Trans Parenthood and the Meaning of 'Mother', 'Father' and 'Parent' - *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559

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ABSTRACT

In *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559, the Court of Appeal held the Registrar General was correct to register a trans man, who had given birth after the issuing of his gender recognition certificate, as 'mother' on his son's birth certificate. In their judgment, the court rejected the appellants' contention that the Gender Recognition Act 2004 should be construed to allow registration as either 'father' or 'parent'. The court further held that the interference with the appellants' Article 8 rights which resulted from the registration as 'mother' was proportionate and justified.

KEYWORDS: birth registration, fatherhood, Gender Recognition Act 2004, legal parenthood, motherhood, trans parenthood

I INTRODUCTION

What makes someone a 'mother' or a 'father' within the legal understanding of parenthood? Is it their biological or genetic contribution to procreation? Is it the social role that they play (or intend to play) in the child's life? Is it simply a reflection of their legal gender? How, if at all, have the rules for the attribution of legal parenthood been affected by the Gender Recognition Act 2004 ('the 2004 Act')? These questions provide the underpinning context for the Court of Appeal decision in *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559. The specific question to be resolved in the case is: if a trans man, who has been granted a gender recognition certificate, gives birth is he legally considered to be the 'father' or the 'mother' (or possibly the 'parent') of his child? The case involved an appeal from a High Court decision of Sir Andrew MacFarlane, President of the Family Division, to

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refuse an application for judicial review of the decision to register the appellant as 'mother' on the birth certificate of his son, YY.[1]

This factual context represents a novel question for the court,[2] and it is apparent that this issue was not within the contemplation of Parliament at the time of the debates on the 2004 Act.[3] However, despite the presence of these underlying conceptual and theoretical questions, the Court of Appeal judgment is instead tightly focused upon issues of statutory interpretation regarding the 2004 Act and the potential application of sections 3 and 4 of the Human Rights Act 1998 ('the 1998 Act'). This narrow approach deliberately leaves any wider questions about the continuing suitability, given the growing diversity of family forms in 21st century UK society, of the existing statutory regimes governing the attribution of legal parenthood and the registration of births to be resolved by Parliament.

II THE FACTS

While this case raises a range of issues, the background factual circumstances are relatively straightforward. The appellant, Alfred ('Freddy') McConnell,[4] who had been assigned female gender at birth, transitioned around ten years ago, in the intervening period he has undertaken testosterone therapy and undergone a double mastectomy.[5] In September 2016, the appellant suspended his testosterone treatment and subsequently began fertility treatment, at a licensed clinic, which aimed to fertilise 'one or more of the eggs in his womb.'[6] In January 2017, he applied for a gender recognition certificate and this was granted on April 11th 2017.[7] The legal effect of this certificate is that, 'the person's gender becomes for all purposes the acquired

[1] *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 2384 (Fam).
[2] In *R (on the Application of JK) v Registrar General for England and Wales* [2015] EWHC 990 (Admin), the High Court previously considered the registration of a trans woman as 'father' on the birth certificates of her two children, with Hickinbottom J finding that there was no violation of Article 8 or Article 14. However, there was a crucial factual difference in that case, as both children were born prior to the issuing of the gender recognition certificate.
[3] The lack of Parliamentary consideration of these issues is explored in the first instance judgment *R (On the Application of TT)* (n 1) [90], where Sir Andrew MacFarlane notes, 'that the issue was not specifically addressed'.
[4] Mr McConnell was the focus of a documentary film titled 'Seahorse', which aired on the BBC in September 2019, about his attempts to become a parent; more information is available at - https://seahorsefilm.com/. As a result of his participation in this documentary, his anonymity was waived by Sir Andrew MacFarlane P in *R (On the Application of TT) v Registrar General for England and Wales* [2019] EWHC 1823 (Fam).
[5] *R (McConnell and YY) v Registrar General for England and Wales* [2020] EWCA Civ 559 [5].
[6] ibid [6].
[7] ibid [7].

gender';[8] however, this is subject to exceptions.[9] Thereafter, the appellant underwent intrauterine insemination treatment, a procedure in which donor sperm was placed inside his uterus, on April 21st 2017.[10] This treatment was successful and the appellant's son, YY, was born in January 2018.[11] After correspondence with the Registry Office, the appellant was informed that he would be required to be registered as 'mother' on YY's birth certificate.[12]

Mr McConnell sought judicial review of the Registrar's decision on two grounds. Firstly, it was argued that as a matter of domestic law he was entitled to be registered as 'father' (or otherwise 'parent') on YY's birth certificate. Secondly, if this interpretation was incorrect and instead domestic law compelled his registration as 'mother', it was argued that a declaration of incompatibility should be granted, under section 4 of the 1998 Act, on the basis that such registration was incompatible with both his and YY's rights under Article 8 in conjunction with Article 14 of the European Convention on Human Rights ('ECHR').[13] At first instance, the appellant was unsuccessful on both grounds.[14] However, leave to appeal was granted and the appeal was founded upon the same two grounds as his original application for judicial review.

III THE FIRST INSTANCE JUDGMENT

Sir Andrew MacFarlane P began his judgment by framing the question before the court in the following terms:

> In this case the court is required to define the term "mother" under the law of England and Wales. Down the centuries, no court has previously been required to determine the definition of "mother" under English common law and, it seems, that there have been few comparable decisions made in other courts elsewhere in the western world.[15]

[8] s.9 (1) Gender Recognition Act 2004.
[9] See e.g. s.9 (2) and s.9 (3) Gender Recognition Act 2004.
[10] *McConnell* (n 5) [8].
[11] ibid.
[12] ibid [9].
[13] ibid [10].
[14] *R (On the Application of TT)* (n 1) [280].
[15] ibid [1].

The President's lengthy judgment briefly sets out the factual background,[16] before detailing the relevant statutory context[17] and the submissions of the parties at greater length.[18] Thereafter, the judgment considered the common law definition of motherhood,[19] the impact upon this definition of provisions of both the 2004 Act[20] and the Human Fertilisation and Embryology Act 2008 ('the 2008 Act'),[21] before expressing a 'preliminary conclusion' on the position under domestic law.[22] This conclusion was expressed as four related propositions. Firstly, the common law position is that the person who gestates and gives birth to a child is the mother of that child. Secondly, the legal status of 'mother' derives from the role of a person within the 'biological process of conception, pregnancy and birth'.[23] Thirdly, the descriptors of 'mother' and 'father', in the context of legal parenthood, are not necessarily gender specific (although factually this would have always been the case until recent decades) and as such, the law recognises 'mothers' who are male and 'fathers' who are female. Fourthly and finally, section 12 of the 2004 Act is prospective as well as retrospective and therefore, the granting of a gender recognition certificate does not affect parental status, regardless of whether the birth of the child takes place before or after the certificate has been granted.

Given this preliminary conclusion, the judgment considered the potential application of both section 3 ('reading down')[24] and section 4 ('declaration of incompatibility')[25] of the 1998 Act. The judgment engages with the role of Article 3 of the United Nations Convention on the Rights of the Child ('UNCRC') in the interpretation of cases involving the Article 8 rights of children.[26] Before setting out his conclusions regarding these human rights issues, the President noted that, 'there is no decision of the ECtHR, or indeed any other relevant decision, that bears directly on the issue that is presently before the court',[27] and as such the analysis is 'based on first principles'.[28] The government had conceded that the requirement of registration as

[16] ibid [4-9].
[17] ibid [10-35].
[18] ibid [63-122].
[19] ibid [131-135].
[20] ibid [136-147].
[21] ibid [150-168].
[22] ibid [149].
[23] ibid.
[24] ibid [171].
[25] ibid.
[26] ibid [176-182].
[27] ibid [246].
[28] ibid. However, it is certainly questionable whether there is no assistance to be derived from the language of the ECHR in previous cases, see e.g. *Goodwin v United Kingdom* (2002) 35 EHRR 18 [77], where the court refers to 'serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity.'

'mother' on the birth certificate was an interference with the Article 8 rights of both Mr McConnell and YY.[29] Therefore, the key issue was whether that interference was 'necessary' and 'proportionate'.[30] The judgment noted that because the entire statutory scheme of birth registration was under consideration, the 'best interests of children in general'[31] were relevant and, on that basis, there were 'sound, child-focused reasons'[32] for the approach adopted by the birth registration scheme. The government argued that, 'the need for an administratively coherent and certain scheme for the registration of births'[33] provided the justification for the interference Article 8 rights. The President accepted this argument, stating that, '[t]he human existence is marked by birth at the first moment of life, and death at the last. The importance of a modern society having a reliable and consistent system of registration of each of these two events is clear.'[34] Thus, the interference with the Article 8 rights of the parties caused by registration as 'mother' was held to be proportionate, necessary and justified.[35]

The judgment concluded by stating that: '[t]he principal conclusion at the centre of this extensive judgment can be shortly stated. It is that there is a material difference between a person's gender and their status as a parent.'[36] Therefore, while a trans man (who has been granted a gender recognition certificate) is legally male, in the event that he gives birth his parental status is that of 'mother'.[37] As such, the judgment observed that parental status is not determined by legally recognised gender, but instead by the 'biological role in giving birth'[38] and consequently, the law recognises mothers who are male and fathers who are female.[39] Finally, the President notably expressed the view that the central issues raised by the application were 'a matter of public policy rather than law',[40] which were 'a proper cause for public debate'[41] and therefore that there was a 'pressing need'[42] for consideration of these issues by Parliament and Government.

[29] ibid [250].
[30] ibid [254].
[31] ibid [262].
[32] ibid [263].
[33] ibid [265].
[34] ibid [266].
[35] ibid [273].
[36] ibid [279].
[37] ibid.
[38] ibid.
[39] As was the result in the factual circumstances of the case of *R (on the Application of JK)* (n 2).
[40] *R (On the Application of TT)* (n 1) [125].
[41] ibid.
[42] ibid.

The President's judgment is wide ranging, spanning two hundred and eighty-five paragraphs.[43] Fenton-Glynn has previously described this as, 'a very carefully crafted judgment…characterised by detailed reasoning and a thorough consideration of all possible aspects of the case.'[44] Undoubtedly, this was a comprehensive and thoughtful judgment, but nevertheless, given the nature of the issues, an appeal appeared to be inevitable.

IV THE COURT OF APPEAL JUDGMENT

The appeal was heard by Lord Burnett of Maldon CJ, Lady Justice King and Lord Justice Singh and the judgment was given by the entire court. In notable contrast to the first instance judgment, the Court of Appeal judgment is significantly more narrowly focused, ignoring many of the issues considered by the President. After briefly setting out the facts,[45] the relevant legislative provisions[46] and some 'ancillary matters',[47] the substance of the judgment is divided into two parts, which relate to the two grounds of appeal. Firstly, the interpretation of section 9 and section 12 of the 2004 Act,[48] and secondly, the potential incompatibility with convention rights.[49]

Before setting out court's reasoning on these issues, it is worth briefly considering one of the issues described as 'ancillary matters'.[50] This is whether the treatment offered to Mr McConnell was lawful under the terms of the Human Fertilisation and Embryology Act 1990 ('the 1990 Act') and the 2008 Act because he is a man and not a woman.[51] Section 2 (1) of the 1990 Act defines 'treatment services' that can be offered under licenses as those 'for the purpose of assisting women to carry children.'[52] The judgment (as was the President at first instance) is careful to avoid determining this point, observing, 'we do not consider it necessary or

[43] It is outside the scope of this note to capture the entirety of the nuances expressed in the President's judgment.
[44] Claire Fenton-Glynn, 'Deconstructing Parenthood: What Makes a "Mother"?' (2020) 79 (1) *Cambridge Law Journal* 34, 36.
[45] *McConnell* (n 5) [5-12].
[46] ibid [15-22].
[47] ibid [23-27].
[48] ibid [28-39].
[49] ibid [52-82].
[50] The other is a factual dispute between the parties about whether there had previously been decisions of the Registrar General which were contrary to the decision taken regarding Mr McConnell and his registration on YY's birth certificate, ibid [24].
[51] ibid [25-26]. This issue was considered in the first instance judgment *R (On the Application of TT)* (n 1) [150-159].
[52] See also s.3ZA (6) 1990 Act which provides, 'in this section…"woman" and "man" include respectively a girl and a boy (from birth)'. This is in the context of a section which defines 'permitted eggs', 'permitted sperm' and 'permitted embryos' for the purposes of licensed treatment.

appropriate to comment on the question whether treatment was lawfully provided'.[53] Nonetheless, this apparent lacuna regarding the regulation of access to reproductive services for trans men represents an issue that would seem to require urgent Parliamentary scrutiny and clarification.

A. Statutory Interpretation

While the judgment notes that, 'there has been much discussion, both in the High Court and in this Court, as to the meaning of "mother" at common law and in the relevant legislation',[54] unlike in the first instance judgment, the Court of Appeal does not consider the definition of 'mother' in any detail. Instead, the judgment states that, 'the critical issue which this Court has to decide as a matter of statutory interpretation is whether section 12 of the GRA is retrospective only in effect or whether it can also have prospective effect.'[55] Section 12 of the 2004 Act, which is titled 'Parenthood', provides that: **'**[t]he 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 appellant submitted that the provision only had retrospective effect, whereas the respondent submitted (as the President had held) that it had both retrospective and prospective effect.[56] The judgment held that the respondent's interpretation was correct; this was based upon four reasons.[57] Firstly, that this is the 'ordinary meaning' of the words used in section 12.[58] Secondly, that the interpretation contended by the appellant, 'would render otiose the provisions of section 9 (2).'[59] Thirdly, that 'the wording of section 12 is very similar to the wording (including the tenses used) in other sections of the GRA which (as the Appellants accept) mark out exceptions to the general effect of a certificate pursuant to section 9 (1).'[60] Fourthly, in other sections of the 2004 Act which only have retrospective effect this is 'made that clear through express language'.[61]

[53] *McConnell* (n 5) [26].
[54] ibid [28].
[55] ibid.
[56] ibid.
[57] ibid [29].
[58] ibid [30].
[59] ibid [31].
[60] ibid [32].
[61] ibid [33].

The judgment explicitly rejects the appellant's contention that the 2004 Act should be interpreted on the basis of 'contemporary moral and social norms',[62] due to the interpretative principle that legislation is 'always speaking';[63] with the court stating that, '[w]e confess that we find it difficult to see how that principle of statutory construction assists in resolving the issue which arises in the present context'.[64] The court observes that the first instance judgment had adopted such an 'always speaking' interpretation by construing the term 'mother' as it had, 'to mean the person who gives birth to a child rather than a gender-specific word like "woman".'[65] The judgment refers back to the language used by Lord Bingham in *R (Quintavalle) v Secretary of State for Health*,[66] stating that, 'if and in so far as the argument is that the word "mother" should be construed as "father", that would offend against the principle as enunciated by Lord Bingham that the word "dog" cannot be construed to mean "cat".'[67] Finally, the court was clear that the argument that 'mother' be replaced with a non-gendered word such as 'parent' must be rejected, as it, 'would not be an exercise in interpretation at all but would amount to judicial legislation.'[68]

The Court of Appeal was similarly dismissive of the appellant's argument that the Explanatory Notes to the 2004 Act provided support for their proposed interpretation of section 12. The judgment observes that the Explanatory Notes were consistent with the 'correct interpretation'[69] of the relevant sections, before noting that, 'in any event…those Notes could not alter the true interpretation of the statute. Our task is to construe what Parliament has enacted, not what the Explanatory Notes say it enacted.'[70] Indeed, it is apparent from the judgment that the Court of Appeal views the issues concerning the interpretation of section 12 of the 2004 Act as involving the straightforward application of orthodox principles of statutory interpretation.

B. Convention Rights

[62] ibid [34].
[63] See e.g. *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 and *Owens v Owens* [2018] UKSC 41.
[64] *McConnell* (n 5) [35].
[65] ibid.
[66] [2003] UKHL 13 [9].
[67] *McConnell* (n 5) [35].
[68] ibid.
[69] ibid [37].
[70] ibid.

Thereafter, the judgment considers the potential incompatibility of this interpretation with the appellants' convention rights.[71] At the outset of this part of the judgment, the Court of Appeal refers to the House of Lords decision *Wilson v First County Trust Ltd (No. 2)*,[72] to emphasise the 'true nature'[73] of the court's task when assessing the compatibility of primary legislation. This restatement is a consequence of what the court describes as, 'times during the hearing before us when it appeared that there may be a misunderstanding about the nature of that exercise.'[74] The judgment is clear the role of the court is simply to consider the compatibility of the legislation passed by Parliament and 'that the court is not concerned with the adequacy or otherwise of what may have been said by civil servants advising ministers at the time of the legislation being considered, still less subsequently.'[75] The judgment briefly summarises the European Court of Human Rights jurisprudence in relation to trans rights,[76] before turning to the substance of the appellant's arguments regarding compatibility.

As at first instance, the Government conceded that there had been an interference with the Article 8 rights of the appellants, although notably they reserved their position on this issue for any subsequent appeal.[77] The judgment observes that this 'concession is correctly made',[78] because the description of Mr McConnell as 'mother' on YY's birth certificate is, 'an example of the state requiring a trans person to declare in a formal document that their gender is not their current gender but the gender assigned at birth.'[79] The judgment states that this is a 'significant interference with a person's sense of their own identity',[80] which is a central part of the right protected by Article 8. With that said, given the respondent's concession, the key issue, as in the President's judgment, is whether the admitted interference is justified.[81] The judgment very briefly sets out that the interference is in 'accordance with the law'[82] and that the interference has a 'legitimate aim',[83] considering the issue of the proportionality of the interference in more detail. To that end, the judgment sets out the 'well established'

[71] ibid [40].
[72] [2003] UKHL 40.
[73] *McConnell* (n 5) [41].
[74] ibid.
[75] ibid [42].
[76] ibid [44]-[51].
[77] ibid [52].
[78] ibid [53].
[79] ibid [55].
[80] ibid.
[81] ibid [56].
[82] ibid [57]
[83] ibid [58].

requirements for proportionality from the Supreme Court decision *Bank Mellatt v HM Treasury (No. 2),*[84] and focuses on the third and fourth of those requirements – '[a]re there less intrusive means available?'[85] and, '[i]s there a fair balance struck between the rights of the individual and the general interests of the community?'[86]

In answering these questions, the judgment refers to four 'fundamental features of this case';[87] firstly, 'the context is one in which difficult and sensitive social, ethical and political questions arise.'[88] Secondly, that the interpretation of the word 'mother' is obviously not limited to one piece of legislation. Consequently, the appellant's proposed interpretation, that 'the word "mother" is no longer to be used to describe the person who gives birth to a child,'[89] would impact a wide range of legislative provisions.[90] To illustrate this, the judgment considers some of the different legislative contexts in which the word 'mother' is used; including the Children Act 1989,[91] the 2008 Act,[92] the Surrogacy Arrangements Act 1985[93] and the Adoption and Children Act 2002.[94] The judgment observes that Parliament, in these different contexts, has made a series of policy choices, all of which would be affected by the appellant's proposed interpretation of 'mother'. Thirdly, 'there is no decision of the Strasbourg Court which suggests the interpretation advanced by the Appellants.'[95] Fourthly, the judgment notes that, 'there is no European consensus in the Council of Europe on the issue which arises in the present appeal.'[96]

This lack of pan-European consensus is relevant to the what the Court of Appeal describes as the 'margin of judgement'[97] that should be afforded to Parliament when determining proportionality. In this case, the court suggests that this 'rests upon two foundations',[98] the first 'is the relative institutional competence of the courts as compared to Parliament.'[99] Parliament

[84] [2012] UKSC 39.
[85] *McConnell* (n 5) [59].
[86] ibid.
[87] ibid [61].
[88] ibid [62].
[89] ibid [63].
[90] ibid.
[91] ibid [64].
[92] ibid [65]-[67].
[93] ibid [68]-[69].
[94] ibid [71].
[95] ibid [72]. The judgment notes [73-78] that there is a pending Strasbourg case concerning the German statutory definition of 'mother' and an applicant in a similar set of factual circumstances to Mr McConnell.
[96] ibid [79].
[97] ibid [80].
[98] ibid [81].
[99] ibid.

has a range of sources of information available to it that are not available to the court and the consequence of this is that, '[i]f there is to be reform of the complicated, inter-linked legislation in this context, it must be for Parliament and not for this Court.'[100] The judgment notes that, **'**[t]he second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy.'[101] Due to this legitimacy, the court should afford Parliament a wide and significant 'margin of judgement' in this case and thus, the interference with convention rights is proportionate and justified.[102]

For all of these reasons, the Court of Appeal concludes that, 'there is no incompatibility between sections 9 and 12 of the GRA, on their natural interpretation, and convention rights. There is therefore no need to give them anything other than their natural interpretation.'[103] Therefore, the appeal was dismissed on both grounds.[104]

V COMMENTARY

There are three aspects of the Court of Appeal's judgment that will be analysed in this section: firstly, the court's approach to statutory interpretation. Secondly, the court's focus upon the 'proportionality' of the interference with the appellants' Article 8 rights. Thirdly, and related to both of these points, the narrow framing of the judgment, which allows the court to avoid considering some of the wider questions seemingly raised by the factual circumstances.

The court's approach to the interpretation of section 12 of the 2004 Act is presented as being a straightforward application of the basic principles of statutory interpretation and there is support for that conclusion in the academic literature on interpretation. As stated in Bennion,[105] a leading work on statutory interpretation: '[t]he starting point in statutory interpretation is to consider the ordinary meaning of a word or phrase, that is its proper and most known signification.'[106] This is the starting point adopted by the Court of Appeal.[107] However, it is

[100] ibid.
[101] ibid [82].
[102] ibid [83]-[86], the judgment briefly considers the role of Article 3 UNCRC and concludes similarly to the first instance judgment.
[103] ibid [88].
[104] ibid [89].
[105] D Bailey and L Norbury, *Bennion on Statutory Interpretation*, (7th edition, LexisNexus UK, 2017).
[106] ibid [22.1].
[107] *McConnell* (n 5) [30].

arguable that the ordinary words of section 12 are not of themselves sufficiently unambiguous to determine whether the provision has prospective as well as retrospective effect.[108] As Welstead stated, regarding the first instance judgment, '[t]he wording of s 12 of the GRA 2004 is clearly open to the interpretation that it is prospective as well as retrospective'.[109] Therefore, as the judgment itself make clear, the meaning of section 12 needs to be determined in the context of the entire statute. Indeed, another fundamental principle of statutory interpretation is that: '[t]here is a presumption that every word in an enactment is to be given meaning.'[110] The judgment notes that if section 12 was only retrospective (as the appellants' argued) that interpretation 'would render otiose the provisions of section 9 (2).'[111] This is an oddly worded sentence, because I would argue that it would be section 12, rather than section 9 (2), that is deprived of any meaning by the appellant's proposed construction. To illustrate this argument, section 9 (2) provides that the general provision of section 9 (1), 'does not affect things done, or events occurring, before the certificate is issued'. The significance of this provision to the interpretation of section 12 is that, as the judgment observes, '[t]he birth of a child is clearly capable of being an event occurring before a certificate was issued.'[112] Therefore, if section 12 was interpreted as only applying retrospectively, then that section would be rendered meaningless, because any legal parenthood that already existed at the time of the granting of the gender recognition certificate is already covered by the general exception in section 9 (2) relating to events that occurred before the certificate was issued. In my view, the court is correct to refer to the importance of this principle of statutory construction, but their conclusion would have been more accurately expressed as that the appellant's proposed construction would render section 12 otiose.[113] The judgment's contextual reading of section 12 is further supported by the reference to the linguistic similarities with other sections of the Act[114] which provide exceptions to the general rule in section 9 (1),[115] and to its linguistic differences from section 15, where the retrospective effect is made clear on the face of the provision.[116]

[108] *R (On the Application of TT)* (n 1) [143].
[109] M Welstead, 'Biology Matters: Is This Person My Mother or My Father?' [2019] 49 (Dec) *Family Law* 1410, 1416.
[110] *Bennion on Statutory Interpretation* (n 105) [21.2].
[111] *McConnell* (n 5) [31].
[112] ibid.
[113] Notably, this is how this point is expressed by the President in *R (On the Application of TT)* (n 1) [144].
[114] See e.g. s.16 Gender Recognition Act 2004.
[115] *McConnell* (n 5) [32].
[116] s.15 Gender Recognition Act 2004 provides that: 'the fact that a person's gender has become the acquired gender under this Act does not affect the disposal or devolution of property under a will or other instrument made before the appointed day.'

The judgment's dismissal of the 'always speaking' doctrine[117] reflects the limitations of the traditional understanding of that doctrine,[118] which does not allow the court to substitute wording that is not in the statute. However, I suggest that the reference to the language of 'dogs' and 'cats' used in Lord Bingham's formulation of the 'always speaking' doctrine in *R (Quintavalle)*[119] is, to put it mildly, an unfortunate metaphor given the factual context of trans parenting that is being considered in this case. While the judgment was, of course, simply repeating the language of a leading authority, depending upon your perspective, the use of this language could be seen as either providing evidence of the Court of Appeal's privileged carelessness or as being deliberately provocative.

Similarly to the questions of interpretation, the court's approach to 'proportionality' is also presented as involving a restatement and application of basic legal principles.[120] Through this approach, the judgment appears to be positioning this part of the decision as also involving the inevitable consequences of well-established and technical rules,[121] rather than as involving any normative judgement about the underlying factual circumstances. This is apparent from the court's reference to the well-known dicta of Lord Bingham in *A v Secretary of State for the Home Department*[122] and Lord Hope in *R v Director of Public Prosecutions, Ex p. Kebilene*,[123] regarding the 'appropriate weight which is to be given to the judgement of the executive or legislature depending upon the context'.[124] However, any finding that an interference with convention rights is 'proportionate' requires, either explicitly or implicitly, a judicial determination about which rights and interests are more worthy of protection than others. As Welstead commented regarding the first instance judgment, 'justification and proportionality…involve policy considerations which of their nature are inevitably politically based.'[125] This is apparent from previous jurisprudence, as Lord Reed noted in *Bank Mellat (No.2)*:[126] '[a]n assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the

[117] *McConnell* (n 5) [34-35].
[118] *Bennion on Statutory Interpretation* (n 105) [14.1-14.2].
[119] [2003] UKHL 13 [9].
[120] *McConnell* (n 5) [59].
[121] It is outside the scope of this note to examine the general approach of domestic courts to questions of 'proportionality' in cases of involving convention rights.
[122] [2004] UKHL 56.
[123] [2000] 2 AC 326.
[124] *McConnell* (n 5) [80].
[125] Welstead (n 109) 1416.
[126] [2012] UKSC 39.

value of the right intruded upon.[127] The Court of Appeal judgment may have attempted to obscure that it was making such a 'value judgment' by framing the key issue as one of 'proportionality', by referring to the language of the 'margin of judgment'[128] and by their deference to the 'democratic legitimacy'[129] of Parliament, but that approach does not preclude their decision from having political dimensions and consequences. The judgment observes that, '[t]he courts have their proper role to play in the careful scheme of the HRA…In appropriate cases that can include making a declaration of incompatibility'.[130] The lack of such a declaration illustrates that this factual context is not understood by the court as an 'appropriate case' for such judicial intervention. Moreover, the judgment emphasises that the 'margin of judgment' should be wider in 'areas of difficult or controversial social policy',[131] but this implies that the categorisation of an issue as 'difficult or controversial' can be undertaken by the judiciary in a neutral and value-free way. Instead, I would argue that this determination is another method through which the Court of Appeal frames this dispute in a manner that avoids engaging with the central questions of the legal parenthood of trans men and the meaning of 'mother' within the law.

Additionally, there are two seemingly important issues which are not fully explored within the court's consideration of 'proportionality' that are worth highlighting.[132] Firstly, there are issues with the potential lack of coherence caused by judgment's approach. Secondly, there is an implicit assumption within the judgment that the best interests of the child are equally served by registration as 'mother' as they would be by registration as 'father'. On the first issue, the judgment notes that the issue is being considered at a 'general level'[133] and that the 'general interests of the community'[134] require to be balanced against any interference. Thus, the judgment is premised upon the idea that the approach it adopts to birth registration will be coherent at this general, societal level. However, there are two consequences of the approach that raise doubts regarding this asserted coherence. The first is that decision creates a gap between the legal reality, where Mr McConnell is registered as 'mother', and the social reality that he will be the 'father' of the child. The second is that the appellant will be identified as

[127] *McConnell* (n 5) [71].
[128] ibid [80].
[129] ibid [82].
[130] ibid.
[131] ibid.
[132] I would like to thank Peter Dunne for highlighting these issues in a discussion of an earlier draft.
[133] *McConnell* (n 5) [58].
[134] ibid [59].

male for the purposes of all other legal documentation than the birth certificate of his son, where he will be identified as 'mother', which is a word that is generally understood both legally[135] and socially as intrinsically associated with being female. Given that trans parenting continues to grow within UK society, it is suggested that there will be issues with the coherence of the overarching regime caused by the approach of the Court of Appeal and crucially, that the judgment does not fully address this in its consideration of 'proportionality'. On the second issue, there is limited consideration of the 'best interests' of the child in the Court of Appeal judgment.[136] While the judgment observes that, '[t]he view that Parliament has taken is 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.'[137] The basis for this assertion is not set out in the judgment. There appears to be an assumption that not registering trans men as 'mother' would affect the ability of children to know and understand their origins,[138] but this ignores that the factual reality of who gave birth to the child in cases such as this will be readily apparent, regardless of whether that person is registered as 'mother', 'father' or 'parent'. Indeed, arguably the child's origins would be more accurately recorded by registration of the legal and social reality of the gender of their parent. As with overarching coherence, it is notable that this aspect of the case is almost entirely absent from the judgment's consideration of 'proportionality'.

Finally, combining both strands of commentary, I would argue that the most notable and interesting aspect of the Court of Appeal's judgment is its narrow focus upon these issues of statutory interpretation and the 'proportionality' of any interference with the appellant's Article 8 rights. In this way, the judgment frames the central issues of the case in a highly technical and legalistic manner. This is especially apparent when compared to the wide-ranging approach taken by the President at first instance. This framing allows the court to ignore some of the more conceptual questions and the issues of public policy that are undoubtedly raised by the underlying issue of the parental status of men who give birth. There is a significant and well developed body of academic literature that has critiqued the approach taken to the attribution of legal parenthood in cases of assisted reproduction.[139] Writing in the context of surrogacy, I

[135] Although, at first instance, the President argued that 'mother' was not a gender specific word, see e.g. *R (On the Application of TT)* (n 1) [279].
[136] *McConnell* (n 5) [83]-[86], the issue is dealt with briefly and rather superficially.
[137] ibid [86].
[138] In the context of donor insemination, s.33-48 Human Fertilisation and Embryology Act 2008 allows for birth certificates that record legal parenthood that does not reflect the genetic reality and there is no legal obligation on parents to inform their children of the circumstances of their conception.
[139] See e.g. A Diduck, 'If Only we can Find the Appropriate Terms to Use the Issue Will Be Solved: Law, Identity and Parenthood' [2007] 19 (4) *Child and Family Law Quarterly* 458 and L Smith, 'Tangling the Web of Legal

have previously argued that, 'the promotion and protection of the traditional nuclear family was influential in shaping the initial legislative approach to determining legal parenthood in cases of assisted reproduction.'[140] Indeed, the legislative approach to the attribution of legal parenthood has consistently failed to properly account for those families whose lived reality is situated outside the confines of the traditional, heterosexual, nuclear family. Ten years ago, McCandless and Sheldon noted that, 'the questions posed by transgender parenthood serve to illuminate many of the tensions inherent in continuing to map our legal determinations of parenthood to a family model that is unmoored from its traditional underpinnings.'[141] The Court of Appeal's judgment suggests that little has changed and starkly illustrates how the approach to legal parenthood obscures and excludes the reality of trans parenting.

Writing about the first instance judgment, Fenton-Glynn, stated that, '[i]n its failure to challenge the status quo, the judgment further entrenches the traditional assumptions underpinning English family law.'[142] The same failure can clearly be levelled at the Court of Appeal, but I would go further and suggest that the judgment not only failed to challenge the status quo, it represented a failure of ambition by not even engaging with significant aspects of that status quo. I suggest there was the potential for a more progressive approach to the interpretation of Article 8, which could have led to the granting of a 'declaration of incompatibility' and this would have left the precise resolution of this area of 'difficult or controversial social policy' to Parliament,[143] avoiding concerns around the boundaries of the appropriate judicial role.

Parenthood: Legal Responses to the Use of Known Donors in Lesbian Parenting Arrangements' (2013) 33 (3) *Legal Studies* 355.

[140] A Brown, 'Two Means Two, but Must Does Not Mean Must: An Analysis of Recent Decisions on the Conditions for Parental Orders in Surrogacy' [2018] 30 (1) *Child and Family Law Quarterly* 23, 37.

[141] J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73 (2) *Modern Law Review* 175, 202.

[142] Fenton-Glynn (n 44) 37.

[143] See e.g. *Re Z (A Child) (Surrogate Father: Parental Order) (No.2)* [2016] EWHC 1191 (Fam), where a declaration of incompatibility was issued regarding the requirement that there be two applicants for a parental order in cases of surrogacy under s.54 Human Fertilisation and Embryology Act 2008, for a relatively recent example of the court issuing a declaration in a somewhat comparable context of 'controversial social policy'.

VI CONCLUSION

On one reading, the Court of Appeal judgment in *McConnell* is a straightforward and uncontroversial application of basic legal rules and principles[144] regarding statutory interpretation and the 1998 Act, but on another reading the judgment provides further evidence of the law's inability and unwillingness to accommodate the lived reality of trans experience. The fact that the judgment can be read in both of those ways seems to provide support for the second of those readings, and for the view that legislative reform in this area is necessary.

I have previously argued that, 'the law's approach to the attribution of legal parenthood is premised upon a binary, two-parent model, ideally consisting of one mother and one father.'[145] The Court of Appeal's judgment provides another example of the issues that result from the application of this model of legal parenthood to the diversity of family forms that exist in contemporary society, where the social reality does not reflect that traditional and heteronormative binary. Writing about the first instance judgment, Fenton-Glynn contended that, '[w]e need to break down the barriers of our conservative approach to the legal family and re-imagine a model of parenthood fit for the twenty-first century.'[146] I entirely agree with this statement. However, unless the Supreme Court takes the contrary view,[147] it seems apparent that such (overdue) reconsideration of the model of legal parenthood will not be facilitated through judicial decision-making. Thus, there is a clear need for Parliament to legislate to address these issues for trans parents and to provide a comprehensive model of legal parenthood and birth registration that reflects the reality of 21st century family life. Unfortunately, given the priorities of the current Government, such reforms do not appear to be likely in the immediate future.

[144] Similar arguments could be made regarding other recent judicial consideration of issues raised by trans parenthood and increasing gender fluidity, see e.g. the Court of Appeal overturning the approach at first instance, of Peter Jackson J, to the 'welfare' test in *Re M (Children) (Ultra-Orthodox Judaism: Transgender)* [2017] EWCA Civ 2164 and the rejection of the application for judicial review in *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2020] EWCA Civ 363. In these cases, complexity results from the divergence between the lived reality of trans and non-binary people and the capacity of the Court to fully understand those lives. I would like to thank Peter Dunne for raising this point.

[145] A Brown, *What is the Family of Law? The Influence of the Nuclear Family*, (Hart, 2019), 7.

[146] Fenton-Glynn (n 44) 37.

[147] After the judgment of Court of Appeal was handed down, Mr McConnell indicated his intention to seek permission to appeal to the Supreme Court.