

Court of Appeal

J v C and another**[2006] EWCA Civ 551**2006 April 5;
May 15

Thorpe, Wall and Richards LJ

Children - Orders with respect to children - Leave to apply for order - Female applicant living as male - Purported marriage to female respondent - Couple living together as husband and wife - Respondent conceiving children through artificial insemination by donor - Whether applicant "party to ... marriage" with respondent - Whether applicant "parent" of children - Whether applicant requiring leave to apply for orders with respect to children - Family Law Reform Act 1987 (c 42), s. 27¹ - Children Act 1989 (c 41), s. 10(4)(a)²

Medical practitioner - Medical treatment - Human fertilisation - Woman inseminated with donor sperm prior to commencement of 1990 Act - Child born after commencement of Act - Whether 1990 Act applying - Human Fertilisation and Embryology Act 1990 (c 37), ss. 28, 49(3)³

The applicant had been born female, but lived as a male. In 1977 he purported to marry the respondent, without informing her that he was a transsexual. At the time of the marriage the applicant was, both in fact and in law, a woman. The couple lived as though husband and wife, with the respondent remaining in ignorance of the fact that the applicant was a woman. The respondent gave birth to two children, who were conceived by means of artificial insemination by donor in 1986 and 1991 respectively. In 1994, after the respondent had seen the applicant's birth certificate for the first time, the marriage was declared a nullity on the ground that the parties were not respectively male and female. In 2000 the applicant filed a Form C1 seeking a prohibited steps order and a specific issue order, pursuant to section 8 of the Children Act 1989, prohibiting the respondent from informing the children of their parentage and the reasons for the breakdown of the parties' relationship, save as advised by a consultant psychiatrist. At a hearing of preliminary issues in the case, by which time the older child had reached 18, the judge declared that the applicant was not a "parent" of the younger child within the meaning of section 10(4)(a) of the 1989 Act and therefore required leave to make an application for an order under the Act. The applicant appealed against the judge's declaration.

On the appeal-

¹ Family Law Reform Act 1987, s. 27: see post, para 26.

² Children Act 1989, s. 10(4)(a): "The following persons are entitled to apply ... for any section 8 order with respect to a child-(a) any parent or guardian of the child ..."

³ Human Fertilisation and Embryology Act 1990, s. 28: see post, para 19.

S 49(3): see post, para 20.

Held, (1) that since the 1989 Act did not define the term "parent" used in section 10(4)(a) it was necessary to look elsewhere for an applicable statutory definition; that, in the context of artificial insemination by donor, parenthood was defined by both the Family Law Reform Act 1987 and the Human Fertilisation and Embryology Act 1990 and it was necessary to determine which statute applied; that it was clear from sections 28(2) and 49(3) of the 1990 Act that the Act did not apply if the artificial insemination had taken place before section 28 had commenced, and it was immaterial that the embryo resulting from the insemination had been carried by the mother after its commencement; that, therefore, since the artificial insemination of the respondent which led to the birth of the younger child had taken place before the commencement of section 28 of the 1990 Act, that Act did not apply and the case was governed by the 1987 Act (post, paras 17-19, 21-22, 26).

(2) Dismissing the appeal, that in English law marriage was exclusively the union of a man and a woman; that, therefore, "the other party to [the] marriage" in section 27(1) of the 1987 Act must be a man in order for there to be a marriage; that at the time of the insemination the applicant was a woman and as such could not have been a party to a marriage with another woman; that, therefore, the applicant could not fulfil the definition of "the other party to [the] marriage" in section 27(1); and that, accordingly, the applicant could not be the parent of the younger child (post, paras 28-30, 39, 44, 45, 51).

Per curiam. It is doubtful that the court has jurisdiction by means of prohibited steps and specific issue orders to dictate to the respondent what she tells the children about their origins. There is a limit to which the court should seek to govern parental behaviour (post, paras 14, 40-41).

Decision of Hedley J affirmed.

The following cases are referred to in the judgments:

Corbett v Corbett (or se Ashley) [1971] P 83; [1970] 2 WLR 1306; [1970] 2 All ER 33
Goodwin v United Kingdom (2002) 35 EHRR 447
M v C [1993] 1 FLR 505, CA
R (Quintavalle) v Secretary of State for Health [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 WLR 692; [2003] 2 All ER 113, HL(E)
S-T (formerly J) v J [1998] Fam 103; [1997] 3 WLR 1287; [1998] 1 All ER 431, CA

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

Ainsbury v Millington (Note) [1987] 1 WLR 379; [1987] 1 All ER 929, HL(E)
B (Parentage), In re [1996] 2 FLR 15
Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593, HL(E)
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Hawkins v Attorney General [1966] 1 WLR 978; [1966] 1 All ER 392
R (A Child) (IVF: Paternity of Child), In re [2005] UKHL 33; [2005] 2 AC 621; [2005] 2 WLR 1158; [2005] 4 All ER 433, HL(E)
R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)
R v Field [2002] EWCA Crim 2913; [2003] 1 WLR 882; [2003] 3 All ER 769, CA
R v K [2001] UKHL 41; [2001] 1 AC 462; [2001] 3 WLR 471; [2001] 3 All ER 897, HL(E)
R v Morgan [1976] AC 182; [1975] 2 WLR 913; [1975] 1 All ER 8; [1975] 2 All ER 347, HL(E)
R v Tolson (1889) 23 QBD 168
Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163

Wilson v First County Trust Ltd (No 2) [2003] UKHL 40; [2004] 1 AC 816; [2003] 3 WLR 568; [2003] 4 All ER 97, HL(E)

X, Y and Z v United Kingdom (1997) 24 EHRR 143

APPEAL from Hedley J

On 20 November 2000 the applicant, Mr J, issued a Form C1 seeking: (1) a prohibited steps order under section 8 of the Children Act 1989 that two children, C and E, who had been conceived by the respondent, Mrs C, by means of artificial insemination by a donor, should not be informed of (a) their parentage and (b) the reasons for the breakdown in relationships between Mr J and Mrs C, in particular Mr J's gender, save at such times and in a manner advised by Dr E, a consultant psychiatrist, or such other consultant psychiatrist as might be agreed; (2) a specific issue order under section 8 of the 1989 Act that Mrs C seek the advice of Dr E; and (3) an order that Mrs C swear an affidavit setting out whether she intended to proceed in accordance with a letter from Mr J's solicitors to Mrs C's solicitors dated 6 November 2002.

On 3 November 2004 Judge Barnett directed the trial of two preliminary issues namely: (1) did Mr J need leave pursuant to section 10(9) of the Children Act 1989 to bring the proceedings; and (2) if he did, should leave be given? On 29 July 2005 Hedley J (1) declared that Mr J was not a "parent" of E within the meaning of section 10(4)(a) of the 1989 Act and so required leave under section 10(1)(a)(ii) to make his application; and (2) refused to grant such leave because Mrs C had given an undertaking to the court to take the advice of a consultant psychiatrist as to how and when E should be informed of her origins.

With the permission of the judge, Mr J appealed against the declaration on the grounds that the judge erred in law in holding that Mr J was not a parent within the meaning of section 10(4)(a) of the 1989 Act.

The facts are stated in the judgment of Wall LJ.

Valentine Le Grice QC and *Rebecca Bailey-Harris* for Mr J.

Judith Parker QC for Mrs C.

Robin Tolson QC and *Heather Pope* for E.

The submissions of counsel are sufficiently set out in the judgments of Wall and Richard LJ.

Cur adv vult

15 May. The following judgments were handed down.

WALL LJ

The appeal

1 At the outset of the hearing of this appeal, we made an order imposing reporting restrictions prohibiting the identification both of the child to whom it relates, and the adults who are the parties to it including the elder child, who is now an adult. That order reflects the highly unusual and sensitive nature of the appeal, and echoes an injunction against publicity made by a circuit judge as long ago as September 1994. Against that background, I propose to identify both the adults and the child concerned in

the case by initials only, and any report of our judgments should follow the same course.

2 The appellant is Mr J. The respondent to the appeal is Mrs C. The child concerned is E, a girl, now aged 14, who is represented in the proceedings by her guardian, CAFCASS Legal. Mrs C is the mother both of E, and of an older child, C, who was also a party to the proceedings, but who is now 18 and to whom the provisions of the Children Act 1989 no longer apply. E and C live with Mrs C, and the latter's husband, Mr C.

3 Before the trial judge, Hedley J, were two preliminary issues arising in proceedings under Part II of the 1989 Act instituted by Mr J in 2000. Those issues were formulated in the following way: (1) did Mr J need leave pursuant to section 10(9) of the 1989 Act to bring proceedings for specific issue and prohibited steps orders under section 8 of the 1989 Act in relation to C and E? and (2) if he did, should it be given? Underlying that legal formulation, however, was a simple but profound question. E had been conceived by means of artificial insemination by donor ("AID"). On the facts of this case, was Mr J, as a matter of law, E's parent, and thus her father?

4 The order made by Hedley J order was to the following effect:

"It is declared that Mr J is not a 'parent' of E within the meaning of section 10(4)(a) of the 1989 Act and requires leave under the 1989 Act section 10(1)(a)(ii) to make an application for an order under the 1989 Act section 8 in relation to E."

5 Having reached that conclusion, the judge refused Mr J leave to make an application for specific issue and prohibited steps orders under section 8 of the 1989 Act. He did so, however, because Mrs C was willing to give, and gave, an undertaking to the court in the following terms:

"to take the advice of Dr E [a consultant psychiatrist] as to how and when E should be informed of her origins and to liaise with CAFCASS and to consider any advice offered by CAFCASS on this issue."

6 The judge made a number of ancillary and consequential orders, none of which is relevant for present purposes. With permission granted by the judge, Mr J now appeals against the declaration set out in para 4 above.

The facts

7 Although the argument before the judge ranged widely, and included submissions relating both to the Gender Recognition Act 2004 and as to whether rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms were engaged, this appeal, in my judgment, turns on a short point of statutory construction. In these circumstances, I propose to relate only those facts which are directly germane to the resolution of this appeal.

8 This is the second time that the relationship between Mr J and Mrs C has been the subject of adjudication in this court. The reader will find a full exposition of the background facts in the judgment of Ward LJ in this court in the earlier litigation, reported as *S-T (formerly J) v J* [1998] Fam 103, 108-111.

9 For present purposes, it seems to me that the relevant facts are as follows.

(i) On 17 July 1977 Mr J and Mrs C went through a ceremony of marriage. At that point, Mrs C was a spinster aged 20. Mr J was 30, and suffering from gender dysmorphia. Although living as a man since approximately the age of 17, he had been registered on the day after his birth as a female, and, at the date of the ceremony of marriage was, both in fact and in law, a woman. This was something he knew, and which he concealed both from Mrs C and from the priest who conducted the ceremony.

(ii) Thereafter Mr J and Mrs C lived together for many years as though husband and wife. Mrs C remained in ignorance of the fact that Mr J was a woman.

(iii) C and E were conceived by means of AID in 1986 and 1991 respectively. Although what Mr J said to the clinic which provided the treatment has never been the subject of judicial investigation, it is plain that he did not disclose the fact that he was a woman to anybody involved in the process.

(iv) The relationship between Mr J and Mrs C broke down in 1994 and Mrs C filed a petition for divorce on 22 April of that year. During the divorce proceedings she saw a copy of Mr J's birth certificate and realised (for the first time) that Mr J was a woman.

(v) On 26 May 1994 the divorce petition was dismissed, and proceedings taken for nullity of marriage. On 19 August 1994 a decree nisi of nullity was pronounced in undefended proceedings in the county court, in which "the marriage in fact had and solemnised" on 7 July 1977 was "pronounced and declared to have been by law void by reason of at the date of the said ceremony the parties were not respectively male and female". That decree nisi was made absolute on 10 October 1994.

(vi) On 18 May 1995 Sir Stephen Brown P dismissed Mr J's application for both direct and indirect contact with C and E. No contact between E and Mr J has taken place since.

(vii) On 25 January 1996 Hollis J dismissed Mr J's application for ancillary relief in the nullity proceedings on the determination of a preliminary issue as to whether Mr J should be debarred from continuing his claim for ancillary relief on the grounds that it was contrary to public policy. Hollis J held that by purporting to marry Mrs C, Mr J had committed perjury.

(viii) In April 1996 Mr and Mrs C married.

(ix) On 21 November 1996 this court (Ward, Potter LJJ and Sir Brian Neill) dismissed Mr J's appeal against Hollis J's order: see *S-T (formerly J) v J* [1998] Fam 103. The court was divided in its reasoning. Ward LJ took the view that the principle of public policy that no one should profit from their own wrong applied; the majority (Potter LJ and Sir Brian Neill) took the view that the principle of public policy identified was not determinative, but that on the facts, and in the light of Mr J's conduct, no court could properly have exercised its discretion to grant him ancillary relief.

(x) On 25 April 1997 Sir Stephen Brown P dismissed a renewed application by Mr J for contact with the two children.

(xi) In April 1999 Mr and Mrs C issued adoption proceedings in relation to the children. On 19 April 1999 Dame Elizabeth Butler-Sloss P gave directions for the trial of a preliminary issue as to whether Mr J was to be

regarded as a parent of either child within the meaning of the Adoption Act 1976. In September 1999, however, Mr and Mrs C withdrew the application.

(xii) On 20 November 2000 Mr J issued a Form C1 seeking specific issue and prohibited steps orders in relation to each child. On 3 November 2004 Judge Barnett directed the trial of the two preliminary issues determined by Hedley J on 29 July 2005.

(xiii) On 1 June 2005 Mr J obtained a gender recognition certificate under the 2004 Act. This shows (1) his gender to be male, and (2) that he is, from 1 June 2005 "of the gender shown". He has also obtained a fresh birth certificate, giving his sex at birth as male.

10 Although, on the face of it, there has been a very substantial delay in the resolution of the proceedings instituted by Mr J on 20 November 2000, the judge found that there was nothing suspicious in the lapse of time, and I say no more about it.

The relief sought by Mr J in the Children Act 1989 proceedings

11 The judge recorded Mr J's aspirations in the the 1989 Act proceedings as limited to the following: (i) a prohibited steps order that the children should not be informed of-(a) their parentage, and (b) the reasons for the breakdown in relationships and in particular Mr J's gender save at such times and in a manner advised by Dr E (a consultant psychiatrist) or such other consultant child psychiatrist as may be agreed; (ii) a specific issue order that Mrs C seek the advice of Dr E; and (iii) an order that Mrs C swear an affidavit setting out whether she intends to proceed in accordance with a letter dated 6 November 2002.

12 The letter to which reference is made was from Mr J's solicitors to Mrs C's solicitors setting out Mr J's view of the manner in which both children should be informed of their respective histories.

Is the relief sought by Mr J in the proceedings under the 1989 Act justiciable?

13 I have already recorded the undertaking given by Mrs C to the judge. Mr J has, in my judgment, achieved by that undertaking all he can reasonably expect to achieve in the proceedings. For this reason, at the outset of the hearing, I raised the purpose of this appeal with his counsel, Mr Valentine Le Grice. Mr Le Grice accepted that since C is of age, the proceedings no longer relate to him. He also acknowledged that his client had not seen E since she was a very small child, and was not seeking contact with her. It was, however, clear that apart from wishing the court to regulate the manner in which both children are informed about their origins, Mr J is anxious, above all, to establish the legal fact of his parentage of E.

14 Speaking for myself, I have grave doubts about whether the court has jurisdiction by means of prohibited steps and specific issue orders to dictate to Mrs C what she tells either C or E about their origins. Mr Le Grice persuaded me, however, that the question of E's parentage was a properly justiciable issue, and that had Mr J not raised it in the proceedings under Part II of the 1989 Act, he could have sought a declaration of parentage under section 55A of the Family Law Act 1986, as inserted by section 83 of the Child Support, Pensions and Social Security Act 2000, the terms of which it is unnecessary to set out. In these circumstances, and given the importance

of the issue for Mr J in particular, we proceeded to hear the appeal. I will, however, return to this point at the end of this judgment.

The applicable statutory provisions: the 1989 Act

15 I begin with the 1989 Act, section 8 of which identifies the orders which the court may make in relation to children under Part II of the Act. These include prohibited steps orders and specific issue orders. The 1989 Act defines these in the following terms.

"Residence, contact and other orders with respect to children

"8(1) In this Act ... 'a prohibited steps order' means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court ... 'a specific issue order' means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."

16 Section 9 of the 1989 Act imposes a number of restrictions on the court's power to make any section 8 order, none of which is relevant here. Section 10 of the 1989 Act identifies the persons entitled to apply for section 8 orders. It divides them into two categories, namely those who have an automatic right to apply, and those who need "leave" (the word used by the Act) to make an application. For present purposes it is sufficient to record that "any parent" of a child does not require leave to make an application: see section 10(4)(a) of the 1989 Act. In the case of a person who requires leave, section 10(9) lays down a number of criteria which the court must consider in deciding whether or not to grant leave. It is not necessary for the purposes of this judgment to set them out.

17 The 1989 Act does not define the term "parent" used in section 10(4)(a). There is also no definition of "father" in the 1989 Act. We therefore have to look elsewhere for an applicable statutory definition. In this context, I respectfully agree (as did the judge) with the observations of Butler-Sloss LJ in a quite different context in *M v C* [1993] 1 FLR 505, 509 that the natural and ordinary meaning of the word "parent" is not fixed, but changes according to the context in which it is used. Mr J is manifestly not E's natural parent. It is therefore necessary to see if he comes within the relevant statutory definition of "parent" contained in the relevant Act of Parliament.

The definition of parent: which statute?

18 Two Acts of Parliament define parenthood in the context of AID. The first is the Family Law Reform Act 1987. The second is the Human Fertilisation and Embryology Act 1990. The judge was addressed, and decided the case, on the basis that section 28 of the 1990 Act applied. He was not invited to consider section 27 of the 1987 Act. In this court, however, the consensus amongst counsel was that the 1987 Act applied to the facts of this case, given the date on which AID must have occurred.

19 In my judgment, for the reasons which follow, section 28 of the 1990 Act does not apply, and this case is governed by the 1987 Act. I will, however, set out the relevant parts of the sections of both statutes.

Section 28 of the 1990 Act is an extremely long section. It is, I think, sufficient to set out only subsections (1) to (3) and (7)(b):

"Meaning of 'father'

"28(1) This section applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

"(2) If-(a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then ... the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).

"(3) If no man is treated, by virtue of subsection (2) above, as the father of the child but-(a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and (b) the creation of the embryo carried by her was not brought about with the sperm of that man, then ... that man shall be treated as the father of the child."

"(7) The references in subsection (2) above to the parties to a marriage at the time there referred to ... (b) include the parties to a void marriage if either or both of them reasonably believed at that time that the marriage was valid; and for the purposes of this subsection it shall be presumed, unless the contrary is shown, that one of them reasonably believed at that time that the marriage was valid."

20 However, section 49(3) and (4) provide that:

"(3) Sections 27 to 29 of this Act shall have effect only in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or of their artificial insemination (as the case may be), after the commencement of those sections.

"(4) Section 27 of the Family Law Reform Act 1987 (artificial insemination) does not have effect in relation to children carried by women as the result of their artificial insemination after the commencement of sections 27 to 29 of this Act."

21 The date on which section 28 of the Human Fertilisation and Embryology Act 1990 commenced was 1 August 1991: see the Human Fertilisation and Embryology Act 1990 (Commencement No 3 and Transitional Provisions) Order 1991 (SI 1991/1400). E was born on 15 March 1992. There is no suggestion anywhere in the papers that she was other than a full term baby. It follows inexorably, in my view, that the artificial insemination of Mrs C took place prior to 1 August 1991, and that accordingly the 1990 Act does not apply.

22 The judge appears to have accepted the argument that section 28 of the 1990 Act applied because E was being carried by Mrs C after 1 August 1991. She plainly was. That, however, is not the test. The critical date is the date of the artificial insemination which resulted in E being carried by Mrs C. That date was plainly before 1 August 1991. The fact that E was "being carried" by Mrs C after 1 August 1991 is thus

immaterial. The phrase "is being or has been carried" in section 28(1) of the 1990 Act in my judgment simply identifies the foetus whose existence in utero, or the child whose birth, has resulted from the act of artificial insemination. The time which is plainly relevant, as sections 28(2) and 49(3) make clear is (in the instant case) the time of Mrs C's insemination. That is a date which is plainly capable of being fixed, and is no doubt a matter of medical record.

23 Fixing the inapplicability of the 1990 Act by reference to the date on which Mrs C was inseminated is a construction of the statute which seems to me not only to give the words of sections 28(1) and 49(3) their natural meaning, and to accord with reality; but it also fits in with the purpose and structure of the 1990 Act.

24 The background to the Human Fertilisation and Embryology Act 1990, which followed the Report of the Committee of Inquiry into Human Fertilisation and Embryology chaired by Dame Mary Warnock DBE (1984) (Cmnd 9314) ("the Warnock Report"), is authoritatively set out in the speech of Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State of Health* [2003] 2 AC 687, paras 11-13. The Act introduced a new and rigorous system of licensing, and it is significant for present purposes that section 28(3) of the 1990 Act specifically envisages AID in the context of "treatment services provided for her and a man together by a person to whom a licence applies". This court knows very little of the circumstances surrounding Mrs C's insemination, but it is reasonably clear that it did not take place in the context of treatment services provided under the 1990 Act. As Ward LJ put it in *S-T (formerly J) v J* [1998] Fam 103, 109:

"The apparent ease with which they were able to obtain this treatment without the truth being disclosed or discovered is, for me, one of the puzzling and, I feel bound to add, unsatisfactory features of this case."

25 I respectfully agree. On any view, Mr J must have misled the doctors treating Mrs C. Had Mrs C and Mr J approached a clinic after the introduction of the 1990 Act, and had Mr J revealed the truth about his gender, the clinic would have plainly risked the forfeiture of its licence had it provided treatment services for them: see section 13 of the 1990 Act ("Conditions of licences for treatment"). In the instant case, therefore, a finding that the relevant "treatment" of Mrs C (the act of AID) took place before the implementation of the 1990 Act is consistent with the statutory framework as it existed prior to 1 August 1991.

26 In my judgment, therefore, it is clear that the applicable statute is the Family Law Reform Act 1987. The relevant section of this Act reads:

"Artificial insemination

"27(1) Where after the coming into force of this section a child is born in England and Wales as the result of the artificial insemination of a woman who-(a) was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled); and (b) was artificially inseminated with the semen of some person other than the other party to that marriage, then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to

that marriage and shall not be treated as the child of any person other than the parties to that marriage.

"(2) Any reference in this section to a marriage includes a reference to a void marriage if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid; and for the purposes of this section it shall be presumed, unless the contrary is shown, that one of the parties so believed at that time that the marriage was valid."

27 For Mr J, Mr Le Grice invited us to give this section a literal construction. The argument, as I understood it, ran along the following lines. Mr J and Mrs C were parties to a void marriage which at the time of the insemination had not been annulled. A marriage in which the parties are not respectively male and female is included in section 11(c) of the Matrimonial Causes Act 1973, where the grounds on which a marriage is void are set out. So this was a void marriage within section 11 of the 1973 Act and section 27(2) of the 1987 Act. Mr J knew the marriage was not valid, but Mrs C plainly believed that it was, and reasonably so believed: see the finding of the judge in Mr J's proceedings for ancillary relief that she was not disabused of her belief about Mr J's gender until after she had instituted divorce proceedings, when she saw his birth certificate. Both parties plainly consented to Mrs C's insemination. The terms of the section, Mr Le Grice argued, were thus satisfied. E is the child of Mrs C and Mr J. He is thus, as a matter of law, her father.

28 Miss Judith Parker, for Mrs C, supported by Mr Robin Tolson, for E, invited us to pay critical attention to the words in section 27(1)(a) of the Family Law Reform Act 1987, "a party to a marriage", and the corresponding words in section 27(1)(b), "the other party to that marriage". Mrs C, the party who was inseminated by AID, is plainly female: she conceived and gave birth to E. So if marriage is exclusively the union of a man and a woman (which, in English law, it plainly is) "the other party to the marriage" must be a man in order for there to be a marriage. If that other party is not a man, there is no marriage. Mr J in 1991 was a woman, and, as such, could not be a party to a marriage with another woman. Therefore, say Miss Parker and Mr Tolson, Mr J cannot fulfil the definition of "the other party to that marriage", and Mr J cannot be E's father.

29 In my judgment, Miss Parker's and Mr Tolson's construction of section 27 of the 1987 Act is correct. It is, of course, true that section 11(c) of the 1973 Act identifies the fact that the parties are not respectively male and female as one of the grounds on which a marriage is void. But the reason for that is not far to seek. Section 11(c) simply gives statutory expression to the decision reached by Ormrod J in *Corbett v Corbett (orse Ashley)* [1971] P 83, a case which involved proceedings for a declaration of nullity of marriage where both parties to the ceremony of marriage were male. The case was, of course, decided in 1970 prior to the enactment of section 1(c) of the Nullity of Marriage Act 1971 (the predecessor of section 11(c) of the 1973 Act). Ormrod J granted the petitioner a decree of nullity as opposed to a declaration under what was then RSC Ord 15. He did so on the ground that he had no discretion to withhold a decree of nullity under the statutory jurisdiction of the High Court, derived originally from section 2 of the Matrimonial Causes Act 1857 (20 & 21 Vict c 85). Such a decree gave rise

to a right to both parties to institute proceedings for ancillary relief. Section 11(c) of the 1973 Act thus simply gives statutory expression to the jurisdiction which Ormrod J assumed.

30 The enactment of section 11(c) of the 1973 Act does not, in my judgment, affect the fundamental proposition, given expression by Ormrod J in *Corbett v Corbett (orse Ashley)* [1971] P 83, 109, that

"on the facts as I have found them, a matrimonial relationship between the petitioner and the respondent was a legal impossibility at all times and in all circumstances, whereas a marriage which is void on the grounds of bigamy, non-age or failure of third party consents, might, in other circumstances, have been a valid marriage."

31 I therefore respectfully agree with Hedley J when he cites, albeit in the context of the 1990 Act, the judgment of Potter LJ in *S-T (formerly J) v J* [1998] Fam 103, 146:

"By section 11(c) of the 1973 Act, a marriage is void if the parties are not respectively male and female. It is plain that the use of the word 'marriage' in such a case is no more than convenient shorthand for a purported ceremony of marriage. As stated in *Jackson, The Formation and Annulment of Marriage*, 2nd ed (1969), p 131: 'If two persons of the same sex contrive to go through a ceremony of marriage, the ceremony is not matrimonial at all: it is certainly not a void marriage, and matrimonial principles have no application to such a "union"; but the participants in the ceremony almost certainly will commit a criminal offence of giving false statements for the purpose of obtaining a marriage certificate.' For the purpose of determining whether a particular human being is of a particular sex, the criteria are biological: see *Corbett v Corbett (orse Ashley)* [1971] P 83, 106, *Rees v United Kingdom* [1987] 2 FLR 111 and *Cossey v United Kingdom* [1991] 2 FLR 492. While it may be that the advance of medical science may lead to a shift in the criteria applied by the English courts, it is plain that, at present, the position is that laid down in *Corbett's* case [1971] P 83 and that, even in jurisdictions which have extended the criteria in the case of transsexuals, a 'female to male' transsexual is not generally regarded as having satisfied the criteria of masculinity unless endowed (by surgery or otherwise) with apparent male genitalia. In those circumstances it is also plain that the defendant was well advised not to defend the suit for nullity brought against him by the plaintiff. However, although a marriage void for the reason that the two parties are of the same sex is not merely a void but a meretricious marriage which cannot give rise to anything remotely matrimonial in character, this has not historically prevented a party from seeking a decree of nullity in respect of it."

32 Mr Le Grice submitted that if Mr Jackson had lived to write a third edition of his remarkable book *The Formation and Annulment of Marriage*, he would have rewritten the paragraph cited by Potter LJ. I do not agree. In my judgment, that paragraph still represents the law.

33 The fact that the 1987 Act and not the 1990 Act applies illustrates the highly unusual nature of the facts in this case. However, I think it only fair to Hedley J to say that, in my judgment, he reached the correct

conclusion (and the same result) in interpreting virtually the same words ("party to a marriage" and "the other party to the marriage") in section 28(2) of the 1990 Act in the same way. Whilst it is dangerous to use the words of one statute in the construction of another, I accept Miss Parker's submission that consistency in the interpretation of near identical language used in the same context but in different statutes is desirable. The Human Fertilisation and Embryology Act 1990 undoubtedly tightened the law on AID and IVF. It introduced a strict system of licensing and the concept of consent to treatment. It would be most unfortunate, in my judgment, if the word "father" was to have a different meaning in the two statutes.

Other matters

34 Since I take the view that the terms of section 27 of the 1987 Act exclude Mr J from being a parent of E, it follows that I do not need to consider the not altogether straightforward question as to whether Mrs C "reasonably believed that the marriage was valid", a subject addressed in detail in Miss Parker's respondent's notice and skeleton argument. Nor do I need to wrestle with the opaque provisions of section 9(2) of the Gender Recognition Act 2004 (which seek to identify the effects of the gender recognition certificate which Mr J obtained on 1 June 2005). I can also leave on one side Miss Parker's ingenious argument based on the apparent decision of the government to drop a clause in the Gender Recognition Bill which provided that where two women presented for treatment under the 1990 Act, and subsequently the non-child-bearing woman obtained a gender recognition certificate as a man, that person would be treated as the father of the child born as a consequence of the treatment. These issues can now await elucidation in a case in which they apply.

35 Whilst Mr J has been able to obtain both a gender recognition certificate and a fresh birth certificate in his male gender, Mr Le Grice did not submit (correctly in my view) that the effect of either was to validate the ceremony of marriage. As a matter of law, and as a consequence of the certificate, Mr J is now a man for all purposes. He can now marry as a man. That does not, however, mean that he was not a woman on 17 July 1977, the date that he entered into the ceremony of marriage with Mrs C.

36 Equally, in my judgment, Mr J's rights under the European Convention on Human Rights are not engaged. He was never married to Mrs C. He has not seen E for very many years. He is not seeking contact with her. There is plainly no family life in relation to which Mr J's right to respect arises. The only family life engaged is that of E and C, their mother and stepfather.

37 Mr J clearly has a right to respect for his private life. But, speaking for myself, I do not see how a declaration that Mr J is not E's father (if, as a matter of law he is not) constitutes such an interference. As Mr Le Grice properly conceded, recognition of Mr J's male gender in this respect is not retrospective: see section 9(1) of the Gender Recognition Act 2004. In these circumstances, in my judgment, section 3 of the Human Rights Act 1998 is not in play, and no question of seeking to read and give effect to section 27 of the 1987 Act in a way which is compatible with article 8 of the Convention arises.

38 Nor, in my view, is article 6 engaged. Mr J was entitled to apply to the court. He has done so and been fully heard. The fact that he needed leave to make an application under section 8 does not engage article 6. There is plainly no separate discrimination under article 14. The 2004 Act gives Mr J the right to be a man and to correct his birth certificate. He can now marry as a man. Article 14 is thus not engaged.

39 It follows, in my judgment, that although Hedley J was directed to, and construed, the wrong statute, he reached the right result. Mr J is not, and never was, E's parent. The fact that he acted as such for a short period of her childhood does not, as a matter of law, enable him to claim the status of parenthood. The declaration made by the judge was correct.

Footnote

40 Although I understand why Hedley J gave Mr J permission to appeal against the declaration which he made in this case, and whilst I am not even remotely critical of him for having done so, I have to say that had he refused to grant permission to appeal, I think it highly unlikely that I would have done so had the matter come before me as a single Lord Justice on paper. I say this despite the misapprehension over the Human Fertilisation and Embryology Act 1990 (had it by then emerged). My reasons are as follows.

41 Whilst the question of Mr J's status is plainly a matter of importance to him, the real question in the case is how both C and E are to be informed about their respective origins. This is a highly sensitive matter, but it does not seem to me to be one which is ultimately justiciable by way of orders under section 8 of the 1989 Act. What Mrs C says to C and E is, in my judgment, a matter for her, and not for the court to determine. There is a limit to which the court can and should seek to govern parental behaviour.

42 In my judgment Mrs C has sensibly agreed to take the advice of Dr E before telling either C or E about their respective backgrounds. I do not think the court can, or should, ask her to do any more. Thus, in my judgment, Mr J, by securing Mrs C's undertaking, had achieved all he could reasonably expect to have achieved in the proceedings under the 1989 Act, and their prosecution could only have served unnecessarily to prolong what has already been an unduly extended court involvement.

43 It follows that although the judge's refusal to give Mr J leave to apply for orders under the 1989 Act is not, strictly speaking, part of this appeal, he was, in my judgment, right not to give leave once Mr J had proffered the relevant undertaking.

44 I take the view that the judge was plainly right in the conclusions that he reached. I would, accordingly, dismiss this appeal.

RICHARDS LJ

45 I agree that the appeal should be dismissed for the reasons given by Wall LJ. Mr Le Grice's submissions based on the literal interpretation of the statute have an attractive simplicity to them: "the parties to that marriage" within section 27(1) of the 1987 Act include, by section 27(2), parties to a void marriage; the grounds on which a marriage celebrated after 31 July 1971 shall be void are set out in section 11 of the 1973 Act and include, by section 11(c), "that the parties are not respectively male and female", so that section 27 extends on the face of it to a marriage celebrated between a

woman and another woman. I am satisfied, however, that that cannot be the correct construction. If one stands back and looks at the statute in its context and against the background of the Warnock Report to which Wall LJ has referred (and passages from which were cited to us, in particular from the section at paras 4.17-4.28), I think it plain that the legislative intention must have been for the provisions to apply only to a marriage in the sense of a union between a woman and a man, and that "marriage" in section 27 must be read accordingly.

46 The language of the successor statute, the 1990 Act, brings that out more clearly by providing in section 28(2) that the other party to the marriage is to be treated as "the father" of the child. Unlike Hedley J, and having regard to the particular statutory context, I would attach significance to such gender-specific language here and elsewhere in the section. The legislature cannot have intended that a woman be treated as "the father" of the child. Although the successor statute cannot be used as a direct aid to the construction of the earlier statute, it does serve to exemplify a legislative policy which in my view cannot have been any different in relation to the earlier statute.

47 Mr J contends that such a construction of the 1987 Act is incompatible with his rights under the European Convention on Human Rights and that the court is required by section 3 of the Human Rights Act 1998 to adopt a different construction in order to produce a result that is compatible with the Convention. Like Wall LJ, however, I find it difficult to see how the case under the Convention even gets off the ground. In my judgment, to construe the statute in the way I have indicated does not interfere with Mr J's rights either under article 8, upon which principal reliance is placed, or under any other article of the Convention.

48 One aspect of Mr Le Grice's submissions under article 8 is that a lack of recognition of Mr J's acquired male gender through failure to accord him the status of parent under the 1987 Act would violate his right to respect for private life under article 8, having regard in particular to the principle of personal autonomy emphasised by the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 447. I cannot accept that argument. The violations of the Convention identified in the *Goodwin* case were rectified by the enactment of the Gender Recognition Act 2004. Mr J has duly obtained a gender recognition certificate pursuant to that Act. He therefore now has the male gender for all relevant purposes and can marry as a man. None of that, however, can rewrite history, even leaving aside the more technical questions of retroactivity of the Human Rights Act 1998. Mr J did not have the male gender, and could not sensibly be treated as having had the male gender, at the time when he went through the marriage ceremony with Mrs C or at any time prior to the marriage being declared void. To give effect to the undoubted fact that he did not have the male gender at the relevant time cannot possibly involve a lack of respect for his male gender as subsequently acquired.

49 Another aspect of Mr Le Grice's submissions under article 8 is that to deny Mr J the status of parent infringes his right to respect for family life. As to that, I agree with Wall LJ that there is no family life capable of engaging that right in the circumstances of this case.

50 I think it unnecessary to deal with other specific points canvassed under the Human Rights Act 1998 or the Gender Recognition Act 2004. In

short, I take the view that none of them advances the case for Mr J. In my view the matter turns instead on the short point of construction of the 1987 Act identified by Wall LJ.

THORPE LJ

51 I agree with both judgments.

Appeal dismissed.

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G F
