

Chapter 1 updates: September 2021

These are linked to the main text as follows:

- **1.2.4 Gender identity**

1.2.4 GENDER IDENTITY

In this section of the main text, we note that the law is insistent that everyone has a legally-identified gender, and that the only options are ‘male’ and ‘female’. We note that some people, particularly those who identify as non-binary or gender fluid, may reject this binary choice of genders, or reject the idea of gender entirely.

Two developments are of interest in this regard.¹ The first relates to a small point of detail regarding changes of names for children who have undergone gender reassignment. In *Re W, F, C and D (Minors) (Name Changes Disclosing Gender Reassignment and other matters)*,² Master McCloud considered the process for children’s names to be changed by deed poll. The detail of this judgment is not significant for the purposes of *Family Law: Text, Cases, and Materials* (the issue is primarily about the inappropriateness of a public document—the deed poll—serving to ‘out’ a person as trans if it includes both their previous names and their new names, if those names serve to disclose the fact that the person has transitioned genders), but some of the Judge’s comments are of interest. For example, she notes that in the previous 25 years, ‘there has been a vast change of approach to transgendered, and more recently to non-binary and other gender variant, people. That is still evolving legally.’³ The Judge also noted the move away from seeing transgender people as having a medical condition, reflecting the same trajectory as was seen previously regarding homosexuality: ‘The difference between cisgendered and transgendered people therefore is no longer one of “health versus illness” but is about the variety of ways in which people experience and express their gender, if any, for themselves.’⁴

The court’s recognition in *Re W, F, C and D* that legal processes need to provide protection from ‘outing’ trans people, and that the law must respect individual choices about gender identity, stands in some contrast to the second development, which relates to the decision to refuse to issue Christie Elan-Cane with a passport with the gender marked as ‘X’, discussed in

¹ See also our updates to Chapter 8, where we talk about the decision of the court in relation to gender confirmation treatment for children in *Bell v Tavistock* [2021] EWCA Civ 1363 and related cases.

² [2020] EWHC 279.

³ *Ibid*, [26].

⁴ *Ibid*, [21].

footnote 76 on p 16 of the main text. As we noted, the High Court refused the application for judicial review of that decision, and that judgment was on appeal when the main text was published. Subsequently, the Court of Appeal in *R (Elan-Cane) v Home Secretary (Human Rights Watch intervening)* has upheld the original decision of the High Court.⁵ King LJ, giving the main judgment, held that the issue of gender identity was clearly within the ambit of Article 8 of the ECHR:

I accept that the issue before the court goes to gender identity, an issue now widely accepted as being of central importance and at the heart of a person's Article 8 private life rights or, as it was put in *Van Kück v Germany* (App No 35968/97) (2003) 37 EHRR 973, 'the most intimate aspect of one's identity'.⁶

However, drawing by analogy with the way in which trans rights had developed in the lead-up to the *Goodwin v UK* decision,⁷ King LJ concluded that although there was a clear *trend* towards the recognition of the status of non-binary people, 'there is, as yet, nothing approaching a consensus in relation to either the broad and indeterminate issue of the recognition of non-binary people, or the narrow and precise issue of the use of 'X' markers on passports which is before this court.'⁸ However, she went on to argue that there was a respectable argument that such a consensus was building, and so it was only a matter of time before the government would be required to take positive steps to respond to the position of non-binary people.⁹ In conclusion, the court took the view that the government was entitled to take more time to consider the full ramifications of the issues raised by the appeal.¹⁰

The issues raised by these two cases go beyond the scope of our book, focused as we are on family law (rather than, say, gender, identity, or discrimination law), but it is certainly notable that the two judgments may suggest that the recognition of trans people's rights is significantly more developed than in relation to other aspects of gender identity.¹¹

⁵ [2020] EWCA Civ 363.

⁶ *Ibid.*, [56].

⁷ (App No 28957/95, ECHR) (2002); see p 17 of the main text.

⁸ [2020] EWCA Civ 363, [84].

⁹ *Ibid.*, [108].

¹⁰ Note the list of factors require particular consideration set out by King LJ in para [105].

¹¹ For commentary on *R (Elan-Cane)*, see P Dunne, 'Travelling Beyond the Binary: No Right to Unspecified Passports under the European Convention on Human Rights' [2020] *Cambridge Law Journal* 240.
