ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES) OR PARTICULARS IDENTIFYING APPLICANT

IN THE FAMILY COURT
AT AUCKLAND

FAM-2006-004-002325

IN THE MATTER OF	the Births Deaths and Marriages Registration Act 1995
BETWEEN	"MICHAEL" Applicant
AND	REGISTRAR-GENERAL OF BIRTHS, DEATHS AND MARRIAGES Respondent

Appearances: A Bean for the Applicant
S Hillda for the Registrar-General
H Janes to assist the Court

Judgment: 9 June 2008

JUDGMENT OF JUDGE A J FITZGERALD
[A declaration as to sex]

CONTENTS

INTRODUCTION

[1] The applicant ("Michael") seeks a declaration that he is a male and for birth certificates issued to record his name as Michael [surname]. Currently his birth certificate records he is a female and his name [female name].

[2] The application is made under s 28 ("the section") of the Births, Deaths and Marriages Registration Act 1995 ("the Act"). The full text of the section is contained in the appendix to this judgment.

[3] The Registrar-General believes this application raises important and novel issues of public interest not previously considered by the Family Court and seeks a decision that will give guidance as to how the section should be interpreted and applied in future. What follows are my efforts to do so, as well as decide this application, and I have been greatly aided in that by the excellent presentation of the case and the careful, thorough submissions of counsel to whom I am grateful.

[4] This application raises, in particular, the question as to the degree of medical (including surgical) intervention required to achieve the necessary physical conformity with the nominated sex required for an applicant to be granted a declaration under the section. It seems there has been a growing anxiety in some quarters about that issue and how the statutory test is being, or will be applied.

[5] Reaching a decision, (and therefore understanding how that has happened) has required careful analysis of the facts in this case and also the medical, legal, social and policy issues behind the section coming into force, as well as consideration of how the section is framed and to be applied.

FACTS

[6] Michael was born with a female body on [date of birth] but, from early childhood, he identified himself as being male. Since the age of nine he has consistently worn male clothing. At about the age of 12 he realised he was sexually attracted to women and thought at that time he must be gay and had several relationships with women over the next four or five years.

[7] After his fourth form year at school, Michael went straight to the sixth form and then on to university at age 16. He completed his first degree by age 19. While at university he realised he was probably not gay, but transgender, which was not something about which he was aware until then.

[8] After finishing his first degree, Michael went to live in X for about a year and did so as a male. He chose X after researching transgender web-sites and discovering that there was a reasonably large transgender community there. He wanted to learn from people who had made the change, as well as having the experience of living as a male. Whilst there he saw a psychotherapist to talk issues through and "…get things sorted out in my head."

[9] In mid 2003, after returning to Auckland, Michael first saw Dr F, a sexual health physician, in relation to treatment for gender dysphoria. Initially Michael was interviewed and examined by Dr F every three weeks. Consultations now occur about once a year. After seeing Dr F, Michael received counselling and assistance from psychotherapists and psychologists in Auckland.

[10] On 24 September 2003 he changed his name by Deed Poll from [female name] to [male name].

[11] In January 2004 Michael first consulted Dr R, Psychiatrist and then subsequently in June 2004 and July 2006. Dr R deposes that Michael's history is,

> "…consistent with strong and persistent cross gender identification since early childhood, and it is my opinion that Michael is a genuine male to female transgender".

[12] Also in January 2004 Michael commenced hormone (testosterone) treatment which he has continued with since and expects to do for the rest of his life.

[13] On 16 April 2004 Michael first saw Mr D, a plastic and reconstructive surgeon, who carried out a bilateral mastectomy as part of a gender reassignment programme done under the supervision of Dr R. The initial surgery was carried out on 24 August 2004 with revisional surgery on 25 January 2005.

[14] Dr H, who has been Michael's GP since childhood, deposes that he is "fully aware of Michael's journey through his gender reassignment" and that he continues to prescribe testosterone replacement therapy. He says Michael presents and identifies as a male, and his appearance, manner and outlook are consistent with that.

[15] In Dr F's opinion, Michael has transitioned permanently to the male gender and his acclimatisation in society as a male has been successful. He believes Michael has assumed the gender identity of a male, has undergone such medical treatment as is desirable to enable him to acquire the physical conformation of a male, and such medical treatment will allow him to maintain that gender identity. Surgery, he says, is not an essential part of gender reassignment therapy, but is merely part of treatment. In all cases, the amount of surgery undertaken is largely dependent on the comfort of the patient, with some requiring more surgery in order to feel they have transitioned to the opposite sex. Therefore the amount of surgery must be assessed on a case by case basis. He believes hormone therapy and a mastectomy is sufficient medical treatment to enable Michael to acquire the physical conformation of a male. A hysterectomy, ovarectomy or reconstructive surgery are not essential and he would not recommend such surgery for Michael at this stage. He notes the basic premise that "all unnecessary surgery should be avoided as it is contrary to the health and interests of the patient". He points out that, in female to male transgender cases, genital reconstruction is more complicated and possibly less effective than for male to female cases and the surgery is not available in New Zealand. It usually requires multiple operations and therefore cumulative added risk. The cost of such procedures is in the region of USA $50,000 to $100,000.

[16] Dr F feels able to make this assessment of Michael confidently because of the steps that have been taken to date. Firstly, and importantly, Dr R, (who Dr F describes as "the pre-eminent psychiatrist in New Zealand who deals with gender identity issues and has done for many years") has made a diagnosis of Michael having gender dysphoria in accordance with appropriate international guidelines, namely the ICD 10[1] and the DSM IV[2]. Secondly, Michael has followed a process of real-life experience as a male, over a period of time, before taking further steps.

[1] International Classification of Diseases, tenth edition.
[2] Diagnostic and Statistical Manual of Mental Disorders, fourth edition.

Next, the approach taken by those with whom Michael has consulted has been in keeping with relevant international guidelines such as the Harry Benjamin Standards of Care[3], or the World Association for Transgender Care (as it is now renamed). The purpose of the Standards of Care is to articulate that international organisation's professional consensus about the psychiatric, psychological, medical and surgical management of gender identity disorders and to provide flexible directions for the treatment of persons with gender identity disorders.

[17] As a result of testosterone therapy a number of changes occur in a person, some of which are permanent, some may be permanent and some are reversible. Examples of permanent changes are increased facial and body hair, deepened voice and clitoromegaly (enlargement of the clitoris by 4-5cm after 1-3 years). Some changes that may happen are male pattern baldness, infertility (changes to the ovaries that make it difficult or impossible to produce eggs or get pregnant), increased risk of ovarian or uterine cancer and more. Reversible changes include increased libido, increased muscle mass, redistribution of body fat, increased sweat, changes in body odour, increased appetite and more.

[18] The fact that he has the internal reproductive organs and external genitalia of a female does not bother Michael, he says, because he cannot see them. He is aware there is additional surgery available to remove of his female organs and create external male genitals and that such surgery is complex and expensive. For him it is not necessary to undergo further surgery in order to feel he has altered his gender to that of a male. He can see no benefit in having further surgery, with all the risk that would entail and he has no desire to stop hormone therapy.

[19] For the past four years Michael has been living openly as a male and does not consider there to be any prospect of him wanting to resume a female identity at any time in the future. He has a girlfriend and has been in a relationship with her for approximately 18 months. She has been aware of his gender reassignment surgery and is very supportive of him. Michael is now studying at University. He has had a

[3] "The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders", Sixth Version, February 2001

part time job at Y for the past three years. In his life as a student, and in his employment, he is recognised and accepted as a male.

[20] Michael's father deposes that he, and the rest of the family, believe Michael is now definitely in his correct gender. He is sure Michael would never revert to being female, or want to have children as a mother and says the approach Michael has taken to his gender dysphoria is typical of the very systematic and careful way Michael goes about making all decisions.

[21] When Michael gave his evidence he presented as being an intelligent, articulate and thoughtful man and I readily accept his father's description if him as being "incredibly capable intellectually, socially and emotionally, and very balanced."

TRANSSEXUALISM AND GENDER DYSPHORIA

[22] To determine whether the requirements of the section are met (and also to understand this judgment), some understanding of transsexualism and gender dysphoria is necessary.

[23] Transexualism has been described as the enduring, pervasive, compelling desire to be a person of the opposite sex. Unlike the majority of people who have a gender identity that matches the sex they were born with, transsexuals experience a conflict between their physical sex and their gender identity as a man or woman. While having the physical characteristics of one gender, psychologically they identify with members of the opposite gender.[4]

[24] Transsexualism is recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It is necessary to distinguish it from other concepts with which it is sometimes confused. On this issue it is helpful to begin with reference to the following key factors and observations taken from the House of Lord's decision, ***Bellinger v Bellinger***[5].

[4] Heike Polster, "Gender Identity as a New Prohibited Ground of Discrimination" (2003) 1 NZJPIL 157 at 164
[5] [2003] 2 All ER 594 (HL) @ pp 597 & 598.

[25] The indicia of human sex or gender are:

a) Chromosomes: XY pattern in males, XX in females.

b) Gonads: testes in males, ovaries in females.

c) Internal sex organs other than gonads: eg; sperm ducts in males, uterus in females.

d) External genitalia.

e) Hormonal patterns and secondary sexual characteristics, such as facial hair and body shape.

f) Style of upbringing and living.

g) Self-perception. Some medical research has suggested that this factor is not exclusively psychological but is associated with biological differentiation within the brain.[6]

[26] In the vast majority of cases these indicia in an individual all point in the same direction. There is usually no difficulty assigning male or female gender to the individual. However, some people are born with physiological characteristics which deviate from the norm in one or more respects and to a lesser or greater extent. These people are referred to as being inter-sexual. Inter-sex is an umbrella medical term that covers a variety of diagnoses and conditions where a person is born with reproductive or sexual anatomy that does not fit the typical biological definitions of female or male, or where these conditions appear later in life. Inter-sexuality is a state of indeterminate sexuality in an individual and may be present in many different forms. A characteristic is that only one type of gonad – testes or ovary – is present.[7] A hermaphrodite is an individual in whom both ovarian and testicular tissue is present.[8]

[27] Transexual people are to be distinguished from inter-sexual people. A transsexual person is born with physical characteristics that are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person

[6] The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative.
[7] Black's Medical Dictionary; 41st Edition, page 373.
[8] Black's Medical Dictionary @ p 329.

of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex.

[28] Also, a transsexual is to be distinguished from a homosexual. A homosexual is attracted sexually to persons of the same sex. Nor should a transsexual be confused with a transvestite who is someone who enjoys dressing in the clothes of the opposite sex, usually for his/her own sexual gratification.

[29] The treatment for gender dysphoria depends on the severity and the circumstances of the individual. Ultimately the most that medical science can do to alleviate the condition is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, so far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a 'sex change' operation. In this regard medical science and surgical expertise have advanced much in recent years. Hormonal treatment can change a person's secondary sexual characteristics. Irreversible surgery can adapt or remove genitalia and other organs, external and internal. By this means a normal body of one sex can be altered so as to give the appearance of a normal body of the other sex. But there are still limits to what can be done. Gonads cannot be constructed. The creation of replica genital organs is particularly difficult with female-to-male gender reassignment surgery**.** Chromosomal patterns remain unchanged. The change of body can never be complete.

[30] There are typically four steps of treatment, namely psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience'), and finally, in suitable cases, gender reassignment surgery. Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents.

[31] Not all transsexuals wish to have treatment. *In* ***Goodwin v United Kingdom***[9], the Court noted the following passage from a report commissioned by the Secretary of State for the Home Department:

[9] [2002] 2 FCR 577,

> Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by other factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes all their lives. Consideration of a way forward [in reference to status under the law] must therefore take into account the needs of people at these different stages of change."

[32] Like any medical treatment decision, the decision whether or not to undergo treatment for transsexualism is one informed by professional clinical guidelines, the clinical judgement of the medical professionals involved and the particular circumstances, needs and desires of the individual client.

[33] The House of Lords noted in ***Bellinger***[10] that there is no 'standard' operation or recognised definition of the outcome of completed surgery. Further, the surgery, however "extensive and elaborate", was inevitably incomplete, with a complete change of sex being "unachievable". It was noted that the point at which a change of gender should be recognised is not easily ascertained. The line could be drawn at a number of different points from the initial diagnosis of gender disorder to the completion of reconstructive surgery. The point at which people feel they have achieved their change of gender varies enormously. From the research it can be seen how much more difficult it is to undergo successful female to male reconstructive surgery than the male to female but the self-identification in the preferred male gender can be as strong as in a post-operative male to female transsexual. The Court expressed the view that it is questionable whether the successful completion of some sort of surgical intervention should be an essential pre-requisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. The aim of the surgery is to make the individual feel more comfortable with his or her body, not to 'turn a man into a woman' or vice versa.[11]

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[10] at pp 603 & 607
[11] at p 603

[34] The House of Lords recognised that the issue of transsexualism includes definitional questions of how far the person must go in order to qualify as a transsexual. Is merely assuming the life and clothing of a woman enough or must it include irreversible gender reassignment? Or something in between? The Court noted that there are cogent arguments against adopting any specific criterion and also that many people revert to their biological sex after living for some time in the opposite sex and some alternate between the two sexes throughout their lives.[12]

[35] In ***Re Alex: Hormonal Treatment for Gender Identity Dysphoria***[13], Nicholson CJ considered it a matter of regret that a number of Australian jurisdictions require surgery as a pre-requisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity noting that this is of little help to someone who is unable to undertake such surgery. He said the requirement of surgery seems to be a cruel and unnecessary restriction upon a person's right to be legally recognised in a sex which reflects the chosen gender identity and would appear to have little justification on grounds of principle. And further, that the requirement of surgery is generally inconsistent with human rights – and that the requirement is more disadvantageous and burdensome for people seeking legal recognition of their transition from female to male than male to female. There was therefore that additional objection to surgery as a pre-requisite as being a form of indirect discrimination.

[36] In a meticulous judgment in the case of ***Re: Kevin***[14]**,** Chisholm J found that from the medical information provided, it would be wrong to identify and define a person's gender simply on the basis of the chromosomes, genitals and gonads with which they are born. The mind as well as the body determines the sex of an individual. Evidence from Professor Diamond[15] provided an illuminating account of the processes by which children come to perceive themselves as male or female. Professor Diamond suggests that while young children might be aware of their genitals, their self-identification derives more from things other than genitals, such

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[12] at p 612
[13] [2004] FamCA 297
[14] Re: Kevin (Validity of marriage of transsexual) 2001 FamCA 1074 at paras 267-269.
[15] Professor Milton Diamond PhD; Professor of Anatomy and Reproductive Biology, School of Medicine, University of Hawaii.

as preferring to be with and engage in the activities of one sex, or such physical markers as clothes, hairstyle and height. Only as they grow older and more sophisticated do they come to see their genitals as sex markers, and for atypical individuals, "the discordance is cause for serious reflection and introspection". While for other children the various aspects are concordant, for these children their anatomy "does not provide the feedback offered to typical individuals".

[37] It was noted that the subjective experience of transsexuals is described movingly in the literature. They speak of being trapped in their bodies. One is reported as saying after sex reassignment: "before this treatment I had/was nobody; now I am somebody". Chisholm J commented that it seems quite wrong to think of these people as merely wishing or preferring to be of the opposite sex, or having the opinion that they are. As the authors put it, given the fact that transsexuals frankly and ingenuously view their gender identity/role as correct and their body as totally wrong, psychotherapy to reconcile their gender identity to their body is doomed to fail. In their reflections transsexuals have no options: "there is only one way out of their deadlock: "the body" must follow "the mind**".**

[38] Chisholm J concluded that the experience of transsexuals and the strength and persistence of their feelings fits well with the view that they have a sexual brain development contrary to their other sex characteristics such as the nature of their chromosomes, gonads and genitalia.

[39] While it was noted that there is still doubt about precisely what characteristics of the brain are involved, how the development takes place, and the extent to which the development extends beyond the time of birth, whatever the answers to these questions might prove to be, the evidence demonstrates that the characteristics of transsexuals are as much "biological" as those people thought of as inter-sex. The difference is essentially that we can readily observe or identify the genitals, chromosomes and gonads, but at present we are unable to detect or precisely identify the equally "biological" characteristics of the brain that are present in transsexuals.

[40] ***The Attorney-General for the Commonwealth v "Kevin and Jennifer" and Human Rights and Equal Opportunity Commission***[16] was a hearing of an appeal against the decision of Chisholm J in ***Re: Kevin*** by the full Court of the Family Court of Australia. In dismissing the appeal, the Court noted that the reluctance of Courts to "enter this area" seems to be based on something of the same logic as that of in earlier cases such as ***Corbett v Corbett***[17]***;*** namely an inability to be able to make a physical or scientific examination in order to determine the sex of a person. The Full Court said that, if one accepts the argument of [the applicant's counsel] and the evidence given in that case, Kevin (the applicant) had always perceived himself to be a man. One then asks the rhetorical question as to why he must subject himself to radical and painful surgery to establish this fact.

PASSAGE OF THE SECTION INTO LAW

[41] With that general background as to Transsexualism, and the views expressed in the judgment's cited, it is next helpful to consider the passage of the section into law by reference to the Parliamentary debates. As introduced to the House, clause 29 of the initial Bill, required that the applicant,

> "has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of the opposite sex".[18]

[42] Medical evidence would be required to show that the person had,

> "undergone surgical procedures sufficient (when accompanied by the appropriate medical procedures) effectively giving the person the physical conformation of a person of the sex concerned".[19]

[43] The purpose of the provision was described in Parliamentary debates as being:

> "… to allow those people who have undergone surgical and medical procedures, and are thus firmly and irreversibly committed to assuming the physical identity of the sex that conforms with their psychological view of themselves, to be issued with birth certificates that accord with

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[16] [2003] FamCA 94
[17] Corbett v Corbett (Otherwise Ashley) [1971] P 83
[18] The Births Deaths and Marriages Registration Bill No. 193-1 (5 December 1989) clause 29(1)(b)(ii).
[19] Clause 29(2)(a) of that same Bill

> that sex. Such people should not be subjected to embarrassing and distressing problems at present associated with routine activities requiring the production of a birth certificate." [20]

[44] Reference in the Bill to "surgical and medical procedures that have effectively given the person the physical conformation of a person of the opposite sex" indicates that genital surgery was originally intended to be a requirement for a declaration as to change of gender to be made. So too does the reference in Parliamentary debates to a person being "irreversibly committed" to assuming the desired gender identity.

[45] However, clause 29 was amended twice before it was enacted in its present form. Supplementary Order Paper ("SOP") 45, dated 25 July 1991, proposed changes to clause 29 including the redrafting of the criteria the Family Court was to apply when considering an application for a declaration. Clause 29(3)(a), as amended by SOP 45, provided that, before issuing the declaration the Court must be:

> "...satisfied, on the basis of expert medical evidence, that –
>
> (i) The person has undergone all medical procedures usually regarded by medical experts as necessary to enable persons with the person's former physical conformation to assume the gender identity of a person of the nominated sex."

[46] SOP 45 also amended the definition of the term "medical" to include surgical procedures. The Justice and Law Reform Committee recommended changes be made to the drafting of clause 29(3)(a) as amended by SOP 45 to make clear the distinction between the psychological adoption of a gender identity and the adoption of a physical conformation of the sex which accords with the gender identity of the person concerned. The committee also recommended that the word "all" be omitted when stating the requirement for transsexuals to have undergone the necessary medical procedures. The committee then noted:

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[20] (Parliamentary Debates, Hon Philip Woollaston (Associate Minister of Justice) on moving the introduction of the Bill on 5 December 1989

> "… medical intervention alone cannot enable a person to adopt the gender identity of a nominated sex. An adult transsexual's gender identity will have been established prior to medical intervention."[21]

[47] During the Parliamentary debates this shift in emphasis was referred to as follows:

> **"**The select committee…recognised that it was principally a psychological, rather than a surgical, matter of identity, and that to require people to go through the full gamut of very expensive surgery in order simply to have themselves recorded on their birth certificate as being the sex with which they identify was inappropriate."[22]

[48] SOP 45 was withdrawn and replaced by SOP 76, which substituted the original clause 29 in one significant aspect by providing that the birth certificate would record the nominated gender only after an applicant had undergone:

> "… all medical treatment usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that accords with the gender identity of a person with the nominated sex."

[49] By the time of the Bill's third reading, clause 29 had been amended to its present form by substituting "such medical treatment" for "all medical treatment". At that time, the Parliamentary debates note that this change was made because there was "…some confusion about what medical procedures should and could and need to be taken."[23] This appears to be a reference to the possibility of medical technology developments by which means of change other than physical procedures may become available.

[50] The legislative history of the section reveals a significant relaxation by Parliament in relation to the extent of medical treatment an applicant seeking a declaration needed to undergo. It is apparent from the legislative history, that by the time the Bill was passed, Parliament did not intend an applicant should necessarily have to undergo all available surgical procedures, including full genital surgery, to satisfy the test under the section. The records would seem to support an

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[21] Report of the committee on the supplementary order Paper No 45 relating to the Births, Deaths and Marriages Registration bill, tabled in the House on 22 June 1993 – Appendix to the Journals of the House of Representatives of New Zealand 1991-1993 Vol XXIII, I.8 page 33 at 35-36.
[22] Richard Northey during the 3rd reading of the Bill – 28 March 1995.
[23] Diane Yates, 28 March 1995.

interpretation of the section as requiring some degree of permanent physical change as a result of the treatment (including psychological treatment) received.

[51] Counsel point out that what is not clear is the point at which change on the treatment continuum will satisfy the requirement for a physical conformation that accords with the nominated sex. It can be inferred from the debates that the absence of definition on that point was deliberate and that what was intended was a case by case assessment of whether the steps taken by an applicant satisfied the test. Such an approach would also accord with the views expressed in many of the cases about the inappropriateness of specifying where the line on treatment is drawn because of how the circumstances of individual applicant's will vary. (See for instance in ***Bellinger*** referred to at para [33] above).

ANALYSIS OF THE SECTION

[52] Next, it is helpful to analyse the section itself; the way it is framed and the language used.

Section 28(1)

[53] The use of the word "may" in subs (1) of the section is empowering, but does not provide a residual discretion because it is subject to subs (3) which provides that the Court "shall" issue the declaration **"**if, and only if**"** all three of the mandatory tests set out in subs (3) are satisfied. In addition to those three tests, the applicant must also be over 18 years of age.

Section 28(2)

[54] Subsection (2) requires the Registrar-General to be served with a copy of the application (as well as any other person who, in the Court's opinion, is interested or might be affected by the making of the declaration).

Section 28(3)

[55] Under subs (3) the Court is required to carry out what Ms Janes eloquently described as "cascading levels of assessment":

Section 28(3)(a)(i),(ii) & (iii)

[56] The first step involves determining whether the registration of the applicant's birth includes information that the applicant is a person of the sex opposite to the nominated sex (or else that the person is of indeterminate sex, or there is no information at all as to the applicant's sex).

Section 28(3)(b)(i) & (ii)

[57] If satisfied that an applicant is not a person of the nominated sex, the second step is to determine whether the applicant has assumed, and intends to maintain, or always has had and intends to maintain, the gender identity of a person of the nominated sex and wishes that sex to appear on his/her birth certificates. That enquiry rests on assessment of the applicant's own evidence as to his/her intentions and wishes.

[58] Firstly, it requires being satisfied that the applicant has assumed or always has the gender identity of the nominated sex. Secondly, that the applicant has the requisite intention to maintain the gender identity of the nominated sex. That "test' is necessarily prospective and to a large extent can only be met by assurances from the applicant and a review and analysis of historical conduct and other social and psychological factors.

Section 28(3)(c)(i)

[59] The third step (so far as it is relevant in the context of this case – given that there is nothing in the evidence to suggest that subs 28(3)(c)(ii) applies here) involves a three-limb test which must be satisfied on all levels on the basis of expert medical evidence.

Section 28(3)(c)(i)(A)

[60] The first limb requires being satisfied on the basis of such evidence that the applicant has assumed the gender identity of the nominated sex.

Section 28(3)(c)(i)(B)

[61] The second limb requires being satisfied on the basis of such evidence that an applicant has undergone such medical treatment as is desirable to acquire a physical conformation that accords with the gender identity of the nominated sex. It is helpful, I think, to pick this test apart as follows:

[62] "Medical" is defined in s 2 of the Act as including psychological and surgical. Therefore, in the context of this provision, "medical treatment" is capable of meaning both surgical interventions and non-surgical measures such as counselling and other psychological treatment as well as hormonal and pharmacological therapies.

[63] "Usually regarded by medical experts as desirable" means the assessment of what is desirable is that of a group or consensus of medical experts, rather than the opinion of an individual medical expert. The test is not what the applicant considers to be desirable for him/her to achieve personal comfort with, or physical conformity to, their nominated gender identity.

[64] "Desirable" means "worth having or wishing for."[24] It does not mean necessary or essential.

[65] "To enable the applicant," means the focus of the assessment regarding medical treatment is on the individual applicant and what is required for him or her to achieve the "desirable" objective. Assessment on a case-by-case basis is required and this will take into account the unique circumstances of the particular applicant.

[24] The Concise Oxford Dictionary, 9th ed.

[66] "Conformation" means "shape or structure"[25], and "physical conformation" therefore refers to the structure or appearance of the applicant's body or physical characteristics.

[67] "A" physical conformation is what is required. Use of the indefinite article "a" rather than the definite article "the" suggests that the degree of conformation is not intended to necessarily be complete conformity with the physical characteristics of the nominated sex.

[68] "Accords with," means to "be consistent with" or "not contradictory"[26].

[69] The individual applicant's degree of comfort with, or physical conformity to their nominated gender identity is the proper focus of treatment decisions by medical specialists, and the therapeutic approach taken should be consistent with accepted and recognised treatment options for gender dysphoria of the type affecting the particular applicant.

[70] The focus of the legal test is the nature of the medical (psychological and surgical) treatment received and it's effect on the degree to which the applicant's physical conformation accords with that of the nominated gender.

[71] A transsexual who has undergone "complete gender reassignment" will satisfy the test under this subsection. That is not is dispute. The issue raised in this case, and in respect of which clarification is sought, is at what point short of complete gender reassignment surgery a person's physical appearance has changed such that it "accords with the gender identity of a person of the nominated sex". More particularly, whether an applicant must have undergone surgery to alter their genitals to satisfy that test; and if so, at what point on the continuum of surgical treatments available to them the genitals are considered to be sufficiently consistent with those of the nominated sex.

[72] For reasons which follow from the comments made at para [51] above, I do not think it appropriate or relevant to talk in terms of "thresholds" or "points on the

[25] The Concise Oxford Dictionary, 9th ed
[26] The Concise Oxford Dictionary, 9th ed

continuum of surgical treatments" in a generalised way in cases under the section. I do not believe Parliament intended there be a standardised test to apply to all applicants and to do so would be to misunderstand transsexualism and the treatment for it. The short answer to the question is that it is not necessary in all cases for an applicant to have undergone full gender reassignment surgery in order to obtain a declaration under the section. Just how much surgery he/she needs to have had is determined on a case by case basis by reference to the evidence in the particular case, including that of the medical experts.

Section 28(3)(c)(i)(C)

[73] The third limb requires being satisfied on the basis of such evidence that, as a result of the medical treatment undertaken, the applicant will maintain the new gender identity.

[74] "Will" again means that the test to be applied is prospective.

[75] "As a result" introduces a causation element to the test. The medical treatment must itself have the effect of maintaining a particular gender identity.

[76] "The medical treatment undertaken" refers back to the medical treatment in the preceding provision; that is, to medical treatment (both psychological and surgical) already undergone or being received by the applicant at the time of the application.

[77] "Maintain" means "cause to continue; keep up, preserve a state of affairs, an activity etc."[27]

[78] The Court must be satisfied that the applicant's adoption of the physical conformation of the nominated gender will be maintained as a result of the medical treatment already undergone at the time of the application. This suggests that the medical treatment referred to in s 28(3)(c)(i)(B) must result in a degree of permanent change. Alternatively, that the Court is satisfied on the basis of expert medical

[27] The Concise Oxford Dictionary 9th ed

evidence that the applicant is currently undertaking medical treatment which achieves physical conformity with the nominated gender, and will in future continue to undertake such medical treatment which will maintain the gender identity of the nominated sex.

[79] The declaration may be issued if, and only if, the Court is satisfied in respect of each step of those tests under the section. Whether or not the test is satisfied in any given case is a matter of fact to be decided by the Court on the basis of evidence presented to it.

[80] As a matter of statutory interpretation, the tests under the section require a large measure of certainty that an applicant has psychologically, socially and physically assumed the nominated gender identity and a degree of permanence in the physical changes brought about by medical treatment.

APPLICATION OF STATUTORY TEST TO THIS CASE

[81] It is now appropriate to apply the statutory criteria to the facts of this case.

Section 28(1)

[82] The criteria in this subsection are met. Michael is over the age of 18.

Section 28(2)

[83] Service has been affected.

Section 28(3)(a)(i)

[84] The notation on Michael's current birth certificate, that he is a female, plus the evidence of Michael and others that his nominated sex is male, satisfies the requirements of this subsection.

Section 28(3)(b)(i) & (ii)

[85] The evidence satisfies me that Michael has assumed, and intends to maintain the gender identity of a male, which is the nominated sex. I am also satisfied he wishes the nominated sex to appear on birth certificates issued for him. In reaching that conclusion I have regard to the careful and thorough way he has gone about understanding his transsexualism, the early age at which he identified himself as being male, the period over which he has lived and been accepted in society as a male, the convincing way in which he speaks of his determination to live the rest of his life as a male and the professional advice he has taken and acted on to date. He also gets strong corroborative support for his position from those who know him well, in particular his father. The medical experts, Doctors R and F, who have worked closely with him regarding his gender dysphoria, are also convinced of his intention to maintain his identity as a male.

[86] Although Michael still has the genitalia and reproductive organs of a female, and transgender people have been known to revert to their biological sex or alternate between the sexes, I assess the chances of that happening in this case to be very slim. Michael gives cogent reasons for not wanting to undertake any further surgical intervention and is supported in this regard by Dr F. The non-reversible effects of his hormone treatment (see at para [17] above) are such that, to some extent, Michael's gender identity as a male is established permanently.

Section 28(3)(c)(i)(A)

[87] Dr R, Dr F, and Mr D all qualify as medical experts. On the basis of their evidence (see paras [11],[13],[15],[16] & [17] above) I am satisfied that Michael has assumed (or has always had) the gender identity of a male.

Section 28(3)(c)(i)(B)

[88] The evidence of Dr F is that Michael has undergone such medical treatment as is usually regarded by medical experts as desirable for him to acquire a physical conformation of a male. The treatment started with the assessment and diagnosis by

Dr R (see para [11] above). Next, Michael has undergone psychological counselling, has been on continuous hormone therapy since January 2004 - relevant given the medical evidence that it can take 2 years for full effects to occur - and has undergone a bilateral mastectomy to acquire the chest of a male.

[89] There is expert medical evidence from Mr D that Michael's surgery has resulted in a masculinised chest. The combination of the ongoing testosterone hormone therapy, and the surgery, mean that Michael will never exhibit the secondary sexual characteristics of breasts in future and therefore will continue to physically conform in that respect to the nominated gender. The ongoing testosterone will also ensure maintenance of the effects set out above.

[90] Dr F is of the opinion that further surgery is not an essential part of gender reassignment treatment. In his view hormone therapy and the mastectomy are sufficient for Michael to have undergone the treatment usually regarded by medical experts as being desirable to enable him to acquire the physical conformation of a male, and he would not recommend other reconstructive surgery at this stage for Michael. This is an opinion provided by Dr F, as an expert, but with reference to the internationally recognised standards of care for transsexual people by medical professionals (see para [16] above]).

Section 28(3)(c)(i)(C)

[91] This subsection requires expert medical evidence that Michael will maintain his male gender identity as a result of the medical treatment undertaken. Dr F and Dr H are continuing to prescribe/provide testosterone replacement therapy, and to some extent the effects of that are irreversible. Dr F deposes that Michael will, as a result of his treatment, maintain a gender identity of male. That is in part because of his confidence in the diagnosis that was made by Dr R, and then the medical treatments that Michael has subsequently received. Dr F's evidence is clear that there is no further surgical intervention contemplated at this time as further surgery is not required in order for [him] to consider that Michael is now of the male sex.

CONCLUSION

[92] It follows from the findings recorded above that the grounds are made out and the application is therefore granted.

[93] A declaration is now made that Michael is a male and that birth certificates issued record his name as [his male names].

[94] Given the issues and concerns raised in Counsel's submissions, and noted in material presented to the Court regarding transsexualism and the law, I think it would be useful to mention something about the effect of the declaration now made, followed by comment of the application of the statutory test generally.

EFFECT OF A DECLARATION UNDER THE SECTION

[95] Section 64 of the Act provides for birth certificates for Michael to now record he is a male, and his name is [male names] – as if he has had that sex and those names since birth.

[96] Section 71 of the Act provides that a birth certificate shall in any proceedings be received as prima facie evidence of the truth of the information it contains.

[97] However, s 33 of the Act provides that the sex of every person shall continue to be determined by reference to the general law of New Zealand.

[98] The effect of s 33 is that the registration of information that the person is of the nominated sex does not itself determine the person's sex in the eyes of the law in all respects.[28]

[99] Following alteration of the birth record, Michael will be legally recognised as a male only to the extent that the general law provides for a birth certificate to be determinative or that he otherwise qualifies. He will not necessarily be a male for all legal purposes.

[28] Births, Deaths and Marriages Registration Bill No 193-1, Explanatory Note, page iii

[100] A properly issued birth certificate will qualify him to hold a New Zealand passport and driver's licence as a male because in each case a birth certificate is required as evidence of identity. A passport and drivers licence in turn serve as evidence of legal identity for many purposes.

[101] Section 77(9) of the Act provides for notification of the fact that Michael has a reassigned sex on his birth certificate to any Government agency having an interest in ensuring that people should not have more than one legal identity.

[102] The Act expressly provides for limited disclosure of birth information where sexual reassignment has been registered. Section 77(6)(c) authorises a marriage celebrant or Registrar to access information that a person is of an opposite sex to that recorded in the original birth record, where the information is material for the purpose of investigating whether or not the parties to a proposed marriage are a man and a woman.

[103] Coupled with the effect of s 33 of the Act, s 77(6)(c) suggests that Parliament did not intend that legal recognition of the nominated sex under the section (ie s28) would be determinative of a transsexual's sex for the purposes of marriage. However, in that regard it is relevant to note the decision of Judge Aubin in ***M v M***[29] where it was declared that a marriage between a woman and a male to female transsexual was a valid marriage.

[104] Also see ***Attorney-General v Family Court at Otahuhu***[30] in which Ellis J drew a distinction between the recognition of a change of sex on birth certificates and whether or not a female to male transsexual was a male for the purposes of marriage. Anticipating the introduction of the Births, Deaths and Marriages Registration Act he noted that:

> "Even if a birth certificate was issued for a person in the alternate sex, that would not automatically allow a person to marry as a member of that sex unless the Courts were willing to endorse such a marriage. It is possible that even though a person has a birth certificate as a female, for

[29] M v M (marriage: transsexuals) [1991] NZFLR 337.
[30] [1995] NZLR 603

> example, pursuant to such legislation, a Court could still hold that the person did not have the attributes to marry in that sex…".[31]

[105] However he also held that there is no social advantage in the law not recognising the validity of a marriage of a transsexual in a reassignment case.[32]

[106] As Ms Janes points out in her submissions in the present case, if the test under the section (s28) can be satisfied by a lower threshold than the test for marriage, transsexuals with amended birth certificates will not necessarily be unable to form legally recognised relationships as a person of their nominated sex. They will be entitled to enter a civil union. However, if they wish to marry, a female to male transsexual, for example, may live as a male, be socially perceived as a male, and be legally recognised as a male in official identity documents, but only be able to marry as a female.

[107] The Court of Appeal confirmed in ***Quilter v Attorney-General*** [33]that under the Marriage Act 1955 same-sex couples are not entitled to obtain a marriage licence and marry. That Act confines marriage to a union between a man and a woman. It is not suggested that the interpretation of the statutory test should be determined by reference to the general law. The threshold adopted for legal recognition under the section may however influence the future development of the general law. Therefore the potential social and policy implications arising from adoption of different thresholds for legal recognition in different aspects of the applicant's life may require further legislative consideration.

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[31] @ p 616; para 8.9
[32] @ p 629; para 15.3
[33] [1998] 1 NZLR 523

COMMENT

[108] As mentioned in the introduction to this Judgment, the Registrar-General sought a decision that would provide guidance as to the interpretation and application of the section. This, it seems, is due to the lack of reported decisions on the section and a growing uncertainty as to how the statutory test is being, or will be applied. It was submitted that the difficult aspect of the present case would be to determine whether Michael is disqualified from meeting the test under the section because he still has the genitals and reproductive organs of a female, and does not have the sexual organs of a male.

[109] For the reasons set out in this judgment, I have not found those factors to disqualify Michael from obtaining a declaration which has now been made. As to the approach to be taken generally to applications under the section, I refer back to paragraphs [51] and [72] above in particular.

[110] Counsel also drew my attention to the Human Rights Commission's Transgender Report 2007[34] which mentions that transgender people are confused about what the test in the section means in practice. Many thought that the requirement for "medical treatment ... to acquire a physical conformation" of the sex matching their gender identity meant that they must have had "full gender reassignment surgery". A number were given this advice by staff at the Department of Internal Affairs, or in their local Family Court. Transgender people said the statutory test was unfair and problematic given the reality that most will never be able to access the full range of surgical procedures. They also said that for many of them such surgeries are simply not available in New Zealand, are too costly, medically unnecessary, or undesirable for other medical or cultural reasons. For these and other reasons most transgender people did not expect to ever have full gender reassignment surgeries, nor to be able to meet the "physical conformity" requirements of the statutory test.

[34] "To Be Who I Am"; Report of the Inquiry into Discrimination Experienced by Transgender People. 2007

[111] In its conclusions, the Commission records that the current legal framework is complex and confusing to transgender people, who are very diverse and should not have barriers placed in the way of their human rights simply because that diversity presents legal complexity. Account should be taken of both the transgender person's subjective view of their gender identity and objective evidence that they have taken steps to live in the appropriate sex, it is said. It is suggested by the Commission that the section should be amended to reflect this. Importantly it says, the distinction as to whether a transgender person is pre- or post-operative should not be determinative of the gender the law should regard the person as having.

[112] In my view, such an approach to addressing the legal status of transgender people would be in keeping with the observations made by the courts overseas in cases such as those referred to earlier in this judgment and the knowledge and understanding the medical profession have of transgender issues, as is evident from the information presented in this case. The law needs to keep pace with medical research and be applied in a manner that achieves justice for those concerned.

[113] Although the framing of the section is complex, I have found that, after analysis, it is intended to be applied in a manner that is capable of addressing the primary concerns raised. It is clear that there can be no standard threshold test because each case must be dealt with on its own merits by reference to the evidence of the particular applicant, and of the medical experts familiar with that person's situation. How much surgery will be required in any given case depends on the circumstances of the particular applicant. The legislative history suggests that Parliament did not intend that a transsexual should necessarily be required to undergo the full range of surgical procedures that may be available before being afforded legal recognition of their chosen gender. Whilst there needs to be some degree of permanent physical change, that does not mean that full gender reassignment surgery will be required in all cases – and it has not been in this case.

RESTRICTION ON PUBLICATION

[114] If this decision is reported in any way, it is to be with the name of the applicant deleted and replaced by the name "Michael". Also, all other names or

particulars that might lead to his identification, (such as date of birth, place of work and study, plus courses of study) must be deleted too, so as to protect the applicant's identity completely.

A J Fitzgerald
Family Court Judge

Signed at 9.30 am this 9th day of June 2008

APPENDIX

"28 Declarations of Family Court as to sex to be shown on birth certificates issued for adults

(1) Subject to subsection (3) of this section, a Family Court may, on the application of a person who has attained the age of 18 years, declare that it is appropriate that birth certificates issued in respect of the applicant should contain the information that the applicant is a person of a sex specified in the application (in subsection (3) of this section referred to as the nominated sex).

(2) The Court shall cause a copy of the application to be served on the Registrar-General, and any other person who, in the Court's opinion, is interested in it or might be affected by the granting of the declaration.

(3) The Court shall issue the declaration if, and only if,—

(a) It is satisfied that there is included in the registration of the applicant's birth—

(i) Information that the applicant is a person of the sex opposite to the nominated sex; or

(ii) Information that the applicant is a person of indeterminate sex; or

(iii) No information at all as to the applicant's sex; and

(b) It is satisfied that the applicant is not a person of the nominated sex, but—

(i) Has assumed and intends to maintain, or has always had and intends to maintain, the gender identity of a person of the nominated sex; and

(ii) Wishes the nominated sex to appear on birth certificates issued in respect of the applicant; and

(c) Either—

(i) It is satisfied, on the basis of expert medical evidence, that the applicant—

(A) Has assumed (or has always had) the gender identity of a person of the nominated sex; and

(B) Has undergone such medical treatment as is usually regarded by medical experts as desirable to enable persons of the genetic and physical conformation of the applicant at birth to acquire a physical conformation that

accords with the gender identity of a person of the nominated sex; and

(C) Will, as a result of the medical treatment undertaken, maintain a gender identity of a person of the nominated sex; or

(ii) It is satisfied that the applicant's sexual assignment or reassignment as a person of the nominated sex has been recorded or recognised in accordance with the laws of a state for the time being recognised for the purposes of this section by the Minister by notice in the Gazette."