that which they were assigned at birth to the gender which they identify with. In the UK, this legislation is the Gender Recognition Act of 2004 (‘GRA’) and its South African counterpart is the Alteration of Sex Description and Sex Status Act of 2003 (‘Alteration Act’). In terms of both the GRA and the Alteration Act, the change of a person’s legal gender (UK) or sex (SA) has no retrospective effect. That is, a person is for all intents and purposes their acquired gender from the date on which their gender certificate is issued (UK) or date upon which altered sex is recorded (SA) (bar certain exceptions in terms of the GRA).¹⁵ However, the change of gender/ alteration of sex description ‘does not affect things done, or events occurring, before the certificate is issued’¹⁶ (or as South African legislation puts it: ‘Rights and obligations that have been acquired by or accrued to such a person before the alteration of his or her sex description are not adversely affected by the alteration’¹⁷)

In South Africa, the consequences of altering one’s sex are not qualified in any way. There are no exceptions; a person whose sex has been altered in terms of the Alteration Act ‘is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration’.¹⁸ In the UK, while s9 of the GRA states that the general consequences are that ‘[w]here a full gender recognition certificate is issued to a person, the person’s gender becomes for all purposes the acquired gender’, this general provision is followed by a number of circumstances (exceptions) where the ‘general’ consequence, namely legal recognition of a person’s true gender identity, may not apply.

The initial Court in TT found that it was possible that one of these circumstances was parenthood. Parenthood is found in s12 of the GRA which states ‘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’. The Right Honourable Sir Andrew McFarlane concluded that

GRA 2004, s 12 may be both retrospective and prospective. If that is so then the status of a person as the father or mother of a child is not affected by the acquisition of gender under the Act, even where the relevant birth has taken place after the issue of a GR certificate.¹⁹

This interpretation of s12 of the GRA was confirmed in April 2020 by the Court of Appeal.²⁰ The Appeal Court dismissed the appeal brought by TT, finding that an interpretation of s12 that is both retrospective and prospective was ‘clearly correct’.²¹

The Alteration Act contains no specific ‘exceptions’ to the rule that once an application for alteration of sex has been granted, ‘a person whose sex description has been altered, is deemed for all purposes to be a person of the sex description so altered as from the date of the recording of such alteration’.²² The only proviso is that ‘rights and obligations that have been acquired by or accrued to such a person before the alteration

of his or her sex description are not adversely affected by the alteration'.²³ It is thus not necessary to embark on interpretation of the statute or an enquiry into prospectivity or retrospectivity of a provision contained therein. For all things before the date of alteration, a person will remain their birth-assigned gender in the eyes of the law, but only if rights and obligations would be negatively affected. For all things which occur after the date of alteration, a person is in the eyes of the law their acquired gender. Therefore, a trans man who gives birth to a child post alteration, as occurred with TT, would have to be registered as the child's father in South Africa.

McConnell is not the first trans man to conceive, carry and give birth to his own child,²⁴ nor is he the first to want to be registered as that child's father. In 2017, a case with near similar facts was brought (on appeal) before the Federal Court of Justice (Der Bundesgerichtshof),²⁵ Germany's highest court in the system of ordinary justice. In this case ('the German case'), the court found that the applicant must be registered on his child's birth certificate as the mother and moreover, must be registered according to his birth name (read: his 'dead' name). Just as the GRA contains exceptions to the general consequences of gender recognition, so does its German counterpart – the Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen ('TSG'), more commonly known as the Transsexuals Act. § 10 TSG states that 'Once the decision that the applicant is to be considered to belong to the opposite gender has become final, his or her gender related rights and duties shall be governed by the new gender unless otherwise stated by law'. This general consequence is followed by § 11 (titled Parent-to-child relationship) which states that 'The decision that the applicant shall be considered to belong to the other sex shall be without prejudice to the legal nature of the relations of the applicant and his or her parents as well as between the applicant and his or her children, in case of adopted children only if they were adopted before the decision became final. The same applies to the descendants of these children'. The court noted that the legislature intended that this would apply to both children born before and after a person has legally changed their gender. This can be deduced, *inter alia*, by the fact that '[t]he principle that the change of sex of the parent does not affect the legal relationship with his or her children is expressly limited in time with regard to the time of their adoption only in the case of adopted children. The obvious reverse conclusion, that there is no comparable time limit for natural children with regard to the time of their birth is expressly supported by the genesis of the law, which can be found in the legislative materials'.²⁶ In 2018, the same court, and on the basis of their previous ruling, held that a trans woman whose sperm had been used in the conception of a child born to her female partner had to be registered as the father of the child.²⁷ The Federal Court of Justice ruled that a trans woman 'can be seen in terms of parental rights only as father and not as mother'.

A detailed discussion of the German position on the definition of the word 'mother' is not necessary for comparative purposes. Nevertheless, there is a definition of the word 'mother' in German Law. § 1591 of the Civil Code states that 'the mother of a child is the woman who gave birth to it'. In the German case, it was argued that as the applicant was legally a male when he gave birth to his child, he did not fall within the above definition of a mother. The Court was not persuaded by this argument.

In contrast to the decisions of the German and UK courts, Sweden does allow for trans persons who have had children after legally changing their gender to be registered on the child's official birth registration documents according to their acquired gender. This occurred as a direct result of two cases brought by trans men. The first claimant, who appeared before the Göteborg Administrative Court, gave birth before legally changing his gender marker to male, Case no. 6186-14, 5 October 2015; and the second claimant, before the Stockholm Administrative Court, gave birth after changing his gender marker to male.²⁸ Both claimants were successful. It is unclear what the specific reasons utilised in the judgments were as the judgments are not available to the public (for privacy reasons, it seems), however it appears that reliance was placed on Art 8 (right to respect for private and family life) of the European Convention.²⁹ It should be noted that as of 1 January 2019, Sweden amended its Children and Parents Code to provide that only where the child is born after the parent has changed their gender marker, will the new gender marker be used when registering the child.³⁰ This means that there is now alignment between legal gender and parenthood in Sweden.

In Brazil, a court recently recognised a trans woman, who also happened to be the genetic parent to the child (having provided the sperm), as the mother of the child for the purposes of birth registration. She had previously been recorded as the 'socio affective' (ie adoptive mother) (for the purposes of health insurance for the infant). The gestational and biological mother was also recorded as 'mother'. The court ruling confirmed the trans woman's status as biological mother, notwithstanding that her contribution was that of male gametes.³¹

Common law definition of Mother

Under the UK Children Act 1989, an unmarried father can acquire parental responsibilities in three ways. First, when he becomes registered as the child's parent under the Births and Deaths Registration Act, 1953; second, upon entering into a parental responsibility agreement with the mother of the child; and third, upon application to court for the award of parental responsibility. The Act does not provide a definition of 'mother' or 'father'. Therefore, reliance had to be placed on the common law meaning of 'mother'.

The initial TT judgment concludes that at UK common law, the person who 'carries a pregnancy and gives birth to a child is that child's "mother"'.³² 'The attribution of motherhood is a consequence of the individual's unique role in the biological process of pregnancy and birth'.³³ The reasoning of the honourable Justice McFarlane in coming to this conclusion seems to ring true:

It is necessary to be crystal clear that in stating what the position at common law must be, I am, at this stage, doing no more than looking back to earlier times, prior to the mid-20th century, when conception and pregnancy other than through sexual intercourse was unknown and where gender was primarily determined by genital examination at birth and then maintained for life. In that context, the lack of copious authority on the question does not, given the nature of the issue, indicate that there is any doubt as to the answer. In those times, at common law a person who became pregnant, through the insemination of an egg in their womb, and who subsequently gave birth to a child must have been that child's mother.

In this the law was doing no more than reflecting common sense, common experience and the basic facts of life; motherhood was established by the act of giving birth, or ‘parturition’ to use Lord Simon’s phrase, and a person who became pregnant and gave birth was a ‘mother’.³⁴

If this was also the position at common law in South Africa, it is submitted that the legal position has been developed, while in the UK it has not. A case in point is surrogacy. In the UK, while surrogacy is legal, a surrogacy agreement cannot be enforced by law. The surrogate mother will be the child’s legal parent at birth, with full parental rights and responsibilities. The commissioning parent(s) can only obtain parental rights and responsibilities after the child has been born through adoption or by obtaining a parental order.³⁵ The common law position that she who births the child is the mother thus remains. In South Africa, surrogacy is fully regulated by the Children’s Act 38 of 2005. The surrogate motherhood agreement must be confirmed by a High Court prior to the surrogate mother being artificially inseminated, it is legally enforceable, and ‘the effect of a valid surrogate motherhood agreement is that any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned’.³⁶

Further, while in TT it was concluded that every child must have a mother, as a result of South Africa’s progressive Constitution and case law surrounding gay rights, it is common cause that a child can instead have 2 fathers and no mother (same-sex commissioning parents) or even just 1 father (single male commissioning parent).³⁷ South Africa is of course not the only jurisdiction in which the commissioning parents are legally the surrogate born child’s parents as from birth, such as in Greece, Georgia and Ukraine.³⁸

In light of the above, we see no impediment in theory to a trans man who gets pregnant and gives birth to a child being registered as his child’s father in South Africa. That said, he would likely still face many procedural and administrative obstacles in his quest to be registered as the child’s father. This is also because the registering authority, the Department of Home Affairs, is notoriously recalcitrant both in providing essential services to trans people in general,³⁹ as well as in relation to birth registration by fathers in the absence of birth mothers, as recent constitutional litigation discussed below tends to illustrate.⁴⁰

Firstly, if it is assumed that the child will be conceived by means of artificial reproduction, as YY was, the provisions of the Regulations relating to the Artificial Fertilisation of Persons, 2016 will need to be complied with. While these Regulations are surprisingly gender neutral, it will be difficult to comply with s16 (‘Reporting the Birth’) if it is the father who births the child. Section 16(1)(b) of the regulations state that ‘the mother who gives birth must ensure that the competent person who effected the artificial fertilisation of or embryo transfer is informed of such birth and recording of the information referred to in sub -regulation (2), within 30 days of such birth’. If it is the father who gave birth, could this peremptory provision still be complied with?

Secondly, in terms of the Children’s Act 28 of 2005, full parental rights and responsibilities of a child is automatically afforded to the child’s biological mother (bar certain circumstances, such as where the mother is a minor herself or in surrogacy

arrangements).⁴¹ The biological father only acquires full rights and responsibilities if he is married to the child's mother (at conception, at birth, or anytime in between).⁴² The issue here is that a trans man who gives birth and wants to be registered as the father of his child is not the mother, nor is he married to her. The trans man would therefore have to 'acquire' parental rights and responsibilities, but this is also not so simple. In terms of the Children's Act

The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

- (a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or
- (b) if he, regardless of whether he has lived or is living with the mother-
 - (i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;
 - (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period;
 - (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.⁴³

The problem is he does not meet these requirements either. In terms of sub-section (a), he does not live with the mother. Regarding subsection (b), the conditions for application to court in terms of s26⁴⁴ are not met. In terms of s26, where a person is claiming paternity, they may apply for an amendment to the child's birth certificate with the mother of the child's consent. Alternatively, they can apply to court for an order confirming paternity where the mother refuses to consent, cannot consent due to mental illness, the mother cannot be located, or she is deceased. As none of these conditions can be met, is therefore unclear on what basis an application to court can be made.

Thirdly, one would need to find a way to bypass the requirements for birth registration as contained in the Regulations on the Registration of Births and Deaths Act, 2014. The most problematic regulation is Regulation 12, which deals with the registration of the birth a child born out of wedlock. Sub-regulation (1) of Regulation 12 states that 'a notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A of Form DHA- 24/LRB illustrated in annexure 1A, whichever applicable'. The question which must then be posed is whether it is possible for the child to be registered at all, as the child has no mother to register him or her, only a father. This issue as to whether a father can register a child's birth is not unique to trans men, and in 2018, the Grahamstown High Court declared Regulation 12(1) unconstitutional and invalid because it 'inhibits access to the rights in sections 28(1)(a) and (2) of the Constitution'.⁴⁵ Subsequently, *Centre for Child Law v. Director General: Department of Home Affairs and Others* was decided on the 19th of May 2020. The matter appealed was the prior ruling of the same court relating to section 10 of the

Births and Deaths Registration Act, which (while holding Regulation 12 unconstitutional) dismissed the leg of the application that section of the Births and Deaths Registration Act was also unconstitutional. The declaration of unconstitutionality of section 10 and of Regulation 12 remain to be confirmed by the Constitutional Court, which may come to the assistance of unmarried fathers generally, including trans fathers.

It is further submitted, however, that registering a trans man as the mother of the child could be in breach of his Constitutional rights to dignity⁴⁶ and equality.⁴⁷ In South Africa, the equality clause in the Constitution contains a list of grounds upon which discrimination is prohibited. Discrimination on the basis of transgender status is not a listed ground of discrimination in the Constitution of the Republic of South Africa. However, the Constitution does not only prohibit discrimination on the grounds listed therein, but also prohibits unfair discrimination on any other ground. Whiscrimination is on an unlisted ground, such as transgender status, the discrimination will amount to unfair discrimination and thus will be prohibited where it ‘impairs the fundamental dignity of the person’ or ‘affects them in a comparably serious manner’. In *September v. Subramoney NO*,⁴⁸ the Equality Court found that gender identity (and trans gender identity) is included in the right to dignity in South Africa. Thus, although not expressly stated, discrimination on the basis of status of a person as trans is prohibited. Therefore, should the state department in charge of recording births find that a trans man who gives birth must be registered as the mother of the child, a Constitutional challenge could be mounted in terms of the right to equality and dignity.

Birth registration and the right to identity as a child’s human right

Turning to the second issue we aim to address, that concerns the position of YY. His rights to birth registration,⁴⁹ to identity⁵⁰ and knowledge of origins, non-discrimination,⁵¹ best interests⁵² and dignity⁵³ are all at stake. Much of the academic debate in recent times has turned on the child’s right to know his or her biological origins, in the context of surrogacy and of artificial reproduction.⁵⁴

It is arguably only quite recently that birth registration⁵⁵ has been explicitly characterised as a human right. This contention is made despite the fact that the right to birth registration is recognised as early as 1966 in the International Covenant on Civil and Political Rights.⁵⁶ Almost nothing had been written on the scope and content of the right to birth registration until the 1990s (in contrast to extensive writing on the right to nationality). Birth registration was seen as an administrative function of the executive arm of state.⁵⁷ Even now, the function is described as ‘recognition by the legal system concerned’.⁵⁸ How that legal recognition should proceed is not really described in international law, save that issues have arisen concerning the limitations the state can impose on the parents’ choice of name for the child where this would be contrary to the best interests of a child.⁵⁹ Tobin notes that, at minimum, registration of birth must include particulars of the child’s name; date and place of birth; the names and addresses of the child’s parents; the parents’ nationality or nationalities and the sex of the child (including the capacity to record an ambiguous or non-binary sexual identity).⁶⁰ He is also of the view that the definition of a child’s parents should not be limited to a

traditional conception of parents ‘and must extend to registering the parents genetic, biological and social parents’.⁶¹ He states, though, that the CRC Committee has yet to indicate what information should be contained on identity documents.⁶² Details on a child’s birth registration certificate are not cast in stone, but can be changed – e.g. when an alternation of gender marker is sought.

While birth registration and certification has been regarded as being mostly concerned with establishing a child’s legal personhood, and while it is now clearly recognised in the literature as a right of the child, the scope and contours of this rights are still largely couched as desirable civic and political bureaucratic goods, to be effected by one or another governmental entity for civic coherence purposes.⁶³ Birth registration is required for a child to get a birth certificate – his or her first legal proof of identity.⁶⁴

Less clear is whether the right to birth registration includes the right to a birth certificate. Writing in 2011, Gerber et al argue that the right to a certificate is implicit in the right to registration⁶⁵; for a moment, assuming this is true, a second question that may arise is whose birth certificate is it? The state’s, the parent’s or the child’s? If it is considered primarily that of the child, this may be relevant to YY’s legal and rights-based interests in what information is recorded on his birth certificate. This is accorded some attention towards the end of this section of the article.

A second relevant CRC right is the child’s right to identity and to know one’s biological origins.⁶⁶ Tobin asserts that ‘from a human rights law perspective, identity is critical because it transforms the biological entity into a legal being and confirms the existence of a specific legal personality capable of bearing rights and duties’.⁶⁷ The right to identity has become extremely topical in the era of artificial reproduction, in cases of surrogacy, anonymous sperm and egg donation and so forth. Anonymous birth (baby baskets) has been extensively before the European Court on Human Rights, and has also attracted comments on from the CRC Committee.⁶⁸ The South African Law Commission is busy with an investigation into this very topic, and an Issue Paper titled ‘The child’s rights to know his or her biological origins’ was released in 2017.⁶⁹ In the United Kingdom, legislation was passed in 2008 removing donor anonymity.⁷⁰ It is well established that the right to know one’s biological origins is a right of the child.

The right to identity and the right to birth registration are linked, but not equivalent. The right to identity builds on the right to birth registration. Usang Assim provides that identity is a ‘distinctly autonomous right’ which support the proposition that there are other elements of identity which expand upon the right to birth registration.⁷¹ ‘Identity is a complex mix of factors that contributes to a person’s sense of self knowledge, self-awareness, and self-esteem. Identity asserts a person’s existence and establishes his or her individuality while distinguishing him or her from other members of society . . . The concept of identity is basic to the claim, guarantee, and enjoyment of rights. Thus, identity has been defined as a right that “protects an individual’s significant and knowable personal attributes and social relationships”’.⁷² Irrespective of the consideration of the balancing act or margin of appreciation⁷³ accorded States as regards the weight to be accorded the child’s rights to know his or her biological origins vis a vis other rights, the initial court in TT correctly asks whether it is the child’s biological relationship that should be reflected on the birth certificate (the government’s claim) or the familial and social reality (TT’s and YY’s claim)?⁷⁴ International law provides no clear answer to this

as the definition and contours of identity are opaque and were controversial at the time of the drafting of the CRC. It is clear that name, nationality and family relations are elements, but that identity is not limited to these.⁷⁵ Several components of identity are not fixed or immutable but are shaped by parental and community influence over time, and by the child's own life experiences. Identity formation is a dynamic process, which is never completed.⁷⁶ Assim also links the right to identity to the right to dignity, which arises for discussion later.

The best interests of the child and the right to dignity

The best interests of the child was raised in both the High Court and Appeal Court judgments. The obligation to give effect to this principle is incurred under article 3(1) of the Convention on the Rights of the Child (1989), according this primary consideration.⁷⁷ The CRC Committee's General Comment No 14 (The best interests of the child)⁷⁸ is instructive. The Committee is clear that the best interest of the child are 'a fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen'.⁷⁹ Moreover, the child's best interests are supposed to be a primary consideration⁸⁰: and they apply to the child as an individual.⁸¹ It applies explicitly against those public institutions concerned with giving effect to children's civil rights and freedoms, such as birth registration, which is mentioned *eo nomine* in the General Comment.⁸²

In TT, the child's (YY's) interests in this matter concerned how his parent was to be recorded on the birth certificate.⁸³ 'The guardian ad litem for YY had claimed in the initial hearing that it is important for YY's identity and self-esteem that his birth certificate reflect the reality of his life. The person who gave birth to him is and was male. "Father" means male parent. That is exactly what TT is. Anything else gives the impression of something secretive or shameful. This could lead to YY feeling excluded from society and that he is different or odd'.⁸⁴ Noting that one parent would then be 'missing' from the birth certificate, counsel correctly pointed out that many children do not have a parent listed on their birth certificate, albeit that this is inevitably a father (although unusual, it is not impossible that the identity of the mother is unknown). At the core of the argument of the guardian ad litem was that the contents of the birth certificate itself are part and parcel of the child's right to an identity.

A subsidiary argument was that listing TT as a mother would set his (TT's) quest to have his male identity recognised right back to square one, and this itself could have an indirect adverse impact on YY. She (the guardian ad litem) concluded that it would be overwhelmingly in YY's best interests for TT to be registered as YY's father. The best interests argument put forward was underscored by the fact that it was inconceivable that YY would not come to know the circumstances of his birth, and therefore, that the legal position as recorded on his birth certificate should reflect the realities of his family life.⁸⁵

Counsel for YY had asserted in the High Court that Parliament had failed to provide for the circumstances of YY's conception within the legislative scheme of the Human Fertilisation and Embryology Act of 2008 or elsewhere. Where that Act sets out specific

means of artificial reproduction, they do not include insemination of TT, a male, by donor sperm.⁸⁶

Countering this, the Secretary of State argued that the registration of the person carrying and giving birth to YY as a ‘mother’ was justified by the child’s right to know – and have properly recognised – the identity of the birthing parent, calling this an important and consistent principle that applies throughout birth registration legislation, including in relation to adoption, surrogacy and children born by donor conception.⁸⁷ In essence, this approach seeks to limit the best interests of the child principle by reference to the need for a ‘certain and coherent administrative scheme for the registration of births’.⁸⁸

The legal waters were muddied by the following two dilemmas: first, if the court were to exercise a discretion⁸⁹ to recognise TT as the legal father of YY, he would thereafter have to apply for a parental responsibilities order by virtue of s4 of the Children’s Act of 1989. This is because he qualified as an unmarried father at the time of birth. Second, were the court to declare that TT was YY’s parent as opposed to ‘mother’ or ‘father’, the current birth registration regime would not afford a mechanism to effect such a registration.⁹⁰ This concern is carefully spelt out in the Appeal Court judgment, which alludes to the relative institutional competence of courts as compared to Parliament, which would be better placed to act on amending legislation.⁹¹

In the European context, an amicus in the High Court had drawn attention to Parliamentary Resolution 2239 (2018)⁹² of the Council of Europe, titled ‘Private and Family Life: achieving equality regardless of sexual orientation’. The focus of this Resolution is on achieving equality in ‘rainbow families’. It advocates that States ‘provide for transgender parents’ gender identity to be correctly recorded on their children’s birth certificates, and [to] ensure that persons who use legal gender markers other than male and female are able to have their partnerships and their relationships with their children recognised without discrimination’.⁹³

The same amicus, citing a plethora of jurisprudence of the European Court of Human Rights, argued that a balance had to be struck between a parent’s individual right to privacy, and the child’s right to know his or her biological identity.⁹⁴ In the words of Michael Freeman, the right to identity is also ‘a right not to be deceived about one’s true origins’.⁹⁵ However, while being aptly stated in the context of anonymous donation of gametes, and surrogacy, the facts in this case do not suggest that YY would not know the identity of the person who gave birth to him, as the High Court pointed out.

Counsel for YY alluded to the difficulties the child might experience when travelling across borders with a person who is a man for all purposes, save parenthood, yet that person is designated ‘mother’ on official documents. This would necessarily impact on the child, YY, and would cause him anxiety and stress, counsel further claimed.⁹⁶ It was put forth that this was an interference in the right to private and family life, protected under article 8 of the European Convention on Human Rights. Applications for benefit support, or student loan applications might also be impacted. This was argued to be an interference in YY’s private and family life.⁹⁷ The initial court agreed with this assertion.⁹⁸

Nevertheless, in that, despite the admitted interference with the right to private life of both TT and his son YY, such interference was justified as being in accordance with the

law, was for a legitimate purpose, and otherwise necessary, proportionate and fair.⁹⁹ The Court was persuaded that although the interference in their right to private life was ‘substantial’,¹⁰⁰ it was outweighed by ‘the interests of third parties and society at large in the operation of coherent registration scheme which reliably and consistently records the person who gives birth on every occasion as “mother”’.¹⁰¹

The initial court had opined that the organising criterion (as regards YY) was the best interests test. This principle, the Court said, provided more support for registration of TT as YY’s mother than as his father. Pitted against the child’s interest in having his birth certificate reflect his lived reality was the need for every child to know with certainty who gave birth to them.¹⁰² And since this is a generic, high level, and non case-specific issue to be decided, it must be decided on principle. The principled approach is also to be taken because it was not argued that YY was in any special category that would make his circumstances different to the general cohort of children born to trans males.

The Appeal Court found similarly: that a child best interests should be taken into account as ‘a’ primary consideration when striking a balance in legislation, and that this is precisely what Parliament had done: the view of Parliament was that every child should ‘have a mother and should be able to discover who their mother was, because that is in the child’s best interests’.¹⁰³

The Appeal court refers to the German case, which found in a similar vein that the person who gave birth was to be recorded as ‘mother’, his new gender status as male notwithstanding.¹⁰⁴ The basis for this was the child’s right to know his origins. The German court had premised this on the fundamental rights of the child, as not recording the incidence of motherhood would deprive the child of essential information; it would affect the right of the child to parental care and education by both parents; and on the basis that the link to the biological reproductive function provides the child with a legally stable association with a father and a mother.¹⁰⁵ (Otherwise, the child would have only one legal parent.)¹⁰⁶

It seems that the approach to the best interests of the child under these circumstances depends on whether the child’s right to know his or her biological origins is the predominant focus, or whether the objective is to guarantee the child’s right to (social) identity. There may be a tension between these, as when the social reality and the factual reality diverge. The CRC Committee defines best interests as a ‘dynamic concept that requires an assessment appropriate to the specific context’, leading to the need for a flexible case-by-case approach in determining its content.¹⁰⁷

The view we support is that the best interests of the child in YYs case are better served by protecting the child’s social reality, given that this will serve to align the child’s identity with his social reality for his entire childhood, and that the best interests of the child has a temporal (longer term) dimension beyond the immediate decision as to how his parental details are recorded on his birth certificate.¹⁰⁸

Supporting this, by implication, are Vandenhoe and Turkelli,¹⁰⁹ citing with approval the dissenting judgment of the European Court of Human rights in *Mantel v. France*.¹¹⁰ The case concerned a challenge to an abstract and generalised definition of the best interests of the child was launched by Judge Nussberger in a dissenting opinion in a case on paternal affiliation. The domestic courts had judged that the best interests of the child lay in the establishment of its real biological affiliation rather than in the maintenance of

the paternal affiliation with the husband of his mother. In his dissenting opinion, Judge Nussberger introduced a distinction between the subjective and objective definition of best interests, dismissing an objective one. Subjectively defined, the child did not want to re-establish ties with the presumed biological father. The abstract and generalised definition of the best interests, that is, to know the truth about one's origins, failed to take into account the child's individualised concrete circumstances.¹¹¹ In this case the child lost his social and legal father and was forced to accept, during his adolescence, his presumed biological father as his new legal father.

The assertion was made that identity is linked to the child's right to dignity, which Ronen defines in the following way: 'The child's right to identity derivative of their human dignity should protect the development of an authentic self actualization individual which maintains psychological ties, primary ties of interdependence to significant others'.¹¹²

South African constitutional jurisprudence (including child rights case law) places heightened emphasis on dignity as a founding constitutional value, and the right to dignity would undoubtedly underpin an analysis of the true import of the child's identity rights in a situation such as that of YY. However, dignity is not an express CRC right, and nor does it weigh in European human rights case law.

Conclusion

It is submitted that the proper application of the best interests principle should not be susceptible to a 'margin of appreciation' or 'discretionary area of judgment', as the Appeal Court in TT held.¹¹³ The South African Constitutional court has (in an elaborate jurisprudence on 'best interests'), twice adduced 'best interest' considerations as a reason for permitting birth registration to mirror the social reality of the child.¹¹⁴ Further jurisprudence in this regard seems likely, given recent judgments pertaining to the unconstitutionality of sections of the Births and Death Registration Act and its Regulations.

We submit that YY's best interests dictate that he should not be forced to confront the confusing disjuncture between his lived experience and his civil registration details from fairly early on in life. His best interests seem rather to point to the need for him to have clarity as to his social identity¹¹⁵ from the outset.

Turning to the right to identity, again there is room to quibble with the judgment. Right to origin information includes gestational information, but that does not mean that every child has a right to know who his 'mother', specifically, is – merely the circumstances of his birth. The High Court judgment concedes that irrespective of the legal status accorded TT, 'for all other purposes, be they social, psychological or emotional, TT will be a male parent and therefore [YY's] "father." This will be the social and psychological reality of their relationship'.¹¹⁶ And as noted, those dimensions of identity that are shaped by parental and community influence and by the child's own lived experience will mean that YY will grow up knowing TT as his father.

Finally, the question of the birth certificate itself. Here, the Swedish position is most advanced in giving effect to the 2019 law that a man who gives birth to a child should be regarded as the father of the child and that a woman who contributes with her sperm to a

child's birth should be regarded as the mother of the child, and recorded officially as such. As every person has, as a corollary of the right to birth registration, the right to access his or her own birth certificate, it is implicit that the relevant document belongs to the person who is so registered, albeit that state authorities have legitimate interest in recording the contents for civic and governmental purposes.¹¹⁷

Thus, it is our view that YY's birth certificate is his – to have and to hold, and to amend if needs be in future. And, having established that YY's best interests suggest that all identifying information accord with his lived social reality, he would most likely have a keen preference in having the gestational parent designated as his father, as his counsel argued. In summary, the German and the United Kingdom judgments do not support a child rights reading of the child's right to birth registration in the circumstances outlined in the case under discussion. YY's best interests were not accorded the primacy that they should have been.

As regards TT, 'to claim – as English courts explicitly did – that McConnell's registration as "mother" does not necessarily indicate that he is female clashes with the social reality that he is a male. Even though the court may claim that McConnell is a "male mother," society will understand his maternal status as being indicative of the female legal gender and this might cause him to be treated accordingly'.¹¹⁸ In South Africa, in the light of *September*, this would violate his 'constitutionally enshrined human rights', as his human rights are 'not being afforded . . . recognition, protection and respect . . . Conduct which is part of [his] experience of being human is being condemned'.¹¹⁹ As the discrimination argument raised by TT's counsel failed at the *court a quo*, we assume that registering McConnell as mother of YY does not amount to discrimination under UK law.

This contribution supports the contention that reconceptualising the law of parent-child relations to adequately reflect both the biological origin and the social reality of a child is required in the present era, when the law cannot accommodate the lived realities of families.¹²⁰

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Julia SlothNielsen  <https://orcid.org/0000-0002-8315-1255>

Notes

1. A documentary (Seahorse) that has been widely aired had revealed his identity subsequent to the anonymity order.
2. *The Queen (on the application of TT) v. Registrar General for England and Wales* [2019] EWHC 2384 (Fam), para. 1.

3. *Ibid.*, para. 98.
4. *Ibid.*, para. 98. The strange grammar is in the original.
5. See J.M. Scherpe, 'The Legal Status of Transsexual and Transgender Persons – An Introduction', in J.M. Scherpe, ed. *The Legal Status of Transsexual and Transgender Persons*. (Cambridge: Intersentia, 2015), p. 2 where he states that '[t]he precise wording and terms used in debates surrounding gender identity often reflect the intensely personal views and feelings of the persons concerned, and are often an area of very intense disagreement'.
6. S. Whittle and L. Turner, "'Sex Changes"? Paradigm Shifts in "Sex" and "Gender" Following the Gender Recognition Act?', *Sociological Research Online* 12(1) (2007), pp. 1–15.
7. G. Siann, *Sex, Gender and Sexuality: Contemporary Psychological Perspectives* (1994) at 3; L.K. Newman, 'Sex, Gender and Culture: Issues in the Definition, Assessment and Treatment of Gender Identity Disorder', *Clinical Child Psychology and Psychiatry* 7(3) (2002), p. 352; J. Pryzgodna and J.C. Chrisler, 'Definitions of Gender and Sex: The Subtleties of Meaning', *Sex Roles* 43(7/8) (2000), p. 553 at 554.
8. Anonymous, 'Gender Equity and Human Rights', *World Health Organization*, date unavailable. Available at: <http://www.who.int/gender-equity-rights/understanding/gender-definition/en/> (accessed 24 August 2018).
9. Siann, *Sex, Gender and Sexuality* (1994).
10. Pryzgodna and Chrisler, 'Definitions of Gender and Sex' (2000).
11. R.J. Stoller, 'A Contribution to the Study of Gender Identity', *The International Journal of Psychoanalysis* 45 (1964), p. 220.
12. V. Pasternski, 'Gender Identity and Intersex Conditions', in J. Scherpe, A. Dutta and T. Helms, eds. *The Legal Status of Intersex Persons*. (Cambridge: Intersentia, 2018) at 65.
13. S. Whittle, *Respect and Equality: Transsexual and Transgender Rights*. (London: Routledge-Cavendish, 2002), p. 3.
14. 'In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright . . . The Yogyakarta Principles address a broad range of international human rights standards and their application to SOGI [sexual orientation and gender identity] issues. On 10 Nov. 2017 a panel of experts published additional principles expanding on the original document reflecting developments in international human rights law and practice since the 2006 Principles, The Yogyakarta Principles plus 10. The new document also contains 111 'additional state obligations', related to areas such as torture, asylum, privacy, health and the protection of human rights defenders.' The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are Available at: www.yogyakartaprinciples.org (accessed 12 June 2020).
15. GRA s. 9(1); Alteration Act s. 3(2).
16. GRA s. 9(2).
17. Alteration Act s. 3(3).
18. Alteration Act s. 3(2).
19. *The Queen (on the application of TT) v. Registrar General for England and Wales* [2019] EWHC 2384 (Fam), para. 149.

20. [2020] EWCA Civ 559.
21. *Ibid.*, para. 29.
22. Alteration Act s. 3(2).
23. Section 3(3).
24. Margaria noted that 205 men in Australia are recorded as having given birth. See A. Margaria, 'Trans Men Who Give Birth and Reflections of Fatherhood: What to Expect?', *International Journal of Law, Policy and the Family*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645101 (pre-published version) (accessed 8 August 2020).
25. BGH, Order of 6 September 2017 – XII ZB 600/14 – Berlin Court of Appeal.
26. Para. 17.
27. BGH XII ZB 459/16.
28. Göteborg Administrative Court, Case no. 6186-14, 5 October 2015; Stockholm Administrative Court Case no. 3201-14, 9 July 2015.
29. Available at: <https://www.skatteverket.se/download/18.361dc8c15312eff6fd14a01/1464684325721/Folkbokf%C3%B6ring+och+%C3%A4ndrad+k%C3%B6nstillh%C3%B6righet.pdf>. See Margaria, 'Trans Men who Give Birth', footnote 139 (accessed 8 August 2020).
30. Personal communication with Professor Jameson Garland of the University of Uppsala. See <https://www.regeringen.se/rattsliga-dokument/proposition/2018/03/prop.-201718155/> (accessed 23 June 2020). See also See Margaria, 'Trans Men who Give Birth', footnote 139.
31. M. Hartmann, 'Justiça do RS Reconhece Mulher Trans Como Mãe Biológica do Filho'. Available at: <https://gauchazh.clicrbs.com.br/comportamento/noticia/2020/08/justica-do-rs-reconhece-mulher-trans-como-mae-biologica-do-filho-ckebslrxq004x013gdp553vv0.html> (accessed 7 September 2020). A full transcript of the judgment could not be found.
32. *The Queen (on the application of TT) v. Registrar General for England and Wales* [2019] EWHC 2384 (Fam) para. 135.
33. *Ibid.*, para. 149.
34. *Ibid.*, para. 133.
35. See <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors> (accessed 23 October 2020).
36. Children's Act 38 of 2005 s297.
37. See s. 292 of the Children's Act 38 of 2005, which states 'at least one of the commissioning parents, or where the *commissioning parent is a single person*, that person, is at the time of entering into the agreement domiciled in the Republic'. That there can be a single commissioning parent who is male was further alluded to in *Ex Parte CJD and Others* 2018 (3) SA 197 (GP).
38. J.M. Scherpe, C. Fenton-Glynn and T. Kaan, eds. *Eastern and Western Perspectives on Surrogacy*. (Cambridge: Intersentia, 2019).
39. See Legal Resources Centre and Gender Dynamix, 'Briefing Paper: Alteration of Sex Description and Sex Status Act, No 49 of 2003' (2015). Available at: https://drive.google.com/file/d/1xvXcmoa5OZ1gsrzMk-z7JbCvd_T0zz5W/view (accessed 9 September 2020).
40. See note 45 below.
41. Section 19.
42. Section 20.
43. Section 21.

44. Section 26 is titled 'Person Claiming Paternity' and states '(1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may – (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 1 l(4) of the Births and Deaths Registration Act, 1992 (Act 10 No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or (b) apply to a court for an order confirming his paternity of the child, if the mother – (i) refuses to consent to such amendment; (ii) is incompetent to give consent due to mental illness; (iii) cannot be located; or (iv) is deceased'.
45. *N and Others v. Director General: Department of Home Affairs and Another* [2018] 3 All SA 802 (ECG) was an application in which a regulation (regulation 12) to the Births and Death Registration Act 108 of 1996 was declared unconstitutional and in violation of the Constitutional rights contained in section 28. Section 28 is the clause enshrining children's rights. In particular, section 28(2) enshrines the principle of the best interest of the child as being paramount as a constitutional precept. However, the application to declare sections of the principal Act unconstitutional (relating to notice of birth, and notice of birth in the case of an illegitimate child) was dismissed. This latter ruling was further appealed. Subsequently, the appeal on this (*Centre for Child Law v. Director General: Department of Home Affairs and Others*) was successful. The application was prompted by the plight of a 2-year-old whose father is a South African citizen and her mother a Congolese citizen. The mother does not have documentation permitting her to reside in South Africa. Shortly after the child's birth her parents tried to register her birth, but Home Affairs refused as the mother does not have a passport or valid visa.
46. Section 10.
47. Section 9.
48. *September v. Subramoney NO and Others* (EC10/2016) [2019] 4 All SA 927 (WCC).
49. Article 7 UN Convention on the Rights of the Child (hereafter CRC).
50. Article 8 CRC.
51. Article 2 CRC.
52. Article 3 CRC.
53. Although the child's right to dignity is not expressly provided for in international treaty law, it is arguably implicit in many provisions.
54. See for instance Tobin (note 62 below).
55. 'Birth registration is the process of officially logging a birth with a government authority, and a birth certificate is the paper issued by the state to the parent or caregiver as a result of this process. A birth certificate proves that registration has occurred'. Available at: <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter> (accessed 21 February 2020).
56. Article 24(2) International Covenant on Civil and Political Rights.
57. 'A fully functional civil registration system should be compulsory, universal, permanent, continuous and should ensure the confidentiality of personal information' (UNICEF Innocenti Digest no. 9, 2002).
58. A. Alen, J.V. Lanotte, E. Verhellen, et al., *Commentary on the UN Convention on the Rights of the Child: Article 7 (The Right to Birth Registration, Name and Nationality and the Right to Know and be Cared for by Parents)*. (Leiden; Marthinus Nijhoff, 2007), par 21.

59. See J. Tobin and F. Seow, 'Article 7: The Right to Birth Registration, a Name, Nationality, and to Know and be Cared for by Parents', in P. Alston and L.B. de Chazournes, eds. *Oxford Commentaries on International Law*. (Oxford: Oxford University Press, 2019), p. 237 at 244.
60. *Ibid.*, at 244.
61. *Ibid.*, at 248.
62. J. Tobin 'Article 8: The Rights to Preservation of a Child's Identity', in P. Alston and L.B. de Chazournes, eds. *Oxford Commentaries on International Law*. (Oxford: Oxford University Press, 2019). Anonymous birth is discussed at p. 292.
63. 'The main barrier to birth registration is that it is not universally perceived as a fundamental right and, as a result, is given low priority at every level': Innocenti Digest p. 13.
64. UNICEF (n 55 above).
65. P. Gerber, A. Gargett and M. Castan, 'Does the Right to Birth Registration Include a Right to a Birth Certificate', *Netherlands Quarterly of Human Rights* 29(4) (2017), pp. 434–459.
66. Article 8 CRC. See in general J. Doek, 'Article 8: The Right to Preservation of a Child's Identity and Article 9: The Rights Not To Be Separated from His or Her Parents', in A. Alen, J. V. Lanotte, E. Verhellen, et al., eds. *A Commentary on the Rights of the Child*. (Leiden: Martinus Nijhoff, 2006). There are scholars who dismiss the claim that the rights in article 7 and 8 CRC found a claim for the right to know biological origins (see e.g. J. Fortin, 'Children's Rights to Know Their Origins – Too far, too fast?', *Child and Family Law Quarterly* 21(3) (2009), p. 336.
67. Tobin, 'Article 8: The Rights to Preservation', p. 281.
68. This is extensively discussed in Tobin, 'Article 8: The Rights to Preservation'. Anonymous birth is discussed at p. 292. An earlier discussion is to be found in Fortin (n 66 above).
69. Issue Paper 32 (May 2017).
70. Human Fertilisation and Embryology Act 2008. See also A. Bainham, 'Arguments about Parentage', *Cambridge Law Journal* 67(2) (2008), pp. 322–351.
71. U. Assim, 'Civil Rights and Freedoms', in U. Kilkelly and T. Liefwaard, eds. *The International Human Rights of Children*. (Hong Kong: Springer, 2019).
72. *Ibid.*, at p. 401. Internal references have been omitted.
73. *McConnell v. Registrar General and others*, judgment of 20 April 2020, par 80.
74. High Court judgment par 201.
75. Tobin, 'Article 8: The Rights to Preservation', p. 291.
76. *Ibid.*, p. 292.
77. The General Comment 14 of the CRC Committee on the right of the child to have his or her best interests taken as a primary consideration is also quoted at length (CRC/C/GC/14 (2013)). The Court of Appeal warned that a General Comment 'is no more than guidance, so that it is not binding even on the international plane, so it may "influence" but never "drive" a conclusion that the CRC has been breached' (par 85 of the Appeal Court judgment).
78. CRC/C/GC/14.
79. Par 6(b).
80. Par 14(b).
81. Par 22 and 24.
82. Par 26. See too par 30. Par 32: '... the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific

- situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child'.
83. A number of jurisdictions already allow non-binary gender categories for all legal purposes, including registration of parenthood, for example Ontario, Malta and Sweden. See L. Holzer, 'Non-Binary Gender Registration Models in Europe Report on third Gender Marker or No Gender Marker Options', *ILGA Europe* (2018), p. 23. Available at: https://www.ilga-europe.org/sites/default/files/non-binary_gender_registration_models_in_europe_0.pdf (accessed 11 September 2020).
 84. Par 59 of the High Court decision.
 85. Par 73 of the High Court decision.
 86. Par 72 of the High Court decision.
 87. Par 78 of the High Court decision.
 88. Par 78 of the High Court judgment. See also Margaria, 'Trans Men who Give Birth', at p. 9 alluding to the enduring role of the maxim 'mater semper certa est'.
 89. Par 104 of the High Court judgment.
 90. Existing law allows for the identification of a 'parent' only where the 'parent' is the female partner of a mother (see 121 (iii) and par 123). The proposal was advanced that if the court were to declare TT as 'parent', the Secretary of State could amend the registration regulations to permit the registration of a person in TTs position as a 'parent'. This proposal did not carry the day.
 91. Appeal court judgment at par 81.
 92. Of 10 October 2018.
 93. Par 184. The Court's analysis of article 8 of the European Convention on the Human Rights (the right to private and family life) and relevant case law in this regard is relevant but beyond the scope of our discussion. This is because the 'margin of appreciation' allowed States to permit interference with that rights on the basis that it pursues a legitimate aim and is proportionate is, in view of the authors, not in 'sync' with a more absolutist approach to children's rights, to which the authors adhere.
 94. Par 194 of the High Court judgment.
 95. M. Freeman, 'The New Birth Right? Identity and the Child of the Reproductive Revolution', *International Journal on Children's Rights* 4 (1996), p. 273.
 96. As argued by YYs counsel: High Court judgment par 218.
 97. High Court judgment par 218.
 98. High Court judgment par 227.
 99. High Court judgment par 273.
 100. High Court judgment par 272.
 101. High Court judgment par 272.
 102. High Court judgment par 259.
 103. Appeal court judgment par 86. At par 58, the Appeal court says that 'the question is not whether it would be in the best interests of YY to have the person who gave birth to him described as his mother on the long-form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was'.
 104. Appeal Court judgment par 75.

105. Federal Court of Justice decision X11 ZB 660/14 par 29.30, 31.
106. The German Court also alluded to the possibility of a subsequent reversal of the recognition of new gender status of the parent under the civil law, which is not merely a theoretical possibility, as 10 persons had applied for gender reassignment reversal previously between 2011 and 2013 in Berlin alone.
107. CRC/C/GC/14 par 1 and 32.
108. M. Freeman, 'Article 3: The Best Interests of the Child', in A. Alen, J.V. Lanotte, E. Verhellen, et al., eds. *A Commentary on the United Nations Convention on the Rights of the Child*. (Leiden: Marthins Nijhoff publishers, 2006) discusses the temporal dimension of a best interests analysis at p. 3.
109. W. Vandenhole and G.E. Türkelli, 'The Best Interests of the Child', in J. Todres and S.M. King, eds. *The Oxford Handbook of Children's Rights Law* (Oxford: Oxford University Press, 2020).
110. *Mandet v. France*, Application No. 30955/12, Eur. Ct. H.R. (14 January 2016).
111. *Mandet v. France* (Appeal Court judgment par 75), dissenting opinion par 8–10.
112. Y. Ronen, 'Refining the Child's Right to Identity', *International Journal of Law Policy and the Family* 18 (2004), p. 147 at 148.
113. Appeal Court par 80.
114. *Du Toit and Another v. Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) (10 September 2002); *J and Another v. Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC) (28 March 2003). The first concerned the striking down of a prohibition on same sex adoption, motivated by section 28(2), but also by the fact that the couple had raised the children together for more than a decade, Yet, their legal parentage was tied to only one parent, which did not reflect this reality. The second concerned the allocation of parental responsibility to a lesbian couple, one of whom was the gestational mother and one of who the biological mother of twins.
115. See Tobin and Seow, 'Article 7: The Right to Birth Registration', at 244.
116. Par 147 of the High Court judgment.
117. As contended by the Secretary of State in the lower court case: par 227.
118. Margaria, 'Trans Men who Give Birth', p. 12.
119. *September v. Subramoney*, at para. 157.
120. J. Scherpe 'Breaking the Existing Paradigms of Parent-child Relationships', in G. Douglas, M. Murch and V. Stephens, eds. *International and National Perspective on Child and Family Law: Essays in Honour of Nigel Lowe* (Cambridge: Intersentia, 2018).