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**IN THE FAMILY COURT
AT WELLINGTON**

**I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA**

**FAM-2020-085-000495
[2022] NZFC 3065**

**IN THE MATTER OF THE BIRTHS, DEATHS,
MARRIAGES AND RELATIONSHIPS
REGISTRATION ACT 1995**

**BETWEEN REGISTRAR-GENERAL OF BIRTHS,
DEATHS MARRIAGES AND
RELATIONSHIPS
Applicant**

**AND [HANNAH NELSON]
Respondent**

Date of hearing: 29 November 2021

Appearances: H Carrad for the Applicant
Respondent appeared in person (via VMR)
S Stevenson as Lawyer to Assist

Judgment: 6 April 2022

RESERVED DECISION OF JUDGE E. SMITH

Application

[1] This is an application under s 85(1) of the Births, Deaths, Marriages, and Relationships Registration Act 1995 (“the Act”) whereby the Registrar-General of Births, Deaths and Marriages (“the Registrar-General”) seeks the Court’s

determination as to whether Mx [Hannah Nelson]’s (“Mx [Nelson]”) sex on their first birth certificate is incorrect.

[2] Mx [Nelson] was joined to the proceedings on 7 May 2021.

[3] On [date deleted] 1985, Mx [Nelson] was born. Their then-birth certificate (“first birth certificate”) recorded their sex as male.

[4] In December 2013, Mx [Nelson]¹ made an application to the Family Court under s 28 of the Act for a declaration (“the declaration application”) that their birth certificate record their nominated sex as female.

[5] On 17 April 2014, the Family Court at Christchurch granted the declaration application and declared that Mx [Nelson]’s birth certificate would be changed so that it no longer recorded their sex as male and instead recorded their sex as female. As a result, Mx [Nelson]’s current birth certificate (“current birth certificate”) now records their sex as female.

[6] In February 2020, Mx [Nelson]² wrote to the applicant saying (amongst other things) they would appreciate it if their birth certificate recorded that their sex is intersex.

[7] The Registrar-General explained to Mx [Nelson] that the Act only permitted the designations of male, female, and indeterminate, not intersex, to be recorded as a person’s sex on their birth certificate. Mx [Nelson] rejected that and still sought for their birth certificate to record their sex as intersex.

[8] The Registrar-General considered Mx [Nelson]’s letter of February 2020 to be a trigger for an enquiry under s 82 and s 84(2) of the Act. That enquiry was intended to determine whether or not the information that was recorded under the Act (i.e. Mx [Nelson]’s sex on the first birth certificate, which records their sex as “male”) was

¹ Mx [Nelson] was then named [Tami Browning].

² Mx [Nelson] wrote this letter under the name [Tami Hannah].

incorrect. If the information had been found to be incorrect, then the Registrar-General would have been obligated to substitute it for the correct information.

[9] After making enquiries pursuant to s 82 of the Act, the Registrar-General was left uncertain as to whether the information on Mx [Nelson]'s first birth certificate could be said to be incorrect (i.e. could not be certain whether it was incorrect that Mx [Nelson]'s first birth certificate recorded their sex as male). The Registrar-General therefore made this application for the Family Court to determine the matter.

[10] The Registrar-General also considered these matters to be further complicated in that the Family Court has previously made a declaration that Mx [Nelson]'s current birth certificate is to refer to Mx [Nelson] as female. The Registrar-General therefore seeks further direction from the Court under s 85(1) in regard to the following:

- (a) Is the information submitted to the Registrar-General by Mx [Nelson] a sufficient basis for the Registrar-General, under s 84, to correct the sex on Mx [Nelson]'s first birth certificate from male to indeterminate on the basis that the sex that was recorded at birth was incorrect?
- (b) If so, is the first birth certificate to be corrected notwithstanding the 17 April 2014 Family Court order which directed that the sex on [Hannah Nelson]'s birth certificate is to be changed from male to female?
- (c) If the Court directs the Registrar-General to correct the first birth certificate so that Mx [Nelson]'s sex is recorded as indeterminate, what does this mean for further birth certificates issued for [Hannah Nelson] by the Registrar-General? In particular:
 - (i) Is the Registrar-General required to record [Hannah Nelson]'s sex as indeterminate on any birth certificate he issues, notwithstanding the 17 April 2014 Family Court order; or

- (ii) Would a successful application by [Hannah Nelson] to quash the 17 April 2014 Family Court order be required before the Registrar-General could do so?

- (d) If the Court directs that the information submitted to the Registrar-General is not a sufficient basis for the Registrar-General to correct the sex recorded on the first birth record to indeterminate, then what does this mean for further birth certificates issued for Mx [Nelson] by the Registrar-General?
 - (i) For the avoidance of doubt, the Court is asked to confirm whether the Registrar-General must continue to comply with the 17 April 2014 Family Court order unless it is replaced by a subsequent order made under s 28 of the Act.

[11] Mx [Nelson] sees no issue. They self-identify as intersex, and, in any event, considers that they likely had an operation that obliterated their vagina (date and surgeon unknown), has a uterus and that their birth certificate is incorrect and should record their gender as being intersex. Mx [Nelson] does not differentiate as to whether they seek for their first or current birth certificate to be changed (or both).

[12] While I appreciate that it would be desirable for the Registrar-General to glean from the Court the guidance that he seeks in posing the questions at paragraphs [10](c) and (d), given the Court's prescribed powers in s 85, I limit this decision to a determination as to whether there is any information recorded on Mx [Nelson]'s birth certificate (first and current) that is incorrect.

The Law

[13] The Registrar-General's power to correct incorrect information is contained in s 84 of the Act. Section 84 provides:

84 Correction of errors

- (1) If a Registrar is satisfied, after making any inquiries under section 82 that seem appropriate, that information recorded under this Act or a

former Act contains a clerical error, he or she must correct the error and notify the Registrar-General of the error and its correction.

- (2) If the Registrar-General is satisfied, after making any inquiries under section 82 that seem appropriate, that any information—
 - (a) recorded under this Act or a former Act is incorrect, he or she must cause it to be removed and (if the Registrar-General is satisfied that relevant information in the Registrar-General's possession is correct) cause the correct information to be substituted; or
 - (b) in the Registrar-General's possession and not recorded under this Act or a former Act is correct and should have been recorded, he or she must cause the information to be recorded.

[14] However, should the Registrar-General be uncertain as to any matter that he must be satisfied of, an application can be made to the Family Court to determine the matter pursuant to s 85 of the Act. Section 85 provides:

85 Family Court may consider proposed corrections in cases of difficulty or dispute

- (1) The Registrar-General, if uncertain as to any matter in respect of which the Registrar-General is required to be satisfied for the purposes of section 84 or 84A, may apply to the office of the Family Court nearest the Registrar-General's office to have the matter determined.
- (2) Any person who wishes the Registrar-General to act under section 84 or 84A in respect of any matter may apply to the office of the Family Court nearest the Registrar-General's office to have the matter determined.
- (3) The Family Court at the office where application is made under this section shall, notwithstanding section 84 or 84A, after—
 - (a) giving every person whom the court considers to have an interest in the matter an opportunity to be heard; and
 - (b) receiving any evidence the court thinks fit,—determine whether or not the Registrar-General should act under that section.

Section 28 of the Act provides for applicants to seek a direction from the Family Court that birth certificates issued for them should contain information that the applicant is

of “the nominated sex” which matches their gender identity (male, female or indeterminate). Section 28 provides:

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

- (1) Subject to subsection (3), the 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*).
- (2) The court must cause a copy of the application to be served on—
 - (a) the Registrar-General, if the applicant’s birth is registered or is registrable under this Act but is not yet registered; and
 - (b) 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 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*.

[15] Section 32 of the Act addresses the relationship between ss 28 and 84. Section 32 provides:

32 Other powers not affected

Nothing in sections 28 to 31 limits or affects—

- (a) the power of the Registrar-General under section 84(2) to substitute for—
 - (i) incorrect information relating to a person's sex; or
 - (ii) information that a person is of indeterminate sex,—
correct information relating to the person's sex; or
- (b) the power of the Registrar-General under section 84(3) to cause correct information relating to a person's sex to be recorded where previously no information at all as to the person's sex was recorded.

[16] Therefore, s 32 of the Act has the effect that a person does not need to apply under s 28 when an error has been made. Further, s 32 does not allow the Registrar-General to override an existing order and issue a new birth certificate under s 28.

[17] Accordingly, the Registrar-General's position is that the request by Mx [Nelson] to correct an error on their birth certificate can only relate to their first birth certificate.

[18] In any event, the Act does not enable a change (if appropriate) of one's nominated sex to intersex. The only correction that can be made is to male, female, or indeterminate (if the grounds for the requested correction are established).

[19] In my view, s 84 of the Act appears to be limited to the correction of information which was factually incorrect at the time it was recorded.

[20] The Registrar-General submits that medical evidence of a person being of indeterminate sex at birth would be needed for him to correct the first birth record, and that he could not correct that record on the sole basis of Mx [Nelson]'s convictions or beliefs about their self-identified sex at birth.

[21] In that regard, the Registrar-General relies on the case of *Suppressed v Registrar-General (Suppressed)*.³

[22] In *Suppressed*, the Registrar-General applied to the Family Court for directions about whether s 84 of the Act authorised him to correct the sex that was recorded at the applicant's birth from male to indeterminate. The Court held that s 84 did impart that power and based its decision on medical evidence that the applicant had been born with ambiguous genitalia, the applicant's "psychological conviction" about their sex, and the practical steps taken by the applicant to ascertain the facts. The Court, concluded, on the balance of probabilities, that the uncertainty that existed in regard to the applicant's sex at birth should be resolved in favour of recording sex at birth as "indeterminate".

[23] The Court was clear in *Suppressed* that the possibilities in terms of the sexes that could be recorded on one's birth certificate (i.e. male, female and indeterminate) were in terms of the applicant's physiology at birth. In formulating the test, Judge Ellis' view was that the focus should be on whether or not it is probable that the information is correct. His Honour noted that s 85 of the Act provided the Family Court with the discretion to receive any evidence the Court thought fit when asked to determine whether the Registrar-General should act under s 84. Judge Ellis found that on a mere balance of probability that there was some surgical procedure carried out on

³ *Suppressed v Registrar-General* FC Wellington FAM 2007-085-000907, 6 October 2008.

the applicant in early infancy. That finding, when combined with some biochemical data and the applicant's psychological conviction, led him to conclude that the uncertainty could be (and should have been) resolved by recording the applicant's sex at birth as "indeterminate". Judge Ellis found that the applicant's consistent conviction (at least in adolescence) that her life as a male was "not right", was a consideration, but that this conviction alone was not conclusive – rather it was another thread in the fabric of her case.

Context

[24] I make some overarching remarks to provide a context to the issues that are presented for the Court's determination. I acknowledge that these remarks are simplistic and record that I mean no offence by that simplicity, but a general understanding of the legal and social issues that collide in this matter is required.

[25] Historically and traditionally, a person's sex has been determined by their biological and physiological factors such as their chromosomes, genes, genitalia, and reproductive organs at birth.

[26] A person's gender identity, meanwhile, is a person's psychological sense of their own gender.

[27] A person is, in most cases, assigned a gender that is based on their biological sex (which is, in most cases, male or female). In some rare cases, a person's sex is considered to be indeterminate.

[28] For many people, their sex and gender identity are the same – but not in all cases. It is now well accepted that, for example, intersex, trans, non-binary, and gender fluid people have a gender identity that is different to their assigned biological sex. That self-identity may also change over time. In New Zealand, the sex recorded on a person's original birth certificate reflects their biological sex at that point in time (i.e. birth). The sex recorded on a person's original birth certificate can be subsequently changed, but not easily.

[29] For some people, it is highly important, if not psychologically critical, that their self-identified gender is reflected on their birth certificate and other personal documentation. For many, they consider that this is, or should be, a legal, if not human, right. The simplistic overview belies, at times, the deep pain, difficulty, and distress that gender minorities experience in achieving self-identification, as well as the hardship that has been suffered in achieving recognition of their identities. It is, for some, simply withering to be denied recognition of their lived lives and identities. This is particularly acute or obvious for those people who are diagnosed with gender dysphoria.

[30] In recognition of the need for self-identification, many organisations, particularly those that hold ID documentation, have made it so that a person's self-identified gender can be recorded on documents following a simple application or declaration process. For example, New Zealand passports and driver's licences can now record a person's self-identified gender. More and more public and private companies, organisations, and institutions are providing a self-identification option on documents.

[31] However, self-identification of gender is not so easily achieved on a New Zealand birth certificate as the law currently stands.

[32] Mx [Nelson], of course, no longer self-identifies as female (as on their current birth certificate) or male (as on their first birth certificate). Mx [Nelson] identifies as intersex and believes their sex was changed by a medical procedure. Mx [Nelson] therefore seeks that their gender be properly recorded as intersex.

Current ability to change nominated sex on birth certificate

[33] Section 28 of the Act provides individuals with the ability to apply to the Family Court for a declaration that their birth certificate be changed so that it states their *nominated sex*. Mx [Nelson] was successful in making such an application in 2014 when they sought to change the sex on their first birth certificate to their nominated sex, female (their sex having been recorded as male in their first birth certificate).

[34] Two immediate problems flow from the current operation of s 28 of the Act. First, under s 28(3), a Court has to be satisfied that the person is either:

- (a) a sex that is *opposite* to their nominated sex (suggesting the binary options of male or female); or
- (b) of indeterminate sex (i.e. their genitalia and biology is uncertain) or that there is no information as to the applicant's sex.

[35] This restrictive criteria excludes Mx [Nelson]'s nominated sex (intersex), as well as all other self-identified genders that are not male, female or indeterminate.

[36] Second, the process that must be followed to persuade the Court that one's sex is opposite to their nominated sex is difficult, expensive, and protracted. It is also widely seen as being considerably intrusive.

[37] Furthermore, and putting aside these two potential difficulties, s 28 of the Act itself is highly prescriptive and requires significant amounts of expert medical evidence and demonstrated medical treatment.

[38] The leading decision under s 28 of the Act is *Re Michael*.⁴ This comprehensive decision sets out the medical, legal, and social policy considerations behind s 28 of the Act. *Re Michael* traces the passage of the Act through Parliament and analyses the steps that must be satisfied before a declaration can be made. I highlight the third step of the legal test in s 28 of the Act, which itself involves a three-limb test that – in order to be satisfied – must be met with expert medical evidence in respect of the three following matters:

- (a) The applicant has assumed the gender of the nominated sex.
- (b) The applicant has undergone such medical treatment as is desirable as to acquire a physical conformation that accords with a gender identity of the nominated sex.

⁴ “*Michael*” v Registrar-General of Births, Deaths and Marriages (2008) 27 FRNZ 58.

- (c) The applicant will, as a result of the medical undertaking, maintain the gender identity.

[39] In *Re Michael*, the applicant had been living as a male for approximately five years, had received hormone treatment, and had undergone two separate medical procedures. However, he had not undergone “full gender reassignment surgery”. Nevertheless, the declaration that was sought under s 28 was still made.

[40] In *Re Michael*, as in Mx [Nelson]’s application in 2013 (which was decided before *Re Michael*) and the recent case of *Logan v Registrar-General, Births, Deaths and Marriages*, there was no medical evidence of surgery.⁵ In *Logan*, there was evidence the applicant had commenced hormone therapy and was in the treatment pool for gender affirmation surgery. In Mx [Nelson]’s 2013 proceedings, they had provided evidence that they had been assessed as being suitable for hormone therapy, but there did not appear to be any evidence that they had commenced hormone therapy. In both Mx [Nelson]’s 2013 and the *Logan* case, the declarations were still made.

Law Reform

[41] The above landscape lead to the promulgation of the Births, Deaths and Marriages and Relationships Bill 2017 (“the Bill”). The Bill engaged in the debate concerning these fundamental concepts of self-identity. Again, I do not pretend or intend to traverse the wide-ranging opposing debate that accompanied the Bill’s passage. What is relevant in the context of this decision, and this has some interpretative effect, is that the Bill has now passed and become the Births, Deaths, Marriages and Relationships Registration Act 2021 (“the 2021 Act”). The 2021 Act will come into force in June 2023 (unless brought forward earlier).

[42] The fundamental change (in the context of this decision) under the 2021 Act will be the introduction of a new s 24 which will enable, by simple statutory declaration, an eligible person to nominate their sex to be registered as “male, female or any other sex or gender specified in the regulations” on their birth certificate. The new s 24 will replace the current judicial process for changing the sex that has been

⁵ *Logan v Registrar-General, Births, Deaths and Marriages* [2020] NZFC 3344.

recorded on a person's birth certificate (i.e. s 28 of the Act) with a more simple and accessible administrative process based on self-identification and the completion of a statutory declaration.

[43] For completeness, the new section 24 of the 2021 Act provides:

24 Application by eligible person for registration of their nominated sex

- (1) An application by an eligible person for registration of the person's nominated sex must—
 - (a) specify male, female, or any other sex or gender specified in regulations for the purposes of this paragraph as the person's nominated sex; and
 - (b) include a statutory declaration by the eligible person verifying that—
 - (i) the eligible person identifies as a person of the nominated sex; and
 - (ii) the eligible person understands the consequences of the application; and
 - (c) if the eligible person is 16 or 17 years old and has never been in a marriage, civil union, or de facto relationship, be accompanied by—
 - (i) the written consent of their guardian; or
 - (ii) a letter of support from a suitably qualified third party that confirms that the third party believes that—
 - (A) the eligible 16- or 17-year-old understands the consequences of the proposed registration of the nominated sex; and
 - (B) the eligible 16- or 17-year-old's preference is for the nominated sex to appear as their registered sex on any birth certificate issued under this Act; and
 - (d) if the Registrar-General has previously registered a nominated sex for the person under section 26, meet any additional requirements set out in regulations; and
 - (e) be accompanied by the prescribed fee.
- (2) An eligible person may apply for registration of a nominated sex at the same time as the person applies for a name change under section 69.

[44] Section 24 of the 2021 Act completely removes the complicated, expensive, difficult, and medical-laden process that is – at present – undertaken and required under s 28 of the Act (and as epitomised in *Michael*) and replaces it with a simple declaration that one self-identifies as any other sex or gender specified. That said, at the time of completing this decision, there are no regulations that clarify the scope of “any other sex or gender specified”. The specified sexes and genders could well include intersex and/or a myriad of other identities. Nevertheless, it is reasonably certain that the regulations as promulgated will provide for identities other than male, female, and indeterminate.

[45] While the 2021 Act is not in force and does not currently help Mx [Nelson], it provides some interpretive assistance in determining whether it is sufficient for the Registrar-General to correct Mx [Nelson]’s first or current birth certificate, in this matter.

Evidence

[46] To determine if there is any information on Mx [Nelson]’s birth certificate that is incorrect, I have assessed:

- (a) the information at Mx [Nelson]’s birth;
- (b) the information considered by the Family Court during the 2013 declaration application;
- (c) the information Mx [Nelson] provided in their February 2020 letter;
- (d) the further information the court directed Mx [Nelson] to obtain during these proceedings; and
- (e) Mx [Nelson]’s evidence at this hearing.

Birth

[47] Mx [Nelson] was born on [date deleted] 1985. The sex on their birth certificate was recorded as male commensurate with Mx [Nelson]'s biological indicators and, in particular, their genitalia. There is no information to suggest that assignment was incorrect.

Declaration application (2013)

[48] On 23 December 2013, Mx [Nelson] (under the name [Tami Browning]) applied under s 28(3) of the Act for a declaration that their birth certificate recorded the nominated sex of female. The evidence in support of that application and the proceedings themselves were, in my view, scant.

[49] In particular, Mx [Nelson]'s two page affidavit of 23 December 2013 in support is limited. The affidavit refers to them having been approved for hormone treatment by Dunedin Public Hospital; their (and others) identity struggle; there being no way they are a male; and their belief that there is a mistake in need of correction. Mx [Nelson] attached six documents as material to satisfy the Court that they had assumed and intended to maintain their gender as female (so as to satisfy the requirements in s 28(b) and (c) of the Act). I summarise those documents as follows (all material referring to Mx [Nelson]'s then name of [Tami Browning]):

- (a) **Letter from Dr Jubilee Rajiah (Consultant Psychiatrist) to Dr Bernadette Berry dated 12 June 2009 (Registered Clinical Psychologist):** Dr Rajiah refers to [Tami Browning] as having given a history that was typical of gender identity disorder. Dr Rajiah further states that [Tami] had been living as a woman for almost a year. Dr Rajiah further stated that [Tami] had been saving money to go [overseas] for gender reassignment surgery. Dr Rajiah noted that [Tami] had been dead-set in their opposition to hormone treatment, but that, a few weeks later, had become excited and exuberant when telling Dr Rajiah of their decision to embark on hormone treatment prior to gender assignment surgery. Although Dr Rajiah considered, following a full

psychiatric assessment, that [Tami] met the criteria for gender identity disorder, Dr Rajiah noted that [Tami]'s presentation was overly dramatic and buoyant and came across as being suggestive, overly simplistic in their thinking, and demonstrating little understanding of the complexities of trans-gender assignment. The doctor recorded her suggestion that [Tami] undergo individual psychotherapy to reach a clear understanding of themselves, and tried to explain that the process for a referral for hormone treatment requires a psychiatric assessment to ascertain a diagnosis of stable mental health. That said, on [Tami]'s request, Dr Rajiah had sent a referral to a Physician Endocrinologist. The doctor reiterated that she told [Tami] they would benefit from psychotherapy and counselling and provided them with a disability certificate for counselling.

- (b) **Letter from Dr Bernadette Berry (Registered Clinical Psychologist) to Dr David Stewart (Endocrinologist, Dunedin Public Hospital) dated 25 August 2009:** Ms Berry advised that she had been seeing [Tami] to assess their suitability for hormone treatment and that, as a result of that assessment, Ms Berry's recommendation was that hormone treatment be started as soon as able.
- (c) **Letter from [the respondent's GP], to whom it may concern, dated 21 January 2010:** [GP], writing on behalf of their patient ([Tami]), advised that [Tami] wished to have their driver's licence amended to reflect the fact that they were – at the time – living as a woman, were registered with the [education provider deleted] and StudyLink as female, were currently receiving hormone therapy, and were planning to undergo gender reassignment in the near future. The letter confirmed [Tami] had been diagnosed with gender dysphoria, but that this did not affect their ability to drive.
- (d) A copy of **Mx [Nelson]'s New Zealand passport** under the name of [Tami Browning] issued on 10 October 2013 with the recorded sex as "F".

- (e) **A letter by Les Davis** (Customer Access - Assessments) from the NZ Transport Agency to [Tami Browning] confirming the Driver Licence Register has been amended so that their licence details are recorded as “female”.

- (f) **A letter from [a GP] to whom it may concern, dated 23 December 2013:** [The GP] confirmed that [Tami Browning] was examined by her on 23 December 2013 and that, in her opinion, it is important for [Tami]’s psychological wellbeing that their official gender on their birth certificate be changed to female as they sees themselves as a woman, live as a woman, and would like to be considered female in an official capacity.

[50] There does not appear to have been any further evidence available at any declaration hearing other than the affidavit of 23 December 2013 and the six attached documents referred to above. On 17 April 2014, his Honour Judge Walsh in the Family Court at Christchurch issued what appears to be a Chambers decision that read in its entirety without other reasoning:

As Birth, Deaths and Marriages have taken no steps, I have made a declaration in the terms sought by the applicant.

[51] Accordingly, an order under s 28 of the Act was also issued on 17 April 2014 that read:

The details of the sex on the applicant’s birth certificate to be changed from male to female.

[52] The Registrar-General subsequently actioned that order of 17 April 2014 such that Mx [Nelson]’s current birth certificate recorded their sex as female.

[53] At least as recently as April 2014, Mx [Nelson], clearly and consistently, identified as female.

[54] While the Court’s decision of 17 April 2014 is absent any reasoning and clearly does not consider matters in the same detail as *Re Michael*, it must be inferred that the Court was satisfied of the prerequisite criteria in s 28(3)(b) and (c) of the Act such that

Judge Walsh was satisfied Mx [Nelson] had assumed the female gender, undergone the requisite medical treatment, and would maintain that female gender identity.

[55] It is notable that the 2013 declaration application proceedings and all of the available evidence therein has a complete absence of any mention or reference by Mx [Nelson] of the now-claimed facts – those being that, at birth, they were intersex; that they have a uterus; and that, at birth or since being born, they were forcibly assigned as a male (by a medical procedure). None of the medical information or doctors submitted refer, in any way, to either a forced medical procedure to change Mx [Nelson]’s genitalia (which Mx [Nelson] believes occurred) or to Mx [Nelson]’s belief that they self-identified as intersex. All of the material clearly points to Mx [Nelson] self-identifying (at least at that time) as female, and Judge Walsh must have been satisfied that Mx [Nelson] intended to maintain a female gender identity.

[56] I therefore consider there to be no information that can be gleaned from the declaration proceedings that could or should lead the Registrar-General to consider (under s 84 of the Act) either the recording of Mx [Nelson] as male on their first birth certificate or as female on their current birth certificate as incorrect.

Application to amend birth certificate to intersex – February 2020

[57] The Registrar-General received an (undated) letter from Mx [Nelson] on 24 February 2020. Within it, Mx [Nelson] says (materially) that, when they were a baby, they were forcibly assigned as a boy. While acknowledging they changed their sex on their birth certificate to female in 2014, Mx [Nelson] says just before they submitted that application, even though they were happy with how they looked, they thought something was not quite right. Since 2013 and over time, they said they have tried to discuss intersex-related matters with medical professionals but have been met with frustration, hurt, and resentment. Mx [Nelson] says they can carry a baby because they have a uterus, but that medical specialists do not want to hear about this. Mx [Nelson] said that it is not uncommon for medical specialists to be frightened by intersex matters. Mx [Nelson] ultimately states in that letter:

I would really benefit widely for my sex to be recorded as intersex on my birth certificate. Up to this point, it has damaged and destroyed my health and

mental health. I would appreciate to be accurately and correctly recorded on my birth certificate as intersex. Intersex is my heart and soul's conviction, intersex is my wish, please.

[58] The Registrar-General had explained to Mx [Nelson] that the Act uses the word indeterminate, not intersex, and that it could be that any amendment to the first birth record would have to use the term "indeterminate".

[59] As mentioned, the Registrar-General took the position that the letter was an invitation by Mx [Nelson] to correct the sex recorded on their first birth record from male to indeterminate (or intersex as they sought) pursuant to s 84 of the Act.

[60] In addition to their letter to the Registrar-General, Mx [Nelson] provided a further six documents which the Registrar-General took as material purporting to support the contention that Mx [Nelson]'s first birth certificate was incorrect. My summary of that material follows:

- (a) **A six-line letter from Dr Stephanie Farrand (Endocrinologist, Southern District Health Board), to whom it may concern, dated 22 January 2016:** Dr Farrand said [Riley] (being the name then used by Mx [Nelson]) had been treated in the Endocrinology Department of Dunedin Hospital between 2009 and 2016 and that, during this time, [Riley] received treatment that was related to them being intersexual. Dr Farrand's opinion was that it would be appropriate for there to be consideration of a legal change to [Riley]'s gender status such that it would read as being indeterminate.
- (b) **A letter from Dr Blair Bermingham to Dr Stephanie Farrand, Dunedin Public Hospital, dated 19 May 2016:** This is an important letter. I return to it in detail at paragraphs [80]-[81]. It is a report by Dr Bermingham (on a referral of "[Riley]" by Stephanie Farrand). The letter features a large number of redactions and I am concerned that these redactions could have been made by Mx [Nelson]. At this point, it suffices to state that the remaining contents do not support their

current contentions in general, or their claims of a secretive medical surgery that changed their genitalia in particular.

- (c) **A five-line letter from Dr Stephanie Farrand, Southern District Health Board to “[Tami Hannah]” dated 3 July 2018:** Dr Farrand states that it is important for “us” to support Mx [Nelson]’s current endeavours and that they (the SDHB) will attempt to update their electronic system to respect Mx [Nelson]’s wishes by referring to them as “intersex”.
- (d) **A six-line letter from [a GP], [health centre deleted], to whom it may concern, dated 16 August 2018:** [The GP] advises that [Tami Hannah] identifies as intersex, and that this identity is strong, pervasive and long standing. [The GP]’s opinion was that if [Tami] is recognised as intersex, that this will have a significant positive impact on their mental health and well being.
- (e) **An eight-line letter from [a second GP from the same health centre], headed medical certificate, dated 21 February 2020:** [The GP] states that [Tami Hannah] identifies as intersex and that the [Health Centre] have that identity recorded as a long-term gender classification. [The GP] further states that [Tami Hannah] has identified as intersex for several years.
- (f) **A letter from [a third GP from the same health centre], dated 16 November 2020:** [The GP] confirms Mx [Nelson] is under her care and that Mx [Nelson] identifies as intersex. [The GP] further states that it would be important to Mx [Nelson] for them to be recognised as intersex. She states that the fact that this is not recognised in their medical documents has been stressful and patronising, and has had an impact on their mental health.

Registrar-application under s85 of the Act

[61] The Registrar-General's position with respect to Mx [Nelson]'s letter of February 2020 was that, although they had provided evidence of their belief that they are intersex, they had not provided any evidence or opinion from a medical expert that established that they were of indeterminate sex at birth. As a result, the Registrar-General was left uncertain as to whether the information on Mx [Nelson]'s birth certificate could be said to be incorrect and has therefore – on 1 December 2020 – made this application for determination to the Family Court.

[62] Given the complexity of the matter, counsel to assist (Ms Stevenson) was appointed by the court. Ms Stevenson first reported to the Court on 18 March 2021.

First conference, 7 May 2021

[63] At the first conference (7 May 2021), Judge Montague formed the view that although Mx [Nelson] had been served as an interested party, they should have the chance to be present at the hearings and any decisions that flow therefrom. Accordingly, Mx [Nelson] was joined to the proceedings, meaning that they received a copy of the file (including Ms Stevenson's report) and could provide evidence on matters as the Court required before an ultimate determination could be made.

[64] Her Honour noted that there needed to be further evidence that:

- (a) clarified the precise impact on Mx [Nelson]'s mental health.
- (b) clarified or established Mx [Nelson]'s position that they have a uterus and can carry a baby; that their family withheld the truth from them about their biological intersex status; and that their vagina was obliterated at birth.
- (c) clarified Mx [Nelson]'s position that they were physiologically of an indeterminate sex at birth. In that regard, her Honour formed the view there needed to be some evidence from Mx [Nelson] herself,

particularly given that Mx [Nelson] had no supporting medical evidence regarding the issue.

- (d) supported Mx [Nelson]'s belief that they have a uterus; that they had ambiguous genitalia; and that they underwent surgery for an intersex condition in the 1980s. In particular, there was a need for evidence from Mx [Nelson] directly regarding the circumstances of their birth.

[65] Furthermore, and clearly thinking that it would assist Mx [Nelson] given the difficulties involved in obtaining such information, Judge Montague appointed a lawyer to assist Mx [Nelson] in providing an affidavit that addressed those particular issues. The affidavit was to include:

- (a) a record of all of the identities that Mx [Nelson] had been known as throughout their adult life;
- (b) their full medical history (if prepared to provide that information), including:
 - (i) details as to the impact on their mental health as referred to by [the third GP from the health centre] in their letter; and
 - (ii) medical evidence that they were physiologically of indeterminate sex at birth;
 - (iii) medical evidence and support of their statement that they have a uterus;
 - (iv) medical evidence to support their view that their vagina was obliterated at birth;
 - (v) medical evidence to support their belief that their family hid the truth about their biological intersex gender status;

- (vi) medical evidence of undergoing surgery for an intersex condition in the 1980s; and
- (vii) any other evidence pertaining to their birth.

[66] Judge Montague acknowledged there might be difficulty for Mx [Nelson] in obtaining the above evidence, but her Honour recorded that there was an expectation that Mx [Nelson] would, with the assistance of counsel to assist, use best endeavours to provide as much of the information as possible to assist the court.

Lawyer to assist report

[67] Ms Pegg, lawyer of Dunedin, was appointed as counsel to assist Mx [Nelson]. After being appointed, Ms Pegg provided a memo on 17 June 2021 which stated that Mx [Nelson] had expressed distress and a lack of understanding in regard to Judge Montague's requests for the information directed above. Ms Pegg further informed that Mx [Nelson]'s preference was not to further engage with her (Ms Pegg). Ms Pegg also stated that Mx [Nelson] did not understand why correcting the sex recorded on their birth certificate should be a problem.

[68] Mx [Nelson] had also emailed the Registrar saying:

Lawyer to assist threatened me on the phone, I don't think it's appropriate for her to be involved.

I have already had to do police reports on other lawyers that have been involved, they are no longer involved [name deleted]. Bullying is violence, which is threatening my progress here.

[69] Accordingly, Judge Montague, in response, provided another minute of **19 July 2021** that recorded:

...

[4] It is important that the Court has all relevant evidence on the file before making a decision for the reasons set out in my minute of 7 May 2021.

[5] I intend to provide a further 21 days for the information to be gathered (as much as possible) by [Hannah Nelson] and filed with the assistance of lawyer to assist, Ms Pegg.

Affidavit of Mx [Nelson] dated 30 July 2021

[70] In response to Judge Montague’s minute of 19 July 2021, Mx [Nelson] did not seek the assistance of lawyer to assist Ms Pegg, but did file an affidavit dated **30 July 2021** that purported to comply with the Court’s directions of 7 May 2021 as regards them providing medical and other evidence.

[71] I refer to that affidavit in its entirety. The affidavit provides no further supporting medical evidence and provides none of the directed information or evidence. Instead, it reiterates that Mx [Nelson] identifies as intersex and that they experience a high level of distress and injustice in not being able to declare as such. Much of the evidence is irrelevant insofar as it does not provide further assistance to either the Registrar-General or the Court in determining the critical issue, that being whether a correction needs to be made to Mx [Nelson]’s first birth certificate or not. The closest that Mx [Nelson] comes to providing medical evidence in this affidavit is to state that “the nature of intersex is that we cannot prove such claims because doctors do a brilliant job of destroying any evidence there was or may have been”.

[72] Mx [Nelson] then took no further steps in response to Judge Montague’s directions of May or July 2021. Mx [Nelson] has also made no further enquiries and has obtained no further evidence beyond their personal opinion and protestations contained in their 30 July 2021 affidavit.

General Memorandum – September 2021

[73] The only other material filed by Mx [Nelson] was what they termed a “general memorandum” that was undated but was received by the Court on **3 September 2021**. It does not assist. Its contents amount to gratuitous, highly personal and irrelevant comments regarding the Registrar-General, as well as a vitriolic and derogatory personal attack on Judge Montague for the minutes she issued in May and July 2021. This attack included Mx [Nelson]’s belief that Judge Montague was being violent towards them.

[74] The Registrar-General sought to have the memorandum removed from the file. On 29 October 2021, Judge Doyle made no such direction but invited Mx [Nelson] to consider, given the concerns raised about the memorandum, whether they would seek to have it removed and replaced with a memorandum which addressed the legal or factual matters in the proceedings before the Court. Mx [Nelson] did not seek to have that document removed or file any other evidence.

Hearing of 29 November 2021

[75] In an effort to obtain all of the possible information that could assist in determining if a correction was required, the Court directed the application to a hearing. The only person called to give evidence was Mx [Nelson].

[76] In general terms, I did not find Mx [Nelson] to be a reliable or persuasive witness. They were prone to obfuscating their answers including highly emotional effect and were indirect in their responses to the questions that were put to them. They lacked the ability to provide any detail as to the material issues, and direct questions would lead – at times – to florid responses in regard to Mx [Nelson]’s self-identification as intersex and their distress at this not being recognised.

[77] In terms of the Court’s enquiry to determine whether there was information that was sufficient to require a correction to Mx [Nelson]’s first (and current) birth certificates, the material evidence that Mx [Nelson] provided under cross examination included:

- (a) In answer to a question by Ms Stevenson, Mx [Nelson] confirmed that in December 2013 they identified as female but further clarified this as follows:

... yes, I did but as time has gone on I have also realised and recognised that I am – my identity as intersex is more appropriate for me because of the stuff that’s happened to me and that sorta stuff has just been... Like many other people, it’s been buried and just with the hope that, you know, people like me never find out, so yes, I did at one stage identify female but as time has gone on I’ve realised that actually, no I can’t be because that’s not the truth of it. The truth of it is that I’m intersex and I need the world, I need the country, I need

New Zealand to realise that and New Zealand's becoming better but we need to be better, yeah.⁶

- (b) Mx [Nelson] confirmed that it was correct that, in June 2009, Dr Rajiah recommended they start hormone therapy, and that the letter of [the GP from the education provider] of 2010 stated they had received oestrogen therapy. Ms Stevenson directly asked Mx [Nelson] whether they were receiving oestrogen therapy by 2010. Mx [Nelson]'s response was confusing and could be interpreted as saying they did receive oestrogen therapy up until 2015/16, but that, over time, they had only taken blocking medication (which they continue to take today).⁷
- (c) Mx [Nelson] rejected the option of having a birth certificate that recorded their sex as indeterminate. Mx [Nelson] further stated that if the Court found that indeterminate was available, they would still seek only for their sex to be recorded as intersex.⁸
- (d) In answering my direct question as to whether Mx [Nelson] had any medical evidence to support the statement that they have a uterus, they replied "I can't prove it at all, no. I can't." When Mx [Nelson] was asked if they had asked for those records, it was clear they had not. They said:

"Like I said, I can't because as I say when you are intersex and you are trying to gain access to medical records doctors are particular they will try to hide the evidence from you", and

"No, I, or there, there might be, oh, there could be one particular of importance, but I guess down the track we can, you can determine that. But I've tried to make the point with doctors that, you know, I am intersex and I've, I've got support from doctors but I just, like I say, the usual situation of it will be, because there's one other person in New Zealand that has been recorded as intersex/indeterminate. I'm the second one in New Zealand. The natural situation if it is, is that we can't prove that we are at all because the evidence has always been thrown away, and we –"

⁶ Notes of Evidence, page 9, lines 23, 29.

⁷ Notes of Evidence, page 10.

⁸ Notes of Evidence, page 12, lines 10-25.

- (e) In answering my question as to the enquiries that Mx [Nelson] had made of any doctor, DHB, parents or otherwise that might support that, when they were born, they had a uterus and/or their vagina was obliterated, they responded: “Nobody, nobody will support it because nobody believes it.” It was clear Mx [Nelson] had made no efforts or enquiries at all, despite their claims that enquiries had been made and that these had just been unsuccessful.

[78] During the hearing, Mx [Nelson] alluded to having further useful information. Out of a belts and braces exercise, I provided an opportunity to give such further information to the Court following the hearing. In particular, I sought to receive an unredacted copy of Dr Bermingham’s report of 19 May 2016. For completeness, Mx [Nelson] provided further information as sought, but did not provide an unredacted copy of Dr Bermingham’s report. Rather, they provided a copy of a document entitled “Settlement agreement pursuant to s 83 of the Human Rights Act as between [Tami/Hannah] and the Department of Internal Affairs”, as well as letters from the New Zealand Transport Agency dated 23 January 2020, 7 February 2020, and 22 October 2020. None of this material assisted.

[79] I refer to Dr Bermingham’s report of 19 May 2016, see paragraph [61](b). Dr Bermingham’s report ought to be considered in its entirety. It is a document that Mx [Nelson] heavily relies upon in support of their application. It is immediately apparent that Mx [Nelson] has heavily redacted so much of the document that it cannot be relied upon in support of any proposition by them to establish a contention that they were of indeterminate sex either at birth or subsequent. In fact, the portions of the document that remain suggest that Mx [Nelson] was never indeterminate at birth. Throughout, Dr Bermingham refers to Mx [Nelson] (being [Riley] at that time) as having an *opinion* that when they were born they had ambiguous genitalia and that they underwent surgery for an intersex condition in the 1980s. It further records [Riley]’s belief at that time that they were born with a vagina which was surgically obliterated during the surgery and that the subsequent explanations given to them were part of a systematic cover up.

[80] I do not have a clear understanding of the purpose of Dr Bermingham's opinion to Dr Farrand, although some of the report reads as a response to an enquiry as to Mx [Nelson]'s psychiatric presentation condition or otherwise. Dr Bermingham's ultimate conclusion at page 4 of the report records:⁹

With respect to [Riley]'s conviction that she is not transgendered but rather suffers from an intersex condition, this appears to be strongly held conviction [redacted] and is associated with the belief that [redacted] her family have hidden from her the truth about her biological intersex gender status. As [Riley] is aware, this view is not supported by the medical evidence and is not mentioned in any previous family assessments from when she was younger. Although this belief is held with such conviction that it could in some circumstances be considered delusional, I do not think that it should be regarded as such. There are no other psychotic symptoms currently or previously documented, which suggests that she does not suffer from a psychotic disorder. Nor is there any history of an affective disorder. I think this is better regarded as an attempt to establish a personal sense of identity.

Decision

[81] Taking into account all of the information the Court now has, I find that, as at 2013, Mx [Nelson] had a very strong personal conviction that their identity was female, and that they wished to live their life in all regards as a female and maintain a female identity.

[82] At the time of this application, Mx [Nelson] has a firm psychological conviction that they are intersex. That conviction is pervasive, driving, real and long standing, and dates back to 2016 at least. I accept entirely, and without reservation, that Mx [Nelson] currently identifies as intersex. Mx [Nelson] declares that they were born intersex and had surgery when they were younger.

[83] However, there is absolutely no medical evidence or any corroboration at all supporting Mx [Nelson]'s firmly held views as to any medical procedure at birth or since to have changed her genitalia or obliterated her vagina or similar. Further, I find that Mx [Nelson] has taken almost no steps at all to address the issues involved in this decision and that, furthermore, they are unable to describe any attempts to obtain such information to even a cursory level. They cannot describe which doctors they have

⁹ I note that the page numbers are hand-written at the top of the document, meaning I cannot be sure as to whether the document was four pages or more.

spoken to, any routine requests they have made of a District Health Board for information, or where, or, in fact, how, they gained a belief in the claimed surgical procedure. Clearly, it is possible to determine if Mx [Nelson] has a uterus as claimed. Mx [Nelson] has taken no steps to provide such evidence. In their evidence, Mx [Nelson] was given to dramatic and, to a degree, histrionic responses. Their responses would often be tangential to the questions that were put to them. This distracted from both their reliability and honesty, particularly in relation to their claim that they had made multiple enquiries to ascertain details but that doctors just do not believe them.

[84] The Court acknowledges that, as a matter of common sense, obtaining dated medical records especially historic records, can be difficult. To assist in that regard, the Court made counsel to assist available to Mx [Nelson]. This was also intended to ensure that the Court had the best possible evidence before it. Mx [Nelson] chose not to accept that assistance. They are not obliged to accept that assistance, but their failure to do so detracts from their unsupported protestation that they have been hindered or obstructed in obtaining medical information or documentation that would have supported their claims of the medical obliteration of their genitalia. The evidence Mx [Nelson] has provided and amassed makes no reference to their physiology at birth being indeterminate. The evidence similarly does not refer to them undergoing, at any stage, medical procedures regarding their genitalia at any time. In that regard, this matter is entirely distinguished from *Suppressed*.¹⁰

[85] The evidence points to Mx [Nelson]'s sex at birth as properly being assigned as male, and that this was representative of their then-genitalia. It is insufficient for Mx [Nelson] to self-identify as intersex or to now consider their sex at birth to have been incorrectly recorded as male. I find that no error is detectable on the current information and, therefore, the Registrar-General is not required to make any correction to Mx [Nelson]'s first birth certificate pursuant to s 84 of the Act.

[86] Further, the Registrar-General is specifically prohibited from making any correction to the current birth certificate recording Mx [Nelson]'s sex as female (that being because that is the current order of the Court, and Mx [Nelson]'s sex can only

¹⁰ *Suppressed*, above n 5.

be corrected under s 28 of the Act by another order). As there is no s 28 application before me, I decline to make any other order under s 28.

Remedy

[87] This decision will come as deeply distressing and disappointing to Mx [Nelson]. No disrespect is intended by it. Neither is it intended to deny Mx [Nelson]'s lived experience, or their self-identification as intersex.

[88] One remedy could be for Mx [Nelson] to apply under s 28 of the Act again, applying for the Court to determine whether or not it is appropriate to have their nominated sex recorded as either indeterminate (which the Act provides for) or intersex (which, while not provided for in the current Act, is the term that Mx [Nelson] would prefer). I give no indication if Mx [Nelson] would be successful or not. The Court cannot make that determination without a s 28 declaration application being before the Court.

[89] Another remedy could well be to wait for the 2021 Act to take effect and see if the Regulations will provide for "Intersex" to be a permissible nomination.

Judge E Smith
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 07/04/2022