

General information regarding Declarations of Family Court as to sex to be shown on birth certificates

Disclaimer: This material is intended to provide general information only about Family Court declarations under section 28 of the Deaths, Marriages, and Relationships Registration Act 1995 and the role of the Registrar-General in such cases. It is not, nor should it be construed as being, legal advice. For questions relating to a particular case independent legal advice should be sought.

Section 28 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 allows an eligible adult to apply to the Family Court for a declaration that his or her birth certificate should show the sex specified in the application. Because the Registrar-General of Births, Deaths and Marriages has the responsibility of recording birth information he is generally served with the application and invited to make a submission.

Section 28 of the Births, Deaths, Marriages, and Relationships Registration Act 1995 and all other New Zealand legislation referred to in this document may be viewed online at www.legislation.govt.nz

Section 28 is set out in full below:

“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 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) of this section 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;
 - (a) 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
 - i. applicant at birth to acquire a physical conformation that accords with the gender
 - ii. 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*."

Eligibility

Only an "eligible adult" can apply for a declaration from the Family Court (section 28(1)). To be eligible the person's birth must be registered, or registrable, in New Zealand, or if the person was born overseas he or she must be a New Zealand citizen or permanent resident. The applicant must also be 18 years or over, or younger than 18 but in a marriage, civil union, or de facto relationship (section 27A).

Elements to prove to the Court

Before the Court can make the declaration the applicant must prove to the Court a number of matters. The most common scenario is outlined below. Section 28 allows for other variations but this is by far the most common. The applicant must satisfy the Court of all of the following:

1. The applicant's birth is registered with the opposite sex to that of the nominated sex; **and**
2. The applicant is not a person of the nominated sex, but
 - a. 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**
 - b. Wishes the nominated sex to appear on his or her birth certificates; **and**
3. 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.

In "*Michael*" v Registrar-General of Births, Deaths and Marriages [2008] 27 FRNZ 58 the Court described the test as follows (full judgment on [Family Court website www.justice.govt.nz/courts/family-court/legislation/decisions-1/decisions](http://www.justice.govt.nz/courts/family-court/legislation/decisions-1/decisions)):

"[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.

[59] The third step ... involves a three-limb test which must be satisfied on all levels on the basis of expert medical evidence."

What medical treatment is required?

One of the main points to come out of the *Michael* decision is that ultimately the test is specific to each individual and must be adapted to their needs. What is required in each case must be assessed taking into account the medical evidence of that particular applicant and what is recommended by the medical profession for that person.

The Court in *Michael* noted that change can never be 'complete'. Chromosomes cannot be altered. Testes or

ovaries cannot be constructed. The Court was satisfied that “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.” What is required is “some degree of permanent physical change as a result of the treatment (including psychological treatment) received” ([50]).

This means that every applicant does not have to go through full reconstructive surgery to meet the test, although some may do. The level of surgery required for each person will be particular to that person based on what their medical advisors are recommending, and what that individual personally feels is required to be comfortable with their gender identity.

So there is no ‘tick-box’ list of treatments to reach the level of “permanent physical change” required. It will vary for every person and cannot be detailed any further because there are an infinite range of circumstances that may arise.

Do different considerations apply to male–female and female–male transgender applicants?

Michael was transitioning from female to male. However that may not be critical in terms of what the Court decided. The Court held that each application must be assessed on a case by case basis and that the level of treatment required will be determined by medical opinion regarding that particular person. This applies to both male and female transgender applicants. How that is applied in each case is a matter for the Court to determine.

The role of the Registrar-General

If an application is filed by a person whose birth is registered or is registrable in New Zealand (generally meaning they were born in New Zealand) the Court must serve the Registrar-General with the application (section 28(2)). This is because the Registrar-General will be administratively responsible for updating the applicant’s birth certificates if the application is successful.

An application under section 28 is a very different to the general litigation process. Although the Registrar-General is served and named as the respondent, the Registrar-General is not the applicant’s adversary.

In traditional litigation the respondent will be negatively impacted if the application is granted by the Court, so will argue against it. The Registrar-General is not negatively affected whether a person’s sex is recorded as male or female. The only concern the Registrar-General has is that he holds the administrative responsibility for recording the information and must ensure that it is recorded within the law. Because of this the Registrar-General will not oppose the application for the reason that the applicant should not have his or her sex recorded as desired. Generally the Registrar-General simply leaves it to the Court to determine the application on the evidence of the applicant alone, and the Registrar-General plays no active role.

The Registrar-General will only get actively involved if there is a novel legal point that needs to be clarified, or if there are any procedural issues that need to be addressed. An example of this was the case of *Michael*. Submissions were made in that case because it was felt that the transgender community needed clarification on whether a person needed to go through the entire surgical process before a declaration could be made. The main point made on behalf of the Registrar-General was that because this clarification was needed the Court should make a full analysis in its judgment. The Registrar-General then helped the Court by providing information on which to base the decision but was not arguing for or against any particular outcome.

The Registrar-General’s process

When the Registrar-General is served, the first step is to look at whether any submissions should be made taking into account the principles outlined above - i.e. are there any wider legal or policy issues raised by the case?

If there are no wider issues to be resolved, which is the bulk of cases, the applicant must still prove to the Court that he or she meets the statutory test in section 28.

The effect of declaration

If a declaration is made the applicant’s future birth certificates will include only the person’s nominated sex and name, and it will appear that it has been that way since birth. This is not an all encompassing declaration and it must be appreciated that the changes apply only to the applicant’s birth certificate. Marriage records, civil

union records, overseas name changes or any other records held by Births, Deaths and Marriages (BDM) cannot be updated in the same way that the birth certificate can be.

Following the conclusion of the Court proceedings the Court sends the Registrar-General a copy of any declarations that are made. BDM then sends the applicant a form to choose which name they would like to appear on certificates, and to pay the [fee](#) for updating the record ([Contact us](#) to confirm the current fee for "Recording additional information in relation to sexual assignment or reassignment"). The nominated name must accord with the nominated sex and must be a name, or any combination of names, that were previously registered (section 64(2)). An entirely new name could be recorded but this would need to be done following the registration of a name change process which incurs an additional [fee](#) (refer BDM [Forms and Fees](#)).

If a person has not previously registered a name that accords with the nominated sex, the first name change registered after the sex is updated can become the name at birth and effectively knock all existing names off certificates (section 64(1)). So it is not essential to register a name change prior to updating the record, however it is generally a good idea.

Most people register a name change as part of the transition process. It is also another piece of evidence to give to the Court to prove that they are committed to the nominated sex, and it means that any relationships entered into in that name will better reflect the birth registration when the birth registration is amended.

Because it is only the birth information that is amended this can create situations where a person has differing registrations. For example, if a person entered into a civil union prior to obtaining a declaration and used their original name and sex, that civil union registration would continue to show those details even after the birth registration is updated. Name changes can be recorded on the civil union but appear as a list and the original name and sex are not removed. This may need to be considered when a person is deciding when to enter into a relationship and when to apply for a declaration.

Declarations and the wider implications

It is important to recognise that the declaration does not apply to all areas of life or the law (section 33). It only applies to the applicant's birth certificates (section 28). If another area of the law has a different test for sex, showing the sex on the birth certificate may not be enough to meet that test.

Recording sex as "indeterminate"

It is not possible to use section 28 to change the sex on the birth register from male or female to "indeterminate".

A person's sex can be recorded as indeterminate at the time of birth if it cannot be ascertained that the person is either male or female, and there are a number of people so recorded. However it is not possible to go from a specified gender to indeterminate at a later stage under section 28.

It is possible to change a person's birth record to indeterminate if the sex was indeterminate at the time of birth and was incorrectly recorded as male or female. This has happened on one occasion and the Family Court made an order under section 85 of the Act that the Registrar-General should correct the birth register. This person provided evidence to the Court that at the time of birth they had been of indeterminate sex but the birth was registered incorrectly as male.

It would not be possible to use this section (section 85) to change from male or female to indeterminate if the indeterminate status had arisen after birth, as the birth would have been correctly registered.

Declarations regarding children

A child's guardian may apply to the Family Court for a declaration as to the appropriate gender identity for a child under section 29 of the Act. The factors to be considered by the Court in these situations differ from those outlined above for adults. If you intend to make an application under section 29 please seek your own legal advice, or contact the Department of Internal Affairs.