

**IN THE FAMILY COURT  
AT AUCKLAND**

**FAM 2015-004-001031  
[2016] NZFC 7669**

IN THE MATTER OF	THE BIRTHS, DEATHS, MARRIAGES AND RELATIONSHIPS REGISTRATION ACT 1995
BETWEEN	LUCAS CLARKE Applicant
AND	REGISTRAR-GENERAL OF BIRTHS DEATHS AND MARRIAGES Respondent

Hearing:	On the papers
Parties/Counsel	Applicant in Person D Sim Counsel to Assist
Judgment:	19 September 2016

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**RESERVED JUDGMENT OF JUDGE A M MANUEL**

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**Introduction**

[1] The applicant has applied under s 28 of the Births, Deaths, Marriages and Relationships Registration Act 1995 (the Act) for a declaration that his birth certificate should contain the information that he is a male. Currently his birth certificate records he is a female.

[2] Counsel to Assist the Court was appointed and has filed memoranda dated 18 December 2015, 18 March 2016 and 10 June 2016. The memoranda raised issues about:

- (a) Whether the evidence adduced by the applicant was sufficient to satisfy the requirements of s 28(3)(c)(i) of the Act; and
- (b) The manner of the hearing, given both the applicant and the maker of an affidavit in support are located in Sydney, Australia.

[3] A third issue, about the manner in which the applicant's initial affidavit had been affirmed, has fallen away since he filed a further affidavit dated 19 January 2016. The January 2016 affidavit was appropriately declared before a Justice of the Peace in Australia in accordance with r 172 of the Family Court Rules 2002 and r 9.76 of the District Court Rules 2014. The affidavit also satisfies the requirements set out in rr 158 and 159 of the Family Court Rules.

### **The relevant law**

[4] The relevant parts of s 28 of the Act provide as follows:

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

- (1) Subject to subsection (3), a Family Court may, on the application of an eligible adult (the **applicant**), 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) referred to as the **nominated sex**).

...

- (3) The court shall issue the declaration if, and only if,—
  - (a) it is satisfied either that the applicant's birth is registrable under this Act but is not yet registered, or that there is included in the record 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*.

### **The applicant's evidence**

[5] In terms of s 28(3)(c)(i) of the Act the Court must be satisfied on the basis of medical evidence that the applicant:

- (a) Has assumed the gender identity of the sex he is seeking to have recorded on his birth certificate;
- (b) Has undergone medical treatment “as is usually regarded by medical experts as desirable” to conform with the applicant’s gender identity; and
- (c) Will, as a result of the medical treatment undertaken, maintain that gender identity in the future.

[6] The applicant’s affidavit of January 2016 attaches supporting documents to address these requirements. They include:

- (a) Exhibit 1 – a copy of a letter dated 30 July 2013 from Dr Hassell, a plastic and reconstructive surgeon who performed bilateral simple

mastectomies on the applicant as part of gender reassignment surgery on 27 June 2011 and bilateral nipple reconstruction and bilateral scar revision surgery on 3 April 2012.

- (b) Exhibit 2 – copies of letters from Dr Ballin, the applicant’s general practitioner of many years standing; one dated 8 January 2016 and the other dated 13 August 2013. The applicant has been a patient at Dr Ballin’s surgery since 1 September 2006 and has administered testosterone under Dr Ballin’s supervision.
- (c) Exhibit 3 – a copy of a letter dated 14 May 2010 from Dr Toohey, a psychiatrist who gave an opinion that the applicant “suffers from Gender Dysphoria and is a suitable candidate for hormone and surgery reassignment treatment”.
- (d) Exhibit 4 – a copy of a letter from Associate Professor Conway, an andrologist at the Concord Repatriation General Hospital in Sydney, who confirmed that the applicant had been a patient of the department since May 2010 and had “been on testosterone treatment continuously for the last four years and has masculinised”.
- (e) Exhibit 5 – a copy of the applicant’s current birth certificate (recording his sex as female);  
  
(there is no Exhibit 6 attached to the affidavit on the Court file)
- (f) Exhibit 7 – a copy of the applicant’s current New Zealand passport (showing his sex as male);
- (g) Exhibit 8 – a list of websites from which the Court is invited to confirm the expert credentials of the medical practitioners.

[7] It is clear from the content of the medical evidence that the applicant has identified as a male from a young age and some years ago he commenced

testosterone treatment and had a bilateral mastectomy in order to physically conform to his gender identity.

[8] The Family Court case “*Michael*” v Registrar-General of Births, Deaths and Marriages<sup>1</sup> is the leading decision in this area. *Michael* includes a detailed assessment of what is required to satisfy s 28(3) of the Act at [55]-[80] of the judgment.

[9] Of particular relevance in the present case is the finding that psychological counselling, hormone therapy and a bilateral mastectomy (the same medical treatments undergone by the applicant in this case) were medically sufficient for the applicant in *Michael* to acquire the physical conformation of a male.

[10] The standard to which the Court should be satisfied was also summarised in *DAC v Registrar-General of Births, Deaths and Marriages*<sup>2</sup> as follows:

[12] ... All of those cases emphasise the importance of the Court being satisfied that the decisions that a person makes about the gender they wish to live as when seeking an application under s 28 are fully and properly considered. Such applications need to be supported by proper evidence of medical treatment being undertaken to assist the person living their life in the gender they seek such as hormone therapy treatment. The Court needs to be satisfied the person has lived their life in this way for a sufficient period of time that it can be confident there is no sudden urge about making the application which may be later regretted or that an applicant is likely to change his/her mind. Evidence of gender re-assignment surgery having been undertaken, while helpful, is not an essential pre-requisite for such an application being granted.

[11] Here, the applicant has provided medical evidence by way of certified copies of letters from four medical practitioners. He notes in his affidavit that there would be both costs and delays if he were required to obtain this information in affidavit form from these medical practitioners.

[12] Counsel to assist raised the issue of the sufficiency of the expert medical evidence produced at [12] of her December 2015 memorandum. Subsequently the applicant filed his January 2016 affidavit. Counsel to assist had submitted that the medical evidence should be to the standard provided in *Michael* to ensure the best

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<sup>1</sup> (2008) 27 FRNZ 58.

<sup>2</sup> [2013] NZFC 1998.

chance of success. In *Michael* the applicant's medical evidence was given by way of affidavit.

[13] In *DAC*, however, the applicant provided evidence by way of affidavit with reports and letters from medical practitioners annexed. The applicant also appeared in person to give evidence in person. She was successful in amending her birth certificate.

[14] In *Crowley v Registrar-General of Births, Deaths and Marriages*<sup>3</sup> the applicant provided evidence by way of affidavit. The decision notes that she had been seen by three psychiatrists, two of whom had provided reports which were before the Court. While it is unclear exactly how detailed these reports were, their findings were summarised at [5] as follows:

- (a) the applicant has always seen herself as a male;
- (b) that her transition to wearing female clothing fulltime as an adult occurred in 2000;
- (c) that she commenced hormonal treatment in December 2012;
- (d) that there have been a number of surgical interventions for the purpose of preparing herself for hormonal and surgical treatment; and
- (e) that both doctors approve her as a good candidate for gender reassignment surgery, both physicians commenting on her good insight and judgment and her detailed awareness of the issues involved in gender reassignment surgery. They both reported no indication of personality or psychiatric disorders.

[15] The applicant in *Crowley* also appeared in person to give evidence. She was successful in amending her birth certificate.

[16] A similar approach to the evidence (medical evidence produced by way of report rather than affidavit) was taken in the following cases, where the applicants were successful in amending their birth certificates:

*M v Registrar-General of Births, Deaths, and Marriages of Wellington*<sup>4</sup>  
*Re B*<sup>5</sup>

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<sup>3</sup> [2015] NZFC 3401.

<sup>4</sup> FC New Plymouth, FAM-2009-043-82, 1 April 2009.

<sup>5</sup> FC Auckland FAM-2009-004-1341, 16 November 2009.

*Re Application by H*<sup>6</sup>  
*MMT v Registrar-General of Births, Deaths and Marriages*<sup>7</sup>  
*Re C-DCT*<sup>8</sup>  
*Basinger v Registrar-General*<sup>9</sup>  
*Kearney v Registrar-General of Births, Deaths and Marriages of Auckland*.<sup>10</sup>

[17] Conversely, in *Mason v Registrar-General of Births, Deaths, Marriages, and Relationships*<sup>11</sup> the applicant provided an affidavit with two annexures; a letter from her psychiatrist and a medical certificate but was unsuccessful in amending her birth certificate.

[18] At the time of her application the applicant had been receiving hormone therapy for just over two years. She did not appear before the Court to give evidence because she was residing in Australia at the time. The applicant explained that she did not have the financial means to provide better evidence, which the Court accepted might explain the situation. The Court nevertheless refused the application on the grounds that the applicant had failed to provide sufficient expert evidence to satisfy s 28(3)(c) of the Act.

### **Assessment of evidence**

[19] In my view, the applicant has provided sufficient expert evidence for the purposes of s 28(3)(c)(i) of the Act.

[20] While detailed affidavits from the health practitioners in question were provided in *Michael*, in subsequent cases the Courts have been willing to accept written reports and letters as expert medical evidence, without requiring the health practitioner to swear an affidavit or to appear in person. In particular, a comparable level of information has been provided in the annexures to the applicant's affidavit as was accepted in *Crowley*, where the applicant successfully amended her birth certificate. I further note that in cases brought before the Accident Compensation

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<sup>6</sup> FC Waitakere, FAM-2009-090-2000, 21 September 2010.

<sup>7</sup> [2012] NZFC 3533.

<sup>8</sup> [2012] NZFC 10036.

<sup>9</sup> [2013] NZFC 3562.

<sup>10</sup> [2013] NZFC 4805.

<sup>11</sup> [2014] NZFC 2600.

Corporation letters from the health practitioners are commonly accepted in evidence without the requirement for affidavits for the practitioners to appear in person.

[21] While some of the letters are somewhat aged, they are unequivocal and support the applicant's case because they show a well considered decision which has been implemented consistently by the applicant over a period of many years. The most recent of the letters was prepared earlier this year. The letters confirm that the applicant, who is now 30 years of age, has identified as male for all or most of his adult life, underwent a bilateral mastectomy in 2011 and has been on hormone therapy since 2010. He has been living publicly as a male since 2009.

**How is the hearing of this application to be conducted?**

[22] The applicant is required at the hearing of his application but, if he wishes, may give evidence by way of audio link from Australia in the manner set out in r 173(f) Family Court Rules 2002 and the corresponding r 9.57 District Court Rules and ss 168 and 168A of the Evidence Act 2006.

[23] I am satisfied that the evidence can be more conveniently given from Australia and that audio link can reasonably be made available.

[24] Should he wish to give evidence by audio link he is to advise the registrar promptly and I direct the arrangements are to be made.

[25] The applicant has also filed an affidavit in support dated 9 January 2016 from Ms Newman, who is his maternal aunt. She raised him from about the age of 10 after his mother's death. Ms Newman's evidence is very helpful but she is not required to give evidence at the hearing.

[26] The application is to be set down for a 30 minute formal proof hearing.

A M Manuel  
Family Court Judge